ANNUAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA.

HON. MILTON REMLEY,
ATTORNEY-GENERAL.

Transmitted to the Governor, January, 1898.

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REPORT.

STATE OF IOWA,
ATTORNEY-GENERAL'S OFFICE.
DES MOINES, January, 1898.

To Hon. Francis M. Drake, Governor of Iowa:

In accordance with section 209 of the code, I have the honor to submit to you the following report of the condition of this office and of all the business transacted by this department, and the opinions of public interest. The law requiring a report is a new feature. It contemplates that a report shall be made biennially. I have, however, included a brief schedule of cases during the first year of my administration.

Schedule "A" contains a complete list, arranged alphabetically, of all criminal cases submitted to the supreme court during the years 1896 and 1897, and the disposition made thereof in the supreme court.

Schedule "B" is a brief statement of the criminal cases submitted to the supreme court during the year 1895.

Schedule "C," hereto attached, contains a list of all civil cases tried in the different courts of the state and the United States in which the state was either a party or interested, including therein divers cases against public officers, the defense of which was conducted by this department.

Schedule "D" contains a list of the cases, criminal and civil, that are now pending in the different courts of this state and of the United States.

Schedule "E" is a statement of the moneys collected by this department.

Schedule "F" contains the official opinions of public interest which have been given to the different state officers and county attorneys. I have omitted from this report such opinions as are manifestly not of public interest, or which, by reason of the adoption of the new code and a change of the law, can no longer be considered of special public interest.

OFFICIAL OPINIONS.

Prior to the first of October, 1897, when the new code went into effect, it was the duty of the attorney-general to give official opinions in writing to the county attorneys of the state. There being ninety-nine county attorneys and numerous state officers who were legally entitled to opinions from the attorney general, this duty has been very onerous and has required great labor and research. During the year 1895, there were 181 written opinions prepared by the attorney-general. During the years 1896 and 1897, there were 301 opinions. In addition to this, many requests were made for opinions which could be answered by furishing a copy of an opinion already given. Such copies have been very frequently furnished. In a number of instances where matters of law have been referred to me in which the public, either the county or municipal corporation were interested, with a view of settlement of threatened litigation, I have furnished opinions to those who, under the law, were not entitled to demand the same at my hands. These are not counted or included among official opinions. Thousands of letters have been written in the discharge of the duties of the office each year.

CRIMINAL APPEALS.

In the matter of criminal appeals, it has been the policy of this department to insist upon the submission of cases at as early a date as possible. I have never thought it in accord with public policy to permit criminal cases to remain on the docket of the supreme court term after term. The sooner punishment comes after the commission of a crime, the more effective it is as a deterrent example to evil doers. I have insisted upon parties appealing criminal cases preparing their appeals and submitting them promptly at the first term after the record could be sent up to the supreme court. Many appeals were taken for delay. The policy adopted has had a wholesome effect. At the January term, 1895, there were fifty-seven criminal cases upon the docket. At the May term, 1895, there were seventy-four; of these, fifty were submitted to the supreme court. At the October term, 1895, there were seventy-two cases upon the docket, forty-one of which were submitted. At the January term, 1896, there were sixty cases upon the docket, thirty-six of which were submitted. Since then the number has gradually diminished until at the October term, 1897, there were thirty-six criminal cases upon the docket, including petitions for rehearing.

Under the former law there was no provision requiring the attorney-general to be notified when an appeal was taken in a criminal case. He could only obtain knowledge of the same upon the docketing thereof in the supreme court. The result was that in not a few instances the appellant, after being admitted to bail, failed to docket his appeal in the supreme court for three or four or five years after the appeal was taken. The last legislature wisely remedied this defect and makes it the duty of the county attorney to immediately inform the attorney-general when an appeal is taken from his county.

The average number of cases upon the docket for each term during the last three years, including petitions for rehearing, is forty-nine and five-ninths. There will be found in schedule "A" a detailed list of all the criminal cases disposed of in the supreme court, together with a statement of the offense, the county from which the appeal was taken, and the disposition made thereof.

There are thirty-three criminal cases already docketed in the supreme court for the January term, 1898.

CIVIL CASES.

Among the civil cases are many actions brought against state officers. There is no direct provision requiring the attorney-general to appear for state officers when suits are brought against them either in *certiorari* or mandamus. Sometimes suits are brought against public officers to determine the legality of a law which has been passed by the legislature. In all such cases it is unjust, at least, to require such officers to bear the expenses of the litigation. Among the civil cases stated in schedule "C" are several where I have had doubts as to whether it was the duty of the attorney-general to defend. There appears to be no adequate provision of law to meet the expenses of cases which may be brought against the several boards or various state officers. With the limited amount of assistance in the attorney-general's office, and the continued increase of duties imposed upon this office, some provision ought to be made to take care of this class of litigation, or else additional help be furnished this department. I make this suggestion because it appears manifestly unjust that one holding a public office, and attempting faithfully to discharge the duties under the law as he understands them, should be put to a personal expense in defending suits brought against him, which are generally brought because of no fault of his own, but for the purpose of testing the validity of some act of the legislature.

EXAMINATION OF ARTICLES OF INCORPORATION.

It is made the duty of the attorney-general to examine and approve various articles of insurance incorporations. There has never been a record kept of the various articles and amendments thereto which have been examined and approved by this office. This branch of the work of this office is by no means inconsiderable. There have been from forty to sixty articles of incorporation or amendments examined each year, some of which are very long and complicated, involving the expenditure of much time and labor.

Since the adoption of the code there has been no public officer authorized to acknowledge the articles of incorporation or amendments which are required by the statute to be taken. I have not refused to approve articles of incorporation which were acknowledged in the manner which was recognized to be legal before the code took effect, assuming that the general assembly would pass a legalizing act. I cannot assume that the general assembly, after providing that such articles shall be acknowledged, intended to provide no officer before whom acknowledgments could be taken. I have, in all instances, called the attention of the incorporators to this omission in the law at the time that I have attached my certificate of approval to the articles. Unless the statute is amended and the many acknowledgments taken by notaries public and others are legalized, serious complications may arise which should be avoided.

MEMBER OF BOARD OF HEALTH.

The attorney-general is by law made a member of the state board of health, but I regret to say that the pressure of other official duties has precluded me from attending many of the meetings of the board, which are usually held at the time that the supreme court is in session. I have, however, attended a number of the meetings of the board and have been frequently consulted by the officers of the board upon questions of law arising in the discharge of their duties. The limited amount of time that I could spare from other duties has prevented me from keeping myself thoroughly informed as to the general work of the board, and from actively participating therein.

COLLATERAL INHERITANCE TAX.

There are two cases pending involving the collateral inheritance tax law, one of which is now pending in the supreme court and the other in the district court of Pottawattamie

county. The faithful collection of this tax will, from the necessities of the case, require no little care and labor. In every instance where the tax is imposed, there is a hearing in the district court. The collateral heirs or legatees are usually represented by attorneys. The administrator, executor, or trustee is not required to look after the interests of the state. Such persons are usually heirs, or personally very friendly to them. There is no person other than the state treasurer whose duty it is by law to guard the interests of the state in such matters. The state treasurer cannot obtain knowledge of all the estates which should pay this tax if not reported to him, nor of the value of those reported if any effort be made to minimize the amount due the state, except by employing some one in each county to guard the interests of the state. There is no provision of law authorizing him to employ any such person. From the cases reported in other states, and my limited observation of the working of the law in this state, I am convinced that more will be realized to the state from the collateral inheritance tax if it were made by law the special duty of the county attorneys to appear in the proceedings to settle every estate liable to pay this tax, and at every step, to protect the interests of the state, and to see to it that the tax is collected from all persons or property liable therefor. It is now the duty of the county attorney to appear in all cases or proceedings in the courts of his county in which the state is a party, but the state is not a party of record in the settlement of estates. It will be noted that section 1467 of the code makes certain property liable for this tax which passes by deed or gift. Such property will seldom appear in the settlement of estates. Human nature is such that the grantee or donee will very seldom hunt the state treasurer to pay the tax. Local influences will deter anyone informing the state treasurer of the rights of the state. The county attorney is, in my opinion, the proper person to guard all the interests of the state in the collection of this tax, and the allowance to him of a reasonable commission out of the amount collected, with a liability on his bond for the neglect of duty, would not only be an additional incentive, but would be a matter of justice, and the state would be largely the gainer in the end.

ESCHEATS.

The number of cases where property has been escheated to the state has been very few. During my administration of this

office there have been but two cases in which the state has reaped any benefit from the law of escheat. In one case the entire property consisted of over $3,200 cash on deposit in a bank. Letters of administration were granted, but the matter dragged along for more than a quarter of a century, and the state realized in the end less than half of the principal. This condition of affairs was largely because it was made no one's especial duty to look after the interests of the state. Several estates in which there are no known heirs have come to my knowledge, ranging in value from $1,000 to $20,000 each. Heirs may yet be found. With no person to resist the claims of spurious heirs, it is easy for them to become possessed of property which should properly be escheated to the state. The provisions of the present law do not seem adequate to secure the best results. It might well be made the duty of the county attorneys to attend to the interests of the state in all escheat matters, with provisions for their compensation from the fund collected.

In cases where property has been escheated to the state, section 3391 of the code provides for the payment of the money received therefrom by the state within ten years thereafter, "to anyone showing himself entitled thereto." The law does not say before whom the showing shall be made, nor is any way provided for obtaining the money from the state.

IN CERTAIN CASES THE STATE MIGHT WELL PERMIT ITSELF TO BE SUED.

Quite frequently cases arise where fines or judgments in favor of the state become liens upon real estate inferior to mortgage liens in favor of other parties, in which there is an apparent but no real or substantial interest in the state, which operates as a cloud upon the title. There is no provision of law authorizing the state to be made a party in the suit to foreclose a prior mortgage or to quiet title against the state. In many instances a great injustice is done to innocent parties. This could be obviated without prejudice to any rights of the state if a law were passed authorizing a prior lien holder to make the state a party to a foreclosure suit, and thus cut off any claim of the state which it did not care to preserve. Of course such a law should be carefully guarded, so as to prevent abuse and preserve every substantial interest of the state, but certainly there should be some way provided by which an unpaid fine or a junior judgment in favor of the state should

not be for years a cloud upon the title of one who procures title to real property under a lien prior to that of the state. In quite a number of instances I have been urged to appear for the state in cases where the state had no equity whatever, but an apparent claim was a cloud upon the title; but the law gives no authority for the attorney-general so to do, and parties whose titles are injuriously affected are without any remedy.

NEEDS OF THE OFFICE.

Prior to the adoption of the code, the attorney-general was by law required to be in attendance at the capitol only during the sessions of the general assembly and the supreme court. There was provided for his use one room with a desk, sofa, chairs, etc., but nothing of a library or the necessary appliances or accommodations for the work of the office or preserving the files and records. There are practically no records of the attorney-general's office before 1886. My predecessors, I am informed, did most of the work of the office at their own offices elsewhere. During my administration of the office, I have been in attendance at the capitol nearly all the time, but at times when intricate cases or difficult questions were under consideration, I have been compelled to go elsewhere to secure freedom from interruptions and facilities for better thought and work than the office at the capitol affords.

The office at the capitol assigned to the attorney-general consisted of but one room opening off the main corridor, having but one window and poor ventilation. It was open to the public, and at no time, however important the business or necessary that it should be done at a given time, or however difficult the questions under consideration, could constant interruption and distraction of thought be prevented. The duties of the attorney-general, with the many cases which require his attention, both civil and criminal, and the examination of the many questions of law required of him, demand close study and careful consideration. One may accustom himself to doing mere clerical work in a public place, but no person whose work is essentially mental can possibly render the best services in a public reception room. Every professional man understands the force of this. There are few lawyers or doctors or othe professional men, even in the smaller country towns, who under take to transact business with such insufficent accommodations It may be done for awhile, but not with the best results.

The new code requires the attorney-general to keep his office at the seat of government. The business of the state has increased from year to year. The statement of the cases and of the opinions rendered which accompanies this report, conveys but little idea of the magnitude of the duties and responsibilities of this office. Some cases have over 600 pages of printed record, and 3,000 pages of transcript. Many involve intricate questions of law which require the examination of many authorities. The preparation of some opinions requires days of labor searching for authorities, and many duties which cannot be recorded and which do not appear under the title of cases or opinions, arise every day. It must be apparent to every person that this work cannot be done under such disadvantageous circumstances. The constant service of an assistant is required, but no place was provided for him to work. This entails upon the attorney-general all the details of the office, which ought to be, in a large measure, cared for by the assistant, leaving to the attorney-general time and opportunity for the consideration of the more important questions. In order to have the business of the state done, for the last three years I have been compelled to do no small part of the work at night when other people slept, and this was continued until serious impairment of eyesight and health was threatened and I resolved that there must be a change. The alternative was presented to me—either to leave the pressing duties of the state unperformed or to secure other quarters where my energies could be expended with better results and to greater advantage. Whether wisely or unwisely, I chose the latter course, and procured rooms outside of the capitol building until such time as a place can be provided in the capitol where the work of this department can be done. It seems important that the office of the attorney-general should be not far distant from the supreme court rooms, the clerk's office, and especially the state library, but I am thoroughly convinced that it is impossible for the best service to be performed under the conditions above referred to. There should be provided a permanent office for the attorney-general with a private office, where he can, not only consult in private, but be in a position to command his own time and devote himself to the examination and consideration of questions without having his attention called away every minute or two by persons, possibly, who have no real business with him. The need of this must be so apparent that there can be but one opinion about it.

Every elective officer of the state who is required to be at the capitol has his private room, and a number of non-elective officers are thus provided, although the duties of some are largely clerical. The accommodations should be such that the assistant may perform his work at the capitol. It is impossible for the attorney-general to be in the office every day. Cases require his attendance in court in different parts of the state and in the federal courts. With room for the assistant working under the direction of the attorney-general, the attorney-general would be relieved of many minor details and would be given a better opportunity for the consideration of more important questions. In this way the office would be continually open, and the public having business at the office would be better served than under the present system, which leaves no one save the clerk at the office when the attorney-general is compelled to be absent. This, I believe, was the intention of the legislature in changing the law requiring the office of the attorney-general to be kept at the seat of government.

The office of the attorney-general should also be provided with proper cases for filing away letters or memoranda pertaining to different subjects, arguments and briefs; in fact, with such modern appliances as are usually found in the best equipped lawyers' offices in the state for preserving and arranging for handy reference all memoranda pertaining to the business of the office. There is great need also of a number of law books. With the state library near at hand, a large number of state reports or books only occasionally used is not necessary, but there should be a well selected office library embracing works of reference, law dictionaries, certain text-books, and in fact, such books as are likely to be used every day or many times a day. The only law books now in the office are the Iowa reports, Statutes and Digests, the Northwestern reporters, and the American and English Encyclopedia of Law, except some of my own private library that I have placed on the shelves temporarily.

The statute provides for an assistant for the attorney-general at a salary of not more than $1,200 per year. The duties devolving upon this office are such that the assistance of an able lawyer is required all the time. Several of the departments of the state are provided with deputies at a salary of $1,500 per year. As a rule, such deputies are not required to have a professional education or experience in their profession

as a qualification for such office. It is impossible to secure the services of an attorney who is well fitted to perform the duties of the assistant, who will devote his whole time, which the demands of the office require, for the salary that is provided. I submit in all candor that there is no good reason for discriminating against this department in that respect.

The present condition of affairs, I am fully satisfied, is not because of any ill will toward this department on the part of any person whomsoever. It is the natural outgrowth of conditions and laws enacted when the state was young. At that time there were comparatively few criminal cases, very few state institutions, and comparatively few duties which devolved upon this office. As the state has grown in population and wealth many new offices have been created, new boards and commissions, the state institutions multiplied, new laws enacted in relation to the control and taxation of corporations, and for the conservation, good order, health and prosperity of the people in the exercise of the police powers of the state, all of which laws must run the gauntlet of different courts, from the lowest state court to the highest federal tribunal. This has multiplied many times the labors and duties as well as the responsibilities of this office. Few persons have accurate information or a just conception in regard to the duties pertaining to this office, or the need of better facilities for the performance of those duties. I am persuaded that no intentional injustice has been done this department, but the present condition exists solely because of lack of information on the part of those whose duty it is to make proper provision for all branches of public service. Heretofore the office of the attorney-general was considered to be at the place of residence of the incumbent of the office, but the change of the law makes changed conditions. The service of the state demands that the office of the attorney-general should be, as the last legislature placed it, at the seat of government. It must be evident to any one that the best interests of the state demand that suitable facilities be provided for this branch of the service of the people.

There is now pending in the supreme court of the United States a case to test the constitutionality of the law prohibiting common carriers transporting intoxicating liquors in the state. There is in the United States circuit court of appeals, a case pending to determine the question whether a United States circuit judge can release in a *habeas corpus* proceedings one convicted of

crime in the state court. In the supreme court of the state a case in pending involving the question of the right of the state to require fish-ways to be built at dams across streams; and there is also pending in the supreme court of the state another case to secure the construction of the collateral inheritance tax law; also a case to determine the rights of the state in lakes and lake beds. In the district court of Pottawattamie county a suit is pending to test the constitutionality of the collateral inheritance tax law. Various insurance companies are about to bring suits to test the constitutionality of the act of the legislature placing a discriminating tax upon such insurance companies. These cases in which the validity of the laws of the state are assailed are prosecuted by able counsel. Many difficult questions are involved. Any attorney would be derelict in duty who did not thoroughly prepare for the defense. The preparation for such defense cannot be made in an hour or a day, but some questions require the patient research of many days in order to examine the subjects exhaustively.

It is certainly for the best interest of the state that the attorney for the state should have the best facilities and time for the preparation of the defense that will enable him to uphold the laws before the courts. My earnestness in pressing the needs of this department is not one of personal interest. As an officer of the state, if I do my best under existing conditions (which I have and shall ever endeavor to do) there is no room for self-reproach or censure on the part of others, but is it not a part of my duty to endeavor to change the conditions so as to secure the best results possible to the state and the public? I feel satisfied that when the matter is understood, suitable provisions will be made for a permanent office and ample facilities for the discharge of the many duties which the law imposes upon this department.

Permit me to express my appreciation of the pleasant relations and uniform courtesy that have been shown by yourself and by all the state officials with whom my official duties have brought me in contact. I wish also to express my indebtedness to my assistants, Mr. Jesse A. Miller and Mr. Hubert Remley, who have rendered faithful service and valuable aid in every manner within their power, and that, too, at a compensation grossly inadequate for the services rendered.

Respectfully submitted,

MILTON REMLEY,
Attorney-General.

SCHEDULE "A."

The following is a list of criminal cases submitted to the supreme court, and also rehearings asked during the year 1896, and the final disposition of the cases:

State v. W. B. Arnold, appellant.

Defendant was convicted of keeping a nuisance; appealed from Dickinson county. Affirmed May 15, 1896.

State v. Aherin, appellant.

Defendant was convicted of keeping a nuisance; appealed from Webster county. Affirmed February 14, 1896.

State v. Nick Abegglen, appellant.

Defendant was convicted of seduction; appealed from Monroe county. The submission was set aside and the case was finally submitted May 11, 1897. Affirmed October 8, 1897.

State v. Joe Allen, appellant.

Defendant was convicted of seduction; appealed from Dickinson county. Reversed December 9, 1896.

State v. John B. Butler, appellant,

Defendant was convicted of keeping a nuisance; appealed from Iowa county. Affirmed February 14, 1896.

State v. J. H. Bussimus, appellant.

Defendant was convicted of keeping a nuisance; appealed from O'Brien county. Affirmed February 14, 1896.

State v. John Bernard, appellant.

Defendant was convicted of assault with intent to commit rape; appealed from Poweshiek county. Dismissed October 6, 1896.

State v. Charles Bernstein and Adolph Bernstein, appellants.

Defendants were convicted of keeping a nuisance; appealed from Marshall county. Affirmed October 8, 1896. Petition for rehearing was filed in November and overruled in January, 1897.

State v. Patrick Brady, appellant.

Defendant was convicted of cheating by false pretenses; appealed from Wapello county. Affirmed December 10, 1896.

State v. George Beabout, appellant.

Defendant was convicted of rape; appealed from Taylor county. Affirmed December 10, 1896.

State v. G. A. Brown, appellant.

Defendant was convicted of grand larceny; appealed from Pottawattamie county. Affirmed December 9, 1897.

State v. Thomas Brock, appellant.

Defendant was convicted of assault; appealed from Pottawattamie county. Affirmed October 27, 1896.

State v. Thomas Cleary, appellant.

Defendant was convicted of keeping a nuisance; appealed from Cherokee county. Affirmed April 7, 1896.

State v. Walter Case, appellant.

Defendant was convicted of murder in the second degree; appealed from Audubon county. Affirmed October 6, 1896.

State v. E. L. Cavanaugh, appellant.

Defendant was convicted of keeping a nuisance; appealed from Benton county. Affirmed October 7, 1896.

State v. George Cooper, appellant.

Defendant was convicted of embezzlement; appealed from Henry county. Reversed May 13, 1897. The state filed a petition for rehearing, which was submitted at the October term, 1897, and afterward overruled.

State v. John H. Cater, appellant.

Defendant was convicted of murder in the first degree; appealed from Winneshiek county. Reversed January 19, 1897.

State v. Isaac Clark, appellant.

Defendant was convicted of assault with intent to kill; appealed from Polk county. Affirmed December 9, 1896.

State v. W. E. Deyoe, appellant.

Defendant was convicted of larceny; appealed from Osceola county. Reversed April 7, 1896.

State v. Fred Danielson et al., appellants.

Defendants were convicted of keeping a nuisance; appealed from Mills county. Affirmed February 14, 1896.

State v. Bert Dougherty, appellant.

Defendant was convicted of selling intoxicating liquors illegally; appealed from Buchanan county. Affirmed October 27, 1896.

State v. John Dolezol, appellant.

Defendant was convicted of keeping a nuisance; appealed from Jones county. Dismissed because of defective record October 29, 1896.

State v. T. P. Edgerton, appellant.

Defendant was convicted of murder in the second degree; appealed from Warren county. Affirmed December 9, 1896.

State v. George Fertig et al., appellants.

Defendants were convicted of keeping a nuisance; appealed from Floyd county. Reversed May 13, 1896.

State v. Martin Fisher, appellant.

Defendant was convicted of keeping a nuisance; appealed from Webster county. Affirmed February 14, 1896.

State v. A. C. Finney, appellant.

Defendant was convicted of obstructing a highway; appealed from Page county. Affirmed October 10, 1896.

State, appellant, v. William Field.

Defendant was indicted for fraudulent banking; he demurred to the indictment and the demurrer was sustained. The state appealed from the ruling on demurrer and the ruling was reversed in 1895. Defendant filed petition for rehearing, and at January term, 1896, the petition was submitted and overruled.

State v. George Feuerhaken, appellant.

Petition for rehearing was dismissed.

State v. Ed. Forsythe, appellant.

Defendant was convicted of rape in Polk county and appealed. The case was submitted without argument on the part of the state in May, 1895. As the record did not show that an appeal had been taken, the case was dismissed October 1, 1895. Appellant filed an amended abstract and petition for rehearing, which was overruled. Appellant made application to have submission set aside and the case reopened in May, 1896, and application was granted. Affirmed October 8, 1896.

State v. Owen Garrity, appellant.

Defendant was convicted of seduction; appealed from Clinton county. Reversed May 12, 1896.

State v. Ferdinand Graff, appellant.

Defendant was convicted of larceny from a building in the night time; appealed from Dubuque county. Affirmed April 9, 1896.

State v. Dudley Gibson, appellant.

Defendant was convicted of larceny; appealed from Fremont county. Affirmed April 8, 1896.

State v. Charles Harris, appellant.

Defendant was convicted of robbery; appealed from Lee county. Affirmed April 7, 1896.

State v. Jesse Harlan, appellant.

Defendant was convicted of rape; appealed from Keokuk county. Affirmed May 22, 1896.

State v. Guy Helm, appellant.

Defendant was convicted of murder in the second degree; appealed from Keokuk county. Affirmed April 7, 1896.

State v. James Hayes, appellant.

Defendant was convicted of larceny; appealed from Jackson county. Affirmed May 27, 1896.

State v. John Ham and Frank Gillett, appellants.

Defendants were convicted of breaking and entering; appeal from Floyd county. Affirmed April 13, 1896.

State v. W. H. Hall, appellant.

Defendant was convicted of larceny; appealed from Pottawattamie county. Affirmed April 7, 1896.

State v. Ed. Harris, appellant.

Defendant was convicted of burglary; appealed from Polk county. Affirmed December 10, 1896.

State v. Hathaway and Palmer, appellants.

Defendants were convicted of grand larceny; appealed from Polk county. Affirmed December 10, 1896.

State v. W. E. Hendren, appellant.

Defendant was convicted of grand larceny; appealed from Van Buren county, and judgment was affirmed in 1895. Petition for rehearing was submitted in January, 1896, and the petition was overruled.

State v. J. P. Hutchinson, appellant.

Petition for rehearing submitted in February and overruled.

State v. John Hamil, appellant.

Defendant was convicted of murder in the first degree in Polk county and judgment affirmed. Petition for rehearing submitted, and overruled May 29, 1896.

State, appellant, v. J. A. Ingalls and Wm. Moody.

Defendants were indicted for breaking and entering and were acquitted by the district court of Winneshiek county. The state appealed and the case was reversed October 8, 1896.

State v. Dee W. Johnson, appellant.

Defendant was convicted of seduction; appealed from Taylor county. Affirmed October 27, 1896.

State v. Wm Jamison, appellant.

Defendant was convicted of assault and battery; appealed from Butler county. Affirmed December 12, 1886.

State v. Chas. W. King, appellant.

Defendant was convicted of seduction; appealed from Warren county. Affirmed April 8, 1896. A petition for rehearing was filed and overruled.

State v. Henry Lauer, appellant.

Defendant was convicted of keeping a nuisance; appealed from Washington county. Affirmed February 14, 1896.

State v. M. J. Lauder, appellant.

Defendant was convicted of keeping a nuisance; appealed from Benton county. Affirmed February 14, 1896.

State, appellant, v. D. G. Lowry.

Appeal dismissed by appellant at May term. The offense charged was that of obtaining money under false pretenses.

State v. Paul Lischer, appellant.

Defendant was convicted of seduction; appealed from Louisa county. Dismissed by appellant.

State v. T. G. LaGrange, appellant.

Defendant was convicted of keeping a nuisance; appealed from Benton county. Reversed October 9, 1896.

State v. Lauderbeck, appellant.

Defendant was convicted of seduction; appealed from Warren county. Affirmed in 1895, and petition for rehearing submitted and overruled.

State v. C. McGuire, appellant.

Defendant was convicted of keeping a nuisance; appealed from Fayette county. Affirmed February 14, 1896.

State v. James F. McNamara, appellant.

Defendant was convicted of keeping a nuisance; appealed from Webster county. Affirmed February 14, 1896.

State v. Robert Mushrush, appellant.

Defendant was convicted of manslaughter; appealed from Audubon county. Affirmed April 8, 1896.

State v. John McElhaney and John McHall, appellants.

Defendants were convicted of assault with intent to commit murder; appealed from Clinton county. Affirmed May 25, 1896.

State v. Albert McKinstry, appellant.

Defendant was convicted of grand larceny; appealed from Washington county. Affirmed December 9, 1896. A petition for rehearing was submitted at the May term, 1897, and the petition was overruled.

State v. John Maher, appellant.

Defendant was convicted of obstructing a highway; appeal from Lyon county. Affirmed October 27, 1896.

State v. Wm. McLaughlin, appellant.

Defendant was convicted of murder in the second degree; appealed from Andubon county. Affirmed October 27, 1896.

State v. Henry Nordman, appellant.

Defendant was convicted of larceny; appealed from Jones county. Affirmed April 8, 1897.

State v. L. B. Oden, appellant.

Defendant was convicted of adultery; appealed from Sioux county. Affirmed December 9, 1896. A petition for rehearing was submitted in May, 1897, and overruled.

State v. O'Brien, appellant. (Two cases.)

Defendant was convicted of keeping a nuisance; appealed from Buchanan county. Affirmed May 25, 1896.

State v. Chas. Philpot and Melville Philpot, appellants.

Defendants were convicted of assault with intent to commit rape; appealed from Taylor county. Reversed April 7, 1896.

State, appellant v. E. E. Patty.

Defendant was charged with obtaining money under false pretenses and acquitted by the district court of Poweshiek county. The state appealed and the case was reversed April 7, 1896.

State v. Smith Porter, appellant.

Defendant was convicted of burglary; appealed from Floyd county. Affirmed April 8, 1896.

State v. Peter S. Rudd, appellant.

Defendant was convicted of assault with intent to commit rape; appealed from Worth county. Affirmed April 7, 1896.

State v. Carl Russell, appellant.

Defendant was convicted of assault with intent to commit rape; appealed from Boone county. Reversed October 6, 1896.

State v. Albert Rachwitz, appellant.

Defendant was convicted of burglary; appealed from Pottawattamie county. Affirmed October 28, 1896.

State v. Noah Reasby, appellant.

Defendant was convicted of robbery; appealed from Mahaska county. Affirmed December 10, 1896.

State v. C. B. Swafford, appellant.

Defendant was convicted of perjury; appealed from Johnson county. Reversed May 20, 1896.

State v. A. B. Stroud and Arthur Eyers, appellants.

Defendants were convicted of disturbing a public meeting; appealed from Dallas county. Reversed October 9, 1896.

State v. Frank Sunderland, appellant. (*Two cases.*)

Defendant was convicted of keeping a nuisance; appealed from Buchanan county. Affirmed May 25, 1896.

State v. George H. Scott, appellant.

Defendant was convicted of keeping a nuisance; appealed from Calhoun county. Affirmed October 9, 1896.

State v. Mrs. C. V. Smith, appellant.

Defendant was convicted of producing an abortion; appealed from Polk county. Affirmed October 9, 1896. A rehearing was asked and overruled.

State v. George S. Smith, appellant.

Defendant was convicted of assault with intent to kill; appealed from Johnson county. Reversed December 9, 1896.

State v. W. H. Simmons, appellant.

Defendant was convicted of keeping a nuisance; appealed from Cherokee county. Affirmed October 22, 1896.

State v. Chris. Stuhlmiller, appellant.

Defendant was convicted of larceny; appealed from Carroll county. Affirmed in 1895. Petition for rehearing was filed and overruled in 1896.

State v. John F. Seery, appellant.

Defendant was convicted of resisting an officer; appealed from Jones county. Affirmed in 1895. A petition for rehearing was filed and then dismissed in 1896.

State v. William Teeters, appellant.

Defendant was convicted of obstructing a public highway; appealed from Johnson county. Affirmed April 8, 1896. A petition for rehearing was filed and overruled.

State, appellant, v. John Thomas and Andrew Thomas.

Defendants were charged with assault with intent to commit murder. The indictment was lost before trial and state moved to substitute copy, but upon showing made, the motion was overruled. The state appealed from ruling. Affirmed April 7, 1896.

State v. F. B. Tower, appellant.

Defendant was convicted of producing an abortion; appealed from Polk county. Affirmed in 1895. Defendant filed a petition for rehearing, which was overruled in 1896.

State v. Henry J. Van Fliet, appellant.

Defendant was convicted of keeping a nuisance; appealed from Marion county. Affirmed April 7, 1896.

State v. L. M. Van Auken, appellant.

Defendant was convicted of forgery; appealed from Cerro Gordo county. Affirmed October 7, 1896.

State v. L. E. White, appellant.

Defendant was convicted of forgery; appealed from Warren county. Reversed May 19, 1896.

State v. Henry Weston, appellant.

Defendant was convicted of manslaughter; appealed from Jackson county. Affirmed May 12, 1896.

State v. Wesley Wiltsey, appellant.

Defendant was convicted of adultery; appealed from Kossuth county. Submitted on transcript and affirmed February 14, 1896. A petition for rehearing was filed and petition granted. The case was again submitted May 26, 1896, and reversed October 8, 1896.

State v. W. J. Warner, appellant.

Defendant was convicted of manslaughter; appealed from O'Brien county. The case was submitted at the February term, the submission set aside and then resubmitted in October. Affirmed December 11, 1896.

State v. Theodore Waibel, appellant.

Defendant was convicted of keeping a nuisance; appealed from Henry county. Affirmed May 25, 1896.

State v. John Whalen, appellant.

Defendant was convicted of seduction; appealed from Boone county. Affirmed October 6, 1896.

State v. A. J. Wright and Wm. Baldwin, appellants.

Defendants were convicted of keeping a nuisance; appealed from Hamilton county. Affirmed October 7, 1896.

State v. Frank White, appellant.

Defendant was convicted of breaking and entering; appealed from Polk county. Affirmed October 10, 1896.

State v. W. B. Waddle, appellant.

Defendant was convicted of subornation of perjury; appealed from Wapello county. Affirmed December 9, 1896

State v. E. F. Waite, appellant.

Defendant was convicted of threatening to accuse another of a crime and thereby compelling him to do a thing against his will; appealed from Howard county. Affirmed April 7, 1897. (See *Waite v. Campbell*, under the heading, "Cases Pending.")

State v. George Weems, appellant.

Defendant was convicted of murder in the first degree; appealed from Polk county. Affirmed in 1895. A petition for rehearing was filed and overruled in 1896.

State v. J. C. Yetzer, appellant.

Defendant was convicted of fraudulent banking; appealed from Cass county. Affirmed April 8, 896. A petition for rehearing was overruled.

The following is a list of criminal cases submitted to the supreme court during the year 1897. Petitions for rehearing which were determined in 1897 in cases which were originally determined in 1896 are noted under the heading of the respective cases submitted in 1896:

State v. B. F. Boomer, appellant.

Defendant was convicted of fraudulent banking; appealed from Allamakee county. Affirmed October 9, 1897.

State v. A. H. Bigelow, appellant.

Defendant was convicted of uttering a forged instrument; appealed from Polk county. Affirmed April 7, 1897.

State v. Ed. Burton, appellant.

Defendant was convicted of larceny; appealed from Jasper county. Affirmed October 7, 1897.

State, appellant, v. W. H. Burling

Defendant was charged with uttering a forged instrument by the grand jury of Fayette county. The district court held that a weigh ticket was not the kind of an instrument contemplated by the statute concerning forgery, and instructed the jury to return a verdict for the defendant. The state appealed. Reversed October 6, 1897.

State v. Ed. Bailor, appellant.

Defendant was convicted of rape; appealed from Mills county. Affirmed December 15, 1897.

State v. Jeremiah C. Brown, appellant.

Defendant was convicted and appealed from Page county. This case was submitted on transcript; the submission was set aside, and the appeal was dismissed by the appellant.

State v. Ed. Clark and J. B. Story, appellants.

Defendants were convicted of refusing, as judges of election, to receive certain votes; appealed from Benton county. Reversed October 6, 1897.

State v. George Debolt and Walter Smith, appellants.

Defendants were convicted of making malicious threats with the intent to extort money; appealed from Guthrie county. Reversed December 17, 1897.

State v. Elias Doty, appellant.

Defendant was convicted of selling obscene pictures; appealed from Linn county. Affirmed December 15, 1897.

State v. Frank Dorland, appellant.

Defendant was convicted of manslaughter; appealed from Fayette county. Reversed October 12, 1897

State v. Henry Eiffert, appellant.

Defendant was convicted of fraudulent banking; appealed from Bremer county. The case was affirmed in 1895, but a rehearing was granted in May, 1896. The case was resubmitted in January, 1897, and affirmed May 15, 1897.

State v. William Franklin and James Hazlett, appellants.

Defendants were convicted of manslaughter; appealed from Monroe county. Affirmed October 29, 1897.

State v. Bert Graves, appellant.

Defendant was convicted of assault with intent to commit murder; appealed from Polk county. Affirmed February 11, 1897.

State v. W. H. Hurd, appellant.

Defendant was convicted of incest; appealed from Woodbury county. Affirmed April 7, 1897.

State v. Wm. Henderson, appellant.

Defendant was convicted of maintaining an opium joint; appealed from Polk county. Affirmed February 11, 1897.

State v. William Hazen, appellant.

Defendant was convicted of obtaining money under false pretenses; appealed from Jasper county. Affirmed December 16, 1897.

State v. Fred Johnson, appellant.

Defendant was convicted of manslaughter; appealed from Clinton county. Appeal was dismissed by the appellant.

State v. William Jamison, appellant.

Defendant was convicted of assault and battery; appealed from Butler county. Affirmed.

State v. Louie Jacobs, appellant.

Defendant was convicted of keeping a nuisance; appealed from Polk county. Affirmed May 26, 1897.

State v. Frank Jackson, appellant.

Defendant was convicted of manslaughter; appealed from Pottawattamie county. Affirmed December 15, 1897.

State v. Charles Kelley, appellant.

Defendant was convicted of grand larceny; appealed from Polk county. Affirmed October 30, 1897. Notice of petition for rehearing has been served.

State v. Charles L. King, appellant.

Defendant was convicted of conspiracy; appealed from Buchanan county. Not decided.

State v. A. Kouhns, appellant.

Defendant was convicted of incest; appealed from Boone county. Affirmed December 15, 1897.

State, appellant, v. J. R. Kimble.

Defendant was indicted for incest in Washington county. The court held that the indictment was insufficient, and on that ground refused to admit the evidence of the state. He also refused to instruct the jury to return a verdict for the defendant, because there was no evidence, and refused to bind the defendant over to the next grand jury. He then discharged the jury from further service, and then discharged the defendant. The state appealed from this ruling. Reversed December 16, 1897.

State v. Robert Lee, appellant.

Defendant was convicted of robbery; appealed from Polk county. Affirmed April 7, 1897. A rehearing was asked and denied.

State v. J. A. Lauder, appellant.

Defendant was convicted of keeping a nuisance; appealed from Clarke county. Affirmed May 29, 1897.

State v. Arthur Lehman, appellant.

Defendant was convicted of larceny from the person; appealed from Clinton county. Affirmed May 29, 1897.

State v. Frank Milmeier, appellant.

Defendant was convicted of arson; appealed from Lee county. Reversed October 12, 1897.

State v. James McDonough, appellant.

Defendant was convicted of rape; appealed from Johnson county. Affirmed December 15, 1897. Petition for rehearing filed.

State v. John McGuan, appellant.

Defendant was convicted of rape; appealed from Johnson county. Appeal dismissed by appellant

State v. H. O. Null, appellant.

Defendant was convicted of keeping a nuisance; appealed from Polk county. Affirmed February 11, 1897.

State, appellant, v. Peter Olinger.

Defendant was charged with wilful and malicious misconduct in office. A demurrer to the indictment was sustained. The state appealed from the ruling on the demurrer. Reversed October 11, 1897.

State v. C. S. Pickett, appellant.

Defendant was convicted of adultery; appealed from Jefferson county. Affirmed December 15, 1897.

State v. C. Rosenbaum, appellant.

Defendant was convicted of receiving stolen property; appealed from Polk county. Affirmed May 29, 1897.

State v. Victor Repp, appellant.

Defendant was convicted of larceny; appealed from Monroe county.

State v. Patrick Reilly, appellant.

Defendant was convicted of seduction; appealed from Dubuque county. Reversed December 15, 1897.

State, appellant, v. T. J. Shea.

Defendant was indicted for wilful and malicious misconduct in office. A demurrer to the indictment was sustained, and the state appealed from this ruling. Reversed October 8, 1897.

State v. William Skillicorn, appellant.

Defendant was convicted of keeping a nuisance; appealed from Mills county. Affirmed December 17, 1897.

State, appellant, v. Suel J. Spaulding.

Defendant was indicted for embezzlement. The district court instructed the jury to return a verdict for the defendant, and the state appealed from this ruling. Affirmed October 5, 1897.

State v. Joe Spiers, appellant.

Defendant was convicted of keeping a nuisance; appeal from Sioux county. Affirmed December 15, 1897.

State v. Mrs. Betsy Smith, appellant.

Defendant was convicted of murder in the first degree; appealed from Polk county. Reversed October 5, 1897.

State v. J. T. Smith, appellant.

Defendant was convicted of assault with intent to commit murder; appealed from Iowa county. Affirmed April 7, 1897. A petition for rehearing was overruled.

State v. Richard Taylor, appellant.

Defendant was convicted of assault with intent to commit rape; appealed from Jefferson county. Affirmed October 7, 1897.

State v. Noah J. Thomas, appellant.

Defendant was convicted of seduction; appealed from Franklin county. Reversed December 15, 1897.

State v. Wm. Urie, appellant.

Defendant was convicted of assault with intent to commit rape; appealed from Adams county. Affirmed April 7, 1897. A petition for rehearing was filed and overruled.

State v. L. R. Van Tassell, appellant.

Defendant was convicted of murder in the first degree; appealed from Chickasaw county. Affirmed October 7, 1897.

State v. Frank Watson, appellant.

Defendant was convicted of burglary; appealed from Jefferson county. Affirmed October 5, 1897.

T. H. Rhodes, plaintiff in error, v. the State of Iowa.
In Supreme Court of United States.

The plaintiff in error was station agent of the railroad at Brighton, Iowa, and was convicted of transporting intoxicating liquors from the car to the depot of the railway. He appealed to the supreme court and the judgment below was affirmed. He sued out a writ of error from the supreme court of the United States to the supreme court of Iowa, contending that being engaged in interstate commerce, he was not amenable to the Iowa law. The case was submitted in the United States supreme court on printed argument in January, 1897, but said submission was set aside and the case was set down for oral argument, and is still pending.

SCHEDULE "B."

CRIMINAL CASES SUBMITTED DURING THE YEAR 1895.

TITLE OF CASE.	COUNTY.	OFFENSE.	DISPOSITION.
State, appellee, v. Chester Addison	Pottawattamie	Hauling upon a highway, hogs which had died of cholera	Affirmed Dec. 12, 1895.
State, appellee. v. Paul C. Akin	Hardin	Assault with intent to maim and disfigure	Affirmed Apr. 2, 1895.
State, appellant, v. Chas. W. Andrews	Dallas	Adultery	Reversed Oct. 5, 1895.
State, appellee, v. B. Arie	Boone	Nuisance	Affirmed Oct. 2, 1895.
State, appellee, v. Wm. Bauerkemper	Pottawattamie	Seduction	Affirmed Oct. 10, 1895.
State, appellee, v. Andrew Beal	Iowa	Larceny of hogs	Affirmed Apr. 2, 1895.
State, appellee, v. Riley Bivins	Iowa	Nuisance	Affirmed Feb. 4, 1895.
State, appellee, v. Henry Beeh	Benton	Nuisance	Affirmed May 31, 1895.
State, appellee, v. Sarah E. Burgor	Scott	Arson	Affirmed Apr. 2, 1895.
State, appellee, v. J. A. Bowman	Wright	Uttering a forged instrument	Reversed Apr. 5, 1895.
State, appellee, v. S. Busby	Hamilton	Nuisance	Affirmed Feb. 5, 1895.
State, appellant, v. J. C. Bonham	Mahaska	Vending drugs as itinerant without license	Affirmed Dec. 10, 1895.
State, appellee, v. Edward Carl	Boone	Uttering a forged instrument	Affirmed May 31, 1895.
State, appellee, v. H. Chapman	Appanoose	Nuisance	Reversed Apr. 2, 1895.
State, appellee, v. James Caffery	Floyd	Nuisance	Affirmed Apr. 2, 1895.
State, appellee, v. Chas. Craig	Winneshiek	Nuisance	Affirmed Feb. 5, 1895.
State, appellee, v. Lyman Cody	Tama	Assault	Affirmed Apr. 4, 1895.
State, appellee, v. Otis Cross	Pottawattamie	Larceny of hogs	Affirmed Oct. 11, 1895.
State, appellee, v. Joseph Cerney	Benton	Nuisance	Affirmed May 31, 1895.
State, appellee, v John Conners	Benton	Breaking and entering	Affirmed Oct 7, 1895.
State, appellee, v. J. A. Campbell	Polk	Seduction	Affirmed May 31, 1895.
State, appellee, v. Charles Case	Lyon	Rape	Affirmed Dec. 11, 1895.
State, appellee, v. M. J. Cox	Woodbury	Rape	Affirmed Dec. 12, 1895.
State, appellee, v. Robert Callahan	Polk	Robbery	Affirmed Dec. 11, 1895
State, appellee, v. F. B. Cooper	Madison	Obtaining property under false pretenses	Affirmed Dec. 10, 1895.
State, appellee, v. John Caywood	Montgomery	Perjury	Affirmed Dec. 12, 1895.
State, appellee, v. Thomas Danforth	Poweshiek	Nuisance	Affirmed Jan. 31, 1895.
State, appellee, v. Wm. Dunn	Winneshiek	Nuisance	Affirmed Feb. 5, 1895.
State, appellee, v. Patrick DeVaney	Greene	Larceny	Affirmed Oct 22, 1895.
State, appellee, v. Anna Dolozal	Jones	Nuisance	Affirmed Oct. 23, 1895.
State, appellee, v. Alonzo Delong	Madison	Assault with intent to commit rape	Affirmed Dec. 14, 1895.
State, appellee, v. C. W. Douglas	Fayette	Nuisance	Reversed Dec 11, 1895.
State, appellee, v. Henry Eiffert	Bremer	Fraudulent banking	Affirmed Dec 12, 1895.
State, appellee, v. S. D. Eaton	Beuna Vista	Obtaining money under false pretenses	Affirmed Oct 19, 1895.
State, appellant, v. Wm. Fields	Buchanan	Fraudulent banking	Reversed Apr. 3, 1895.
State, appellee, v. J. L. Forkner	Polk	Nuisance	Affirmed Apr. 3, 1895.
State, appellee, v P. A. Fernald & A. W Brown	Washington	Conspiracy	Affirmed Oct. 2, 1895.
State, appellee, v. James Frost	Audubon	Breaking and entering	Affirmed Oct 5, 1895.
State, appellee, v. B Frolich	Sioux	Using false weights	Affirmed Oct. 4, 1895.
State, appellee, v. George French	Dallas	Assault with intent to commit rape	Affirmed Dec. 10, 1895.

SCHEDULE "B"—CONTINUED.

TITLE OF CASE.	COUNTY.	OFFENSE.	DISPOSITION.
State, appellee, v. George Feuerhaken	Pottawattamie	Receiving stolen property	Affirmed Dec. 11,1895.
State, appellee, v. Ed Forsythe	Polk	Rape	Dismissed Oct. 1,1895.
State, appellee, v. N. Gaston	Benton	Rape	Affirmed Dec. 14,1895.
State, appellee, v. Sam'l Hopkins	Benton	Illegal sale of intoxicating liquors	Affirmed Apr. 3,1895.
State, appellant, v. G. Haug	Allamakee	Unlawfully seining fish	Reversed Oct. 3,1895.
State, appellee, v. H. C. Hart	Woodbury	Adultery	Affirmed Oct. 3,1895.
State, appellee, v. Henry Houghton	Benton	Nuisance	Affirmed May 29,1895
State, appellee, v. James P. Hutchinson	Tama	Assault with intent to commit rape	Affirmed Oct. 10,1895.
State, appellee, v. J. Hartney	Polk	Burglary	Affirmed May 31,1895
State, appellee, v. Atlee Hart	Plymouth	Extortion of money by threats to accuse of crime	Affirmed Dec. 11,1895.
State, appellee, v. Ira Husted*	Benton		
State, appellee, v. John Hamil	Polk	Murder in first degree	Affirmed Dec. 13,1895.
State, appellee, v. W E. Hendren	Van Buren	Grand larceny	Affirmed Oct. 24,1895.
State, appellee, v. Elias W. Ingraham	Winnebago	Assault with intent to commit rape	Affirmed May 31,1895.
State, appellee, v. Mason Ingraham	Poweshiek	Nuisance	Affirmed Dec. 11,1895.
State, appellee, v. Anna Jelencke	Benton	Nuisance	Affirmed May 31,1895.
State, appellee, v. Joseph Jelencke	Benton	Breaking and entering	Affirmed Oct. 4,1895.
State, appellee, v. Charles Jones	Polk	Larceny from the person	Affirmed May 31,1895.
State, appellee, v. Charles Jones	Hamilton	Nuisance	Affirmed Oct. 19,1895.
State, appellee, v. W. F. Judiesch	Ida	Seduction	Revers'd Dec. 11,1895.
State, appellee, v. Thomas Kennedy	Sioux	Seduction	Affirmed Apr. 2,1895.
State, appellee, v. F. C. King	Polk	Larceny from a dwelling house	Affirmed May 31,1895.
State, appellee, v. Frank Kowolski and John Arduser	Delaware	Running a steam engine along a highway contrary to law	Affirmed Dec 12,1895.
State, appellee, v. W. B. Kent	Polk	Uttering a forged instrument	Affirmed Oct. 23,1895.
State, appellee, v. James La Grange	Poweshiek	Breaking and entering	Affirmed Apr. 2,1895.
State, appellee, v. Sam Lee	Hamilton	Breaking and entering	Affirmed Oct. 4,1895.
State, appellee, v. Henry W. Lauderback	Warren	Seduction	Affirmed Dec. 10,1895.
State, appellee, v. George Laird	Polk	Grand larceny	Affirmed Oct. 26,1895.
State, appellee, v. Lewis Miller	Wapello	Seduction	Affirmed Oct. 1,1895.
State, appellee, v. John Manning	Keokuk	Robbery	Affirmed May 29,1895.
State, appellee, v. Edward Mogle	Pottawattamie	Assault with intent to commit rape	Affirmed May 31,1895.
State, appellee, v. H. L. Mecum	Greene	Entering dwelling house with intent to commit adultery	Affirmed Oct. 4,1895.
State, appellee, v J. T. Merrill	Ringgold	Nuisance	Affirmed Oct. 19,1895.
State, appellee, v. D. P. Minard	Calhoun	Murder in the second degree	Affirmed Dec. 11,1895.
State, appellee, v. Alex. Marshman	Clay	Nuisance	Affirmed Oct. 24,1895.
State, appellee, v. Irvin Myerdirk	Clay	Nuisance	Affirmed Oct. 23,1895.
State, appellee, v. Henry Neeson	Polk	Nuisance	Affirmed Oct. 7,1895.
State, appellee, v. F. Ortschid	Benton	Nuisance	Affirmed May 29,1895.
State, appellee, v. James Ozman	Polk	Nuisance	Affirmed May 31,1895.
State, appellee, v. Robert O'Callaghan	Polk	Grand larceny	Affirmed May 23,1895.
State, appellee, v. Jeff Osborn	Polk	Robbery	Affirmed Dec. 11,1895.
State, appellee, v. William Phipps	Boone	Breaking and entering a dwelling house in the night time	Affirmed Oct. 7,1895.

State, appellee, v. George Phipps	Boone	Malicious mischief	Affirmed Oct. 7,1895.
State, appellee, v. R B. Price	Benton	Nuisance	Affirmed Oct. 8,1895.
State, appellee, v. Ed. Pitcher	Clay	Larceny	Affirmed Oct. 21,1895.
State, appellee, v. George Quinnett	Polk	Burglary	Affirmed May 31,1895.
State, appellee, v. W. C. Ralls	Marshall	Assault with intent to commit murder	Affirmed May 7,1895.
State, appellee, v. Maggie Russell	Washington	Keeping a house of prostitution	Affirmed Oct. 3,1895.
State, appellee, v. George Reed	Clinton	Lewdness	Affirmed Oct. 19,1895.
State, appellee, v. Alexander Rattray	Polk	Grand larceny	Affirmed Oct. 23,1895.
State, appellee, v. Augustus Steinkopf	Delaware	Appeal from order in proceedings to bind defendant over to keep the peace	Revers'd Apr. 6,1895.
State, appellee, v. Emmet Seymour	Jones	Murder in second degree	Affirmed May 22,1895.
State, appellee, v. Chris Stuhlmiller	Carroll	Larceny	Affirmed Oct. 3,1895.
State, appellee, v. John F Seery	Jones	Resisting an officer	Affirmed Oct. 12,1895.
State, appellee, v. John W. Shaffer	Polk	Grave robbery	Affirmed Oct. 2.1895.
State, appellee, v. August Strobehn	Scott.	Rape	Affirmed Dec 12,1895.
State, appellee, v. William Tippet	Mahaska	Manslaughter	Affirmed May 21,1895.
State, appellee, v. Albert J. Tharp	Davis	Larceny of cattle	Affirmed Oct. 1,1895.
State, appellee, v. C J. Thompson	Polk	Burglary	Affirmed Oct. 5,1895.
State, appellee, v. T. B Tower	Polk	Abortion	Affirmed Oct. 21,1895.
State, appellee, v. J. H. Tucker	Poweshiek	Nuisance	Revers'd Dec.11,1895.
State, appellee, v. Ole Valure	Hamilton	Illegal selling of intoxicating liquors	Affirmed Oct. 3,1895.
State, appellee, v. John Wilson	Des Moines	Larceny from a building in the night time	Affirmed Oct. 1,1895.
State, appellee, v. W. B. Waddle	Wapello	Appeal from order refusing to direct shorthand reporter to extend his notes at the expense of the county.	Affirmed Oct. 2.1895.
State, appellee, v. Albert Wickliff	Marion	Seduction	Revers'd Jan.28,1896.
State, appellee, v. F. J. Will	Wright	Nuisance	Affirmed Oct. 2,1895.
State, appellee, v. A. J. Windall	Mahaska	Manslaughter.	Affirmed Oct. 5,1895.
State. appellee, v. V. A. Wheelock	Shelby	Vending drugs, as itinerant, without license	Affirmed Oct. 10,1895.
State, appellee, v. Lew. Warren	Polk	Burglary	Affirmed May 31,1895.
State, appellee, v. Geo. Weems	Polk	Murder in first degree	Affirmed Dec.13,1895.
State, appellee, v. C. E. Whitten	Polk	Abortion	Affirmed Oct 26,1895.
State, appellee, v. Herbert Young	Mahaska	Keeping a house of ill fame.	Affirmed Dec 10,1895.

* Appeal dismissed.

SCHEDULE "C."

The following is the list of civil cases, arranged alphabetically.

Daniel O. Ball et al. v. S. B. Evans et al., Commissioners of the Iowa Soldiers' Home.

Action was brought by the inmates of the Soldiers' home against the commissioners, in the district court of Marshall county, to set aside certain rules relating to the disposition of pension money received by inmates in the home. The case was tried in October, 1895. The judgment of the district court required a modification of the rules, from which judgment both parties appealed. After a full argument the supreme court decided, October 7, 1896, that the commissioners had authority to make the rules in question and the same were reasonable, thus sustaining the action of the commissioners.

James Bellange, Chairman, etc. v. G. L. Dobson et al., constituting an Election Board.

Action was brought in the district court of Polk county in *certiorari*, to review the action of the so called election board in overruling the objections to permitting the People's Party ticket, appearing on the official ballot, and the use of the name People's Party over the ticket headed by Charles A. Lloyd, candidate for governor. An order was made by the district court setting aside the action of the board in overruling the objections and the board was ordered to not permit such ticket to appear upon the ballot. The defendants appealed and filed a *supersedeas* bond, and the action is now pending in the supreme court.

College of Physicians and Surgeons of Keokuk v. E. A. Guilbert et al., constituting the State Board of Medical Examiners.

An action in *certiorari* was brought in the superior court of Keokuk to review and set aside the action of the state board of medical examiners taken with reference to the College of Physicians and Surgeons. Judgment was rendered against the defendant in the court below, but on appeal to the supreme court the case was reversed and remanded with an order to transfer the case to the district court of Polk county. No further action has been taken in the case and it will probably be settled without further litigation.

E. W. Curry, Chairman, and E. M. Carr, Secretary of the State Central Committee of the Democratic Party of Iowa, v. William McFarland et al, constituting an Election Board.

An action of *certiorari* was brought in October, 1896, in the district court of Polk county, Iowa, to review the action of the board in permitting

the ticket of the National Democratic party to be put upon the ballot, using the name "National Democratic." Upon the hearing before the court the writ was dismissed, and the action of the board sustained.

E. W. Davenport, Administrator of the Estate of William Parks, deceased, v. First National Bank of Council Bluffs, Iowa, State of Iowa Intervenor.

William Parks died in 1870, having over $3,000 deposited in the First National Bank of Council Bluffs. An administrator was appointed by the district court of Pottawattamie county, but he did not collect the amount on deposit for so long a time that payment was refused, the statute of limitation being pleaded. The administrator did not have possession of the certificates of deposit. The state intervened, claiming that the estate should escheat to the state, Parks having no known heirs. Judgment was rendered in favor of the administrator for $3,227, and he was ordered, after the payment of costs and expenses, to pay the balance to the state. In October, 1896, there was paid into the state treasury the sum of $1,604.

Iowa Central Railway Company, Plaintiff in error, v. State of Iowa. In the United States Supreme Court

An action was brought by the state in the supreme court to procure a mandate directing the Iowa Central railroad to operate its line of road from Manly Junction to the town of Northwood. The order was granted, the decision of the court being reported in the 83d Iowa, 720. The Iowa Central railroad sued out a writ of error in the supreme court of the United States to review the judgment of the Iowa supreme court. The case was fully argued and submitted, and on January 6, 1896, the supreme court of the United States dismissed the writ, leaving the judgment of the Iowa supreme court in full force. The Iowa Central railroad then complied with the order of the supreme court in the operation of its road.

Mary Greggory v. Henry Sabin, Superintendent of Public Instruction, et al.

Action was brought in the district court of Polk county, in *certiorari*, against the superintendent of public instruction, to review his action in a case which came before him upon appeal, in which the teacher's certificate held by the plaintiff had been revoked. The case is still pending.

E. A. Guilbert et al. v. Joseph C. Burk, Judge of the Superior Court of Keokuk.

Action of *certiorari* was brought in the supreme court of the state to test the validity of an order for the arrest of the state board of medical examiners. A return was made to the writ, but, by agreement, the case was settled at the defendant's costs.

D. N. Guthrie v. George E. Delavan, Fish Commissioner.

Action was brought in the district court of Dickinson county to enjoin the fish commissioner from building a dam at the outlet of Lake Okoboji, which was authorized by an act of the legislature. The attorney-general appeared with the county attorney and made defense therein. The case, however, was dismissed at plaintiff's costs before it came to trial.

Oliver P. Judkins v. E. A. Guilbert et al., constituting the State Board of Medical Examiners.

This action was brought in mandamus in the superior court of Keokuk to compel the state board of medical examiners to issue to the plaintiff a certificate to practice medicine. Judgment was rendered against the

defendants by the superior court, and, on appeal to the supreme court, the judgment was reversed in December, 1896. After reversal, the plaintiff dismissed his case and paid the costs.

Estate of Thomas H. McGhee, deceased, Nathaniel French, Administrator, v. State of Iowa.

This was a probate matter pending in the district court of Scott county The state of Iowa intervened and instituted proceedings to fix the amount of collateral inheritance tax due the state. The decision of the district court was in favor of the state. The administrator appealed from the judgment of the district court. The case is now pending in the supreme court.

Donald C. McGregor v. John Cone, Sheriff, etc.

The plaintiff was convicted of selling cigarettes in violation of the Iowa statute. He sued out a writ of *habeas corpus* before the superior court of Cedar Rapids, claiming that under the law the conviction was unconstitutional. He was remanded into custody of the sheriff by the superior court and appealed to the supreme court of the state. The case was submitted at the October term, 1897, and the judgment of the superior court has since been affirmed by the supreme court.

Wilson L. Meade et al., Copartners under the firm name of Callaghan & Co., Complainants, v. Emlin McClain. In the Circuit Court of the United States for the Northern District of Iowa.

Wilson L. Meade, et al., Copartners under the firm name of Callaghan & Co., Complainants, v. Emlin McClain, Freeman R. Conaway and A. B. Shaw, Respondents. In the Circuit Court of the United States for the Southern District of Iowa.

These actions were brought to enjoin the defendants therein from using the annotations furnished by Emlin McClain in the publication of the code of Iowa. The hearing of the first case was had before Judge Shiras at Dubuque, and of the second case before Judge Woolson, judge of the district court for the Southern district of Iowa, at Des Moines. In each case the injunction asked for was denied. In the last named case damages is asked as against the state printer for the publication of the code with McClain's annotations. This action is still pending and undisposed of.

Ella N. Miller, plaintiff, v. Frank Leonard.

In March, 1897, a writ of *habeas corpus* was sued out in the district court of Polk county, in behalf of an inmate of the Industrial Home at Mitchellville, to test the legality of her confinement. Upon hearing, the writ was dismissed and the plaintiff was remanded to the Industrial Home.

John R. Prime v. Francis M. Drake, Commander-in-Chief, and H. H. Wright, Adjutant-General.

Action was brought in mandamus in the district court of Polk county, Iowa, by the plaintiff, claiming that he was elected brigadier-general of the First brigade of the Iowa National guards, to require the defendant to declare plaintiff elected, and to issue a commission accordingly. The case was tried in January, 1897, and judgment was rendered against the defendants ordering the issuance of a commission to the plaintiff. An appeal was taken to the supreme court of the state, and was submitted at the October term, 1897, but remains undecided.

Edwin O. Rood et al. v. George A. Wallace et al , State of Iowa Intervenor, and four other like cases.

In November, 1895, the state intervened in the above entitled actions, pending in the district court of Humboldt county, claiming the title to a tract of land which was formerly known as Owl lake, the same having been meandered by the surveyors of the general government. The plaintiffs claimed under the swamp land grants. The state intervened to recover possession of the land and to have the title of the lake beds of Iowa settled by the courts. The cases were tried in November, 1896. Judgment was rendered February 11, 1897, dismissing the intervenor's petition, from which judgment the state appealed. The appeal is still pending in the supreme court.

State of Iowa v. Burlington, Cedar Rapids & Northern Railway Company.

This action was brought by the state in September, 1895, in the district court of Keokuk county, to enforce an order of the railroad commissioners in regard to putting in an undergrade cattle way. Judgment was rendered by the district court in favor of the plaintiff. On appeal by the defendant to the supreme court, the judgment of the lower court was reversed October 26, 1896.

State of Iowa v. Chicago, Milwaukee & St. Paul Railway Company.

This action was brought by my predecessor to enforce an order of the railroad commissioners requiring the Milwaukee railroad to maintain a station at Bismarck, Clayton county. It was originally brought at Council Bluffs and transferred to the district court of Clayton county. The pendency of the suit did not come to my knowledge for some time, a year or more, after I assumed the duties of the office. The terms of court at Elkader being held at the same time that our supreme court is in session, I have been unable to press the case for trial. The case is still pending, but under the facts and the law, its further prosecution is of doubtful utility.

State of Iowa v. Joseph A. Dyer et al.

This action was commenced in the district court of Polk county, Iowa, in October, 1893, to recover from the defendant, an ex-deputy oil inspector, and his official bondsmen, Simon Casady and J. H. Holland, $100 retained by said Dyer at the time of his vacating his office. February 10, 1897, judgment was rendered against the said defendant and his bondsmen for $122.15 and costs of suit. Thereafter the defendants appealed from the said judgment, and the case is now pending in the supreme court.

State of Iowa v. W. M. McFarland et al.

This action was brought in the district court of Polk county, at the September term of court, 1897, upon the official bond of the defendant, to recover damages for the violation of his official duties as secretary of state. The action is still pending.

State of Iowa v. Donald C. McGregor.

This action was brought before Judge Sanborn, of the United States circuit court of appeals. The defendant was convicted of selling a package of cigarettes, which was claimed to be an original package, before a justice of the peace in Cedar Rapids. He sued out a writ of *habeas corpus* as stated. The case was heard by Judge Sanborn, in St. Paul, in July, 1896, and the defendant was discharged on the ground that the package sold was an original package, but no opinion was filed by the judge.

State of Iowa v. In re Estate of George Ridinger, insane.

George Ridinger had been supported by the state many years as a state patient in the insane hospital at Mt. Pleasant. It was learned that he had a small estate in the hands of a guardian in Jefferson county. A claim was filed in the district court of Jefferson county against the estate in the sum of over $3,000. The court allowed the same, and ordered the guardian to pay all the funds in his hands, after paying the costs of guardianship, on said claim. The sum of $899 has been collected and turned into the state treasury.

State of Iowa v. Suel J. Spaulding et al.

This action was brought at the September term of the Polk county district court, on the official bond of said Spaulding as treasurer of the pharmacy commission, to recover for the embezzlement of funds of the state. This action, like that of the case of State v. McFarland, is still pending, both of which will be tried at an early date.

State of Iowa ex rel. Attorney-General v. William Beardsley.

This action was brought in the district court of Mahaska county by the fish commissioner, to compel the building of a fish-way at a dam across Skunk river. The case was tried below, and judgment was rendered against the state in April, 1897, from which an appeal was taken to the supreme court, where the said case is still pending.

State of Iowa ex rel. Attorney-General v. Guaranty Fund Life Association.

This action was brought in February, 1897, in the district court of Clinton county, by the attorney-general at the request of the auditor of state, to dissolve the Guaranty Fund Life association, and to have a receiver appointed to take charge of its assets and wind up its affairs. The prayer of the petition was granted, a receiver appointed, and the affairs of the corporation are being settled.

State of Iowa ex rel. Attorney-General v. Harlan State Bank et al.

This action was brought in December, 1896, by the attorney-general at the request of the auditor of state, in the district court of Shelby county, for the appointment of a receiver of the Harlan State bank, said bank being insolvent at the time. A receiver was appointed, as prayed in the petition, and he is engaged in closing up the affairs of the bank.

State of Iowa ex rel. Attorney-General v. National Reserve Life Association et al.

This action was brought in December, 1896, by the attorney-general at the request of the auditor of state, to dissolve the National Reserve Life association, and to have a receiver appointed to take charge of its assets. A receiver was appointed as prayed.

State of Missouri v. State of Iowa.

A bill in equity was filed by the state of Missouri, in the supreme court of the United States, December 16, 1895, asking the appointment of a commission to survey disputed boundary line between the state of Missouri and the state of Iowa. Answer was filed and a stipulation entered into agreeing to the appointment of a commission. A commission was duly appointed, consisting of Gen. James Harding of Missouri, Hon. Peter A. Dey of Iowa, and Dwight C. Morgan, who were authorized to make a survey of the boundary line. The line was run and marked at the mile points by erecting granite monuments for a distance of twenty-one miles. The report of the commissioners was approved by the supreme court in January, 1897.

The expense of the survey and the erection of the monuments was $5,273.56, which was paid in equal shares, as well as the costs of the court, by the state of Missouri and the state of Iowa.

John Y. Terry v. C. S. Campbell, Executor, et al.

An action in the district court of Pottawattamie county, wherein certain collateral heirs resisted the right of the state to require the payment of the collateral inheritance tax. The question raised in this case is as to the constitutionality of the collateral inheritance tax law. The case is still pending at this time.

Upton E. Traer v. State Board of Medical Examiners.

The plaintiff, whose certificate to practice medicine was revoked, filed a petition in *certiorari* in the district court of Polk county. The cause was heard in the district court and judgment was rendered for the defendant. The plaintiff appealed to the supreme court, where the case is still pending.

United States v. J. R. Ratekin et al., Commandant and Commissioners of the Iowa Soldiers' Home.

Information was filed in the United States district court for the Southern district of Iowa, in November, 1896, charging the defendants with the offense of taking pension certificates as a pledge. Information was quashed on motion of the attorney-general.

United States v. J. R. Ratekin et al., Commandant and Commissioners of the Iowa Soldiers' Home.

An indictment in the United States district court for the same offense as the last. Three counts of the indictment were quashed on motion of the attorney-general, and a plea of not guilty was entered on the other count, and the case tried before a jury, the court, at the close of the plaintiff's testimony, instructing the jury to return a verdict for the defendants.

United States Trust Company, of New York, v. The Omaha & St. Paul Railway Company, State of Iowa, Intervenor.

This was an action brought to enforce the order of the railway commissioners in regard to furnishing facilities at Summit station for the erection of elevators by shippers. The case was submitted to the court on a demurrer and the petition of intervention, and, pending the decision of the court, the receiver entered into a lease with the parties desiring to ship grain at Summit station, in accordance with the order of the railway commissioners, which lease having been approved by the court, the petition of intervention was dismissed at the cost of the defendant.

Edward F. Waite v. A. C. Campbell, Sheriff.

Action before the United States circuit court, Northern district of Iowa. Waite was convicted by the district court of Howard county of violating the state statute. He claimed to be acting as special examiner of the pension department. He appealed to the supreme court of Iowa, and the judgment of the lower court was affirmed. He then sued out a writ of *habeas corpus* before Judge Shiras, judge of the district court of the Northern district of Iowa, and the petition was heard at Ft. Dodge. William Wilbraham, Hon. C. C. Upton and Hon. Thomas D. Healy appeared for the sheriff. The court discharged the petitioner. Because of the important question involved, an appeal has been taken by the state to the United States circuit court of appeals, where the case is still pending.

SCHEDULE "D."

The following is a list of criminal cases pending in the supreme court of Iowa, January 1, 1898:

TITLE OF CASE.	APPEALED FROM.	OFFENSE.
State, appellant, v E. E. Alverson	Iowa	Embezzlement.
State, appellant, v. J. A. Gunn and R. J. Boatman	Mahaska	Murder, second degree.
State v. John Baker, appellant	Story	Assault with intent to commit rape.
State v. A. M. Bangness, appellant	Lee	Indecent exposure of person.
State v. W H Burling, appellant, rehearing	Fayette	Forgery.
State v. Charles Carnagy, appellant	Linn	Assault with intent to commit rape.
State v. E. J. Chingren, appellant	Webster	Obtaining money under false pretenses.
State v. Ike Cohen, appellant	Black Hawk	Arson.
State v. Bert DeWald, appellant	Buchanan	Conspiracy.
State v E T Dankwardt, appellant	Des Moines	Tampering with jury.
State v. John S. Dixon, appellant	Cerro Gordo	Nuisance.
State v. William Field, appellant	Buchanan	Fraudulent banking.
State v. Con Fogerty, appellant	Palo Alto	Grand larceny.
State v L W. Haley, appellant	Dubuque	Murder.
State v J T. Hayes, appellant	Scott	Seduction.
State v Zelmer Hughes, appellant	Pottawattamie	Seduction.
State v. N. J Heagen, appellant	Polk	Embezzlement.
State v. James Kennedy, appellant	Polk	Assault with intent to commit murder.
State v William Lightfoot, appellant	Cedar	Malicious mischief.
State v H M. Marshall, appellant	Benton	Burglary.
State v. James Minor, *et al*, appellants	Harrison	Larceny.
State v. James McDonough, app't, rehearing	Johnson	Rape.
State v M. C Moore, appellant	Woodbury	Larceny.
State v. W. F. Nine, appellant	Polk	Obtaining property under false pretense.
State v J K Olds, appellant	Dallas	Forgery.
State, appellant, v Peter Olinger, rehearing.	Dubuque	Violation of official duty.
State v. J N Porter, appellant	Guthrie	Subornation of perjury.
State v. Fred Reil, appellant	Polk	Manslaughter.
State v Richard Rowe, appellant	Poweshiek	Embezzlement.
State v. T. Shea, appellant	Wapello	Assault with intent to commit great bodily injury.
State, appellant, v. T. J Shea, rehearing	Dubuque	Violation of official duty.
State v. John G. Steele, appellant	Monroe	Murder.
State v. James Wycoff, appellant	Wapello	Adultery.
State v Mary Whitcomb, appellant	Polk	Conspiracy.
State v William Young, appellant	Woodbury	Murder in first degree.

The following is a list of cases, in which the state of Iowa is interest d, pending in the federal courts:

In the supreme court of the United States:

T H. Rhodes, plaintiff in error, v. State of Iowa. Writ of error to the supreme court of the state of Iowa.

In the United States circuit court of appeals:

A. C. Campbell, appellant, v. Edward F. Waite. Appeal from the circuit court of the United States for the northern district of Iowa.

In the circuit court of the United States for the southern district of Iowa:

W. L. Meade *et al.*, copartners under the firm name of Callaghan & Co., complainants, v. Emlin McClain, Freeman R. Conaway and A. B. Shaw, respondents.

The following is a list of the civil cases, in which the state is interested, pending in the supreme court of Iowa:

James Bellangee, chairman, etc., v. G. L. Dobson *et al.*, constituting an election board. Appeal from Polk district court.

Estate of Thomas H. McGhee, deceased, Nath. French, administrator, appellant, v. State of Iowa, appellee. Appeal from Scott district court.

Donald C. McGregor, appellant, v. John Cone, sheriff. Appeal from superior court of Cedar Rapids.

John R. Prime v. Francis M. Drake, commander-in-chief, and H. H. Wright, adjutant-general, appellants. Appeal from Polk district court.

Edwin O. Rood *et al.* v. Geo. A. Wallace, State of Iowa, intervenor and appellant, and four other like cases. Appeal from Humboldt district court.

State of Iowa v. Joseph A. Dyer *et al.* appellants. Appeal from Polk district court.

State of Iowa, *ex rel.* attorney-general, appellant, v. Wm. Beardsley. Appeal from Mahaska district court.

Upton E. Traer, appellant, v. State Board of Medical Examiners. Appeal from Polk district court.

The following is a list of the civil cases, in which the state is interested, pending in the district courts of the state:

College of Physicians and Surgeons of Keokuk v. A. E. Guilbert, *et al.*, constituting the State Board of Medical Examiners. Pending in the superior court of Keokuk, Iowa.

Mary C. Greggory v. Henry Sabin, superintendent of public instruction, *et al.* Pending in the district court of Polk county.

State of Iowa v. Chicago, Milwaukee & St. Paul Railway Co. Pending in the district court of Clayton county.

State of Iowa v. Wm. M. McFarland *et al.* Pending in the district court of Polk county.

State of Iowa v. the estate of George Ridinger, insane. Pending in the district court of Jefferson county.

State of Iowa v. Suel J. Spaulding *et al.* Pending in the district court of Polk county.

John Y. Terry v. C. S. Campbell, executor, *et al.* Pending in the district court of Pottawattamie county.

SCHEDULE "E."

The following is a full account of all moneys collected by me during the period covered by this report:

August 3, 1897, collected from the estate of George Ridinger (insane), for support in Mt. Pleasant hospital, as a state patient..... $ 899.00
September 1, 1897, received from the plaintiff return of costs of printing paid by the state, in the case of Judkins v. Guilbert, *et al.*, Board of Medical Examiners..... 40.00
November 10, 1897, received proceeds of escheat of the Blake interest in the Coakley estate, Keokuk county..... 428.32

The above amounts were all duly paid to the treasurer of state, whose receipts I hold for the same.

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ANNUAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA.

HON. MILTON REMLEY,
ATTORNEY-GENERAL.

Transmitted to the Governor, January, 1898.

PRINTED BY ORDER OF THE GENERAL ASSEMBLY.

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1898.

REPORT.

STATE OF IOWA,
ATTORNEY-GENERAL'S OFFICE.
DES MOINES, January, 1898.

To Hon. Francis M. Drake, Governor of Iowa:

In accordance with section 209 of the code, I have the honor to submit to you the following report of the condition of this office and of all the business transacted by this department, and the opinions of public interest. The law requiring a report is a new feature. It contemplates that a report shall be made biennially. I have, however, included a brief schedule of cases during the first year of my administration.

Schedule "A" contains a complete list, arranged alphabetically, of all criminal cases submitted to the supreme court during the years 1896 and 1897, and the disposition made thereof in the supreme court.

Schedule "B" is a brief statement of the criminal cases submitted to the supreme court during the year 1895.

Schedule "C," hereto attached, contains a list of all civil cases tried in the different courts of the state and the United States in which the state was either a party or interested, including therein divers cases against public officers, the defense of which was conducted by this department.

Schedule "D" contains a list of the cases, criminal and civil, that are now pending in the different courts of this state and of the United States.

Schedule "E" is a statement of the moneys collected by this department.

Schedule "F" contains the official opinions of public interest which have been given to the different state officers and county attorneys. I have omitted from this report such opinions as are manifestly not of public interest, or which, by reason of the adoption of the new code and a change of the law, can no longer be considered of special public interest.

OFFICIAL OPINIONS.

Prior to the first of October, 1897, when the new code went into effect, it was the duty of the attorney-general to give official opinions in writing to the county attorneys of the state. There being ninety-nine county attorneys and numerous state officers who were legally entitled to opinions from the attorney general, this duty has been very onerous and has required great labor and research. During the year 1895, there were 181 written opinions prepared by the attorney-general. During the years 1896 and 1897, there were 301 opinions. In addition to this, many requests were made for opinions which could be answered by furishing a copy of an opinion already given. Such copies have been very frequently furnished. In a number of instances where matters of law have been referred to me in which the public, either the county or municipal corporation were interested, with a view of settlement of threatened litigation, I have furnished opinions to those who, under the law, were not entitled to demand the same at my hands. These are not counted or included among official opinions. Thousands of letters have been written in the discharge of the duties of the office each year.

CRIMINAL APPEALS.

In the matter of criminal appeals, it has been the policy of this department to insist upon the submission of cases at as early a date as possible. I have never thought it in accord with public policy to permit criminal cases to remain on the docket of the supreme court term after term. The sooner punishment comes after the commission of a crime, the more effective it is as a deterrent example to evil doers. I have insisted upon parties appealing criminal cases preparing their appeals and submitting them promptly at the first term after the record could be sent up to the supreme court. Many appeals were taken for delay. The policy adopted has had a wholesome effect. At the January term, 1895, there were fifty-seven criminal cases upon the docket. At the May term, 1895, there were seventy-four; of these, fifty were submitted to the supreme court. At the October term, 1895, there were seventy-two cases upon the docket, forty-one of which were submitted. At the January term, 1896, there were sixty cases upon the docket, thirty-six of which were submitted. Since then the number has gradually diminished until at the October term, 1897, there were thirty-six criminal cases upon the docket, including petitions for rehearing.

Under the former law there was no provision requiring the attorney-general to be notified when an appeal was taken in a criminal case. He could only obtain knowledge of the same upon the docketing thereof in the supreme court. The result was that in not a few instances the appellant, after being admitted to bail, failed to docket his appeal in the supreme court for three or four or five years after the appeal was taken. The last legislature wisely remedied this defect and makes it the duty of the county attorney to immediately inform the attorney-general when an appeal is taken from his county.

The average number of cases upon the docket for each term during the last three years, including petitions for rehearing, is forty-nine and five-ninths. There will be found in schedule "A" a detailed list of all the criminal cases disposed of in the supreme court, together with a statement of the offense, the county from which the appeal was taken, and the disposition made thereof.

There are thirty-three criminal cases already docketed in the supreme court for the January term, 1898.

CIVIL CASES.

Among the civil cases are many actions brought against state officers. There is no direct provision requiring the attorney-general to appear for state officers when suits are brought against them either in *certiorari* or mandamus. Sometimes suits are brought against public officers to determine the legality of a law which has been passed by the legislature. In all such cases it is unjust, at least, to require such officers to bear the expenses of the litigation. Among the civil cases stated in schedule "C" are several where I have had doubts as to whether it was the duty of the attorney-general to defend. There appears to be no adequate provision of law to meet the expenses of cases which may be brought against the several boards or various state officers. With the limited amount of assistance in the attorney-general's office, and the continued increase of duties imposed upon this office, some provision ought to be made to take care of this class of litigation, or else additional help be furnished this department. I make this suggestion because it appears manifestly unjust that one holding a public office, and attempting faithfully to discharge the duties under the law as he understands them, should be put to a personal expense in defending suits brought against him, which are generally brought because of no fault of his own, but for the purpose of testing the validity of some act of the legislature.

EXAMINATION OF ARTICLES OF INCORPORATION.

It is made the duty of the attorney-general to examine and approve various articles of insurance incorporations. There has never been a record kept of the various articles and amendments thereto which have been examined and approved by this office. This branch of the work of this office is by no means inconsiderable. There have been from forty to sixty articles of incorporation or amendments examined each year, some of which are very long and complicated, involving the expenditure of much time and labor.

Since the adoption of the code there has been no public officer authorized to acknowledge the articles of incorporation or amendments which are required by the statute to be taken. I have not refused to approve articles of incorporation which were acknowledged in the manner which was recognized to be legal before the code took effect, assuming that the general assembly would pass a legalizing act. I cannot assume that the general assembly, after providing that such articles shall be acknowledged, intended to provide no officer before whom acknowledgments could be taken. I have, in all instances, called the attention of the incorporators to this omission in the law at the time that I have attached my certificate of approval to the articles. Unless the statute is amended and the many acknowledgments taken by notaries public and others are legalized, serious complications may arise which should be avoided.

MEMBER OF BOARD OF HEALTH.

The attorney-general is by law made a member of the state board of health, but I regret to say that the pressure of other official duties has precluded me from attending many of the meetings of the board, which are usually held at the time that the supreme court is in session. I have, however, attended a number of the meetings of the board and have been frequently consulted by the officers of the board upon questions of law arising in the discharge of their duties. The limited amount of time that I could spare from other duties has prevented me from keeping myself thoroughly informed as to the general work of the board, and from actively participating therein.

COLLATERAL INHERITANCE TAX.

There are two cases pending involving the collateral inheritance tax law, one of which is now pending in the supreme court and the other in the district court of Pottawattamie

county. The faithful collection of this tax will, from the necessities of the case, require no little care and labor. In every instance where the tax is imposed, there is a hearing in the district court. The collateral heirs or legatees are usually represented by attorneys. The administrator, executor, or trustee is not required to look after the interests of the state. Such persons are usually heirs, or personally very friendly to them. There is no person other than the state treasurer whose duty it is by law to guard the interests of the state in such matters. The state treasurer cannot obtain knowledge of all the estates which should pay this tax if not reported to him, nor of the value of those reported if any effort be made to minimize the amount due the state, except by employing some one in each county to guard the interests of the state. There is no provision of law authorizing him to employ any such person. From the cases reported in other states, and my limited observation of the working of the law in this state, I am convinced that more will be realized to the state from the collateral inheritance tax if it were made by law the special duty of the county attorneys to appear in the proceedings to settle every estate liable to pay this tax, and at every step, to protect the interests of the state, and to see to it that the tax is collected from all persons or property liable therefor. It is now the duty of the county attorney to appear in all cases or proceedings in the courts of his county in which the state is a party, but the state is not a party of record in the settlement of estates. It will be noted that section 1467 of the code makes certain property liable for this tax which passes by deed or gift. Such property will seldom appear in the settlement of estates. Human nature is such that the grantee or donee will very seldom hunt the state treasurer to pay the tax. Local influences will deter anyone informing the state treasurer of the rights of the state. The county attorney is, in my opinion, the proper person to guard all the interests of the state in the collection of this tax, and the allowance to him of a reasonable commission out of the amount collected, with a liability on his bond for the neglect of duty, would not only be an additional incentive, but would be a matter of justice, and the state would be largely the gainer in the end.

ESCHEATS.

The number of cases where property has been escheated to the state has been very few. During my administration of this

office there have been but two cases in which the state has reaped any benefit from the law of escheat. In one case the entire property consisted of over $3,200 cash on deposit in a bank. Letters of administration were granted, but the matter dragged along for more than a quarter of a century, and the state realized in the end less than half of the principal. This condition of affairs was largely because it was made no one's especial duty to look after the interests of the state. Several estates in which there are no known heirs have come to my knowledge, ranging in value from $1,000 to $20,000 each. Heirs may yet be found. With no person to resist the claims of spurious heirs, it is easy for them to become possessed of property which should properly be escheated to the state. The provisions of the present law do not seem adequate to secure the best results. It might well be made the duty of the county attorneys to attend to the interests of the state in all escheat matters, with provisions for their compensation from the fund collected.

In cases where property has been escheated to the state, section 3391 of the code provides for the payment of the money received therefrom by the state within ten years thereafter, "to anyone showing himself entitled thereto." The law does not say before whom the showing shall be made, nor is any way provided for obtaining the money from the state.

IN CERTAIN CASES THE STATE MIGHT WELL PERMIT ITSELF TO BE SUED.

Quite frequently cases arise where fines or judgments in favor of the state become liens upon real estate inferior to mortgage liens in favor of other parties, in which there is an apparent but no real or substantial interest in the state, which operates as a cloud upon the title. There is no provision of law authorizing the state to be made a party in the suit to foreclose a prior mortgage or to quiet title against the state. In many instances a great injustice is done to innocent parties. This could be obviated without prejudice to any rights of the state if a law were passed authorizing a prior lien holder to make the state a party to a foreclosure suit, and thus cut off any claim of the state which it did not care to preserve. Of course such a law should be carefully guarded, so as to prevent abuse and preserve every substantial interest of the state, but certainly there should be some way provided by which an unpaid fine or a junior judgment in favor of the state should

not be for years a cloud upon the title of one who procures title to real property under a lien prior to that of the state. In quite a number of instances I have been urged to appear for the state in cases where the state had no equity whatever, but an apparent claim was a cloud upon the title; but the law gives no authority for the attorney-general so to do, and parties whose titles are injuriously affected are without any remedy.

NEEDS OF THE OFFICE.

Prior to the adoption of the code, the attorney-general was by law required to be in attendance at the capitol only during the sessions of the general assembly and the supreme court. There was provided for his use one room with a desk, sofa, chairs, etc., but nothing of a library or the necessary appliances or accommodations for the work of the office or preserving the files and records. There are practically no records of the attorney-general's office before 1886. My predecessors, I am informed, did most of the work of the office at their own offices elsewhere. During my administration of the office, I have been in attendance at the capitol nearly all the time, but at times when intricate cases or difficult questions were under consideration, I have been compelled to go elsewhere to secure freedom from interruptions and facilities for better thought and work than the office at the capitol affords.

The office at the capitol assigned to the attorney-general consisted of but one room opening off the main corridor, having but one window and poor ventilation. It was open to the public, and at no time, however important the business or necessary that it should be done at a given time, or however difficult the questions under consideration, could constant interruption and distraction of thought be prevented. The duties of the attorney-general, with the many cases which require his attention, both civil and criminal, and the examination of the many questions of law required of him, demand close study and careful consideration. One may accustom himself to doing mere clerical work in a public place, but no person whose work is essentially mental can possibly render the best services in a public reception room. Every professional man understands the force of this. There are few lawyers or doctors or othe professional men, even in the smaller country towns, who under take to transact business with such insufficent accommodations It may be done for awhile, but not with the best results.

The new code requires the attorney-general to keep his office at the seat of government. The business of the state has increased from year to year. The statement of the cases and of the opinions rendered which accompanies this report, conveys but little idea of the magnitude of the duties and responsibilities of this office. Some cases have over 600 pages of printed record, and 3,000 pages of transcript. Many involve intricate questions of law which require the examination of many authorities. The preparation of some opinions requires days of labor searching for authorities, and many duties which cannot be recorded and which do not appear under the title of cases or opinions, arise every day. It must be apparent to every person that this work cannot be done under such disadvantageous circumstances. The constant service of an assistant is required, but no place was provided for him to work. This entails upon the attorney-general all the details of the office, which ought to be, in a large measure, cared for by the assistant, leaving to the attorney-general time and opportunity for the consideration of the more important questions. In order to have the business of the state done, for the last three years I have been compelled to do no small part of the work at night when other people slept, and this was continued until serious impairment of eyesight and health was threatened and I resolved that there must be a change. The alternative was presented to me—either to leave the pressing duties of the state unperformed or to secure other quarters where my energies could be expended with better results and to greater advantage. Whether wisely or unwisely, I chose the latter course, and procured rooms outside of the capitol building until such time as a place can be provided in the capitol where the work of this department can be done. It seems important that the office of the attorney-general should be not far distant from the supreme court rooms, the clerk's office, and especially the state library, but I am thoroughly convinced that it is impossible for the best service to be performed under the conditions above referred to. There should be provided a permanent office for the attorney-general with a private office, where he can, not only consult in private, but be in a position to command his own time and devote himself to the examination and consideration of questions without having his attention called away every minute or two by persons, possibly, who have no real business with him. The need of this must be so apparent that there can be but one opinion about it.

Every elective officer of the state who is required to be at the capitol has his private room, and a number of non-elective officers are thus provided, although the duties of some are largely clerical. The accommodations should be such that the assistant may perform his work at the capitol. It is impossible for the attorney-general to be in the office every day. Cases require his attendance in court in different parts of the state and in the federal courts. With room for the assistant working under the direction of the attorney-general, the attorney-general would be relieved of many minor details and would be given a better opportunity for the consideration of more important questions. In this way the office would be continually open, and the public having business at the office would be better served than under the present system, which leaves no one save the clerk at the office when the attorney-general is compelled to be absent. This, I believe, was the intention of the legislature in changing the law requiring the office of the attorney-general to be kept at the seat of government.

The office of the attorney-general should also be provided with proper cases for filing away letters or memoranda pertaining to different subjects, arguments and briefs; in fact, with such modern appliances as are usually found in the best equipped lawyers' offices in the state for preserving and arranging for handy reference all memoranda pertaining to the business of the office. There is great need also of a number of law books. With the state library near at hand, a large number of state reports or books only occasionally used is not necessary, but there should be a well selected office library embracing works of reference, law dictionaries, certain text-books, and in fact, such books as are likely to be used every day or many times a day. The only law books now in the office are the Iowa reports, Statutes and Digests, the Northwestern reporters, and the American and English Encyclopedia of Law, except some of my own private library that I have placed on the shelves temporarily.

The statute provides for an assistant for the attorney-general at a salary of not more than $1,200 per year. The duties devolving upon this office are such that the assistance of an able lawyer is required all the time. Several of the departments of the state are provided with deputies at a salary of $1,500 per year. As a rule, such deputies are not required to have a professional education or experience in their profession

as a qualification for such office. It is impossible to secure the services of an attorney who is well fitted to perform the duties of the assistant, who will devote his whole time, which the demands of the office require, for the salary that is provided. I submit in all candor that there is no good reason for discriminating against this department in that respect.

The present condition of affairs, I am fully satisfied, is not because of any ill will toward this department on the part of any person whomsoever. It is the natural outgrowth of conditions and laws enacted when the state was young. At that time there were comparatively few criminal cases, very few state institutions, and comparatively few duties which devolved upon this office. As the state has grown in population and wealth many new offices have been created, new boards and commissions, the state institutions multiplied, new laws enacted in relation to the control and taxation of corporations, and for the conservation, good order, health and prosperity of the people in the exercise of the police powers of the state, all of which laws must run the gauntlet of different courts, from the lowest state court to the highest federal tribunal. This has multiplied many times the labors and duties as well as the responsibilities of this office. Few persons have accurate information or a just conception in regard to the duties pertaining to this office, or the need of better facilities for the performance of those duties. I am persuaded that no intentional injustice has been done this department, but the present condition exists solely because of lack of information on the part of those whose duty it is to make proper provision for all branches of public service. Heretofore the office of the attorney-general was considered to be at the place of residence of the incumbent of the office, but the change of the law makes changed conditions. The service of the state demands that the office of the attorney-general should be, as the last legislature placed it, at the seat of government. It must be evident to any one that the best interests of the state demand that suitable facilities be provided for this branch of the service of the people.

There is now pending in the supreme court of the United States a case to test the constitutionality of the law prohibiting common carriers transporting intoxicating liquors in the state. There is in the United States circuit court of appeals, a case pending to determine the question whether a United States circuit judge can release in a *habeas corpus* proceedings one convicted of

crime in the state court. In the supreme court of the state a case in pending involving the question of the right of the state to require fish-ways to be built at dams across streams; and there is also pending in the supreme court of the state another case to secure the construction of the collateral inheritance tax law; also a case to determine the rights of the state in lakes and lake beds. In the district court of Pottawattamie county a suit is pending to test the constitutionality of the collateral inheritance tax law. Various insurance companies are about to bring suits to test the constitutionality of the act of the legislature placing a discriminating tax upon such insurance companies. These cases in which the validity of the laws of the state are assailed are prosecuted by able counsel. Many difficult questions are involved. Any attorney would be derelict in duty who did not thoroughly prepare for the defense. The preparation for such defense cannot be made in an hour or a day, but some questions require the patient research of many days in order to examine the subjects exhaustively.

It is certainly for the best interest of the state that the attorney for the state should have the best facilities and time for the preparation of the defense that will enable him to uphold the laws before the courts. My earnestness in pressing the needs of this department is not one of personal interest. As an officer of the state, if I do my best under existing conditions (which I have and shall ever endeavor to do) there is no room for self-reproach or censure on the part of others, but is it not a part of my duty to endeavor to change the conditions so as to secure the best results possible to the state and the public? I feel satisfied that when the matter is understood, suitable provisions will be made for a permanent office and ample facilities for the discharge of the many duties which the law imposes upon this department.

Permit me to express my appreciation of the pleasant relations and uniform courtesy that have been shown by yourself and by all the state officials with whom my official duties have brought me in contact. I wish also to express my indebtedness to my assistants, Mr. Jesse A. Miller and Mr. Hubert Remley, who have rendered faithful service and valuable aid in every manner within their power, and that, too, at a compensation grossly inadequate for the services rendered.

Respectfully submitted,

MILTON REMLEY,
Attorney-General.

SCHEDULE "F."

The following are official opinions of public interest given to state officers and county attorneys:

INSURANCE—Cancellation of policy in Mutual company—short rates.

DES MOINES, Iowa, January 11, 1896.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

SIR—Your favor of the 6th inst., asking my opinion "as to whether or not, under chapter 39, laws of 1878, or chapter 210, laws of 1880, which chapters contain reference to the cancellation of policies of insurance by fire insurance companies, a mutual fire insurance company organized and operating under the general fire insurance laws of this state governing mutual companies or associations, in cancelling a policy written for six years, the premium being six times one annual premium, should, in determining the amount to be charged for cancellation, estimate the customary short rates upon the full amount of the premium for the six years or for that portion of a year which the policy has run, and for which the annual premium has been assessed in accordance with the terms of the premium note given by the assured."

In reply I would say that chapter 39 of the laws of the Seventeenth General Assembly, enlarges the power and duty of the auditor with reference to the form of policies to be used by insurance companies.

Chapter 210 of the laws of the Eighteenth General Assembly, has an entirely different purpose and object, and the two, to my mind, are in no way especially connected. The purpose of chapter 210 is to protect policy holders from unjust forfeitures of policies. It relates to all insurance companies which accept notes for a fixed premium.

Section 2 of the chapter requires thirty days' notice to be mailed to the insured before the policy shall be forfeited. Section 3 provides for a case in which the policy has, by its terms, lapsed.

The first part of the section provides the means and terms in which the insured in such a case may reduce the amount due, as shown by any note given for policies or judgment thereon, and the latter part of the section provides for reinstating the policy by payment in accordance with the terms.

In chapter 39, of the Seventeenth General Assembly, it is provided "that the auditor shall not approve a policy which does not provide for the cancellation of the same at the request of the assured upon equitable terms." This gives the auditor the right to determine what are equitable terms, and to see that the terms, which he considers equitable, are inserted in the policy It evidently was not contemplated that a policy should be sufficient if it contained the language of the statute above quoted, but the terms which the auditor has approved of as equitable should be stated in the

policy. Now, if the policy contains the statement of the terms under which it may be canceled, the insurers and the insured are bound by the terms as stated therein.

Chapter 210 relates only to cases where the company takes premium notes for a fixed amount, and a failure to pay the note invalidates the policy. I do not think that it can have any application to a strictly mutual company organized under the laws of this state.

It might also be said that in determining what are equitable terms for the cancellation of a policy in a mutual company by the insured, the auditor should have due regard for the provisions of sections 1138 and 1139 of the code of 1873.

I would also refer you to an exhaustive and able opinion by my predecessor, given to Hon. J. A. Lyons, auditor of state, January 30, 1891, in which he clearly sets forth the manner in which the amount due on a note given by a member of a mutual company, shall be determined.

The latter part of section 1138 provides: "but any person insured in any mutual company, except in case of notes required by this chapter, to be deposited at the time of its organization, may at any time return his policy for cancellation, and upon payment of the amount due at such time upon his premium note, shall be discharged from further liability thereon." As General Stone has said, the insured receive their indemnity at cost. This is the theory of mutual insurance.

Section 1139 provides the directors or trustees of any such companies shall have the right to determine the amount of the note to be given in addition to the cash premium by any person insured in the company. This note is referred to in one place as a premium note, yet in the next section it is referred to as a deposit note. At all events the liability thereon is to be determined by the amount of losses and expenses.

The statute, I think, provides that any member of a mutual company may withdraw from the company by returning his policy for cancellation, and the payment of his pro rata share of expenses and losses incurred up to the time of such withdrawal.

If this is the fair construction of the law, and I fully concur with General Stone's views upon this point, then there is no such thing as customary short rates with mutual insurance companies organized under chapter 4, title 9, of the code of Iowa. The basis of the liability on any note given as a premium note or deposit, is the amount of losses and expenses incurred and unpaid at the time of the cancellation of the policy rather than the time for which the policy has been in force.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

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1. **TAXES**—Separate assessment upon incorporation of town.
2. **NOTICE** of incorporation.

DES MOINES, Iowa, January 11, 1896.

C. F. Stookey, Esq., County Attorney, Shellsburg, Iowa:

DEAR SIR—Yours of the 4th inst. at hand enclosing an inquiry from the county auditor of your county upon which you desire my opinion. You ask, first, "whether the town of Luzerne is entitled to a separate assessment on any taxes for the year 1896. They were incorporated at the last

term of court, and the real estate for the year 1895 was assessed by the assessors of Leroy and Iowa townships in the same books with their township assessments. There is no assessment of real estate this year.

"Also, find out what notice an auditor is supposed to have before treating a new corporation as such."

Answering the last question first, I would say that section 572 provides that when certified copies are made and filed as required in section 571 of McClain's code, the incorporation is complete, notice whereof shall be taken in all judicial proceedings, which, of course, requires the auditor to take judicial notice of it. Section 573 of McClain's code provides for the election of the town officers.

Second, assuming that the town of Luzerne was duly incorporated and the officers are elected, the assessor chosen is required to assess the property of the town for the year 1896. The auditor is required to furnish to each assessor a suitable plat of his township on which to check each parcel of land assessed, and suitable books in duplicate, properly ruled and headed, in which to enter the following items, for which see section 1300, McClain's code.

Section 1301 of the code requires the assessor in each year in which real estate is not assessed to list and value any real property not included in the previous assessment. It is difficult to see how the assessor could assess real estate without having a book showing the previous assessment. It is the auditor's duty to furnish to the assessor such books and plats as may enable him to properly discharge the duties of his office.

I am inclined to the opinion that the auditor should provide the assessors of such town with lists of the real estate assessed therein, and plat to check each parcel of land assessed as provided in section 1300. It will require a little extra work for this one time on the part of the auditor, but he will be more than compensated by diminution of labor when he comes to make out the tax lists. He would be required, in making out the tax lists, to enter the real estate assessment of the previous year on the tax list of the incorporated town of Luzerne.

I am of the opinion that the course above stated is fairly contemplated by the law, and it will be economy of labor for the auditor to carry it out in the first instance.

Yours truly,

MILTON REMLEY,
Attorney-General.

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1. **MULCT LAW**—Issue of writ of abatement superseded by filing bond.
2. Place of suit or mulct bond.

DES MOINES, Iowa, January 11, 1896.

H. P. Hancock, Esq., County Attorney, West Union Iowa:

DEAR SIR—Your favor of the 10th inst. at hand, in which you ask my opinion upon the following question:

"In an action to set aside the operation of the mulct law, on the grounds of not having the required 65 per cent in the county, and defendants come in and file a bond as provided in section 2391, does the action of the filing of the said bond and costs, abate as a whole or only abate as to the realty?"

I cannot say that I certainly understand the question. I assume, however, that you have brought an injunction suit against one selling intoxicating liquors, who claims the benefit of the bar of the prohibitory law because

of having the consent of 65 per cent of the voters of the last election, as provided in section 17, chapter 62 of the acts of the Twenty-fifth General Assembly, and that the court found that the bar plead did not avail the defendant and entered a decree abating the nuisance, and granted a permanent injunction, as provided for in chapter 66, acts of the Twenty-first General Assembly, and after judgment, the owner of the property filed a bond as contemplated in section 7 of the said act, being section 2391 of McClain's code.

Now, upon this state of facts, I am of the opinion that the filing of said bond and the payment of the costs was to supersede the issuance of a writ to abate as in the manner provided for in section 2389 of the code, and applies clearly to the personal property as well as the realty,

The action does not abate, but the issuance of the writ to abate is superseded by filing such bond. If the injunction has been procured against the defendant who sold the liquor, that injunction is still in force and enjoins the defendant from selling intoxicating liquors contrary to the law throughout the entire judicial district in which the action is brought. Section 2393.

Second, you ask further: "Where a mulct bond is given in this county, with all the sureties and principals thereon residing in another county, can the said bond, for a violation of its provisions be sued on in this county where given?"

The action on such bond is undoubtedly a personal action and must be brought in the county where the defendants or some of them reside (McClain's code, section 3791), unless there are provisions authorizing it to be brought elsewhere. If the bond provided for the payment of damages in your county, it might be brought in your county.

Actions on official bonds of a public officer may be brought in the county where the cause of action or some part thereof arose. McClain's code, section 3784. But this is not an official bond of a public officer.

Action may be brought, when, by its terms, a written contract is to be performed in a particular place in the county, where such place is situated. Section 3786.

It is a very close question whether action might not be brought in your county under the provisions of the said section last cited.

I am inclined to think, however, the cases of *Manley v. Wolf & Co.*, 24 Iowa, 141; *Independent District v. Reichard*, 39 Iowa, 168, are conclusive upon this point. I have no doubt that it was contemplated by law that the principal should reside in the county, and I doubt whether such a bond should have been accepted without some of the sureties residing in the county, but under the circumstances, I should very much doubt whether an action could be maintained in the county. Yours respectfully,

MILTON REMELY,
Attorney-General.

INTOXICATING LIQUORS—Filing bond in injunction proceeding abates action only as against the reality.

DES MOINES, Iowa, January 15, 1896.

H. P. Hancock, Esq., County Attorney, West Union, Iowa:

DEAR SIR—Yours of the 14th inst. at hand in which you say that the question propounded to me was not quite understood. You re-state your question as follows:

"In the injunction proceeding, authorized under the prohibitory law, to set aside the bar in consequence of their not having 65 per cent of the voters, etc., as required under the new mulct law, the defendants, before any order of entry is made by the court, or hearing of the testimony, come in, file a bond and pay the costs provided for in section 2391 of McClain's code and claim thereby that the action abates, not only as to all the property, both real and personal, but also as to the persons engaged in the illegal traffic, and thereby no order of restraint or injunction can issue against them, the persons so engaged in said business, and that the payment of said costs and the filing of said bond ends all proceedings in that action."

Your inquiry involves the construction of said section 2391, or the following clause: "And if the proceeding be an action in equity, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated." I am of the opinion that it must be considered as referring to the defense which the owner of the property imposes. The whole section and the other sections of said act, together with section 12, of chapter 143, of the Twentieth General Assembly, and also section 4 of chapter 73 of the Twenty-second General Assembly, being section 2398 of McClain's code, all incline me to the opinion that the abatement of the action therein provided for only relates to the action against the owner of the property so far as it relates to the property in question. I think it should be construed the same as if the following words were added after the word "abated," viz: "so far as the real estate is thereby affected."

If it were otherwise, a man that had four or five buildings, operating a saloon himself in one, when an injunction suit is brought against him could prepare his bond, and just before the judgment is rendered, file his bond and if the action abated he could move his saloon into another building. Then another action being brought against him, he would proceed in the same way, and so on. Every term of court an action might be maintained against him in regard to another building, and there would be no personal injunction rendered against him.

The result would be that if he had four buildings, inasmuch as each county has no more than four terms of court in a year, he could move from one to the other for a year, and by that time the obligation of his bond given on the first would be at an end, and he could move his saloon back into the first building referred to, and so on, going the rounds year after year. A construction that permits such a thing would seem to be in conflict with section 2389 of McClain's code.

Another view; in case the building of one man is occupied by another as a saloon, the plain intent of all the sections is that an injunction may be obtained against the saloon keeper. The owner of the building may be joined therein for the purpose of making the judgment a lien upon the property and procure an order as against the property. Now, I cannot think that the legislature intended that one man, viz., the one filing the bond, can prevent the court granting relief as against his co-defendant, one with whom there is no community of interest. The seller in the case supposed should be enjoined. If the owner of the building had not been joined as defendant for the one purpose of affecting his realty, then the plaintiff would be clearly entitled to an injunction restraining the seller from maintaining a nuisance anywhere in the judicial district.

It seems preposterous that the legislature should intend to prevent the enforcement of the remedy given against the seller by reason of the filing of a bond by the owner of the building. The bond does not provide for the continual good behavior of the seller and no reason suggests itself to my mind why the action should not be prosecuted against him to final determination.

I am, therefore, inclined to the view that you express in your letter, that the action should be abated only so far as it relates to the real estate which is sought to be charged with the lien of the judgment and affected by the order of abatement. The language of the statute in general, and were it not for the other provisions of the statute the contrary view would have to be adopted, but the construction above given, to my mind, more nearly harmonizes all the provisions and works no injury to any person and expresses what I apprehend is the legislative intent.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

DISTRICT COURT may be in session in several counties of a judicial district, having more than one judge, at the same time.

DES MOINES, Iowa, January 30, 1896.

J. M. Grimm, Esq., County Attorney, Cedar Rapids, Iowa:

DEAR SIR—Your telegram came yesterday. I had it repeated. It came word for word as the first. I enclose you a copy of it that you may see the dilemma I was in. I answered the second telegram. "I think one judge's right to hold court is unaffected by another judge opening court in another county, and judgment rendered is valid, if I understand the question."

The question you ask in your letter is substantially the same, being as follows:

"Court is in session in Linn county for the January term, and criminal cases have not been assigned as yet, and it is not advisable to assign them all until the second or third week in February. But here comes the difficulty. Court convenes in Tipton, Cedar county, on February 17th. Judge Wolfe is holding the January term in Linn county, and Judge Thompson will hold the February term in Cedar county. The question is, whether, under section 231 of McClain's code, a judgment entered in this county in a criminal case after the 17th day of February, the day set for the opening of court in Cedar county, will be valid."

In reply I would say that section 231 of McClain's code was made when we had but one judge in a district, and was intended to cover a case where a judge had to go from one court to another at a fixed time, and a jury had not yet returned a verdict in a case which had been tried. It virtually gave a judge power, while holding court in one county to receive a verdict of a jury in another county where he had been holding court, notwithstanding the term of the court in the last named county had adjourned by operation of law.

The case you present has nothing kindred to that. The court in Linn county may continue as long as there is business to do, provided there is no law requiring the judge holding the same to open court in another county.

You have two district judges, and the opening of court in Cedar county by another judge does not disqualify Judge Wolfe from continuing his court in Linn county. The state of facts does not exist which implies that the Linn county court must adjourn at a given date by operation of law. I see nothing in the statute nor on principle that would require court to adjourn in Linn county because of Judge Thompson opening court in Cedar.

The reorganization of the judicial districts was done for the purpose of enabling courts to be held in different places in the same district at one time, and if there was anything in the previous law which prevented it, it would be repealed and the latter law prevail. The condition that you present in your letter was evidently contemplated by the later laws, and in my judgment Judge Wolfe can continue to hold court, and any of his acts, including judgment in criminal cases, will be valid.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PARDONS—As to whether pardon restores citizenship—Query.

DES MOINES, Iowa, January 31, 1896.

Hon. F. M. Drake, Governor of Iowa, Des Moines, Iowa:

DEAR SIR—In the matter of the application of Fred Lovell for pardon, it appears that he was indicted and convicted of breaking and entering a railroad car with intent to commit a public offense, and was sentenced on the seventeenth day of April, 1895, to the penitentiary at Anamosa for one year.

The purpose of the pardon seems to be to restore him to citizenship. The long list of petitioners of the leading men of the community, testifies to his previous good character. He will have nearly completed the full punishment imposed by the sentence after deducting the good time.

There is no question raised as to the legality of his conviction, or his guilt. He appears to be a young man, always sustained a good reputation before, and whether a pardon restores him to citizenship or not (it is supposed to do so), it may give him a new incentive to become a respectable and worthy citizen.

I am inclined to the opinion that a proper case is presented for the exercise of executive clemency. Yours respectfully,

MILTON REMLEY,
Attorney-General.

REMISSION OF FINES—As to whether Governor can remit fine for contempt of court—Query.

DES MOINES, Iowa, January 31, 1896.

Hon. F. M. Drake, Governor of Iowa, Des Moines, Iowa:

DEAR SIR—In the matter of the application of Josephine Bock, formerly Cap, convicted of contempt of court July 15, 1888, which you have referred to me, I would say the facts stated in the application are not sufficient to enable me to give an intelligent opinion.

It is stated "that it was understood at the time the judgment was rendered that so long as she refrained from the sale of intoxicating liquors the

said judgment would not be enforced." The evidence of that agreement is not with the application. I have serious doubt whether the executive can properly remit fines imposed because of contempt of court. The power to punish for contempt is inherent in a court and is necessary for the protection of the court and the enforcement of its rules. Suppose a court, to enforce its orders, would punish one for contempt in open court, and the governor would stand by and pardon or remit the fines just as fast as the court imposed them. It would immediately produce a conflict between the co-ordinate branches of government.

It may be said that the judgment in this case is simply to aid in the enforcement of the criminal laws. The same principles, however, would apply.

If the judge who imposed the fine for contempt interposed no objections and the parties interested in the prosecution would sign a recommendation for the remission of the fine, in view of the character of the men who petitioned therefor, I can readily see that no harm would be done by granting executive clemency. Otherwise I would not like to recommend it.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXES—EXEMPTION TO WIDOW OF SOLDIER—From what exemption to be deducted.

DES MOINES, Iowa, February 1, 1896.

L. L. Mosher, County Attorney, Indianola, Iowa:

DEAR SIR—Yours of the 28th ult., asking my construction of paragraph 8, section 1271 of McClain's code, relating to the exemption of the homestead of soldiers' widows, at hand.

It will be noticed that it is not every soldier's or sailor's widow who is entitled to the exemptions, but only the widows of such soldiers or sailors who died while in service, or who have since died of wounds or disease contracted while in the service. Of this class of soldiers' widows, those who own other real estate than such homestead are, by the proviso, precluded from having the benefit of the exemption.

I apprehend from your letter that the real difficulty arises from the language of the first clause of the paragraph, viz: "The homestead not to exceed $500 in value, of the widow of any federal soldier," etc. The question is, does it mean whether, if the homestead exceeds $500, nothing shall be exempt, or whether $500 shall be deducted from the value of such homestead and the excess in value assessed. There is no decision upon this point, and we must determine the true meaning from the language itself. This language must be construed with reference to the first clause of the section, viz: "The following classes of property are not to be taxed, and they may be omitted from the assessment thereof; * * * the homestead, not to exceed $500 in value, of the widow of any federal soldier or sailor," etc. In this connection, I am of the opinion that the homestead, to the extent of $500 in value, may be omitted from the assessment list, and in applying this statute, the assessor should determine what is the value of a homestead of a person entitled to exemption. If it were $1,000, then $500 should be deducted, and the other $500 assessed on the same basis that $500 of real

estate belonging to some other person is assessed. If the basis of assessment is 50 per cent of the actual value, the homestead should be assessed at $250.

I do not think the language will justify deducting the $500 from the assessed value, where the assessed value differs from the actual value. If the statute requiring property to be assessed at its actual value were complied with, then it would make no difference. In arriving at the assessments where the homestead exceeds $500, I am inclined to the opinion that the $500 should be deducted from the value of the homestead, and the remainder used as a basis for the assessment.

This construction is sustained by the rules for construing statutes.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

OFFICIAL NEWSPAPER—CIRCULATION—Who are *bona fide* subscribers, and how circulation determined.

DES MOINES, Iowa, February 1, 1896.

N. E. Kendall, County Attorney, Albia, Iowa:

DEAR SIR—Yours of the 31st ult. at hand, in which you state the following facts and make the following inquiries:

"In the fall of 1894 the Monroe County Republican was established at Albia, a regular weekly publication; subscription, $1.50 per year. Its first issue, and subsequent issues up to the 1st of January, 1895, contained a statement to the effect that the paper would be sent free to everyone who received it up to the end of the year 1894, and if no notice to discontinue was received, all such persons would be considered as *bona fide* yearly subscribers to the paper. Since that time the paper has offered and given premiums in the form of a bicycle and a wagon to the party securing the largest list of subscribers within a given time.

Sometime during last summer, the paper reduced its subscription price to 25 cents a year up to the 1st of January, 1896, and gained a large increase in circulation thereby. A newspaper contest is now on, and I desire your opinions upon the following propositions:

First.—Where a paper is sent to a person under the first state of facts above submitted, and he receives the paper and never notifies the publisher to discontinue it, is he a subscriber?

Second.—Is a person who subscribes for a paper under the circumstances set out in the above proposition, where the publisher offers a premium, a subscriber within the meaning of the statute?

Third.—Under the third state of facts, is a person who subscribes for a paper and pays 25 cents a year therefor, a subscriber in contemplation of law?

Fourth.—In view of the recent supreme court decision (64 N. W. Rep.), are affidavits to be accepted by the board of supervisors as evidence?"

In regard to the first inquiry, I would say, that in my judgment, unless the person receiving the paper can be shown to have done something from which an implied contract to pay for the paper would be raised, I do not think he could be considered a subscriber. The fact that the paper was sent to him without charge, and that afterwards there was published a

statement therein that unless the one receiving the paper notified the publisher to discontinue it, would not be evidence that he saw or read such notice, nor would a contract to pay therefor necessarily be implied therefrom. It would be a circumstance which might be given in evidence, but not conclusive, by any means. I think such a state of facts should be shown as that a contract to pay for the paper could be implied therefrom. I would not like to say the facts stated alone would necessarily imply a contract to pay for the paper by the one receiving it under such circumstances.

In regard to the second question, I see nothing in the fact that a premium was offered or prize given to those who would procure subscribers to affect the *bona fide* of the subscribers thereby received. It is competent and not improper for a publisher, by premiums or otherwise, to increase his subscriptions.

Third.—The statement of fact in regard to the 25 cents a year up to the 1st of January, 1896, is a little obscure. If it means that the subscriber may pay at the rate of 25 cents a year from the time he subscribes to the 1st of January, 1896, and if that is the limit, he would not be a yearly subscriber, in my judgment. If it means subscribers shall be received up to January 1st for one year from the time subscription is given for the sum of 25 cents, then such subscriber becomes a *bona fide* subscriber in contemplation of law, unless such offer is made for the purpose of padding the list with reference to such contest. The term, "*bona fide* yearly subscriber" as it occurs in the statute, appears to me to mean those who, in the usual course of business, become subscribers for the newspaper. Any scheme adopted which would secure a list of subscribers who care nothing about the paper, but whose names are added for the purpose of contest is, so far as other contestants are concerned, a fraudulent scheme. If the evidence indicated that taking subscribers at 25 cents per year was for the purpose of the contest, then I do not think such subscribers should be considered. It is hard to lay down any rule which would govern. There is no law saying a person should charge more than 25 cents for a subscription. The price of the subscription is not to be the criterion as to whether he is a *bona fide* subscriber, but the price and also the time at which his subscription is taken are circumstances to show whether or not it is an ordinary business transaction.

Fourth.—The general rule of law is that *ex parte* affidavits cannot be received in evidence in judicial proceedings. On the hearing of an appeal from the board of supervisors it is clear affidavits could not be received except by consent. The statute relating to the contest is not very definite as to what character of evidence shall be received. If witnesses were required to be brought before the board of supervisors, how could a party obtain them if they were unwilling to come? There are many cases where evidence may be received, but apparently no provision for compelling the parties to appear to give evidence. When this is the case, I am inclined to the view that the strict rule of evidence applied in a court of law do not necessarily apply.

The language of section 428 of McClain's code, in case charges of fraud are made by an aggrieved publisher, the board shall *seek* other evidence of circulation. This seems to mean that the board shall inform themselves on the subject in the best way possible. They are to seek other means of

evidence; obtain information from all sources and try to arrive at a just conclusion according to their best information. This may be a somewhat general statement of the proposition, but the code contains a very general statement of law, and under the circumstances I would not be willing to say it is improper to receive affidavits, giving, of course, to the other party reasonable opportunity to contradict them.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSURANCE—MUTUAL COMPANIES—Extent of liability of insurer upon his notes.

DES MOINES, Iowa, February 3, 1896.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—Your favor of the 29th ult. at hand, in which you ask my "official opinion as to the liability of the policy holders on premium notes given by them to a mutual fire insurance company operating under section 1124 of the code of Iowa, 1873. In this connection I would refer you to section 1139 of the code of Iowa, 1873."

Permit me to say that section 1139, to which you refer, is an answer to your question in very plain language. It provides that "the directors shall, as often as they deem necessary, after receiving notice of any loss or damage, settle and determine the sums to be paid by the several members thereof as their respective portions of such loss. * * * The sum to be paid by each member shall always be in proportion to the original amount of his deposit note and shall be paid to the officers of the company within thirty days after the publication of said notice; and if any member shall for the space of thirty days after personal demand, or by letter, for payment shall have been made, neglect or refuse to pay the sum assessed upon him as his proportion of any loss aforesaid, the directors may sue for and recover the whole amount of his deposit note, with costs of suit, but execution shall issue for assessments and costs as they accrue only, and every such execution shall be accompanied by a list of losses for which the assessment was made, * * * but no member shall ever be required to pay for any loss more than the whole amount of his deposit note."

The preceding section, 1138, among other things, provides that "members shall be bound for losses and such necessary expenses as aforesaid, accruing the said company during the period of his insurance in proportion to his or their deposit note." This, to my mind, makes it plain that the liability of a member of a mutual insurance company is limited to the amount of his note in any event. He is liable on his note only for assessments made to pay actual losses and expenses during the time that he is insured, and that assessments must be made upon his premium notes in the proportion that his notes bear to the aggregate amount of the notes held by the company subject to assessment.

It would appear that the directors can legally only make assessments to meet actual losses and expenses, and in the absence of losses and expenses, have no legal authority to assess any premium notes.

Yours truly,

MILTON REMLEY,
Attorney-General.

OIL INSPECTORS—State Board of Health has no authority to review tests made by oil inspectors.

DES MOINES, Iowa, February 6, 1896.

Dr. J. F. Kennedy, Secretary State Board of Health, Des Moines, Iowa:

DEAR SIR—Yours of this date at hand, submitting to me the following question as to whether or not under the provisions of chapter 185, acts of the Twentieth General Assembly, said board has authority to make rule 16, to-wit:

Rule 16. In all cases of dispute between an inspector and a dealer as to a test of oil, the question, together with a sample of the oil in dispute, must be sent to the office of the state board of health for adjudication. The sample must be so marked as to be readily indentified.

Also, whether or not the board has authority to direct or authorize an expert to make such adjudication or tests as is contemplated in said rule 16, and if so, whether or not the following resolution is in conformity to the intent and purposes of the statute and rule 16:

Resolved, That inspections and tests of oil heretofore made by Mr. Andrews in behalf of the state board, are hereby approved and he is further authorized to make like tests in cases of dispute between an oil inspector and a dealer as to an inspection made.

In reply to the above permit me to say that the different acts relating to the subject of the inspection of coal oil are, chapter 135 of the Twentieth General Assembly, chapter 149 of the Twenty-first General Assembly, and chapter 52 of the Twenty-fourth General Assembly. These are all the statutes upon the subject pertinent to the inquiry you make. By chapter 52 of the Twenty-fourth General Assembly, the state board of health was authorized to approve the number of deputies which the state oil inspector should appoint. The only other power given to the state board of health, relating to the oil inspector or deputy inspectors, is found in the following language: "The oil tester adopted and recommended by the state board of health shall be used by the inspector and his deputies in all tests made by them; and said board shall prepare rules and resolutions as to the manner of the inspection, which rules and resolutions shall be in effect and binding upon the inspector and deputies appointed under this act."

The question arises whether, under the provisions above quoted, the state board of health is authorized by law to adopt rule 16. The oil inspector is appointed by the governor with the advice and consent of the senate. He appoints his own deputies, the number to be approved by the state board of health. He may remove his deputies for reasonable cause. The duties of the oil inspector and his deputies are, to a certain extent, defined by statute. and the state board of health is authorized to prepare rules and regulations "as to the manner of the inspection," which, when thus prepared, must be followed by the oil inspector and his deputies and are binding upon them.

It will be noticed that the rules and regulations authorized to be made by the state board of health, relate *alone to the manner of the inspection.* It does not authorize the board to either appoint an inspector or inspect the oil themselves. The oil inspector and deputies are not required to report to the state board of health, nor has the board supervisory control over

their actions. They are amenable to the people for the faithful discharge of their duties and liable, like other public officers, to persons for the result of their wrongful acts.

The power to make rules and regulations as to the manner of the inspection does not authorize the state board of health to act as a court of appeals, or give them any further control over the state and deputy oil inspectors.

Rule 16, above set forth, in effect, provides a method of appealing from the inspection or decision of the inspector to the state board of health. This appears to me to be without warrant of law. The statute nowhere authorizes the state board of health to entertain appeals from the oil inspector. I think, therefore, that rule 16 is unauthorized by law, and therefore void.

Second.—It necessarily follows from this that the board has no authority to direct or authorize any other person to inspect the oil, or, in other words, to usurp the functions given by law to the office of oil inspector. If the oil inspector or his deputies fail to discharge the duties of their office properly, since the board of health has no supervisory control over them, they are in no way responsible for the misdeeds or omissions of such oil inspectors, but anyone aggrieved by the action or inaction of the oil inspectors has a remedy directly against them as against any other public officer who is derelict in duty. Certain it is that the statute in no way makes the board responsible for the acts of the oil inspector or his deputies.

I need hardly add that the board would have no authority to adopt the resolution, or if adopted, it would be without any force or effect.

Respectfully,

MILTON REMLEY,
Attorney-General.

COUNTY ROAD TAX—Board of supervisors has no authority to levy same within incorporated towns and cities.

DES MOINES, Iowa, February 7, 1896.

C. W. Vermilion, Esq., County Attorney, Centerville, Iowa:

DEAR SIR—Yours of the 31st inst. at hand, in which you ask my opinion upon the question, "whether or not, section 1467 of McClain's code as amended by chapter 22, of the acts of the Twenty-fifth General Assembly, authorizes the levy of a one-mill tax on all the taxable property of the county, including the property within the limits of incorporated towns and cities?"

This is not the exact language of your inquiry, but it is the substance thereof, as well as two or three other inquiries upon the same subject.

The language of the section, as amended, is "The board of supervisors in each county shall, at the time of levying taxes for other purposes levy a tax of not more than one mill on the dollar, of the assessed value of the taxable property in their county, which taxes shall be collected at the same time and in the same manner as other taxes are collected, and shall be known as the 'road tax fund,'" etc.

The question raised is not affected by the amendment made by the Twenty-fifth General Assembly. The right to levy a road tax on the property in an incorporated town or city, if it did not exist before, would not exist after the passage of the amendment. The whole theory of our law as

gathered from a number of sections of the statute, as well as decisions of the supreme court, is that the cities and incorporated towns have charge of, open, and work the streets and highways within such cities and towns, and the expense thereof is paid out of the general tax for incorporation purposes, and that the road tax is not collected from property that is subject to general corporation taxes.

Referring to McClain's code, see sections 726, 1443 and 586.

Lands within the city limits not subject to general municipal taxation must be taxed for road purposes. (Section 586.) In regard to cities acting under special charter, the same principle holds. (See section 935.)

Marks v. Woodbury Co., 47 Iowa, 452.
Clark v. Town of Epworth, 56 Iowa, 462.
Gallagher v. Head, 72 Iowa, 173.
Ill. Cen. Ry. Co. v. Hamilton Co., 73 Iowa, 313.

We may say as a rule the board of supervisors has no control or supervision over the public highways within the corporate limits, with a very few exceptions specially named by statute and which are found in section 726 in regard to constructing or building bridges over any stream crossing a state or county highway. Road supervisors likewise have no control over highways or streets within the incorporated limits of a city or town. In the case of *Marks v. Woodbury County, supra*, the power of the township trustees to levy a tax upon property within the corporate limits of the city was expressly denied, notwithstanding the general language of section 1464, and it was held that the statute means simply that taxes which were to be levied upon the property liable to the tax should not be less than one, nor more than five mills on the dollar on the amount of the township assessment for that purpose.

Section 1467, as amended by the acts of the Twenty-fifth General Assembly, takes away from the trustees the right to levy more than four mills and gives to the board of supervisors the right to levy one mill. It will be noticed that this transfers the power to levy, so far as the one-mill tax is concerned, from the township trustees to the board of supervisors, but does not expressly change the well settled rule of law that property within the corporate limits of a city is not subject to the payment of a road tax, except such road tax as may be levied by the city or town council on certain property within said city.

I think the fair conclusion is that the city or town council in incorporated cities or towns have exclusive control of the levy of a road tax on property subject thereto within the city, and that the township trustees and board of supervisors can only levy a road tax on property situated outside of the corporate limits of such town.

There seems to be something in the language of the statute which conveys this idea. It says, "The board may levy a tax of not more than one mill on the dollar of the assessed value of the *taxable* property in their county." Why the use of the word "taxable" if it means all property? Property to be taxed must be assessed. If it were intended that all property assessed within the county should be taxed for road purposes, then what significance is given to the word "taxable?" The use of the word in the sentence suggests the idea that the legislature had in mind the recognized law that some property within the county, viz., that within the city or town, is not

taxable for road purposes, and the language used would imply that only such property as could, under the law, be taxed for road purposes by the township trustees, was by the board of supervisors to be subject to the levy. Whether this be true or not, the construction given to the language of section 1464 by the supreme court in *Marks v. Woodbury County*, applies with equal force to this section.

There are a number of other sections and decisions which confirm me in this view, which would extend this opinion unduly to refer to. I will only add that there must be authority of law for every tax that is imposed. Unless the language of the act plainly requires property inside of cities or incorporated towns to be taxed for a fund which could not be expended within such city or town, it would be repugnant both to justice and established principles of law to impose such tax.

I am, therefore, of the opinion that the county road tax levied by a board of supervisors cannot be legally collected from property within incorporated towns and cities. Yours respectfully,

MILTON REMLEY,
Attorney-General.

PARDONS—**What are not good legal grounds for granting executive clemency.**

DES MOINES, Iowa, February 11, 1896

Hon. F. M. Drake, Governor of Iowa, Des Moines, Iowa:

DEAR SIR—I have carefully examined the great mass of letters, etc. referred to me, with the application for pardon of Atlee Hart. In view of the many extraordinary letters and the various reasons assigned why a pardon should be granted, I have re-examined the record in the supreme court on which the judgment in the district court was sustained.

The grounds on which the request for executive clemency is based, stripped of verbiage, may be classified as follows:

First.—It is claimed he is not guilty.

Second.—That large sums of money were improperly used to secure his conviction.

Third.—That his defense having cost him many thousands of dollars, ruining him financially, he has already been punished sufficiently.

Fourth.—That before the commission of the crime of which he was convicted, he stood high as an honorable citizen and man.

Fifth.—That he has been influential in party councils, and brings to his aid many prominent politicians.

Sixth.—That his mother, wife and family are crushed by the disgrace and humiliation of his conviction.

I respectfully say in regard to these grounds:

First.—The jury and the district court have found Atlee Hart guilty and the supreme court has affirmed the judgment. He was defended by able counsel, and made a vigorous defense. The evidence, in my judgment, leaves no room to doubt that he was guilty as charged.

Second.—If large sums of money had been improperly used in the prosecution (of which there is no evidence except the unsupported statements of men who do not claim to know anything about it) that fact would have been a ground for a new trial and should have been presented to the court

where the charge could have been sifted to the bottom. For the executive to pardon him on this ground would be a seeming approval of an unwarranted aspersion on the courts, juries and officers appointed by law to prosecute criminals.

Third.—That he has expended thousands of dollars in his defense is evidence that he was not without means of establishing his innocency, if he was innocent.

The law, however, fixing the punishment undoubtedly took into consideration the expense of making defense. The judge in this case gave to the defendant but one-half of the maximum punishment, and he, after hearing the evidence, was better able to do justice than personal friends, whose sympathies naturally override their judgments. I am not prepared to say just how much punishment is deserved by a man who, for personal gain, would, by slander, ruin the reputation of honorable business men, disrupt families, bring disgrace, humiliation and shame, sorrow, tears and broken hearts to loving wives, mothers and innocent children, whom he did not know, and who had never harmed him. I am willing to leave that matter to the law and the court which administers it.

Fourth.—The high standing, wealth and social position of Mr. Hart, before the commission of the crime, is an aggravation instead of a palliation. He knew better; he could have foreseen the consequence not only to himself and family, but to his victims and their families. If he had been a poor, hungry, uneducated fellow with dull moral perception and wanting in sensibilities, more easily could he be excused.

Fifth.—To the fifth ground above stated I give no consideration. It is, in my humble opinion, a shame to even suggest such considerations. All men are equal in the eyes of the law, and no political party has a right of immunity from punishment, or special claims on the executive for clemency.

Sixth.—The sixth ground is more difficult to deal with. It is most unfortunate that the commission of crime entails suffering upon others who are not responsible therefor. It is ever so. I have no doubt that the wife and family of Mr. Hart are all that the many letters testify and that they feel keenly the disgrace of his conviction. One cannot help feeling a deep sympathy with them. If, however, every convict who has a mother, wife, children or relatives, was on that account to go scot free, the criminal laws might as well be repealed.

While I would be glad to avoid the responsibility of making any recommendation in the matter, yet since the duty is placed upon me, I can not do otherwise than state my conclusions regardless of consequences. I have no doubt of the guilt of Mr. Hart, or that he was rightfully convicted. I cannot persuade myself that it would be best for society for the executive to interfere with the due course of law in this case.

Some considerations presented by Mr. Hart's friends make it highly improper for the governor to interfere.

I therefore recommend that the petition for pardon be denied.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—Where personal property should be assessed.

DES MOINES, Iowa, February 11, 1896.

Col. D. J. Palmer, State Senator, Des Moines, Iowa:

DEAR SIR—Your favor of the 8th inst. at hand, in which you enclose a letter from I. M. Sproull, stating the following facts:

"A man of this town (Wayland) has fifteen head of horses which he keeps on forty acres over in Washington county, but he has not been living in that place, and has no agent there to list the stock. Now, he claims that he gave that stock in in Washington county, and we claim the right to assess the stock for taxation here, as he lives here."

You ask my opinion as to where the property is taxable.

The general rule is that the personal property is assessed in the county and township in which the owner resides. Where, however, a business is conducted in some other township, the personal property used in and about such business is to be assessed in the township where it is kept. If the horses in question are kept for temporary purposes in Washington county, as for instance, for the purpose of feeding or pasturing for a short time, that would not be, in my judgment, such a business as would make it an exception to the general rule above stated.

If, however, the party is engaged in the business of raising horses over in Washington county, and keeps the stock there year after year, or so long as he is conducting such business, then they would be subject to assessment for taxation in Washington county. McClain's code, 1879. The supreme court in case of *Rhyno v. Madison Co.*, 43 Iowa, 632, says: "The nature of the subject is such that it is not practical to lay down a general rule which will furnish a safe guide. Every case must be determined from its facts." It also uses this language: "A farmer owning a stock of merchandise in a city ought not to escape city taxes because he lives in the country, and upon the other hand, a merchant owning a farm ought not to pay city taxes upon his implements of husbandry."

A resident of a town having a horse or horses in the country, because they were absent from the town or city on the first day of January, would not authorize their assessment in any other place than the place of residence of the owner. If the gentleman in question simply has his horses on pasture in Washington county, looking after them himself, while he resides in the town and is not operating a business distinct from that conducted at his place of residence, then I can see no reason why the horses in question should not be assessed to him at his place of residence.

There may be other facts connected with it which might change the rule, as each case must be determined by the peculiar facts therein.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

MULCT TAX—Power of board of supervisors to remit a part of mulct tax.

DES MOINES, Iowa, February 12, 1896.

F. L. Holleran, Esq., Assistant County Attorney, Lyons, Iowa:

DEAR SIR—Yours of the 22d ult. came duly to hand, but an earlier reply was prevented by pressing duties in the supreme court.

You ask my construction of section 7, chapter 62 of the laws of the

Twenty-sixth General Assembly. You suppose a case of a man running a saloon during the months of January and February, then closed his saloon until June and July, during which months he again opened it, then closing until November, and running again through November and December. You ask, "Would the board have a right to rebate six months of this man's tax and only charge him for the actual time he was engaged in selling intoxicating liquors?" You also enclose me the opinion of Mr. A. T. Wheeler, county attorney, to the board of supervisors, in which he concludes that the board has no right to rebate the tax under the case supposed.

I agree with Mr. Wheeler's conclusion, but not with his construction of the statute which leads to the conclusion. If his view of the intent of section 7 of chapter 62 of the Twenty-fifth General Assembly is correct, there is no way to escape his conclusion.

The language of section 7 is, "Should it be found in the trial before the board of supervisors, or on appeal," etc. What trial? It refers to some specific, definite trial. Section 6 says, "The trial shall be conducted as an equitable cause." Section 5 refers to a specific trial and the manner in which it is to be conducted, giving the manner of appeal.

We must go back to section 4 to find what trial is referred to. Anyone claiming that the tax was improperly assessed against him, or the owner of the property who claims that the tax was not properly assessed against such property may by petition ask to have the tax abated, and it is the trial of the issue raised by that petition which is referred to throughout sections 5, 6 and 7, and no other trial is referred to. This application to rebate must be made at the meeting of the board of supervisors next following the listing aforesaid, hence, in my opinion, sections 4, 5, 6 and 7 of the chapter referred to are closely connected and relate to one and the same trial. Section 7 only refers to the trial of an application made by persons alleged to be selling liquors and the owner of the property upon which the same is said to be sold, who apply for a rebate of the taxes because of the alleged improper assessment.

I do not think it gives authority or warrants the board of supervisors rebating or reducing the tax which was properly assessed and acquiesced in for a time simply because the seller quits the business. Under sections 1, 2 and 3 all persons selling liquors are assessed the full tax of $600. Unless the parties thus assessed appear before the board of supervisors and protest against the assessment in the manner provided by sections 4 to 7 inclusive, the tax stands as a legal tax and no authority is given to the board to rebate the same.

The purpose of section 7 is evidently this: Liquors may be sold in premises without the knowledge of the owner. When he learns of the assessment he may apply for a rebatement. If the evidence shows his tenant is selling liquor he may put him out. In such cases the board of supervisors are authorized to reduce the tax *pro rata* for the time the premises were actually used for that purpose, provided it does not exceed six months.

I see nothing in the law that authorizes the board of supervisors to say that it amounts to a license of $50 per month, and let a man sell for a month or two and then stop and begin again, nor do I find anything in the statute which enables them or authorizes the board to rebate a tax for any amount whatsoever that was properly assessed in the first instance simply because

the man finds the business of selling unprofitable. A peddler who pays the peddler's tax for a year, or the itinerant vendor of drugs who pays the tax of $100 per year and receives a license, because he quits the business after having used his license for a month, would not be entitled to recover back *pro rata*.

My conclusion is that section 7 relates alone to those persons who object at the meeting of the board of supervisors next following the listing, to the assessment of the tax against them, and none others.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INDEPENDENT SCHOOL DISTRICTS—Change of boundaries.

DES MOINES, Iowa, February 12, 1896.

C. W. Kellogg, County Attorney, Missouri Valley, Iowa:

DEAR SIR—Your favor of the 10th inst. at hand, in which you ask my opinion upon the following question:

"The town of Little Sioux extended its corporate limits and by so doing extended the independent school district by operation of the law co-extensive with the town limits. Afterwards the same territory that had been annexed was severed from the corporation as provided by section 593 of McClain's code. Now, did the severance of the territory from the corporation also sever the territory from the independent school district, which said territory has come into the independent district solely by virtue of said extension? In other words, does the severance of the territory operate to restore the same territory to the original school district?"

In my judgment, this question should be answered in the negative. You will notice by section 2919 of McClain's code, territory contiguous to a town or village may be incorporated within the school district with such town. Section 2922 of McClain's code provides for the manner of incorporating with the school district in such city or town, contiguous territory not within the corporation. Section 2920 of McClain's code requires all territory incorporated in the city or town to become a part of the independent district or districts in such city or town. This by no manner of means provides that no territory not within the corporate limits shall not be a part of the independent school district. (See *Ind. District v. District Twp. Lynn Grove*, 82 Iowa, 169.)

Independent districts may be made of territory embraced within two or more civil districts in the same or adjoining counties. Nowhere can I find any provision of law preventing an independent school district including a municipal corporation as well as territory outside of the corporation. The boundaries of an independent district may be changed by concurrent action of the respective boards of directors. McClain's code, section 2832. The legislative intent seems to have been that all the territory inside of the boundaries of the corporation should be a part of the independent school district of such town, but the other statement is no less certain, that territory outside of the corporation may be a part of the independent district of such town.

The statute nowhere declares that the severance of territory from the town should change the boundaries of the school district. If the people desire a change, they can adopt the method provided by statute to secure that end. Yours respectfully,

MILTON REMLEY,
Attorney-General.

CLAIMS AGAINST THE STATE—Extent of liability thereon.

DES MOINES, Iowa, February 13, 1896.

Hon. F. M. Drake, Governor of Iowa, Des Moines, Iowa:

DEAR SIR—In regard to the claim of Ashbury M. Johnson under chapter 63 of the acts of the Eighth General Assembly, and chapter 172 of the Eighteenth General Assembly, I would respectfully report that I have examined the same and find that the land in question, to-wit: the southwest quarter of section 7, township 87, range 26, was sold to Wm. A. Scott for $43.83 cash, and deferred payments secured by mortgage, amounting to $131. That Scott paid some interest on the mortgage; the exact amount does not appear, but presumably about $75. That after the passage of chapter 63 of the Eighth General Assembly, the mortgage in question was foreclosed, and on the 15th day of June, 1864, the land was sold under special execution and was purchased by Jacob Johnson, the father and grantor of Ashbury M. Johnson, he paying $255.15 therefor and received a deed. That said Jacob Johnson and the claimant have used and occupied the land ever since, but about three years ago he was evicted and had to purchase the title from the real owners.

In the opinion given January 23, 1895, to Hon. F. D. Jackson, governor, in regard to the claim of Ellen Nesten of Webster county, I arrived at the conclusion that under the acts referred to, money paid by the claimant after the acts of the Eighth General Assembly could not be refunded because of the reason stated therein. I am satisfied with the conclusions therein reached. It is a rule of law that a purchaser at a sheriff's sale under a valid judgment takes all the interest which the judgment debtor had as well as the judgment creditor. Any claim or interest in the land which Wm A. Scott had passed by the sheriff's deed to Jacob Johnson. The option to relinquish the land and receive the money paid therefor to the state would, I think, unquestionably pass by such conveyance. The measure of damages for a breach of covenant of a warranty may be briefly stated to be the price with 6 per cent interest from the time of the eviction It is not equitable that interest should be paid on the purchase price from the time of such payment where the grantee has had the rents and profits of the land conveyed.

By chapter 130 of the laws of the Twenty-fifth General Assembly the legislature paid to the claimant the purchase money with 6 per cent interest from the time of such payment, but it does not appear whether the claimant had any rents and profits of the land during any part of the time. This sets a precedent for allowing the purchase money with 6 per cent interest, and in one view it seems equitable that the state should refund the money it received, together with the interest it has received thereon. Just how much of the $225 paid for the land at the sheriff's sale went to the state

does not appear. It would probably be not more than $200, allowing $55 for costs of court and sheriff's sale, which is approximately correct. The state received no benefit of such costs and expenses. Upon this basis the claim against the state would approximately amount to nearly the sum hereinafter stated, but under the views expressed in my opinion to Governor Jackson, the claimant is not entitled to recover the money paid since the act of 1860 was passed.

I think, however, in accordance with that opinion he would be entitled to recover the amount of money which had been paid by Mr. Scott prior to the passage of the act of 1860, with 10 per cent interest thereon. From the data furnished me by the deeds, I have computed the amount due at $605.10. This sum falls short of the amount paid in '64 with 6 per cent interest by over $100. It is the sum of $33.10 in excess of the amount of money realized by the state from the sheriff's sale, with 6 per cent thereon, assuming the state realized $200

I think the governor is authorized to allow such sum under the statute, and it is as near substantial justice as I am able to determine from the facts.

I therefore recommend that the claim of Mr. Ashbury M. Johnson be stated at $605.10, and upon his surrendering to the state the patent and filing the deeds and evidence of his right thereto, together with a receipt in full settlement of all claims against the state, that he be allowed the sum of $605.10. Respectfully submitted,

MILTON REMLEY,
Attorney-General.

TAXATION—Upon what assessment of personal property of a dealer in grain or a dealer in ice should be based.

DES MOINES, Iowa, February 18, 1896.

Hon. Joseph M. Junkin, State Senator, Des Moines, Iowa:

DEAR SIR—In compliance with your request I have examined the statute relating to the following inquiry:

"Is that portion of the corn crop for 1895 purchased from producers by dealers prior to January 1, 1896, and by said dealers cribbed and held for pecuniary profit, subject to this year's assessment?"

I am of the opinion that a dealer in corn or grain is by section 815 of the code (1293 McClain's code) considered as a merchant and should be assessed on the average of the stock or grain on hand during the year previous or for the part of the year that he has been engaged in the business, and if he has just commenced, the value of the property at the time of assessment.

This is in accord with the reasoning of *McConn v. Roberts*, 25 Iowa, 152. It is evident to my mind that such property is subject to assessment.

The second question, "Is ice put up and sold as merchandise during the year 1895 (none on hand the 1st of January, 1896) assessable?"

The same section would apply to this. The average value of the stock of ice during the year 1895 would be the basis for the assessment for the year 1896. A difficulty sometimes arises in determining the average value, but that is one of fact more than of law.

If a man engaged in buying and shipping corn keeps on hand $50,000 worth during six months of the year and then sells all of it, we can readily

see that $15,000 would be the average during the year, but when it is on hand for a short time or for a few months, then all sold, afterwards other bought, it becomes simply a question of computation to ascertain the average value. Yours respectfully,

MILTON REMLEY,
Attorney-General.

OFFICIAL NEWSPAPERS — PUBLICATION OF PROCEEDINGS OF BOARD OF SUPERVISORS — What is not a part of its proceedings — Compensation.

DES MOINES, Iowa, February 19, 1896.

T. S. Stevens, County Attorney, Hamburg, Iowa:

DEAR SIR — Your favor of the 10th ult. came duly to hand when I was engaged in supreme court work, and was forced to lay it aside until court adjourned. I take it up at the earliest possible moment.

You state: "The official papers of this county have been furnished by the county auditor with a tabulated statement or abstract of the official canvass of the vote at the last election, which they published, and now have filed their bill asking pay for the same at the rate of $1 per square. The auditor was not authorized by the board of supervisors to have the same published, but simply sent it with the rest of the proceedings of the board." You ask: "Does the law require the publication of the official count in this or any other manner, or does it simply require the publication of the names of the parties elected for the office for which they are elected?"

Second. — "If the law requires the publication of such tabulated statement or abstract of the votes in the official papers of the county, what compensation are they entitled to per square for the publication of the same?"

In regard to the first, I would say that I do not think the law requires the abstract of the votes to be published. It is not proceedings of the board of supervisors, but the board while counting the votes are called county canvassers. (See McClain's code, section 1097, and following.) The certificates of election are not signed by the members of the board, as members of such board of supervisors, but signed by the president of the board of canvassers. In canvassing the vote they are acting as a board of canvassers and their proceedings are not kept in the book of proceedings of the board. They are recorded in what is known as the election book. (McClain's code, 1103.) But if this were not true, the tabulation and addition prior to a declaration of who is elected is not the proceedings of the board any more than the figures made in adding up the claim filed. All reports presented to the board and claims filed, the discussion of different questions, are not considered part of the procedings, but only the final action can be considered, and in no view of the case does it appear to me can such tabulated statement be considered as proceedings of the board required by law to be published.

Second. — In the case of *Brown v. Lucas Co*, 62 N. W. Rep, 694, the supreme court held that for tabulated work the publisher was entitled to receive such a price as would be equivalent to a square of ten lines of brevier. The cost of setting tabulated matter being greater and by printer's rule, as

shown by the evidence in that case, being charged for at three times the price of brevier, the publisher would be entitled to recover on that basis.

I might call your attention to the fact that what in common parlance is called "legal rates" is really the maximum rate. The statute (McClain's code, 5112) simply provides that no one shall be required to pay more than that. It is competent for the board of supervisors to determine before hand the amount that shall be paid for such publication, and have it published accordingly If the price does not suit the publisher, they need not apply to be selected as the paper in which to publish the proceedings.

Yours truly,

MILTON REMLEY,
Attorney-General.

TAXATION — Amount of levy that may be made for county purposes, including the support of the poor.

DES MOINES, Iowa, February 20, 1896.

W. F. Kopp, Esq., County Attorney, Mt. Pleasant, Iowa:

DEAR SIR—Your favor of the 18th inst. at hand, asking my opinion upon the following questions:

"Can a county like Henry, with a population of less than 20,000 and an area less than 200 square miles, without a vote of the people to that effect, levy a tax of six mills or less for ordinary county revenue, including support of the poor, or is four mills the maximum?"

You add: "The power to levy as high as six mills seems plain, but has been seriously called in question."

I agree with you that the power to levy the six mills seems to be almost as plainly provided for as language can make it and do not see how any other construction could be placed upon the language. The second paragraph of section 1270 of McClain's code divides the counties of the state into two classes, determined by the population of the county, 20,000 being the dividing line, except that counties having less than 20,000 population, but exceeding 900 square miles in area, are put in the class with the counties having a population of over 20,000. A county of the first class can levy a tax of not more than four mills. Those of the second class may levy as high as six mills.

The clause commencing, "*Provided*, however, that in counties having a population of 20,000 and less, * * * such levy may be six mills or less," seems to leave no room for doubt. The second proviso simply authorizing counties in which the levy is limited to four mills to submit the question of increasing the same to six mills or less to the vote of the people, excludes the idea that such a vote is necessary in counties of the second class, which are by law permitted to levy a tax of six mills if needed.

The first few lines of the section makes it obligatory upon the board of supervisors to levy a tax for county purposes, and paragraph two of the section leaves the amount to be determined by the board within the limits therein prescribed.

There are no decisions contrary to this view that I have been able to find, and I can imagine no argument that would subvert the plain language of the statute. Yours respectfully,

MILTON REMLEY,
Attorney-General.

FISHING — BONAPARTE DAM — Right of adjacent property owners to take fish from river.

DES MOINES, Iowa, February 21, 1896.

Hon. W. G. Crow, House of Representatives, Des Moines, Iowa:

DEAR SIR—In reply to your inquiry I would say there is no doubt in my mind that the right to take fish from a river is one of the rights that pass not only to the riparian owner, but the public generally. When land is purchased with reference to the river it may be presumed that such right was in contemplation of the owner at the time of such purchase. To deprive the owners of the benefits resulting from such right is an injury of greater or less importance, according to the circumstances

I apprehend that it will not be denied the people of the upper Des Moines valley have a substantial interest in the fish supply of the river as a matter of right. Any obstruction interfering with the fish supply deprives them of a right which they and their grantors may be said to have acquired when the land was purchased from the general government.

I have at the request of the fish commissioner, investigated to a certain extent, the matter of the Bonaparte dam across the Des Moines river, and am satisfied that justice to the people of the upper Des Moines valley requires either that the obstruction should be removed, or fish ways be placed in so as to permit the free passage of fish up the stream. When the legislature by the act of March 3, 1860, authorized the sale of the dam and property formerly belonging to the Des Moines River Improvement company, it is unfortunate that the rights of the people above the dam were not fully protected, and that for a paltry sum of $200 such an injustice should be done them.

I am not prepared to say what is the best method of righting that wrong. From the facts before me, I am unable to state whether the Meek Bros. have a right to obstruct the passage of fish, but certain it is, they have certain vested rights which cannot be ignored.

The question has been before the courts on several occasions, resulting generally adversely to the state. The questions of law involved are complicated and not well settled by judicial decisions, and are further complicated by the proceedings already had in the courts.

If the legislature, for a reasonable consideration, could settle with the owners of the Bonaparte dam so as to secure the free passage of fish, it would undoubtedly be a happy solution of a vexed question, and at the same time be an act of simple justice to many thousand citizens of the state.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

OFFICERS — Offices of township clerk and township trustee not abolished in incorporated towns.

DES MOINES, Iowa, February 24, 1896.

B. F. Ross, County Attorney, Onawa, Iowa:

DEAR SIR—Replying to your favor of the 13th inst., in which you ask in substance, my opinion as to whether "under chapter 10 of the laws of the Twenty-fourth General Assembly, in an incorporated town, the offices of

township clerk and township trustee are abolished?" You state that you understood my predecessor held that the act applied to incorporated towns as well as to cities. I find no such opinion recorded in this office, and I do not so construe the act.

By referring to the chapter in question, it will be seen that it relates alone to cities. A repeal of a statute never arises by implication unless the subsequent statute is inconsistent with the former. The title of the act is: "An act to abolish the offices of township clerk and township trustee in certain cities." Section 1 abolishes those township officers in cities having a population of less than 7,000, provided that such cities constitute one civil township, the boundary lines of which coincide throughout with the boundary lines of such cities. An incorporated town is not a city. There must be a population of at least 2,000 to entitle it to become a city.

I do not see how the act can be well extended so as to include incorporated towns. It would be contrary to the plain language of the statute and at the same time do violence to the rules for the construction of statutes.

I am of the opinion that the offices of township trustee and township clerk were not abolished by said chapter 10.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSPECTION OF OILS — Right of State Board of Health to require oil inspectors to use certain brands or stamps.

DES MOINES, Iowa, February 24, 1896.

Dr. J. F. Kennedy, Secretary State Board of Health, Des Moines, Iowa:

DEAR SIR—Your favor of the 20th inst. at hand, in which you ask my opinion as to whether or not rule 8 comes within the purview of the statute and the power of the state board. Rule No. 8 is as follows:

Rule 8. Brand No. 2 shall be square in form, not less than seven inches outside measurement, without date, and must contain the following words: "Rejected for illuminating purposes ---- ---------- inspector, Iowa." It must contain the name of the inspector; it must be affixed to all packages, casks, cans, barrels or vessels containing kerosene which does not flash at a point above 105° Fahrenheit. It must also be affixed to all packages, casks, barrels or vessels containing gasoline, naphtha or benzine.

Brand No. 3 shall be of like form and dimensions as brand No. 1, and shall contain the words: "For illuminating cars, approved (or rejected as the case may be) ----- degrees, Iowa ---------- 189 ---------- inspector." It shall have adjustable spaces for dates, degrees, and the words "approved" and "rejected." It must also contain the name of the inspector. No oil must be approved for illuminating cars that burns at a temperature below 301° Fahrenheit.

Stencil brands must conform to patterns on file in the office of the secretary of the state board of health.

My attention is specially called to that clause of the rule which requires the brand rejected for illuminating purposes to be affixed to all packages, casks, barrels or vessels containing gosoline, naphtha or benzine. Chapter

185 of the Twentieth General Assembly, authorizes the inspection of coal oil or other products of petroleum used for illuminating purposes. Section 2 of the act, as amended by the acts of the Twenty-first and Twenty-fourth General Assemblies, authorized the board of health to prepare rules and regulations as to the manner of inspection, which rules and regulations shall be in effect and binding upon the inspectors and deputies appointed under this act.

Section 14 of said chapter 185, as amended by chapter 149 of the Twenty-first General Assembly, provides that within sixty days after the passage of this act, the state board of health shall make and provide the necessary rules and regulations for the inspection of illuminating oils and for the government of the inspector and deputy inspectors provided for in this act. It further provides for the removal, by the governor, of any inspector or deputy for failing to comply with or carry out said rules and regulations or any provision of the act. The different acts authorize the inspection of any product of petroleum which is used for illuminating purposes, and rules made with reference to the inspection of kerosene, gasoline, benzine, benzole, naphtha, rhigolene, are certainly within the purview of the power of the board.

I think there can be no question that the inspection of oils used for illuminating purposes, of which any of the products of petroleum is a component part, or is the base, would clearly come within the meaning of the act.

I see nothing in rule 8 which is not authorized by statute and it appears to be a proper rule for the purpose of carrying out the intent of the legislature in enacting the laws for the inspection of petroleum and its products.

Yours respectfully

MILTON REMLEY,
Attorney-General.

TAKING PERSONAL PROPERTY, HELD UNDER LEGAL PROCESS FROM OFFICER—The question as to whether the officer could hold the property if a personal action were brought against to him recover the same is immaterial.

DES MOINES, Iowa, March 5, 1896.

W. L. Smith, County Attorney, Humboldt, Iowa:

DEAR SIR—Yours of the 22d ult. came to hand, requesting my opinion upon a question which may be stated as follows:

"A sheriff made a levy on personal property under an execution and left it in the care of one not an officer. While there, the execution defendant, by force, took the property from the custodian for the sheriff. In case of an indictment of the execution defendant, you ask whether it is necessary for the state to prove that the levy of the execution would hold the property, or whether it is a crime to take the property from the sheriff, no matter whether the levy would hold the property or not?"

Under section 3815 of the code, it is made a crime for "any person knowingly and without authority of law to take, carry away, secrete or destroy any goods or chattels while the same are in the custody of any sheriff, coroner, marshal, constable, or other officer, and rightfully held by such officer by virtue of execution or writ of attachment, or other legal process, issued under the laws of Iowa"

In the case put, the custody of the person holding for the sheriff was the same as the custody of the sheriff. He was the sheriff's agent, authorized to hold for the sheriff, by the sheriff.

Under section 3055 of the code, it is the duty of the sheriff to levy on personal property in the possession of, or that he has reason to believe belongs to the defendant, or on which the plaintiff directs him to levy. The law provides a way and method by which property belonging to others may be released; also a method for releasing property which is not subject to levy, as exempt property, for example; but any property which the law requires the sheriff to levy on, if levied upon, is lawfully in his custody and rightfully held by him until it is released in the manner pointed out by law.

A party cannot, by force or stealth, deprive the sheriff of property which the law makes it his duty to levy on, and for him to do so is by this statute made larceny.

I am, therefore, of the opinion that the question whether the sheriff could hold the property under the execution, in case a personal action was brought against him, does not enter into the question of whether the crime under section 3815 was committed or not. I think it may be conceded, for instance, that the property was exempt from execution, and he would still be liable if by force he took the same away from the sheriff.

It occurs to me that all the state would be required to prove is that the property was levied upon by the sheriff as the property of the judgment debtor, and while in his possession it was taken away by the defendant Of course, the venue, the fact that he had an execution, etc., must be shown, but the essential points are as above stated.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

OFFICIAL NEWSPAPER—Board of supervisors may fix compensation to be paid by the county.

DES MOINES, Iowa, March 10, 1896.

F. M. Molesbury, County Attorney, Columbus Junction, Iowa:

DEAR SIR—Yours of the 6th inst. at hand, in which you ask my opinion on the following question:

"Section 428 of McClain's code of Iowa defines the amount of compensation that the board of supervisors may pay to have their proceedings published, and after providing the number of papers that shall publish the proceedings, states, 'and the cost of such publication shall not exceed one-third the rate allowed by law for legal advertisements.' What would you say is the compensation for each paper that is determined to be entitled to publish the proceedings?"

In reply to this I would say the section in question fixes the maximum price for the publication of legal notices. I have no doubt that it would be competent for the board of supervisors to fix a lower rate than that named, and make such contract as they may be able in regard to the rate for publishing, but in the absence of the contract, because of what I think to be the universal custom in charging 33⅓ cents per square of ten lines of brevier, the board would have to pay what it is reasonably worth, and I dare say that the custom would be considered as fixing the price.

If we take into consideration the language preceding the clause quoted by you, which provides that two papers shall be selected and shall be the county official papers in which the proceedings, etc., shall be published at the expense of the county, that is, there are two publications, one in one paper and another in another, and "the cost of such publication shall not exceed one-third of the rate allowed by law for legal advertisements." This evidently refers to each publication. In other words, each newspaper is entitled to receive in the absence of a contract, the reasonable value of such publication in that paper, not to exceed 33⅓ cents per square. The case of *Brown v. Lucas Co.*, 62 N. W. Rep., 694, is the latest case upon this question. The exact question you ask, however, was not raised in that case. The opinion seems to take it for granted that 33⅓ cents per square of ten lines of brevier is the price fixed by law for such publication. That seems to be the price allowed by the district court and also the supreme court. I do not think that that question was raised in the case. The real question was as to the price that should be paid for table work.

It is evident to me that the clause of the section that you refer to defines the maximum price to be paid to each paper which may be selected.

Yours truly,

MILTON REMLEY,
Attorney-General.

ERECTION OF COUNTY BUILDINGS — What money can be expended by the board of supervisors without submitting the question to the voters of the county.

DES MOINES, Iowa, March 13, 1896.

T. B. Mockler, County Attorney, Harlan, Iowa:

DEAR SIR—Your favor of the 11th inst. at hand, in which you state that "the poor house in your county was recently burned and there was received $2,000 as insurance on the building." You ask my opinion as to "whether the board of supervisors may appropriate $5,000 together with the $2,000 received from the insurance company, for the erection of a new poor house, without submitting the question to the voters of the county?"

In reply to this I would say that paragraph 24 of section 402 of McClain's code authorizes the board of supervisors to "erect a court house, jail, poor house and other buildings, or bridges, when the probable cost will not exceed $5,000, without submitting the question to the voters of the county." This statute has received the construction of the supreme court in the case of *Merchant v. Tama Co.*, 32 Iowa, 200. It has been the law for a great many years, and it is, I think, uniformly held that under this section the board of supervisors had full authority to order the erection of county buildings, including a poor house, at an expense not exceeding $5,000, without getting the approval of the majority of the voters at a general or special election.

After chapter 54 of the acts of the Nineteenth General Assembly was enacted, in which it was provided "in any county of this state where the public buildings thereof have been or may hereafter be destroyed by fire, wind, or lightning, the board of supervisors of such county, for the purpose of reconstructing the same, may appropriate in addition to the amount now

authorized by law, the amount received by way of insurance on such building or buildings so destroyed." The clause "in addition to the amount now authorized by law" evidently refers to paragraph 24 of section 402 of McClain's code, and it appears to me there can be no question that $5,000 may be appropriated in addition to the $2,000 received from the insurance.

The statute last quoted leaves in my mind no doubt about the authority of the board in this matter.

You refer to the contention of certain parties that the "original cost of the other building should be taken into consideration." The statute nowhere so provides. If that construction were possible and the building destroyed had originally cost ten or twelve thousand dollars, the board of supervisors of your county would be without authority to appropriate any sum whatsoever. This would practically abrogate the statute entirely.

I see no reason for placing this construction upon the statute It does violence to the plain language of the statute and practically annulls the same. I concur with you in the view that you have taken upon this question in advice to the board. Yours respectfully,

MILTON REMLEY,
Attorney-General.

CONSTITUTIONALITY OF STATUTE — Section 907 of Code of 1873 apparently unconstitutional.

DES MOINES, Iowa, March 16, 1896.

Edward Mills, County Attorney, Red Oak, Iowa:

DEAR SIR—Your favor of the 14th inst. at hand, asking my opinion as to the constitutionality of section 1392 of McClain's code. You state that your "predecessor gave his opinion that the statute was void; was interfering with the interstate commerce, and that you are inclined to the same opinion."

I do not see how for so long a time this statute seems to be unquestioned in our own courts. It levies a tax for state purposes upon peddlers of merchandise not manufactured in this state. There is nothing in the section which authorizes the levy of a tax or requires a license to be paid by ped dlers of merchandise manufactured in the state.

The case of *City of Marshalltown v. Blum*, 58 Iowa, 184, holds that an ordinance of a city making such a discrimination is unconstitutional. The case of *Welton v. Missouri*, 91 U S. Rep., 295, holds that a statute making a discrimination between merchandise manufactured in states other than the state adopting the statute is unconstitutional. There are many other decisions of the United States supreme court in which the principle is recognized. I have not the least doubt in my own mind that the section in question is unconstitutional.

In October last, in an opinion to D. H. Meyerhoff, of Corning, the same view was expressed, he having previous to that time dismissed a case based upon the violation of the statute.

I would not advise bringing a prosecution under section 1393 of McClain's code, 907 of the code of '73 I do not think it could be sustained.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

LAKE BEDS — The title of the beds of rivers and lakes is in the State of Iowa.

DES MOINES, Iowa, March 18, 1896.

Hon. F. M. Drake, Governor of Iowa, Des Moines, Iowa:

DEAR SIR—In regard to the request made of you to make an application to the commissioner of the general land office of the United States to have what is known as the "Sand Hill Lake bed" patented to the state as swamp land, which you have referred to me, I beg to state that, in my judgment, the government of the United States has no authority whatever to issue a patent for any of the meandered lake beds of this state to the state. On June 22, 1895, I gave to Hon. F. D. Jackson, governor of state, an opinion upon this question, which subsequent investigation and study have only served to confirm.

It is clear to my mind that no land passed to the state under the swamp land grant, except such tracts as were surveyed; that all lake beds, river beds, and lands not surveyed because of their being unfit for tillage or use, passed to the state in its sovereign capacity. The governor of state has no right in law to convey away the property of the state, and it would be, in my judgment, altogether improper for the executive in his official capacity to do anything which would enable any person to procure any patent or deed which would be a cloud upon the title of the state.

I am, therefore, of the opinion that the request made of you to ask the commissioner of the general land office of the United States to issue a patent to the state, ought not to be granted.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

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1. **TAXATION — Where personal property should be assessed.**
2. **TAXATION—Upon what the assessment of the personal property of a dealer in grain should be based.**

DES MOINES, Iowa, March 18, 1896.

L. L. Mosher, County Attorney, Indianola, Iowa:

DEAR SIR—Your favor of the 17th inst. at hand, in which you ask my opinion upon the following questions:

First.—"A bank, as I understand, running in this county as a co-partnership, owned by stockholders of a savings bank of Des Moines, refuses to list its bank stock in this county under a claim that the same is assessed in Polk county." Query. "Should the capital be assessed here?"

I accept the statement of the question just as it appears. The fact that the owners of the bank in your county may be also stockholders in a savings bank in Des Moines is not an element to be considered in determining the question propounded.

It is provided by section 806 of the code of '73, "When a person is doing business in more than one county, the property and credits existing in any one county shall be listed and taxed in that county." This leaves no question that the assets of the bank located and doing business in your county

should be assessed in your county, notwithstanding the fact that the owners of the bank may reside elsewhere, or have stock in a dozen banks in other parts of the state.

It has been held that the capital and stock of a business should be assessed in the township where the business is conducted, although the proprietor may live in another township in the same county. The case of *Rhyno v. Madison Co.*, 43 Iowa, 632, sustains this view, although the question was not directly involved.

If the bank was a corporation organized under the general incorporation laws, chapter 39 of the acts of the Twenty-third General Assembly would apply, and the assessment should be made to the bank as a corporation, but I assume it is a private bank.

I am inclined to the view that the assets of the bank should be assessed in your county.

Second.—"Our grain dealers have considerable corn stored here, and had on January 1st, claiming that it should not be listed as it is to be shipped soon. Should it not be listed here unless held with intention to ship in a short time and followed by shipment soon afterwards?"

In reply to this I would say that, in my judgment, the case should be determined under section 805 of the code of '73 (1292 McClain's code). A grain dealer would be considered as a merchant under the provisions of that section. Probably the corn, as corn, should not be listed at all, but the average value of the property in his possession, or under his control, should be determined as provided in said section, and it should be taken as the basis of his assessment. A grain dealer may have no grain on hand on the 1st of January, but on that account should not escape assessment, and it would be equally unfair if, on January 1st, he had many thousands of dollars of grain on hand, and half of the year he had nothing, to fix his assessment by the value of grain on hand at that date. The average value of the stock on hand, as provided by the section above referred to, is the only safe and fair basis for determining his assessment.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CORONER—Duty to hold inquest only upon dead bodies of certain persons.

DES MOINES, Iowa, March 20, 1896.

Dr. Elliot R. King, Muscatine, Iowa:

DEAR SIR—Yours of the 17th inst. at hand, in which the county attorney joins you in asking my opinion upon this question: "Is it my duty as coroner to view every body dead from other than natural causes, even if the friends and relatives are satisfied no foul means have been used?"

In reply to this I would say that section 487 of McClain's code directs an inquest to be held upon the dead bodies of such persons only as are supposed to have died by unlawful means. Section 5075 of McClain's code, as your letter points out, makes a difference in the fee, viz., a fee of $3 for viewing without inquest, and one of $5 with an inquest.

The exact question that you ask is not easily determined by the statute, but nowhere does it appear to be the duty of a coroner to view every body

that has died from other than natural causes. It was not so under the common law. It is only where there may be, or is, suspicion of unlawful means used in compassing the death. If a man should be seen to fall from a building and killed, there would be no need of viewing the body—or killed in a runaway. I do not think the coroner would be justified in viewing the body unless the circumstances under which it was found, or the circumstances under which the death occurred were such as to create a suspicion that the death resulted from criminal carelessness or unlawful means.

If the coroner is called or goes to see the body, and upon viewing it determines there are no suspicious circumstances which would justify an inquest, the statute fixes his fee for that at $3; but if an inquest is held, it is then $5. I do not think the statute in regard to the fee implies an obligation to view every body dead from other than natural causes.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION OF STREET RAILWAYS — Street railways should not be assessed by executive council, but by the assessors of the districts where such street railways are located.

DES MOINES, Iowa, March 24, 1896.

To the Executive Council, Des Moines, Iowa:

GENTLEMEN—Your favor of to-day at hand, asking my opinion:

First.—"As to whether the Cedar Rapids & Marion City railway comes within the purview of the law governing the assessment of railway property in the state of Iowa by the executive council?"

Second.—"What relations the line operated on the streets in the city of Cedar Rapids bears to that part of the line running from Cedar Rapids to Marion and the classification thereof as to the main line, branches or side tracks?"

In regard to the first question I would say that the only authority given by law for the executive council to assess the property of railway companies is found in sections 2016 to 2022 of McClain's code, inclusive. The language of section 2016 seems to be very general, it being "The executive council shall assess all property of each railway corporation in the state, except the lands, lots and other real estate belonging thereto not used in the operation of any railway." This, however, is limited by section 2022 so as not to apply to any railway until the gross earnings of the preceding year shall exceed the sum of $4,000 per mile average for all miles of road operated during the whole of the preceding year.

The question arises whether the clause "each railway corporation in the state" applies to street railways. If from the use of the language it must be held so to apply, then all other laws in regard to the railways of the state for a like reason must be held to apply to street railways. Under chapter 159 of the Twentieth General Assembly, tax may be voted to aid in the building of a railway. The language does not limit it to steam railways.

In the statutes relating to the building of railways and their operation, we find the same general language employed, with possibly two exceptions. Section 16 of chapter 70 of the Twentieth General Assembly, defines what

shall be understood by the phrase "railroad" in construing that act. In chapter 28 of the Twenty-second General Assembly, section 1, because of the general and comprehensive language used relating to all common carriers engaged in this state in the transportation of passengers and property by railroads therein, an exception is made at the close of the section as follows: "Street railways excepted." Aside from these I know no other exceptions.

I think it evident that from the context of the different statutes and the history of railroad legislation in the state of Iowa that wherever in the statute the terms "railroads," "railways" appear, without more, it is intended to apply to such railroads or railways as are operated by steam and engaged in the transportation of persons and property between different towns and places in the state, as well as interstate transportation. The use of the term both in legislation and in common usage among the people, applies only to such railroads and not to street railways. We speak of railroads, and it gives a certain definite idea which is well understood. We speak of street railways and another idea, also well understood, is conveyed. To lose sight of this distinction disregards the well known rules of language and the rules for the construction of statutes.

I venture to say there is no one familiar with the railroad legislation of this state who will think for a moment that any legislator thought or intended the statutes enacted for the building or control of railways, embraced and included also street railways.

There are several statutes which relate to street railways and they are always designated as street railways. For instance, in section 623 of McClain's code it is provided, "Cities and towns shall have the power to authorize or forbid the laying down of tracks for railways or street railways on all streets, alleys and public places," and it further provides that "no railway track can be thus located until after the injury to property abutting on the streets, etc., shall have been ascertained and compensated for in the manner provided for taking private property for works of internal improvement."

In chapter 16 of the Twenty-second General Assembly, in granting additional power to certain cities, power was given to the cities with regard to street railway companies, and certain other powers in regard to railway companies. Chapter 11 of the acts of the Twenty-third General Assembly provides "cities and incorporated towns shall have power to authorize or forbid the construction of street railways within their limits." Chapter 32 of the Eighteenth General Assembly empowers street railways in cities and incorporated towns to locate, build and operate their roads over and along any portion of certain highways outside of the limits of the city.

It will be noticed that there is a line of legislation relating to railways with no distinguishing term, and another line relating to street railways. There are very few provisions which are applicable to street railways and standard railways.

The reason of the law authorizing the executive council to assess the property of any railway is apparent. Most railways in the state have lines running through different counties, as well as into or through different states. The rolling stock passes from one county to another, and from one state to another. It is used over the entire system and on the lines of other

companies. It has no fixed place where it may be used or could be assessed. The value of one part of the line depends not on what it cost, but upon the value of the whole system or line of which it forms a part. Were it not for the law authorizing the executive council to assess such railroads, there would be many assessors with as many different ideas as to the true basis of valuation, each of whom would be required to assess, at most, but a few miles of railway. The incongruity of the assessment of a railway by many assessors is palpable.

The reason of the law wholly fails when it is applied to street railways. There is no reason apparent for taking the assessment of a city railway out of the hands of the local assessors. The street or city railway owes its life and value to the franchise given. It occupies streets without paying damage to abutting property owners. Its construction and operation are controlled largely by city ordinances. The city owning the fee of the streets and being responsible for their condition, from the necessity of the case must have control, in a large measure, of the street railways. They are for the convenience of the local community. I can conceive of no reason for a law providing for the assessment of their property in any other manner than other property in the city is assessed.

The provisions of sections 2016 to 2022 inclusive, of McClain's code, do not suggest the idea that the legislature had in mind the assessment of the street railways by the executive council. I can find in no statute a syllable or line that suggests such a right.

My conclusion is that the executive council has no authority under the law to assess the property of street railways in this state, and the fact that a street railway has extended its lines as authorized by chapter 32 of the Eighteenth General Assembly, beyond the limits of the city, does not change the rule. To construe the law otherwise would involve more inconsistencies and contradictions in our laws relating to railways and municipal corporations than I would wish to undertake to explain during the next five years.

Second.—Having arrived at the conclusion above stated, the second question becomes really immaterial. I would say, however, that it is difficult to consider a system of street railway for the carrying of persons to different parts of the city, in the nature of main lines and branch lines. The system is an entirety and any line upon which the street cars run bears little analogy to the trunk lines and branch lines, or feeders, of a standard railway company. Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—Personal property in transit and out of the state January 1st—where assessed.

DES MOINES, Iowa, March 20, 1896.

C. T. Hardinger, County Attorney, Osceola, Iowa:

DEAR SIR—Your favor of the 25th inst. at hand, in which you make the following statement and inquiry:

"On December 31st, parties living and residing in this county loaded and shipped from Osceola a car-load of cattle consigned to their commission house in Chicago. On January 1st the cattle were outside the state, but in

transit. The stock arrived in the union stock yards on January 1st and not sold until the morning of the 2d of January. Should these cattle be assessed to the owners in this county?"

The question is a novel one. If the parties were engaged in the business of buying and selling stock a different rule of law would obtain than is applied to one not engaged in such business. We will consider the latter case first.

The policy of the law is that all property should be assessed for taxation. If the cattle had been sold prior to January 1st, or on that day, the price thereof could have been assessed to the owners as moneys and credits. But they were not sold until January 2d.

Section 803 of the code of '73 provides that "every inhabitant of this state, of full age and sound mind, shall assist the assessor in listing all property subject to taxation in this state, of which he is the owner," etc.

Section 812 provides, "All taxable property shall be taxed each year and personal property shall be listed and assessed each year in the name of the owner thereof on the 1st day of January."

Section 823 of the code provides, "The assessor shall list every person in his township and assess all the personal and real property thereof, except such as heretofore specifically exempted."

It might be stated as a general rule that the situs of personal property is where the owner resides, except such personal property which is used in connection with a business conducted at another place.

Section 806 provides for the assessment of property referred to in the exception. The owner of personal property is required to list it for assessment at the place where he resides, unless the property is used in connection with a business conducted elsewhere. The fact that cattle are out of the township where the owner resides on the 1st of January, and in another township, does not prevent the assessor of the township of the owner's residence from assessing them, nor authorizes the assessor of the township where the cattle actually are to assess them.

Rhyno v. Madison Co., 43 Iowa, 632.

So moneys and credits in a county different from the place of residence of the owner cannot be assessed in the former county, but must be assessed where the owner resides.

Barber v. Farr, 54 Iowa, 57.

The assessment of personal property should be made at the place of the residence of the owner thereof.

Cooley on Taxation, §§ 369–372.

Remey v. Board of Equalization of Burlington, 80 Iowa, 470.

I think it fairly deducible from these principles that the cattle in question should be assessed to the owners at the place they reside, notwithstanding the fact that they were on their way to market on the 1st day of January, and were actually out of the state. The owners still had control of them; could have stopped them in transit, recalled them to their home, or sold them.

Any construction of law which would enable those living near the state line to drive their stock over into a neighboring state for a few days and thereby escape taxation would do violence to reason and the plain intent of

the statute. The cattle in question could not be assessed in Illinois, and I can conceive of no reason why they should not be assessed, and assessed at the place where the owners reside.

The statement of facts is silent upon one point. If the parties referred to were engaged in buying and shipping cattle for sale, the rule above stated would not apply to their case. I am inclined to think that the assessment of such persons should be on an entirely different basis. They would be deemed merchants, under section 815, and the average value of the property in their possession, or under their control during the next year previous to the time of assessing would be the basis of their assessment.

Yours truly,

MILTON REMLEY,
Attorney-General.

COMPENSATION OF PUBLIC OFFICERS—What salary a member of the general assembly is entitled to who fills the office but a portion of a regular session.

DES MOINES, Iowa, March 27, 1896.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—Your favor of the 26th inst. at hand, submitting to me the following facts:

"Dr. F. McClelland, a representative of the house of the Twenty-sixth General Assembly, from Linn county, died about February 13th. At a special election David Brant was elected to fill the vacancy created by the death of Dr. McClelland. He was sworn in as a member of the house on the 10th of March, 1896. On the 12th day of February, 1896, you drew a warrant for $275, to Dr. McClelland," and upon these facts you ask my opinion:

First.—"Is David Brant entitled to the sum of $550 for the time he may serve during the present session of the Twenty-sixth General Assembly, or is he only entitled to one-half that amount, $275 having already been paid to his predecessor in office?

Second.—"If he be entitled to $550, am I authorized by law to draw him a warrant now for $275, and another warrant for $275 at the end of the present session of the general assembly?

Third.—"Is the estate of the late F. McClelland entitled to any additional compensation other than that which has already been paid to him by reason of his services as a member of the house, and if so, am I authorized to draw another warrant to said estate for $275, or a less amount, without a special appropriation for such purpose?"

In regard to the first inquiry I would say that where there is a yearly, monthly, or per diem salary attached to an office, the person holding the office can only receive his pro rata share for the time he so holds. This is unquestionably the correct rule in such cases. The language of section 12 of McClain's code, as amended by subsequent statutes, does not afford a basis to pro rate for the time the office is occupied by one. Formerly the compensation of the members was a per diem. That statute was repealed and a lump sum of $550 was provided for "every member for each regular

session." If the session should extend for six months, no more could be received than the $550, and for only a 30 days' session the same would be paid.

Unquestionably Mr. Brant is a member of the regular session of the Twenty-sixth General Assembly. The section in question makes no provision for diminishing the amount to be paid because of the absence of a member or his failure to attend for any given time, but the sum named is provided for every member. To determine whether he is entitled to receive the $550, it is only necessary to determine whether he is a member. Of course, this must be construed with the provisions of chapter 3 of the Fifteenth General Assembly.

One-half of the salary having been paid to Dr McClelland, any part thereof could not be recalled. The session may last 60 or 90 or more days after Mr. Brant took his seat. There would be no justice in requiring him to receive no more for two or three or more months of service than was received by Dr. McClelland for 30 days' service.

I know of no way to pro rate, and the absence of any provision of the statute authorizing it leads to the conclusion it was not the intent of the law that there should be a pro rating of the compensation.

In reply to the second question, I would say the law is silent upon it. Within 30 days after the convening of the general assembly, upon the certificate of the presiding officer, the auditor may issue a warrant for one-half of his salary to each member. Mr. Brant was not a member within 30 days after the convening, and was not by virtue of that provision entitled to a warrant, but to carry out the spirit of the law and by analogy to the provisions above referred to, I think you would make no mistake in issuing a warrant to Mr. Brant for one-half of his compensation within 30 days of the time he was sworn in, upon the proper certificate of the presiding officer.

In regard to your third inquiry, taking the provisions of chapter 3 of the Fifteenth General Assembly (McClain's code, section 13), in connection with section 12, I am of the opinion that you could not properly issue a warrant to the estate of the late Dr. McClelland for the remaining one-half of his salary. Such warrant is not to be issued until the close of the session, and only then to the members. He ceased to be a member before he became entitled to any part of the remaining half of the salary which had been unpaid to him.

I cannot think that his estate would be entitled to any part of the unearned salary as a matter of law. Such a contingency as that stated by you does not seem to have been in mind when the statute was enacted. Legislatures have been generous in the past in making appropriations to pay salaries of both members under similar circumstances, but without some such act, I do not think you would be justified in issuing any further warrant to the estate of the late Dr. McClelland.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

NOTE.—The general assembly, ere it adjourned, by a special act, appropriated $275 to Mrs. McClelland, the widow of Hon. F. McClelland, in full of the salary he would have received had he survived the session of the legislature.

COMPENSATION OF PUBLIC OFFICERS—What fees clerk of district court is entitled to.

DES MOINES, Iowa, March 30, 1896.

D. H. Meyerhoff, County Attorney, Corning, Iowa:

DEAR SIR—Your favor of the 26th inst. at hand, in which you call my attention to section 5036 of McClain's code, and ask, "Can the county clerk collect from the county for the services of keeping a registry of births, deaths and marriages, and making a report thereof as provided in McClain's code, section 2560. Also, can the clerk retain fees for matters of probate and guardianship, as provided by McClain's code, section 248? Also, can the clerk recover for services as clerk of the commissioners of insanity as provided by McClain's code, section 5102, when the fees of the clerk do not in any one year exceed the sum of $1,300, or does the $1,300 cover the clerk's fee for services of every kind done by him, the excess, if any, to be turned over to the county treasurer?"

In regard to this I would say the compensation of the clerk is determined by the amount of fees collected up to the sum of $1,300, in a county like yours, with a population exceeding 10,000, but not exceeding 20,000. Section 5036 of McClain's code limits the amount of fees that he may retain. All in excess should be paid in to the county treasurer. If the fees pertaining to his office did not amount to $1,300 he is not entitled to more than the fees of the office amount to.

Under section 248 of McClain's code, the board of supervisors may authorize him to retain from probate fees such a sum as the board may fix, not exceeding the sum of $300 per year, but if the fees received from probate business of any one year do not amount to $300 or the sum fixed by the board as his extra compensation, he can receive no more on this account than is collected.

The fees authorized to be charged by the clerk under section 2560 (McClain's code, 5102), are fees pertaining to the office. He undoubtedly is entitled to receive the same from the county, but like fees received from other sources, an account must be kept thereof, and if the total amount received exceeds $1,300, such excess should be paid into the county treasury. The account of probate fees should be kept separate from the account of other fees. The law does not contemplate that probate fees in excess of the sum fixed by the board should be credited on the general account of the fees received so as to swell the receipts of that account in case it should fall short of the limit fixed by section 5036.

The case of *Moore v. Mahaska County*, 61 Iowa, 177, is in point. The language of section 2560, which says, "For services connected with keeping the registry of births, deaths and marriages, the clerk shall receive, in addition to the compensation already allowed by law, the sum of 10 cents," etc., must be taken in connection with the language of chapter 184 of the Eighteenth General Assembly, which fixes the limit. He may receive such sum in addition to the other fees up to the limit fixed by chapter 184. As a matter of fact, chapter 184 is the later statute.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CONSTITUTIONALITY OF A STATUTE—CIGARETTE BILL—The act of the general assembly prohibiting the sale of cigarettes held constitutional.

DES MOINES, Iowa, April 4, 1896.

Hon. F. M. Drake, Governor of Iowa, Des Moines, Iowa:

DEAR SIR—On the 2d inst. you submitted to me what is known as the "Cigarette Bill," passed by the present general assembly, and asked my opinion as to whether it is constitutional or not.

I have given the matter careful consideration. The right of the general assembly of the state to pass any bill it believes to be for the promotion of the health, morals or welfare of the state, is unquestionable. All legislative authority of the state is vested in the general assembly.

Article 3, section 1 of the Constitution.

The bill in question is an exercise of the police power of the state. The general assembly is the sole and exclusive judge of the time and manner in which the police power of the state shall be exercised and its action shall be liberally construed.

Garrett v. Aby, 17 Southern Rep., 238.

"The power of the state to impose restraints and burdens upon persons and property for the conservation and promotion of public health and order and prosperity is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive. This court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the constitution, necessarily infringing upon any right which has been confided expressly, or by implication, to the general government."

In re Rahrer, 140 U. S., 545.

There are many decisions, not only of our own supreme court, but of the United States supreme court, and the supreme courts of nearly all states, announcing a similar doctrine. The judgment of the legislature upon what does promote the health, welfare or prosperity of a state, is exclusive. I do not mean to say that the general assembly may, under the guise of exercising police powers, arbitrarily restrict the citizen's right to pursue lawful employment, or interfere with the inalienable rights of citizens by enacting measures that have no reference to the welfare, health and prosperity of the people

It is said, however, in *People, ex rel., v. Warden*, 144 N. Y., 529, "Natural right to life, liberty and pursuit of happiness is not an absolute right. It must yield whenever the concession is demanded by the welfare, health or prosperity of the state. The individual must sacrifice his particular interest or desires if the sacrifice is a necessity, or in order that organized society as a whole shall be benefited." There are innumerable cases which enunciate the same doctrine. In the same case it is added, "Courts should always assume that the legislature intended by its enactment to promote those ends."

It may also be stated that the acts of the general assembly must yield

when they are in conflict with the powers granted by the state to the federal government, or in conflict with the laws enacted by the general government in pursuance of its constitutional power.

There is no suggestion that in the passage of the cigarette bill, the general assembly has transcended the police power of the state which has never been surrendered to the general government, nor that it is an arbitrary exercise of the power which necessarily deprives the citizens of any of their natural rights.

The only objection to the act in question is: it is alleged to be in conflict with the constitutional right of congress to regulate interstate commerce. I do not think it will be contended by anyone that the act in question, so far as it applies to the citizens of this state, or the property which has commingled with the mass of property of the state, is vulnerable to any constitutional objection.

The doctrine of the case of *Leisy v. Hardin*, 135 U. S., 100, is that the police regulation of the state prohibiting the sale of an article of commerce cannot be applied to articles imported into the state and sold in their original packages. It is contended that the act prohibiting the sale of cigarettes and cigarette wrappers in the state, cannot be applied to such articles imported into the state and sold in original packages; that the act is unconstitutional as applied to such importations, and being unconstitutional in part, the whole must necessarily fall.

Under the decisions of the supreme court of the United States, the police power of a state and the power of congress to regulate interstate commerce impinge so hard against each other that there appears to be in some instances a direct conflict of power; or at any rate, it is difficult at times to distinguish which power should prevail. The construction given by the federal courts to the interstate commerce clause of the federal constitution, I apprehend, carries the doctrine to a greater length than the framers of the constitution ever contemplated.

The supreme court of Pennsylvania in *Commonwealth v. Schollenberger*, 27 Atl. Rep., 30, says: "We might have held, had the question been one for us, that the object of the interstate law commerce clause was quite different from what it seems thought to be. We might have thought it intended to prevent the establishment of state custom houses and taxation along state lines, and to make for the general purposes of legitimate trade all the states open to manufacturers and merchants of the several states. But for this the states might have intercepted all goods reaching their borders, and weighed, valued, and taxed them before permitting them to proceed to their destination. The destructive effect upon commerce of such restrictions was clearly foreseen and wisely guarded against by our fathers. But the protection of the lives, the health and morals of citizens was the chief of the duties of government left to the states when the Union was formed. The common law rights and remedies are to be sought in the courts of the states. For this reason we would have held that the police regulations of the states stood on impregnable ground, and that, while no state had the right to tax or to burden interstate commerce, each state had the right to exclude from its territory such articles of food or drink as were injurious in their character and effect upon the health or the morals of the public. But, however this may be, it will not be denied that state commerce, that is,

business conducted within the lines of a state, was left to state control. It was the intention of the United States to protect the citizens and the productions of one state against unjust discrimination by the other states, but it was and is the duty of the state to protect its citizens against each other."

The application of the doctrine that, because of the constitutional provision empowering congress to regulate interstate commerce, articles of commerce which the state has condemned as injurious to the health, prosperity and welfare of the state, may, notwithstanding state laws, be imported and sold within the state, seems to have reached its high tide in the case of *Leisy v. Hardin*. The trend of the decisions seems to be the other way.

I am not prepared to say how long or for how short a time an article which is positively injurious to the public health must be upon the market before its character as an article of commerce is established. I can conceive of articles compounded of noxious drugs which, by skillful advertising, may be placed upon the market and brought into general use in the interval between two sessions of the general assembly, and the question whether its character as an article of interstate commerce is thereby established, and the state is powerless to prevent its introduction into the state, is a debatable one. Just when or how long an article must be used by the public generally before it comes within the protection of the interstate commerce clause of the constitution, I would not undertake to determine.

I am unwilling to concede that because a law enacted by the police power of the state cannot be enforced against all property it is necessarily unconstitutional.

The supreme court of the United States, *In re Rahrer*, 140 U. S., 545, referring to the *Leisy v. Hardin* case, said: "We reversed the judgment upon the ground that the legislation to the extent indicated, that is to say, as construed to apply to importations into the state from without, and to permit the seizure of the articles before they had by sale or other transmutation become a part of the common mass of property of the state, was repugnant to the third clause of section 8 of article 1 of the constitution of the United States, in that it could not be given that operation without bringing it into collision with the implied exercise of a power exclusively confided to the general government. *This was far from holding that the statutes in question were absolutely void, in whole or in part, and as if they had never been enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the state.*"

Also in *Plumley v. Massachusetts*, 155 U. S., 474: "The language we have quoted from *Leisy v. Hardin* must be restrained in its application to the case actually presented for its determination, and does not justify the broad contention that the state is powerless to prevent the sale of articles manufactured in and brought from another state and subjects of traffic and commerce, if their sale may cheat the people in purchasing something they did not intend to buy, and which is wholly different from what its conditions and appearance import," and the same case reasserts the doctrine that the power of the state to impose restraint and burdens upon persons and property in the promotion of public health, good order and prosperity, is a power originally and always belonging to the states, and not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and is essentially exclusive.

In *Powell v. Pennsylvania*, 127 U. S., 678, the statute of Pennsylvania absolutely prohibiting the manufacture and sale of oleomargarine is sustained by the supreme court of the United States, although the case before the supreme court did not involve the question of interstate commerce. Objections to the law were argued on other constitutional grounds. The court, however, reaffirms the doctrine above stated that whether "the sale of oleomargarine in fact involved danger to public health so as to require for the protection of the people the entire suppression of the business rather than its regulation, are questions of fact and of public policy which belong to the legislative department to determine."

The same statute was before the supreme court of Pennsylvania in the case of *Commonwealth v. Schollenberger*, 27 Atlantic Rep., 30, and a conviction for its violation was sustained, although the defense was made that the sale was protected by the interstate commerce clause in the federal constitution. It appeared, however, that the defendant did not prove that it was an original package that was sold. The court held that "it was incumbent upon him to show his right to violate the police laws of the state in which he lived and carried on his store, affirmatively and clearly. It is not enough to hint or suggest the existence of such a right. It must be certain and his ability to escape the penalty of the broken law depends on the sufficiency of the justification."

There is no intimation that the law itself is unconstitutional because it cannot be applied to every sale which is made within the state It may be admitted that such police regulations when applied to articles imported into the state and sold in original packages are inoperative and cannot be applied to those particular cases, but this, as the supreme court said *In re Rahrer*, does not render the statute absolutely void in toto or in part.

In *Plumley v. Mass.*, 155 U. S., 461, the supreme court of the United States sustained a conviction under the oleomargarine law of Massachusetts, in which it was conceded that the article sold was manufactured in and imported from another state. The statute prevented the sale of any oleomargarine that was colored and made to look like butter. In the opinion, the court approved the language of *Sherlock v. Alling*, 93 U. S., 99: "In conferring upon congress the regulation of commerce, it never was intended to cut the states off from legislation upon a subject relating to the life, health and liberty of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the constitution."

I have no doubt whatever that tobacco is an article of commerce which would come within the protection of the interstate commerce clause of the federal constitution. But whether tobacco prepared in the form of cigarette tobacco, in which it may be easily adulterated with noxious ingredients, would necessarily be protected, it is not necessary for me to discuss.

So paper is an article of commerce, and under the protection of the federal constitution. It may be imported into the state and sold in original packages, but in regard to paper prepared in a peculiar manner and adapted solely for the purpose of furthering an evil that the state legislature determines to be injurious to public health and welfare, is entirely a different question, and one that we need not discuss.

It is a debatable question whether the act under consideration could be made operative as against cigarettes imported and sold in the original package in which they are imported. If it should be held that it is not operative upon that class of property or sale of property, it would not render the act unconstitutional. Because the facts of some particular case may show the person charged with violation of the law is protected by another law, or a higher law, it by no means follows that the first law is void. In the case at hand it would be a misuse of language to say that the law was unconstitutional, because cases may arise under it which the federal constitution takes from under its operation.

But if it were conceded that because of the federal constitution, the act now before me was unconstitutional in part, there is no question that enough therein remains to control the traffic to a great extent within the state and to operate upon all the citizens in the state engaged in selling cigarettes or cigarette paper, which have become a part of the general mass of the property of the state.

If the constitutionality of the act were doubtful, I apprehend it would be the duty of the executive to resolve that doubt in favor of the act of the legislature. There can be no doubt about the constitutionality of the act as applied to all property or sales, except such as may be protected by the interstate commerce clause of the federal constitution, and if that were resolved certainly against the act, there would be sufficient remaining to preserve the integrity of the act as a whole.

In my judgment, the act in question is not obnoxious to the constitutional objections. Yours respectfully,

MILTON REMLEY,
Attorney-General.

BONDS—ISSUE OF BONDS BY INDEPENDENT SCHOOL DISTRICT —The board of directors must have authority, from the electors, to issue bonds to the amount issued by them.

DES MOINES, Iowa, April 7, 1896.

Hon. Henry Sabin, Superintendent of Public Instruction, Des Moines, Iowa:

DEAR SIR—You ask my official opinion upon the question submitted to you by the letter of J. F. Kerberg, which is this: "The auditor of O'Brien county informed the board of directors of the independent district of Sanborn that the assessed valuation of such district was $196,000, and at a special election the district voted to issue bonds on that amount. After the election it was learned that the assessed valuation of the district was $222,000." He asks, "whether it would be legal to issue warrants on the difference between the supposed valuation and the actual valuation?"

I assume from the question the proposition voted on was to issue bonds for an amount equal to 5 per cent of $196,000, the supposed assessment, and the question is whether that proposition having carried, the directors may now issue bonds for a sum equal to 5 per cent of $222,000.

In regard to this I would say that the board of directors is limited to the amount of bonds voted for by the electors. If the electors voted to issue bonds for $9,800 the directors would have no legal right to issue bonds for $11,100. They would have no more authority to issue bonds for the

$1,300 in excess of the amount the electors voted to issue, than they would to issue for that amount in case there had been no election. Section 1822 of the code requires the question of issuing bonds to be submitted to the electors.

The question really is: "Would it be legal for us to issue *warrants* on the difference between our supposed valuation and real valuation?"

I do not understand how warrants could be issued when bonds may not. I think that Mr. Kerberg intended to ask about bonds.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CLAIMS AGAINST THE STATE—Claims for the support of soldiers' orphans at the soldiers' orphans' home.

DES MOINES, Iowa, April 10, 1896.

Hon. W. H. Berry, Chairman Committee on Claims:

DEAR SIR—You request my opinion upon the claim of Woodbury county for the maintenance of F. G. and Jennie Laughlin, soldiers' orphans at the soldiers' orphans' home; also a like claim of Cedar county for the support of Stella Lupton, a soldier's orphan, at the soldiers' orphans' home.

In regard to these claims I would say that when the orphans' home was established by chapter 92 of the Eleventh General Assembly, there was a provision made for a special tax by the state for the support of the home and maintenance of orphans therein.

This act was amended by the acts of the Twelfth General Assembly, chapter 66, repealing the provisions for a special tax and making an appropriation out of the state treasury for the support of the orphans at such home. Some minor amendments have been made since, but the law with reference to the support of the home is found substantially correct in McClain's code, sections 2681 to 2690, inclusive. These are all the sections relating to the support of the home.

Chapter 92 of the acts of the Eleventh General Assembly also made provisions for the support of the soldiers' orphans by the county, providing for a county support fund. This fund was to be used for the maintenance of soldiers' orphans remaining in the county, and had no relation to the support of the orphans at the home. To avoid any misunderstanding, a section was contained therein which is now section 2700 of McClain's code. Sections 2690 to 2700 inclusive, of McClain's code relate alone to the maintenance and education of soldiers' orphans who are not included in the home. Afterwards the Sixteenth General Assembly, chapter 94 of the act, provided for the admission of indigent children who are not the orphans of soldiers, the provision being that the county should support such indigent children. This act, with some slight amendments, is found in McClain's code, sections 2701 to 2708, inclusive.

A careful examination of these different acts shows that it has been the policy of the state and the intention of the law that the orphans of soldiers kept at the home should be supported by the state at large out of the state fund.

None of the acts limit the benefits of the home to the children or orphans of Iowa soldiers. While I think that the intention was that the benefits should be for the orphans having a legal settlement in the state, the law is silent upon it. The humane policy of the law, I think, fairly embraces all soldiers' orphans, whether they are Iowa soldiers or not. On the other hand, I think the county authorities sending children to the home should not send those having a legal settlement in any other state; that such orphans, if paupers, should be sent to the place of their settlement under the poor laws.

My conclusion is that the state is under obligations to support at the home the orphans of all soldiers who are admitted to the home, reserving the question, however, as to whether they should support orphans not having a legal settlement within the state.

I know nothing about the facts of these cases, but have seen nothing to cause me to suspect the good faith thereof. If the orphans named were the orphans of soldiers having a settlement in Iowa, and the county has paid for the maintenance thereof, thus relieving the state of its obligation under its existing laws, my judgment is that they are valid claims against the state.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CONSTITUTIONALITY OF A STATUTE—An act which would ever be limited in its operation to certain cities would not be constitutional if it became a law.

DES MOINES, Iowa, April 10, 1896.

Hon. F. M. Drake, Governor of Iowa:

DEAR SIR—Yours of to-day asking my opinion upon the constitutionality of house file No. 290, has received as careful attention as time permits.

The bill amends section 1 of chapter 1 of the acts of the Twenty-fourth General Assembly so as to make the act applicable to cities which had 25,000 inhabitants at the time of the state election in 1895.

There are, I believe, but six cities in the state to which the act as amended would apply. They are as definitely known as if they had been specially named in the bill. The law as amended cannot apply to any other cities than the six referred to. This being true, under the decision of the supreme court of this state in the case of *State, ex rel., West v. Des Moines*, 65 N. W. Rep., 818, the act in question is local legislation and is repugnant to the constitution.

If the bill were amended by striking out of the next to the last line the words, "at the time of the state election in 1895," this constitutional objection would, in my opinion, be obviated.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COMPENSATION OF PUBLIC OFFICERS — SHERIFFS, DEPUTY SHERIFFS AND BAILIFFS—Neither a sheriff nor his deputy can draw a salary as a bailiff.

IOWA CITY, Iowa, April 14, 1896.

H. F. Arnold, Esq., County Attorney, Manchester, Iowa:

DEAR SIR—Your favor of the 10th inst. at hand in which you state the following facts and ask my opinion upon the following questions:

"We have a regularly appointed deputy sheriff who receives a salary fixed by the board of supervisors at our last term of court. The sheriff appointed him, in addition, as court bailiff, and he now claims as additional fees to his salary as deputy sheriff, compensation as bailiff, and I should like your opinion:

First.—"Whether a deputy sheriff regularly appointed and acting as such and receiving a fixed salary as such deputy from the county, is required to attend the regular terms of court as such deputy under the salary so fixed for him?

Second.—"Whether a deputy sheriff regularly appointed and acting as such and receiving a salary so fixed as above, when he attends a regular term of court during his term of office, can, in addition to his salary, demand and collect, or be paid compensation as bailiff, whether he has been specially designated as such or not?"

In reply I would say that the statute is a little obscure as to the duties and compensation of bailiffs, section 476 of McClain's code appearing to be the only section referring thereto. The number of bailiffs is to be fixed by the court. The sheriff shall appoint them. He is to be allowed the assistance of such number of bailiffs as the court may direct. The sheriff is as responsible for their acts as if they were deputy sheriffs.

In *Bringolf v. Polk County*, 41 Iowa, 454, the court held that the county must pay a reasonable compensation for their services, and it is there stated that if they perform services for which a fee is allowed by law, they, and not the sheriff, are entitled to the fee, and the amount of fees earned by them must be taken into account by the board of supervisors in fixing the amount of their compensation.

The sheriff is required to attend court, and for such services he is allowed such salary as the board of supervisors shall determine. (Section 5062, McClain's code.) If the sheriff, attending to other duties, desires the deputy to attend court, he is not attending court as bailiff, but as a deputy sheriff. If a deputy is serving papers or performing other duties, he is not entitled to compensation as a bailiff.

The spirit of the law and the decision of the *Bringolf case* leaves no doubt in my mind that one person cannot occupy the office of deputy sheriff and bailiff at one and the same time. The sheriff is not entitled to the fees earned by the bailiff, and I can conceive of no principle of law by which a person receiving a salary as deputy sheriff can also receive a salary for the same time as bailiff. If a bailiff earn fees by performing sheriff's duties and receives the same, the supreme court says: "Such fees should be taken into account by the board of supervisors in determining the compensation of the bailiff."

Replying to your first question specifically, I would say that the sheriff by himself or deputy is required to attend the regular terms of court, and neither would be entitled to receive the compensation of bailiffs while so attending.

I infer from the statement of facts that your board of supervisors has construed section 3 of chapter 75, acts of the Twenty-fifth General Assembly, to apply to counties having a population of less than 28,000. If that is the case, I do not wish anything said above to be considered an approval of that construction of the law, and by silence I would not wish to endorse the right of the board in counties having less than 28,000 of population to appoint a deputy sheriff and pay his salary out of the county treasury.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

OFFICIAL NEWSPAPERS—PROCEEDINGS OF BOARD OF SUPERVISORS—The costs in a criminal case may be stated in the aggregate in publishing the proceedings of the board.

IOWA CITY, Iowa, April 16, 1896.

C. G. Saunders, Esq., County Attorney, Council Bluffs, Iowa:

DEAR SIR—Yours of the 8th inst. at hand, asking my opinion upon the following question:

"Will it be a compliance with the law if the county auditor, in publishing the proceedings of the board of supervisors, shall publish only the total of witness fees in the district court and before justices of the peace? *e. g.*, there are perhaps thirty witnesses allowed fees for having been in attendance upon the justice court of H. C. Cook; is it necessary that the name of each witness and the amount allowed him be printed?"

In reply, I would say that sections 304 and 307 of the code were repealed by chapter 197, acts of the Twentieth General Assembly, and a substitute enacted therefor. This has again been amended by section 2, chapter 86, acts of the Twenty-first General Assembly, and the law is correctly stated in section 428 of McClain's code.

It will be noticed that section 304 of the code of '73 required the publication of "a schedule of the expenditures and receipts of the county, which shall state the names of all claimants, the amount claimed and the amount allowed, and for what purpose allowed." These two sections were construed in the case of *McBride v. Hardin County*, 58 Ia., 219, and the statement of bills allowed, it was held, was required to be published in but one paper.

It will be noticed that the language in regard to the publication has been materially changed. The language of the present law is, "All the proceedings of the board of supervisors, a schedule of bills allowed, and the report of the county auditor, including a schedule of receipts and expenditures." This change was evidently for some purpose. It will be noticed that the names of the claimants are not specified to be published, nor the amounts claimed, the amounts allowed, and for what purpose. Only a schedule of bills allowed is required to be published, and a schedule of receipts and expenditures.

What is meant by a schedule of bills? I am inclined to the opinion that it means a concise statement of the different bills allowed; not necessarily an itemized statement, but such a statement as sufficiently describes the bill; giving the amount allowed, with something to identify the bill, usually the name of the person to whom allowed, or the case in which the bill is allowed. If each witness filed a claim against the county, and each claim were acted upon separately, it would probably be necessary to give the name of each witness, but if a bill of costs from the justice court is presented for a case, as is usually done by the justice certifying up a transcript of the costs of the case, and it is acted upon as a bill and is allowed, to be paid to the person entitled thereto as shown by the bill, I see no reason why publishing a statement of "Costs in the case of *State v. John Doe*, $———," would not be sufficient.

It might be well, in such case, to place all costs under the head of "Criminal prosecutions before a justice." In this way the costs of publication might be very materially lessened, which seems to have been the intention of the legislature by changing the law after the decision in the case of *McBride v. Hardin County*.

I think the above would be a compliance with the requirements of the statute.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

REQUISITION — EMBEZZLEMENT — Facts stated in an information held not to charge embezzlement. Under an application founded upon such information, the governor should not deliver the accused to the officers of a sister state.

DES MOINES, Iowa, April 17, 1896.

Hon. F. M. Drake, Governor of Iowa, Des Moines, Iowa:

DEAR SIR—You ask my opinion as to whether or not the complaint (information) in the case of *State of South Dakota v. Fred Cates*, a copy of which is attached to the requisition issued by the governor of South Dakota for the apprehension and arrest of said Cates, charges said Cates with the crime of embezzlement under the laws of South Dakota.

The complaint was made before and filed in the office of one James McKinley, a justice of the peace in and for Davison county, South Dakota, and by said complaint it was sought to charge said Fred Cates with the crime of embezzlement. The facts set out in said complaint show that the complainant, Herbert E. Cheadle, on or about the 1st day of October, 1895, sold and delivered to said Cates a team of horses at the agreed price of $100, the said Cates to pay the said purchase price by delivering to said Cheadle twenty tons of corn stalk fodder at the agreed price of $5 per ton, and that if said Cates did not deliver the whole of said twenty tons of fodder, that he would execute to said Cheadle a note for the balance or difference between the fodder so delivered at the price above named, and the agreed price of the horses, and secure the payment of the note by a chattel mortgage upon one corn plow, one stirring plow and all his household goods. That said Cates delivered but five tons of said fodder and failed to make and deliver said note and mortgage according to said agreement.

Under the statutes of South Dakota, as under the statutes of most of the states, a person charged with embezzlement must have been an agent, clerk or servant and must have come into the possession of the money or chattels alleged to have been embezzled, by virtue of his employment in such capacity. While embezzlement is defined by the statutes of South Dakota as "the fraudulent appropriation of property by a person to whom it has been intrusted" (Compiled Laws of Dakota, 1887, section 6796), yet by sections 6797 to 6801 it will be seen that the crime of embezzlement can only be committed by persons standing in a relation such as agent, clerk or servant of the party whose money or property is embezzled. By the sections referred to, the statutes of South Dakota make the misappropriation of money or property by a common carrier, a trustee, bailee, agent, clerk or servant, embezzlement. And it is expressly provided (section 6804) that upon an indictment for embezzlement it is a sufficient defense that the property was appropriated openly, avowedly and under a claim of title preferred in good faith, even though such claim is untenable.

I refer to the compiled laws of 1887, as I have no later edition at hand. Section 24 of the enabling act (approved February 22, 1889,) the act of congress under which the territory of Dakota was divided into North Dakota and South Dakota and both admitted into the union as states, provides that "all laws in force made by said territory, at the time of their admission into the union, shall be in force in said states, except as modified or changed by this act, or by the constitutions of the states respectively." I have examined the act referred to, the constitution of the state of South Dakota and the acts of the legislature, and find no change in the statutes affecting the crime of embezzlement.

The facts set out in the complaint show a sale of the property alleged to have been embezzled. The parties did not stand in the relation of master and servant or principal and agent; no relationship of this character existed. It is true that Cates failed to fulfill his part of the contract, but if he entered into the contract in good faith, his failure to fulfill the same would not subject him to a criminal prosecution. Even though he did not enter into the contract in good faith, such fact would not make him guilty of the crime charged in the complaint.

My conclusion is that the facts stated in said complaint show affirmatively that said Cates is not guilty of the crime charged, and in my opinion, a warrant authorizing his removal from the state should not be issued.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

WHEN A BILL PASSED BY THE GENERAL ASSEMBLY BECOMES A LAW—Construction of the constitutional provisions relating to the same.

DES MOINES, Iowa, April 22, 1896.

Hon. F. M. Drake, Governor of Iowa, Des Moines, Iowa:

DEAR SIR—Your favor of the 21st inst. at hand, in which you submit to me the following questions, upon which you desire my opinion:

First.—"A bill came to the governor on Tuesday, April 7th. It was his intention to let the bill become a law without his signature. On Saturday,

the 11th, the day of adjournment of the general assembly, when the governor was about to send the bill to the secretary of state, as provided by law, it was found that the bill had not been signed by the presiding officers of the houses. The defect was remedied on that day. What is the legal status of the bill? In other words, did it become a law on April 10th in accordance with the provision of sections 15 and 16, article 3 of the constitution?"

In regard to this, I would say section 15 provides: "Every bill having passed both houses, shall be signed by the speaker and president of their respective houses." The next section provides: "Every bill which shall have passed the general assembly shall, before it becomes a law, be presented to the governor," etc.

It will be noticed that the signing of the bill by the presiding officers of both houses is necessary. Such signing is an authentication of the bill, practically a certificate of the fact that it has passed both houses. The governor would have no right to assume that the paper presented to him in the form of a bill had passed both houses of the general assembly, without the signature of the presiding officers thereof. Suppose the governor would approve and sign a bill which had not been signed by the presiding officers of both houses. Would it become a law? I think there could be but one answer; that it would not. The governor is not authorized to approve or disapprove a bill until such time as it shall have received the signatures of the presiding officers of both houses.

My conclusion is that the bill, when it came to the governor on April 7th, was not a bill of which he could take cognizance. It did not become so until the 11th, on which day it was signed by the presiding officers of both houses. Consequently it did not become a law upon the 10th.

I think it should be treated as if the bill were presented to the governor for his approval on the 11th day of April, when it came into his possession duly signed by the presiding officers of both houses.

Second.—"A bill comes to the governor with the following enacting clause: 'Be it enacted by the General Assembly of Iowa.' Is the defect fatal?"

Third.—"Another bill omits the word 'general' from the enacting clause. Same question as in No. 2."

I will consider these two together. Section 1 of article 3 of the constitution provides: "The style of every law shall be—'*Be it enacted by the General Assembly of the State of Iowa.*'" It will be observed in question 2 that the words "state of" are omitted and in No. 3, that the word "general" is omitted.

Among the constitutional law writers and decisions of courts, there has been much discussion whether the provisions of a constitution are mandatory or directory. I have no question in my own mind that the greater weight of authority holds that the provisions of constitutions are mandatory. There are some decisions of very respectable courts, however, which make a distinction between what is called the essence of a law and the form; and hold that a provision of the constitution which relates to the essence of the law is unquestionably mandatory, but those provisions relating to the form alone are directory. There appears to be force and reason in this distinction, but it is not necessary to enter into this discussion.

I concur with the idea that all constitutional provisions should be considered mandatory and binding upon the conscience of legislators, and the political and judicial officers of the state, as well as all citizens. The question presented, however, is not so much the construction of the constitution as the application.

The Nevada constitution provides, "The enacting clause of every law shall be, 'The people of the state of Nevada represented in Senate and Assembly, do enact as follows:'" The enacting clause of a certain bill omitted the words "Senate and." The Nevada supreme court held that such omission was fatal.

State v. Rogers, 10 Nevada, 250.

In *State v. Wright*, 12 Pac. Rep., 708, with similar constitutional provisions, a heavy pen stroke appeared through the words, "Be it enacted," and the supreme court of Oregon held it was doubtless done surreptitiously by some irresponsible party, and it was held that the legislative intent could not be defeated in such manner.

In *Swan v. Buck*, 40 Miss., 268 (292-3), it was held that the constitutional provision as to the form or style of the act did not exclude the use of some other phraseology or form. The constitution of Mississippi had a provision similar to ours, "The style shall be—'Be it enacted by the Legislature of the state of Mississippi.'" In the act before the court, the style was: "Resolved by the Legislature of the state of Mississippi." The court says: "There are no exclusive words in the constitution negativing the use of any other language, and we think the intention will be best effectuated by holding the clause to be directory only. It is necessary that every law should show on its face the authority by which it is adopted and promulgated, and that it should clearly appear that it is intended by the legislative power that enacts it that it should take effect as a law. These conditions being fulfilled, all that is absolutely necessary is expressed. * * * The requirement of the constitution is thereby substantially complied with, and the will of the legislature sufficiently declared."

The Maryland constitution provided: "The style of all laws of this state shall be—'Be it enacted by the General Assembly of Maryland.'" In the law presented to the court the words, "by the General Assembly of Maryland," did not appear. The court said: "Being satisfied that the words, "by the General Assembly of Maryland," are not of the essence and substance of the law, but their use directory only to the legislature, we cannot, because of their omission from the enactment, declare the law in question unconstitutional."

Admitting, however, that all the provisions of the constitution are mandatory, the question arises whether the omission of the words referred in questions 2 and 3 are a material defect? The authority by which the law is promulgated sufficiently appears. There can be no reasonable doubt that the general assembly intended to comply with the provision of the constitution in the style of the bill, and in my opinion, there has been a substantial compliance with the constitution. They do not go to the essence of the law. Evidently it is a clerical error. The law does not regard little things which do not go to the essence, or those appearing to be simply clerical errors. If such omissions are fatal to the bill, where will be the line at which we may stop? Suppose a "t" was not crossed, and "i"

was not dotted, or a word spelled wrong in the enacting clause, would it be contended that the bill failed to comply with the constitution so as to be fatally defective?

The constitution was designed to lay down general rules by which the rights of the people might be better protected, and I cannot think it was intended to thwart the will of the legislature because of some clerical error.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—PUBLIC OFFICERS—Duty of county auditor, upon receiving notice of transfer of personal property, as to tax assessed against said property.

IOWA CITY, Iowa, April 27, 1896.

Owen Lovejoy, County Attorney, Jefferson, Iowa:

DEAR SIR—Yours of the 24th inst. at hand, in which you ask my construction of section 853 of the code as amended by chapter 39, acts of the Twenty-fourth General Assembly, upon the following points:

First.—"If the notice contemplated is served upon the auditor after the tax becomes due is he obliged to go into the treasurer's office and assess the owner with the tax, the property having been transferred before the tax becomes due?"

Second.—"After the tax becomes due, does the service of the notice upon him authorize or compel him to release the party originally assessed with the tax from such tax upon the treasurer's books, the property having been transferred before the tax became due?"

The section as amended is as follows:

"All taxes upon real estate shall, as between vendor and purchaser, become a lien upon such real estate on and after the 31st day of December in each year. And when a merchant or other person assessed with personal property only, shall sell or transfer in bulk any stock of goods or merchandise, after the tax thereon have become payable and remaining unpaid, all such unpaid taxes shall become a lien upon such personal property in the possession or under the control of such purchaser or vendee; and when any such transfer occurs after the assessment and before any such tax becomes due and can be paid, the auditor shall, upon notice being given to him, change the name as to the owner, and any such tax shall be collectible against such owner, purchaser or vendee, the same as if such personal property had been assessed in his or her name."

The amendment to the section made by the Twenty-fifth General Assembly was with the view to secure the payment of taxes assessed against those persons who had personal property only. The statute in regard to the distress and sale of personal property did not make the tax a lien upon personal property until seized by the treasurer. The amendment affects goods sold by those persons who are assessed with personal property only, and does not apply in case the seller of a stock of goods has real estate other than his homestead assessed to him. It is intended to give the treasurer the means of collecting the tax, in case of a transfer of the property taxed, when the person against whom it is assessed has no real estate upon which it is a lien.

Section 843 of the code makes it the duty of the auditor to deliver the tax list to the treasurer on or before the 31st day of December, and take his receipt therefor. Taxes may be paid at any time after the tax lists go into the hands of the treasurer, and it is the duty of every person subject to taxation to go to the treasurer's office sometime between the first Monday of January and the 1st of March, and pay his taxes. (Section 857.)

I know of no authority for the auditor making any entries in the tax lists after they pass into the hands of the treasurer. He holds the treasurer's receipt, and under section 844, must make and certify a statement of the aggregate valuation of lands and also the aggregate amounts of each separate tax as shown by said tax books.

If one wants the entry made by the auditor, he should give the notice before the tax books leave the auditor's hands. Hence, in answer to your first question, I would say in my judgment the auditor has no authority to go into the treasurer's office and make any entry in the tax books.

I would answer your second question in the negative. I do not understand that the section as amended releases the person owning the property at the time it was assessed against him from the obligation to pay the tax. This section does not change the law making one liable for the assessment on property owned by him the first day of January, but is only a provision to secure the tax levied in the case named.

I would not like to say that if the purchaser were obliged to pay the tax, he might not recover from the seller. The change of the name of the owner may be only for the purpose of having a memorandum so as to keep the treasurer in mind as to how the tax may be collected.

Suppose a case. A, with $10,000 in cash on the 1st of January, is assessed therefor. Say, on the 1st of June he purchases therewith a stock of goods from B for $10,000, and the notice referred to in said section is given to the auditor. Will it be contended that he becomes primarily liable for the tax on the cash assessed to him and also for the tax assessed on the stock of goods which he bought on June 1st? I think not. The section, as amended, may require him to make provision so that the tax of B shall be paid. At least he shall take the stock of goods subject to the lien created by said section. If B has real estate, then the section does not apply.

I am very clear, however, that the auditor cannot be required, after the tax becomes payable, to change the name of the owner on the tax book after the tax books have left his hands.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

DOMICILE—INSANE PERSON—How a domicile may be acquired.

DES MOINES, Iowa, April 23, 1896.

C. H. Kelley, County Attorney, Forest City, Iowa:

DEAR SIR—Yours of the 17th inst. failed to reach me in time to comply with your request by telegraphing an answer, and at the earliest possible moment I reply. You submit substantially the following state of facts:

' December 29, 1892, one Oliver Thompson, a resident of your county, was sent to the insane asylum at Independence. On December 25, 1894, his father went to Independence, and the patient was turned over to him and

brought back to your county. Sometime in the month of March, 1895, the father moved to Presho county, South Dakota, taking his family and insane son with him, where they have both since resided.

In September, 1895, proceedings were had in Lyman county, South Dakota, to which Presho is attached for judicial purposes, before the board of insanity, and Oliver Thompson was again adjudged insane, and was taken in custody by the sheriff of Lyman county, and has since been in his charge. Oliver Thompson is an unmarried man, and has at all times, except when in the insane asylum, and the time that he was in the custody of the sheriff of Lyman county, been a member of his father's family. The sheriff of Lyman county brings the person to your county and wishes the commissioners of insanity of Winnebago county to take charge of him."

You ask my opinion as to the liability of the county under the facts stated.

It is undoubtedly true that the domicile of a person is not lost until one is acquired elsewhere. It is also true that a person of full age who becomes insane and has no volition in the matter cannot change his domicile. It is also true that the domicile of a minor changes with that of his parents. These are the general rules.

It has, however, been held that an insane person who continues in his father's charge and as a member of his family, is the ward of his father so that when the father changes his domicile, the domicile of the insane person is changed likewise.

I presume that there is no question that the father and Oliver Thompson resided in South Dakota a sufficient length of time to secure a domicile. The domicile of the father being in Winnebago county prior to his removal, he having charge of his son from infancy up to the present time, the son never having elected or chosen a place of domicile, other than the place of his father's domicile, under both English and American cases, his domicile would not be in Winnebago county, after he had remained in South Dakota a sufficient length of time to acquire a domicile there.

Buswell on Insanity, section 342.

Holyoke v. Hawkins, 5 Pick., 20.

He was, as I understand it, never emancipated from his father; was always a member of his father's family, and in fact has never chosen a place of settlement. So far in life, that place of settlement or domicile has been chosen by his father. If I understand the facts correctly, the case is an exception to the general rules above stated.

If the young man had chosen a place of residence and had been emancipated from his father, ceased to be a member of his family, a different rule would apply. Other questions of fact might enter into it. If it could be shown in any event that at the time he went to South Dakota he had mental capacity sufficient to chose his place of settlement, the fact that he afterwards became insane, would not defeat the choice thus made.

Under the statement of facts, it is impossible for me to definitely determine the question more plainly than stated above. I think, from the facts stated, that he had acquired a settlement or domicile in South Dakota, and the commissioners of insanity in your county, in that case, should be under no obligation to take charge of him.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

SCHOOLS, BOARD OF DIRECTORS—A board of directors has no authority to make a contract for the employment of a superintendent for a period of five years.

IOWA CITY, Iowa, April 27, 1896.

G. W. Dawson, County Attorney, Waterloo, Iowa:

DEAR SIR—Your favor of the 23d inst. at hand, in which you state that the superintendent of the city schools was elected in 1893 for five years. He held a state certificate for five years dated January 1, 1891. During the last two years the majority of the people have been opposed to the superintendent, and now a majority of the board are opposed to him and have asked him to resign. There are two questions involved:

"One is: Did the board have a right to make a contract with the superintendent for five years when no member of the board was elected for more than three years? The other is: Had the board a right to make a contract with the superintendent for a longer time than the life of his certificate, even though he were granted a new certificate after the expiration of the old one?"

First.—Replying to the last question first, I would say that the policy of the law is that no teacher shall be employed who does not have a certificate. If a certificate is held by the teacher during all the time that he is teaching school, it occurs to me that that is sufficient.

Second.—The real question is, had the board authority to enter into a contract for five years for the employment of a superintendent? The law authorizes the board of directors to employ teachers and make contracts employing janitors, furnishing fuel and school supplies. This is unquestioned. The election of directors occurs every year, so that the people may give expression to their wishes in regard to the management and control of the schools. The directors are required by law to make out statements annually and publish the same, so that the electors may know about the expense of the schools. The annual elections are intended for the people to make changes, if needed; approve or disapprove of the management of school affairs by the board of directors.

If a contract may be made with a superintendent of city schools for five years, why not for twenty-five? If a contract can be made with him, why may not a like contract be made with all the teachers necessary, and all the janitors and carpenters to do repair work, and a contract made to furnish supplies and fuel, and, in fact, every contract anticipating the wants of the schools for the entire twenty-five years? If this can be done, then subsequent boards of directors have practically nothing to do.

In my judgment, such contracts are contrary to the intent and spirit of the law. I do not think a board of directors in office three years ago could deprive their successors of performing the functions of their office which the law intended them to perform. I see nothing in the statutes which leads me to think it was intended that the board of directors should employ teachers by contract running for more than one year. They only have such authority as is given them by law, and while the law does not limit their authority to one year in express language, yet, under the spirit of the law, it seems to me it should thus be limited. Certainly it should not extend beyond the time that the majority of the board hold their office. They cannot bind their successors.

I have found no case directly in point, but a number of authorit'es which enunciate this principle, I think, could be cited. In my judgment, a contract for the employment of a superintendent for five years is against public policy, *ultra vires* and void. Yours respectfully,

MILTON REMLEY,
Attorney-General.

CLAIMS—Certain claims being costs taxed against the state in suits brought by the board of railroad comissioners should be paid by the state.

DES MOINES, Iowa, May 1, 1896.

Hon. G. W. Perkins, C. L. Davidson and E. Dawson, Railroad Commissioners, Des Moines, Iowa:

GENTLEMEN—You request my opinion as to whether certain costs taxed against the plaintiff, the state of Iowa, or the board, should be audited and paid by the commissioners out of the appropriation made to defray the expenses of litigation. One of the cases referred to, I am informed, was brought to enforce the order of the board in regard to an overhead crossing. The other cases were brought in the name of the state, or the board of commissioners, against different railroads at Council Bluffs, to enforce an order of the board in regard to joint rates. In each case the costs, as I understand it, were taxed to the plaintiff.

The authority of the board to bring actions in its name or in the name of the state is derived from sections 16 and 28 of chapter 28 of the acts of the Twenty-second General Assembly. Section 28 of the act relates to suits brought to recover penalties for extortion or unjust discrimination, as provided by sections 26 and 27 of the act. Under section 16, however, it is made the duty of the board of railroad commissioners to bring an action to enforce any lawful order or requirement of the board. Under this section wherever the board has authority to make an order, whether that authority is derived from chapter 28 of the laws of the Twenty-second General Assembly or some other statute, the board is authorized by this act to enforce the order by proper proceedings in court.

Suits having been brought by virtue of the authority given under section 16, the costs and expense of such suits are provided for by section 31 of the act. This section 31 "appropriates $10,000 or so much thereof as may be necessary, to defray the necessary expenses of the commissioners in making investigation and prosecuting suits, and to pay all necessary costs attending the same."

In my judgment, the claim submitted to me should be properly audited by the commissioners and paid by a warrant issued by the state auditor upon the requisition of the commissioners.

I return the bill herewith.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICERS—WARDEN OF ANAMOSA PENITENTIARY GIVING AWAY STONE—Authority so to do. Liability therefor.

IOWA CITY, Iowa, May 4, 1896.

M. W. Herrick, Esq., County Attorney, Monticello, Iowa:

DEAR SIR—You request my opinion upon the following statement of facts:

"Last October Warden Madden gave to an employe of the penitentiary four car-loads of rock, the same being what is called rubble stone, all prepared for building purposes. He caused it to be loaded on the cars by convicts without charge. Is the warden, for such acts, liable to indictment for a violation of chapter 20, laws of 1874? To what does 'such stone' in the fourth line of said page refer? If not so liable to indictment, is he liable for the violation of any provision of the statutes?"

In regard to this I would say the title of chapter 20 clearly indicates the purpose, viz: "For the breaking and loading of stone by convict labor at the Anamosa penitentiary and the state quarry to be used in improving highways and streets by macadamizing." Section 1 of the act apparently contemplates that all refuse stone which is not used for building purposes by the state shall be broken up into macadam. Section 3 provides for the furnishing of such broken stone to any county, township, road district, town or city. Section 2 seems to contemplate the event of many counties making application therefor. Taking the entire act together, I would not say that it was the duty of the warden to break up stone into macadam unless there was demand therefor, or future orders to be filled. In prosecuting the work of the state, stone of a certain kind being needed, there might be a great deal of refuse stone not used by the state, and in advance of the orders from counties, townships, etc., who are entitled to receive the broken stone, I cannot think that the legislature intended the work on the state buildings to be delayed until all of the refuse stone was thus broken

In the last sentence of section 3 of the act, the phrase, "such stone," occurs twice. The requisitions for such stone (that is, stone broken suitable for macadam) shall be filed in the office of the warden and he shall fill the same in rotation in the same order as they are received by him, and none of such stone (evidently stone broken for macadam) shall be used or disposed of for any other purpose whatever, except for the use of the state and such purposes as are named in said act. I do not think that this refers to any stone other than that which may be broken for macadam. The evident intent of the legislature was that counties, cities, etc., should have all macadam that was broken up so that their orders might be filled.

It will be noticed that disposing of "such stone" is not made a criminal offense and there is no penalty for a violation of this act in itself.

I do not find any section of the statute which in express terms is violated by the act of the warden referred to. He is the general superintendent and financial agent of the state. (McClain's code, sections 6141, 6147 and 6217.) He must have considerable latitude. It may be that the stone loaded upon the cars was such as could not be used, and that putting the same on the cars was no greater labor than carrying it off to throw on the dump.

You will probably recall that chapter 20 of the acts of the Twenty-fifth General Assembly, was enacted during the "good roads" agitation. It was

then thought that many counties would jump at the chance to get macadam by paying the freight on it for county roads. The result in this respect does not meet the expectation. It would, in my opinion, be the sheerest nonsense to require the warden to break up stone and pile it, not knowing what would become of it. If there is an excess of refuse stone beyond what is needed for macadam, I can conceive of a condition under which it might be perfectly proper for the warden to give it to anyone who would take it away. I cannot, without knowing more of the facts, say that the warden acted improperly, much less criminally.

If there is any law violated by said act, sections 5274 and 5275 of McClain's code might authorize an indictment for a misdemeanor, but I do not think the act complained of was prohibited by any statute that even under these sections the warden could be punished.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICERS—SHERIFFS—COMPENSATION—Sheriff or his deputy must attend district court; cannot perform duties by bailiffs. If deputy sheriff attends court instead of sheriff he cannot recover compensation as bailiff.

IOWA CITY, Iowa, May 4, 1896.

W. E. Gray, Esq., County Attorney, Rockwell City, Iowa:

DEAR SIR—Your favor of the 1st inst. at hand. You ask my opinion upon an agreed statement of facts relative to the right of a deputy sheriff to act as bailiff and receive pay as such while he is deputy sheriff. Enclosed I send you a copy of an opinion upon the same subject which was given to H. F. Arnold, county attorney. It covers nearly all of the points raised by your statement of facts.

Let me add, however, in the first place, you say your county has less than 28,000 inhabitants That being so, I do not understand that the county must allow a salary to the deputy. Section 3 of chapter 75 evidently relates to the sheriffs referred to in section 2. The title to the act indicates its purpose. It was not to authorize the board of supervisors to pay the salary of a deputy except in those cases where the fees of the sheriff were turned into the county treasury. It is evident to my mind that the legislature never intended that in counties having less than 28,000 inhabitants, the sheriff should receive the fees the same as before the passage of this act, and in addition thereto the deputy should be provided with a salary paid by the county treasury.

If I am correct in this, then the pay of the deputy sheriff in your county stands exactly in the same position that it did before the passage of chapter 75, acts of the Twenty-fifth General Assembly. His compensation is a matter of contract between himself and the sheriff. He does the sheriff's work and the sheriff is entitled to the fees that he earns, and the county has nothing whatever to do with his appointment.

Under section 5062 of McClain's code, the sheriff is allowed a salary for attending district court, etc., in such sum as the supervisors may fix between $200 and $400. It becomes his duty, then (McClain's code, section 476) to attend the district court while in session, to preserve good order, and to act as the ministerial officer of the court. If he cannot do so personally, then his deputy should attend for him, and while so attending is performing sheriff's duties.

I think it is unquestionably the sheriff's duty either to personally attend the court or to have a deputy there, and where he is receiving the entire fees of his office and the salary fixed by the board for those services, he is entitled to no other compensation, whether it is performed by himself or by his deputy.

The case of *Bringolf v. Polk County*, 41 Iowa, 554, holds that for services performed by the bailiff, the sheriff is not entitled to pay therefor. The court says: "If the sheriff employs them (the bailiffs) in the service of papers for which a fee is allowed by law, they and not the sheriff are entitled to the fees, which must be taken into account in fixing the amount of their compensation. This will prevent the sheriff from performing his duties by bailiffs paid by the county; and at the same time recover fees for for the services performed by them."

Your statement of facts shows that the sheriff has allowed the deputy sheriff $100 a year as jailer of such county, and that the deputy sheriff verbally agreed that if the board would allow a compensation for the jailer, he would not ask for a salary. Under section 474 of McClain's code part of the duty of the sheriff is to "have charge and custody of the jail and other prisons of the county, and all the persons in the same." See also *McDonald v. Woodbury County*, 48 Iowa, 404. His services as jailer are a part of the duties of his office, and the allowance by the board of $400, which is the limit which they are authorized to allow under section 5062 of McClain's code, and $100 in addition thereto is in excess of their authority.

Under the facts stated, he would possibly be estopped from asserting that he was not performing the duties of deputy sheriff all the time.

Under section 476 of McClain's code, the sheriff appoints the bailiffs. The court only determines the number which are necessary. The ninth fact stated, viz., "that if a sheriff had been in attendance during said term, he and one bailiff could have performed all the duties required by said court," and from the eighth fact stated, "one bailiff was appointed besides Ira Baker, the deputy sheriff," makes it apparent that the appointment of Ira Baker, the deputy sheriff, as bailiff was for the purpose of discharging the sheriff's duties and enabling him to secure pay from the county, which, as deputy sheriff, he could not obtain.

My conclusion from the authorities is that the sheriff or his deputy must be in attendance in court all the time the court is in session. Second, that the sheriff cannot perform the duties of his office by bailiffs. Third, if the deputy sheriff, instead of his principal, attends upon the court he cannot recover compensation as bailiff.

I cannot think that the law ever intended that the sheriff, having accepted the office for the salary and the fees attached thereto, and employing a deputy to assist him, who is either earning fees for services performed or discharging other duties of the sheriff so that the sheriff is earning fees,

can, directly or indirectly, by appointing his deputy a bailiff, secure through the county compensation not provided by law.

I return you the agreed statement of facts, contrary to my usual custom, but I request that you send me a copy thereof.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

JURISDICTION OF A JUSTICE OF THE PEACE to try certain criminal cases where the defendant is charged with making illegal sales of liquor.

IOWA CITY, Iowa, May 5, 1896.

Owen Lovejoy, Esq., County Attorney, Jefferson, Iowa:

DEAR SIR—Yours of the 1st inst. at hand, calling my attention to section 2, chapter 35, laws of the Twenty-third General Assembly, and also to section 1540 of the code, and you ask:

"Has a justice of the peace jurisdiction to try a defendant for giving away or dispensing intoxicating liquors in violation of said section 2, chapter 35, laws of the Twenty-third General Assembly, and if so, does the above punishment provided for in section 1540, apply to such cases?"

In regard to this I would say that section 12, chapter 35, provides: "Every permit holder, or his clerk, under this section, shall be subject to all the penalties, forfeitures and judgments, and may be prosecuted by all the proceedings and actions, criminal or civil, and whether at law or in equity, provided for or authorized by the laws now or hereafter in force for any violation of this act, and the act for the suppression of intemperance, and any law regulating the sale of intoxicating liquors, and by any and all proceedings applicable to such complaints against such permit holders, and the permit shall not shield any person who abuses the trust imposed by it or violates the law aforesaid."

This seems to be as full and explicit as language can make it. It will be noticed that section 1540 of the code, only applies to those persons who have not a permit. It is construed in *State v. Douglas*, 73 Iowa, 279, as applicable only to the class of persons not holding permits. It will be noticed, however, that section 1542 is not limited to persons holding a permit, and the same is true in regard to section 1543 of the code.

Your statement of facts does not inform me whether the defendant holds a permit or not. I am of the opinion that if a person not holding a permit violates the provisions of section 2, chapter 35, laws of the Twenty-third General Assembly, he is amenable to the punishment provided for in section 1540 of the code, and a justice of the peace has jurisdiction to try the case. He is also liable under section 1542, and a justice has jurisdiction for the first offense. He could also be indicted for a nuisance under section 1543.

If, however, the person holds a permit, he would not be liable to prosecution before a justice under section 1540 of the code, but could be prosecuted before a justice under section 1542, and be indicted for keeping a nuisance under section 1543 of the code.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

1. FISH LAWS—What method of fishing prohibited. 2. REMISSION OF FINES—Who has power to remit same.

DES MOINES, Iowa, May 8, 1896.

Hon. Geo. E. Delavan, Fish Commissioner, Estherville, Iowa:

DEAR SIR—Your favor of the 4th inst. at hand, in which you ask my opinion as to "whether using a spoon hook with three hooks attached or made by welding the shanks of three hooks together, would be a violation of section 2 of the fish laws passed by the last general assembly?"

Section 2 is: "No person shall use more than two lines with one hook upon each line, for still fishing, trolling or otherwise." Three hooks upon one line would be a violation of the statute. Welding the shanks of the hooks together does not change the character of the hooks. They are still three hooks, and I think without question would be a violation of the section of the statute referred to.

You also ask, "Has a justice of the peace power to remit the fines of convicted persons?"

Unquestionably, no. The governor alone has that power. The board of supervisors has no such power, or even to take less than the full amount of the fine. Any attempt to change or remit a fine would leave the fine exactly as it was before. Execution could issue, or a mittimus issue upon the judgment, notwithstanding the pretended remission.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

AUTOMATIC CAR COUPLERS—What fills the requirement of the law.

DES MOINES, Iowa, May 9, 1896.

W. W. Ainsworth, Esq., Secretary Board of Railroad Commissioners, Des Moines, Iowa:

DEAR SIR—Your favor of the 9th inst. at hand, in which you ask my opinion upon the question, "Whether section 1, of chapter 23, of the acts of the Twenty-fourth General Assembly requires the automatic car couplers, therein referred to, to be so constructed that the knuckles can be opened or set for coupling by a contrivance operated from the side of the car, or is, provided the ordinary M. C. B automatic coupler, the knuckles of which are opened by hand from the end of the car before the coupling is done, a substantial compliance with the law?"

In reply I would say that section 1, of chapter 18, of the acts of the Twenty-third General Assembly prohibited the use of cars after the time stated therein "that are not equipped with safety or automatic couplers or draw-bars, such as will not necessitate the going between the ends of the cars to couple or uncouple them, but operate from the side of the cars."

This section was repealed by the acts of the Twenty-fourth General Assembly, and in lieu thereof was enacted section 1, of chapter 23, of the acts of the Twenty-fourth General Assembly. You will note a material change in the language of the two. This latter section provides for the equipment of cars "with automatic couplers so constructed as not to require

any person or persons to be between the cars when the act of coupling or uncoupling is done." There is a substantial difference between the old section and the new. The new section, as amended, contemplates that a coupler which does not require any person to be between the cars at the time the cars are coupled or uncoupled is sufficient.

I do not understand that this prohibits a coupler being used which requires the knuckles of the coupler to be set by hand before the cars come together, nor does it require a coupler that has a contrivance by which it may be operated from the side of the car.

The act of the Twenty-third General Assembly seemed to provide for such a coupler. That being repealed and another statute enacted in lieu thereof, shows an intent on the part of the legislature to change the law in that particular respect. The purpose of the law is to prevent the loss of life and injury to the persons of railroad men engaged in coupling the cars. The danger arises because of the bumpers giving away, or the man coupling getting his hands between the bumpers, or falling down between the cars when they are in motion, and the purpose of the law is to have couplers provided so that they will work automatically when the cars come together, so that any person need not be between the cars when the act of coupling is done. No possible danger could arise from being at the end of the car when the car is stationary. The coupler can be set by opening the knuckles of the stationary cars with no danger whatsoever; then, when the cars are brought together, the coupling is done automatically whether the man is ten feet away or a mile distant.

In my judgment, any coupler, howsoever it may be operated, which does not require the operator to be between the ends of the cars at the time the act of coupling or uncoupling is done, is sufficient in contemplation of the law.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INTOXICATING LIQUORS — PERMIT-HOLDERS — With what officer a permit-holder's bond should be filed. Effect of mistake, if filed with wrong officer.

DES MOINES, Iowa, May 12, 1896.

W. M. Jackson, County Attorney, Bedford, Iowa:

DEAR SIR—Yours of the 11th inst. at hand, requesting my opinion upon the "proper construction of sections 5 and 9 of chapter 3, of the acts of the Twenty-third General Assembly, with reference to the place of filing the bond of a permit holder," and ask my opinion as to the "proper disposition to make of the bond, and would the fact that the bond was not deposited with the auditor effect the liability of the sureties, or affect the admissibility of the bond in evidence in a suit for the breach of the same?"

There is a patent conflict between the provisions of the two sections. Section 5 provides that "the said bond shall be deposited with the county auditor."

Section 9 provides: "The clerk of the court granting the permit shall preserve as a part of the records and files of his office, all petitions, bonds,

and other papers pertaining to the granting or revocation of the permit, and keep suitable books in which bonds and permits shall be recorded."

This, without any other section, conveys the idea that the bond itself, after being recorded in the proper book, should be preserved by the clerk as a part of the records and files of his office. The provision of section 5 is unmistakable. There is a conflict that I would not undertake to reconcile, but if we construe the two cases together, the bond being recorded in the clerk's office in a suitable book, he would still have the record of the bond in his office, and if the bond were deposited for safe keeping with the auditor, both provisions of the law would be more nearly satisfied.

Second.—I do not think that the validity of the bond or the liability of the sureties, or the right to introduce it in evidence in any proceedings where competent, is at all affected by the question, as to who is the custodian of the bond. Suppose a mistake were made as to the custody of the bond? The sureties are not prejudiced thereby, nor does it affect the consideration of the bond.

On no principle of law that I can conceive of, could it be contended that the sureties were released because the bond was deposited for safe keeping in some place that the law did not contemplate. The bond being recorded in the clerk's office, the clerk could give a certified copy thereof, which, for all practical purposes, would be sufficient, but the original would be admissible in evidence in any proceeding if it be shown to be the original.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICERS — SHERIFFS — COMPENSATION — Certain fees that may be charged by sheriff.

DES MOINES, Iowa, May 18, 1896.

A. N. Wood, County Attorney, Grundy Center, Iowa:

DEAR SIR—Yours of the 15th inst. at hand, in which you ask my opinion upon the following questions, combining three in one:

"Is the sheriff entitled to $2, under section 5047 of McClain's code, in addition to the fees allowed in section 5060, for taking a prisoner to the penitentiary and making his return; also for taking a person to the insane hospital under an order of the commissioners; also for taking a person to the reform school under an order of the judge?"

In reply I would say that the compensation provided for in section 5060 of McClain's code, for the duties therein named, is stated in said section to be "as full compensation therefor." Section 5047 of McClain's code, in my judgment, has no reference to such orders. The sheriff in conveying a prisoner in his custody from the county jail to the penitentiary does not serve any papers, but on the other hand is simply, as an executive officer of the court, disposing of the prisoner in his possession as directed by the judgment of the court. It is a misuse of language to say that a sheriff serves a mittimus. The mittimus is issued and placed in the hands of the sheriff as authority for the warden of the penitentiary or the jailer to receive the prisoner and retain him in custody. He makes no return of the

mittimus. He may take a receipt from the warden of the penitentiary for the prisoner, but all the duties performed in regard to conveying the prisoner to the penitentiary, or the reform school, or a patient to the insane hospital, are embraced within the term, "conveying a convict, or patient," etc.

Even if the services performed were within the general class described in section 5047, yet specially naming the duties referred to in section 5060, would, under well known rules of construction, remove them from the general class and the special provision would prevail over the general. Under no view of the law do I think the sheriff could charge anything outside of the provisions of section 5060, for the services therein named.

I do not mean to say that if a prisoner is not in the custody of the sheriff and the sheriff must procure a warrant of the court for his arrest before he can be taken to the penitentiary, that he may not on such warrant charge the $2 for service and such other fees as may be allowed by the law. But where the prisoner is in jail or in court at the time the sentence is given, no warrant is needed and no service of any paper is made such as is contemplated in section 5047.

Second.—You further ask: "Is the sheriff entitled to $2 under section 5047, for serving a mittimus, where a person is convicted by the district court and sentenced to serve a term in the county jail, or is it covered by the fees provided by section 5054 of the same code?"

The general form of a mittimus or "warrant of commitment," as it is called, is given in section 5630 of McClain's code. A person sentenced is presumed to be in the custody of the sheriff as a ministerial officer of the court. If he is not on bail, he is brought into court by the sheriff from the jail. I cannot conceive how a mittimus can be served in the sense of serving an execution or a warrant. It is simply a command to the sheriff to receive the prisoner into custody and detain him in the jail. The sheriff could not serve a paper on himself very well. Hence, I do not think a mittimus is such an order as the sheriff is entitled to anything for serving, for there is no service.

Section 5054 provides a small fee for the sheriff for each commitment to the jail. The law requires him to keep a jailer's book, stating the date of commitment, the offense, etc. For receiving the prisoner and entering the record on the jailer's book, the law allows twenty-five cents. I think the sheriff is entitled to this fee from whatever source the prisoner is received; from the justice court or the district court. But I do not think he would be entitled to a commitment fee before trial, and afterwards the same fee for keeping the prisoner there after sentence.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF SUPERVISORS—NATIONAL GUARD—The board of supervisors has no authority to appropriate money to build an armory for the use of a company of the Iowa National Guard.

DES MOINES, Iowa, May 22, 1896.

E. C. Ebersole, County Attorney, Toledo, Iowa:

DEAR SIR—Your favor of the 21st inst. at hand, in which you ask my opinion upon the question, whether or not the board of supervisors of a county are authorized by law to make an appropriation from the county fund to aid in building an armory for the use of a company of the Iowa National Guard? This is not the exact language of your inquiry, but the substance of it.

In reply to this I will say the board of supervisors are by law given certain powers and authority, but are limited in their powers to the provisions of the statute. I might compare them to agents acting under a limited power. It is an erroneous idea that the board of supervisors may deal with the county funds or property as freely as an individual may do with his own There must be authority of law for everything done by the board. Outside of the provisions of law, they are without authority whatsoever.

The county taxes are voted and levied for the specific purposes provided by law. The board of supervisors would have no authority to divert any of the money from the purpose for which they were authorized to collect the same. I find no provision of the statute which would authorize the board of supervisors to tax the people of your county to build an armory for a company of the Iowa National Guard. Maintaining a military company is not one of the powers conferred upon the county. However important such an organization may be is immaterial to the inquiry. The state gives such support to such organizations as the judgment of the legislature thinks best, but it has in no place authorized the board of supervisors to tax the people to raise money to build armories or to equip military companies or maintain such organizations.

It has been suggested that because the sheriff may call upon military companies as a *posse comitatus* it would be proper for the county to aid in having an effective *posse comitatus* always subject to call. However this may be, the legislature has not yet taken this view of it or seen the necessity of giving the board of supervisors such authority. If because of such suggestion the county could make appropriations of the kind inquired about, the same reasoning would apply to furnishing armories and equipment for the military companies. Many companies might be organized and many armories built. A small standing army might be quartered on the county in times of peace. Following the idea to its limit shows the absurdity.

I have no question in my own mind that an appropriation of the county funds to build an armory is without authority of law and a misapplication of the people's money to purposes never intended.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

JOINT RESOLUTION OF THE LEGISLATURE — EFFECT — Money cannot be appropriated by a joint resolution of the legislature.

DES MOINES, Iowa, May 26, 1896.

Col. C. H. Gatch and Hon. H. H. Trimble, Members of the Soldiers' and Sailors' Monument Commission, Des Moines, Iowa:

DEAR SIRS—You have requested of me my official opinion "in regard to the authority of the soldiers' and sailors' monument commission of the state of Iowa, under the second paragraph of joint resolution No 19, adopted by the Twenty-sixth General Assembly. The special inquiry we desire to make is whether the commission has authority to appropriate public money or contract indebtedness for the purposes contemplated therein?"

In regard to this I will say that while there is great difference of opinion in regard to the force and effect of a joint resolution, concurrent resolutions, and wherein they differ in their binding force from a statute or a law, yet I do not think, in the face of our constitutional provision, there can be any doubt that "no money shall be drawn from the treasury but in consequence of appropriations made by law."

Section 24 of article 3 of the Constitution.

Section 1 of article 3 of the constitution provides: "The style of every law shall be—'*Be it enacted by the General Assembly of the State of Iowa.*'"

To my mind a joint resolution does not have the force and effect of a statute or a law enacted by the general assembly under the forms of the constitution. There is no constitutional provision in our state prescribing the manner of adopting resolutions, nor their effect. The theory of the constitution seems to be that the legislative will, which is binding upon the officers of the state and the public generally, shall be expressed by laws regularly enacted in accordance with the constitution. I do not mean to say that resolutions of either of the houses, or joint resolutions adopted by both houses are not binding upon the officers, the members and employes of such houses, or that such resolutions may not express the sentiment or wishes of either house or the general assembly, but they are not to be considered as laws of the state in the general acceptation of the term.

Resolutions of congress and the practice in regard thereto cannot be considered as a precedent or authority under our state constitution, which contains no reference to resolutions.

In order to enact a law the bill must be assented to by a majority of all members elected to each branch of the general assembly, and the question upon the final passage shall be taken immediately upon its last reading and the nays and yeas entered upon the journal. (Section 17, article 3 of the constitution.) No such formality is required of a resolution.

The senate rules of the Twenty-sixth General Assembly provide: "Every bill and joint resolution shall receive three several readings previous to its passage." Rule 16 of the senate provides that "on each bill and resolution the title thereof shall be endorsed." House rule 57 of the same assembly provides: "Joint resolutions shall not be required to be framed or treated as a bill." Nothing in the constitution requires the governor to approve any resolution.

A resolution may pass the house without three readings, or having the yeas and nays called. It may be adopted without having received what is called a constitutional majority.

I refer to this to show there is a well defined distinction between joint resolutions and laws. The joint resolution in question does not purport to appropriate any money for the purpose of carrying it out (if it did it would be invalid); nor does it purport to authorize the expenditure of any money for which an additional appropriation is or may be required. It conveys to the commission an expressed wish and will of the general assembly which may well be considered morally, if not legally, binding upon the commission.

If there were funds on hand by which this will could be carried out, I would not question the right or the duty of the commission in thus carrying into effect the resolution. But I doubt the authority of the commission to expend money or incur indebtedness beyond the appropriation previously made for the purpose of erecting the monument. Section 10 of chapter 70 of the acts of the Twenty-fourth General Assembly provides: "No contract shall be made, nor any plan or design for any monument adopted, nor work done under the provisions of this act, which contemplates an expenditure exceeding $150,000, for the erection and full completion of the monument." That sum was appropriated by the first section of the chapter.

Chapter 136 of the acts of the Twenty-second General Assembly appointed the commission and appropriated $5,000, to be expended in preparing a site and foundation for a monument. Section 10 of chapter 70, of the Twenty-fourth General Assembly, placed a limit to the total cost of the monument, including everything necessary to complete it.

I am clearly of the opinion that a statute enacted by the general assembly cannot be repealed by joint resolution. Section 10, of chapter 70, of the Twenty-fourth General Assembly, is not affected by this resolution, and I do not think that the joint resolution referred to would authorize the commission to enter into a contract which would increase the cost of the monument when completed, in excess of $150,000.

I do not think it would be good doctrine to say that the legislature by resolution could authorize contracts to be entered into which would require the expenditure of money, for the payment of which no provision has been made by law It is plain by the constitution that appropriation of money must be made by law. To say that it is in the power of the legislature by resolution to authorize contracts to be entered into, which create an indebtedness against the state, is only one way of evading the constitutional provision.

Suppose this commission should incur an indebtedness acting under this resolution. No money could be drawn to pay the debt without further legislation. It would then be expending money and incurring an indebtedness without authority of law.

In my judgment the commission would be justified in carrying into effect the resolution of the legislature so far as it may be done with the unexpended balance of the appropriation made by the Twenty-fourth General Assembly, but beyond this I do not think it would be authorized to go.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICERS — COUNTY ATTORNEY — DUTIES — The county attorney is not required to appear for a school board in litigation to which it may be a party.

DES MOINES, Iowa, May 27, 1896.

J. W. McGrath, County Attorney, Eagle Grove, Iowa:

DEAR SIR—Yours of the 25th inst. at hand, in which you ask whether it is the duty of the county attorney to appear for school boards in the trial of appeal cases before the county superintendent?

In reply to this I will say that chapter 8 of title 3, being sections 267 to 269, inclusive, of McClain's code, define the duty of the county attorney. There are a number of other places in the statute which refer to the specific duties of the county attorney, but in no place that I can find does the statute require the county attorney to appear for the different school boards of the county in any case whatsoever. The school boards are the representatives of a different corporation. There are a number of such corporations in each county. The labor and drain upon the time of a county attorney to be counsellor for all such organizations might be enormous

Section 269, requiring the county attorney to give written opinions and advice to the board of supervisors and other civil officers in their respective counties * * * limited his duties "to all matters in which the state or county is interested, or relating to the duties of the board or officers, in which the state or county may have an interest."

I think the fair conclusion from the different statutes is that the county attorney must appear in all cases in which the state or county is interested, and give opinions and advice in all matters in which the state or county is interested, but in none others. School districts, being independent organizations, cannot demand of the county attorney gratuitous service for them.

Yours truly,

MILTON REMLEY,
Attorney-General.

OFFICIAL NEWSPAPER—PROCEEDINGS OF BOARD OF SUPERVISORS—1. What should be published. 2. The publisher of an official newspaper cannot add matter to the copy furnished by the auditor and collect from the county for such matter so added.

DES MOINES, Iowa, May 28, 1896.

W. F. Kopp, County Attorney, Mt. Pleasant, Iowa:

DEAR SIR—Your favor of the 22d inst. at hand, asking my opinion upon four different questions. I enclose you copy of an opinion given to C. G. Saunders, County Attorney, April 16th, which I think is a sufficient answer to two of your questions.

Your first question is: "Shall bills allowed during the vacation of the board of supervisors be published?"

There are very few bills that can be allowed during vacation. The pay of jurors and grand jurors and witnesses before the grand jury are all that occur to me now that can properly be paid without an action of the board of supervisors.

I think it would be well to incorporate in the schedule of bills which is published, a general statement: "Amount paid grand jurors, so much, for such a term of court." "Amount paid petit jurors, so much." "Amount paid witnesses, so much." The law is somewhat obscure upon this point and I make this as a suggestion which occurs to me is sufficient.

Your fourth question is: "Can a newspaper publish the proceedings according to its own notion; that is, add to or subtract from the copy furnished by the auditor? If the auditor does not furnish an official paper a copy of all the proceedings, can it then add to the copy so furnished and collect for the part so added?"

I have been told that that has been done in one or two cases that afterwards found their way to the supreme court, but the question of the right of the papers to do so was not involved in the record in the supreme court and there was no decision upon this point.

I think there is a popular misconception as to the rights of the publishers to publish proceedings. It is assumed that the statute fixes the rate for publishing such proceedings. Section 428 of McClain's code says: "The cost of such publication shall not exceed one-third the rate allowed by law for legal advertisements." The rate allowed by law for legal advertisements evidently refers to section 5112 of McClain's code, which says: "The person or officer desiring such publication shall not be required to pay more than $1 per square of ten lines," etc. This fixes the maximum that may be charged, but the board of supervisors would be authorized to fix even a less amount.

I think it goes without saying that a publisher of a newspaper can only collect pay for such publication as is furnished to him by the proper authorities. If the auditor should unjustly refuse to furnish to the official paper matter which the law requires to be published, the publisher's remedy would be against the auditor, but a publisher has no right to assume the duties of the board of supervisors or of the auditor, in determining what shall be published, and I think, on principle, he can only collect pay for the publication of such matter as is furnished him by the auditor under direction of the board.

Yours truly,

MILTON REMLEY,
Attorney-General.

CENSUS—Has legal effect only from time it is completed and officially declared.

IOWA CITY, Iowa, May 30, 1896.

E. H. Swasey, Esq., County Attorney, Denison, Iowa:

DEAR SIR—Your favor at hand in which you ask my opinion upon the following question:

"The state census was taken in 1895, as of date January 1, 1895. The statement of the official count was not issued by the secretary of state until September, 1895. The clerk of the district court entered upon the duties of his office on the first Monday in 1895. The fees of his office during the year amounted to something over $2,100. The county auditor sent his tabulated statement of the census return to the secretary of state in the month

of April, and such statement showed the population of the county to be about 20,069, which is an increase over the previous census. The question is whether, during the year 1895, the clerk is entitled to an increase of salary as provided by section 5036 of McClain's code."

In regard to this I would say that in a number of places in the statutes where something is to be determined by the population of a county, appears the statement, "as determined by the last state or national census," and I am inclined to the view that the last state or national census must be used to determine the population of the county as stated in section 5036 of McClain's code. The clerk was elected to the office, and accepted his position with the understanding that his salary was determined by the population of the county as it then was and as shown by the census which had been last taken, and I am inclined to the view that he is concluded by that census until another census is taken and officially declared.

Suppose there had been a decrease in the population of the county so that, under section 5036, the limit of the clerk's salary would be $1,100. Would he have accepted that $1,100? Would he not have insisted that the salary was fixed at $1,300 when he began the year, and that it could not be changed during the year?

The secretary of state may require a part of the census to be retaken, or all of the county, and until the compilation in the office of the secretary of state is fully made and announced, I do not think it can be said that the census has been completed.

Take another view: suppose it could be demonstrated in some county that the population was more than 20,000 so as to increase the salary under the census in 1890. Could it be claimed that ever since 1890 the clerk could recover the increased compensation?

While the matter may not be free from doubt, I am of the opinion that the last state or national census must control until such time as a new census is taken and officially stated by the secretary of state.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICERS—SHERIFF—COMPENSATION—Right of sheriff to mileage or actual expenses for service of notices in civil cases.

IOWA CITY, Iowa, June 2, 1896.

J. W. Hallam, Esq., County Attorney, Sioux City, Iowa:

DEAR SIR—Your favor of the 11th ult. came duly to hand at a time when I was engaged in supreme court work and could not give the matter immediate attention.

You refer me to the laws of 1894 in regard to the compensation of sheriffs, and say:

"Our sheriff claims he ought to have his expenses paid in serving notices in civil cases, although the law seems to make no provision for it. He also claims it would take all of his salary to pay his expenses in serving civil papers unless he is reimbursed."

You ask my opinion in the matter. The language of section 2, chapter 75, seems to be plain and explicit. It says: "Sheriffs in counties having a

population of more than 28,000 and less than 45,000 according to the last state or national census, shall pay into the county treasury all fees received by them and their deputies in excess of $2,300 per annum; in counties having a population of more than 45,000, *all fees received by them* and their deputies in excess of $3,000 per annum." Provision is made thereafter for the payment to the sheriff of "all expenses actually and necessarily paid by him while in the performance of official duties in serving processes in criminal cases."

The fees retained by the sheriff under the provisions of this act shall be in full compensation for all services. Section 3 of the act provides for the employment of one or more deputies by the board of supervisors. Section 4 repeals all acts and parts of acts inconsistent with this act.

I have given the matter no little thought, and have not been able to arrive at a conclusion that is perfectly satisfactory to my mind, because the strict language of the statute would seem to work the injustice that your sheriff complains of. I can readily see that the expense and cost to the sheriff of attending to the duties of his office relating to civil business may consume a large part of his compensation which he is allowed to retain. The provision for the payment of actual expenses in criminal cases seems to negative the idea that he shall be allowed for his expenses in serving all civil processes.

If the sheriff should report the net amount received from fees in civil business after paying the expenses, this does not seem to be a compliance with the statute. The language is explicit. "They shall pay over *all* fees received by them and their deputies in excess of $3,000," etc. Yet, one reading the statute without carefully analyzing it, obtains the idea that it was the intention of the legislature that the sheriffs should receive $2,300 and $3,000, respectively, as their net income from the office, possibly with the keeping of their own team or teams in discharging the duties.

The last clause of section 3 would seem to preclude the sheriff receiving a salary of $200 to $400 from the county. The difficulty met with here is such as is often met in fitting a new law to an old order of things. I have tried to make myself believe that the intention of the legislature was that only the net fees after paying expenses for civil business should be paid over, but this is unsatisfactory, and if we cut loose from the plain language of the statute I cannot foretell where we would land. I cannot think such intent of the legislature can be derived from the language of the statute.

Another suggestion: Section 13 of chapter 94, acts of the Nineteenth General Assembly, being section 5052 of McClain's code, provides: "Mileage in all cases required by law, going and returning, per mile, 5 cents." This mileage is presumably to pay the expense of travel. In one sense it may not be considered fees. Mileage is defined to be: "An allowance by law for travel to defray expenses," etc. Bouvier says: "It is compensation allowed by law to officers for their trouble and expenses in traveling on public business" The connection in which it is used in the act and in section 3788 of the code of '73, renders it difficult to make a distinction between fees and mileage. There is a difference, although in the manner in which the terms are used in the statute, but it does not make the distinction very apparent.

If the sheriffs were not required to account for and pay over to the county their mileage, the injustice complained of would largely be done

away with. I would be more inclined to think the legislature intended to make this distinction between fees and mileage than to think it was the intention to require the sheriff to pay one-third or two-thirds or all of the fees that they were allowed to retain, as expenses for serving civil processes.

The sheriff cannot refuse to take a civil process because there is no provision of law by which he may be reimbursed for his actual cash expenses in serving it There seems to be an oversight in passing this act. It was certainly unfortunate. They did not plainly express what was intended so as to work no injustice to the sheriffs.

Under the circumstances, I think the sheriff would be justified in retaining, in addition to the sums fixed by section 2 of chapter 75, Twenty-fifth General Assembly, any money received by him as mileage and report and pay over all fees properly so called, in excess of the limit of his compensation I would advise that they keep a strict account of all sums received as mileage and report the same to the board of supervisors; also let an agreed case be made and submit the same to the court for a judicial construction. I think the court would take the view that it was not intended that money received as mileage in civil business should be paid into the county treasury.

You ask what the practice is in other counties. Of the eleven counties to which the law applies, I have been informed that the board of supervisors in ten of these allow the sheriffs their actual expenses for serving civil processes. In Polk county, however, the right of the sheriff to such expenses, I am told, has been disputed and payment of the same has been refused. I have also been informed that there will be a test case to determine the question in the district court.

I can see that the allowance of expenses in civil cases might lead to great abuse. Service of some notices would leave the county in debt, if expenses were allowed, especially if it included livery hire I think the more just way, and liable to less abuse, would be to let the sheriff retain what he receives for mileage, and yet there are difficulties in that plan.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSANE PRISONER—No formal commission required to determine sanity of prisoner serving sentence in the penitentiary.

DES MOINES, Iowa, June 5, 1896.

Hon. F. M. Drake, Governor of Iowa, Des Moines, Iowa:

DEAR SIR—In regard to the application which has been made, and affidavits presented, asking you to appoint a commission to examine as to the sanity of one W. F. Pieper, who is now confined in the penitentiary at Anamosa, on a charge of placing an obstruction on the railway, I will say the affidavits presented, if they tend to show anything, tend to show that he was insane before his trial in the district court of Scott county. The presumption is that his insanity would have been urged as a defense, could it have been made available.

Under section 2293 of McClain's code, the governor is authorized to inquire into the facts and upon being satisfied that a convict, after being convicted, becomes insane, he may be sent to the insane hospital, and the sentence may be suspended during such time. It may be that the case in question will come under the provisions of this section. At all events, it requires no formal commission, but inquiry can be made in regard to the facts, and if satisfied after such examination that justice or mercy requires him to be sent to the hospital, a warrant should issue accordingly.

I would recommend that the matter be further investigated and a report in regard to his condition from the warden, or prison physician, would probably be all that is necessary. I return you herewith the papers.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COSTS—REMISSION BY GOVERNOR—The governor has no power to remit costs in a criminal case.

DES MOINES, Iowa, June 15, 1896.

Hon. F. M. Drake, Governor of Iowa.

DEAR SIR—You have referred to me the application of William Larson for the remission of the costs taxed against him in a criminal case in which he was adjudged guilty of selling intoxicating liquors in violation of law, and you ask my opinion as to whether or not you have the authority to remit the costs. In reply I would say that in my opinion you have not the authority to remit costs taxed against a defendant in a criminal case. This question has been passed upon by the supreme court and it was held in the case of *State v. Beebee*, 87 Iowa, 636, that the governor of this state has no authority to remit costs and should he do so his act in so doing is void and such remission is no bar to the recovery of the costs taxed in the case. The Beebee case is directly in point and there can no longer be any question as to the want of authority on the part of the governor to remit costs in criminal cases.

Yours truly,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICERS—SHERIFF—COMPENSATION—What compensation the sheriff, in a county having a population of less than 28,000, is entitled to. In such a county, sheriff is not entitled to have a deputy paid by the county.

IOWA CITY, Iowa, June 18, 1896.

Hon. Shirley Gilliland, County Attorney, Glenwood, Iowa:

DEAR SIR—Your favor of the 13th inst. I found awaiting me on my return home this morning. You ask my opinion upon the following:

"Our board of supervisors at the last meeting made an order allowing our sheriff one deputy and fixing the salary for same, and declined to allow the sheriff any salary. This was under chapter 75 of the acts of the Twenty-fifth General Assembly. Does this act necessarily repeal section

23 of chapter 94 of the Nineteenth General Assembly, relating to salary for 'attending court and such other service for which no compensation is allowed by law?' "

In regard to this I would say, that I have not construed sections 2 and 3 of chapter 75 as applying to counties having a population of less than 28,000. Section 1 of the chapter seems to be general, and the quarterly report will enable the board of supervisors to see how much is received by the sheriff for his services, and thereby enable them to act intelligently in fixing his salary, which, under section 23 of chapter 94, Nineteenth General Assembly, shall not be less than $200 nor more than $400.

It is very evident to my mind that the term, "each sheriff," as it occurs in section 3, relates to the sheriffs referred to in section 2 of chapter 75. The act was to limit the compensation of the sheriffs and not to increase it If sheriffs in counties having a population of less than 28,000 are not required to pay any of the fees into the county treasury, then it would increase their compensation to allow a salary for a deputy sheriff. There is nothing in the act to indicate, to my mind, that the legislature intended that counties should pay a deputy sheriff when the county received no part of the earnings of the sheriff's office.

Your county having less than 28,000 population, I do not think is affected by chapter 75, except that the sheriff shall report quarterly the fees received, etc.

I cannot see that chapter 75 is inconsistent with section 23, chapter 94, of the Nineteenth General Assembly, and hence would not be repealed. I am inclined to the opinion that your board of supervisors erred in allowing the sheriff a deputy and fixing his salary, and also that it erred in not allowing the sheriff at least $200 salary, and as much more, if any, as was necessary to give him a reasonable compensation for his office.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICERS—JUDGE OF SUPERIOR COURT—COMPENSATION—One who under appointment fills the office of judge of the superior court during the sickness and consequent disability of the person elected to that office is entitled to the salary—One who holds the office but does not perform the duties is not entitled to a salary.

IOWA CITY, Iowa, June 19, 1896

Robert M. Marshall, Esq., County Attorney, Keokuk, Iowa:

DEAR SIR—Yours of recent date at hand, calling my attention to chapter 77 of the acts of the Twenty-sixth General Assembly, amending section 4, chapter 143 of the acts of the Sixteenth General Assembly, and stating that an appointment had been made to the office of judge of the superior court under the provisions of said chapter 77, and you ask my opinion upon the following question:

"Is the county bound to pay said appointee $1,000, in addition to the $1,000 said county now pays to Joseph C. Burk, who has been sick for something like a year?"

You will notice that no provision is made, whatever, for the payment of such appointee in express terms. The statute is silent upon the question as to the manner of paying the incumbent of the office. You will also notice that under the statute there is no authority given for payment of two salaries.

I do not think it will be disputed that a public officer is entitled only to the compensation which attaches to the office as provided by the statute. In other words, the statute is the only authority for the payment of compensation to a public officer, and unless authority for the payment is found in the statute, express or implied, there can be no compensation. I might quote many cases to sustain this proposition.

It is equally true that possession of an office carries with it the right to the emolument pertaining to the place. One entitled to an office is entitled to the compensation pertaining to that office (*McCue v. County of Wapello*, 56 Iowa, 698; 19 Am. and Eng. Enc. of Law, 526.) As between the public and the incumbent of an office, the right to compensation attached to the office depends only upon the performance of the service required. (*State v. Stanley*, 66 N. C , 59)

It is, so far as this inquiry is concerned, unnecessary to discuss the rights of a *de facto* and a *de jure* officer, or the liability of a *de facto* officer to a *de jure* officer for the compensation. I think it goes without saying that one entitled to hold a public office is not entitled to the compensation thereof unless he performs the duties of the office

In my opinion these principles control the question which you present. The present incumbent of the office, during the inability of Judge Burk, is discharging the duties of the office. He is not an interloper: not an intruder into the office, but is regularly appointed under and by virtue of the authority given by the statute, to enter upon the discharge of the duties of the office. I do not have a question but that he is entitled to receive the compensation or emoluments pertaining to the office.

The second inquiry is whether Judge Burk, who is not performing the duties of the office, is entitled to receive such compensation I know of no principle of law which would entitle him to recover compensation for services which he does not render. It cannot be said that there are now two judges of the superior court. The present incumbent is vested with all the powers of the superior judge and, while he is acting, after being duly qualified as required by law, and being duly appointed, Judge Burk cannot be said to be the judge of the superior court. So long as his disability continues, the present incumbent is rightfully discharging the duties of the office.

I hardly think any lawyer would contend that an order made by Judge Burk while his place on the bench is held by the present incumbent, would be of any validity whatsoever. By virtue of chapter 77, acts of the Twenty-sixth General Assembly, he ceases to be judge during the continuance of his disability, and the new judge is appointed *ad interim.*, hence, in my judgment, as between the present incumbent and Judge Burk, I am of the opinion that the present incumbent is entitled to the compensation of the office.

The only remaining inquiry is whether the board of supervisors may pay the salary to both Judge Burk and to the present incumbent. My

sympathies lead me to wish such might be the law. I understand that the kindly feeling entertained by the community would approve of the payment to both Judge Burk and the present incumbent of the office the salary provided by law for an incumbent, if it could lawfully be done. It is a trite saying that "hard cases make bad law." I am sure it would be a bad precedent to pay to one not discharging the duties of the office the salary pertaining to the office, and to pay to one who is discharging the duties the same amount of salary. There is no authority of law for so doing.

Suppose the salary were paid to Judge Burk under the present circumstances, and also to the present incumbent, then the present incumbent should become disabled because of sickness and another man appointed to fill the place during his disability, then the present incumbent and Judge Burk both would be entitled, by the same reasoning, to compensation. And suppose the one then upon the bench should become disabled and he was put on the retired list at full salary. There might be three or four salaries paid to persons not discharging the duties of the office if the bars were once let down. The statute fixes a salary to the office and does not authorize, practically, a pensioning of one who does not discharge the duties of the office.

I have been told that the thought of those who advocated the passage of chapter 77, acts of the Twenty-sixth General Assembly, was that the salary might be continued to Judge Burk, and also be paid to the present incumbent. If that is true, they were unfortunate in not so providing. I know of no way of stretching the statute to make it embrace subjects and powers not included therein. In this particular case I would be glad to be able to reach a different conclusion, but it is impossible for me to do so.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

NOTICE OF SCHOOL ELECTION TO VOTE UPON ISSUING BONDS —What notice should be given—Effect of failure to give such notice.

IOWA CITY, Iowa, June 19, 1896.

Hon. Henry Sabin, Superintendent Public Instruction, Des Moines, Iowa:

DEAR SIR—Your favor of the 15th inst. at hand, in which you ask my opinion upon the following questions:

"In giving notice for a meeting of the electors to vote upon the question of issuing bonds under section 1822, will publication of the notice in newspapers within the district take the place of the notices directed by section 1742 to be posted in five conspicuous places within the district? If such newspaper notice is given, will failure to post the five notices, as directed by the law, injuriously affect the legality of the bonds when issued?"

In regard to this I would say that where the law fixes the time and place of holding an election, and at the same time provides for the giving of public notice it has frequently been held that a notice is not essential to the validity of the election, but I do not recall any case in which it is held that where a notice is required of the holding of a special election that the notice required by statute may be dispensed with.

The power to issue bonds by the directors in an independent school district is given by statute only after an affirmative vote of a majority of the electors voting at a general or special election, called in the manner provided by statute. The legislature, in its wisdom, has provided that notice shall be posted in five places. You will notice that in nearly all the elections by school districts, district townships or independent school districts, the statute requires the notice to be given by posting. In independent districts having a population of not less than 15,000 a notice of the election must be posted in three public places, notwithstanding the publication in the newspaper. (Section 4, chapter 8, Eighteenth General Assembly.)

I would not like to say that the publication of the notice in one or more newspapers would take the place of the notice required by statute. I am aware of the decision of the supreme court of this state in the case of *Dishon v. Smith, County Judge, etc.*, 10 Iowa, 212, in which the supreme court says: "The voice of the people is not to be rejected for a defect, or even a want of notice, if they have in truth and in fact been called upon and have spoken. In the present case, whether there were notices or not, there was an election and the people of the county voted, and it is not alleged that any portion of them failed in knowledge of the pendency of the question, or to exercise their franchise."

If the legislature had intended to leave to the board of directors a discretion as to the notice given, and had required only reasonable notice, I have no doubt that the notice said to have been given by the Oskaloosa board of directors would be such reasonable notice, and possibly the election held, if it involved only the right to an office for a year or two, upon a showing that the electors generally participated in the election, might be held by the court to be sufficient. But bonds are to be issued, which are to be paid, possibly, by different persons from those who voted the bonds, and courts scrutinize more closely the acts of public officers which relate to fixing an indebtedness upon a municipal corporation.

I think the rule of law is well settled, that when an election authorizing the issuing of bonds requires a notice of a particular kind to be given, that the provisions of the law in regard to the notice must be complied with, and the will or judgment of the board of directors cannot be substituted for the provisions of the statute.

In regard to the second question, I am of the opinion that the failure to give the notice does injuriously affect the legality of the bonds when issued. I do not express an opinion whether the bonds, if issued and sold, and the independent school district receives the proceeds of the sale and erects a high school building as contemplated, could not, under any circumstances, be collected. Other elements might enter into the problem which would enable a recovery on the bonds, but the holders would be placed at a disadvantage, and may be required to affirmatively prove certain facts which they would not otherwise be called upon to do. I would have grave doubts as to the validity of the bonds if issued under such circumstances.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TRAVELING LIBRARY—Who entitled to—What must be done to secure same.

DES MOINES, Iowa, July 23, 1896.

Mrs. Lana H. Cope, State Librarian:

DEAR MADAM—Your favor of the 21st inst. at hand, requesting my opinion as to "whether a woman's club can, upon its own petition, become entitled to the privileges of chapter 49 of the acts of the Twenty-sixth General Assembly, or must twenty-five resident taxpayers petition that the privileges conferred by said chapter be given to said woman's club?"

In reply I would say that section 7 of the act provides: "Where no such library exists, and whenever twenty-five resident taxpayers petition therefor, such books or collection of books may be lent to any college, school, university extension center, Chautauqua circle, literary society, reading course, study club, or other association approved by the rules prescribed by the board of trustees of the state library," etc. From the wording of this section, I think it clear, first, that the privileges of this chapter can be conferred only where no such library exists, and second, that this first requisite being present, that upon the petition of twenty-five resident taxpayers the privileges of the act may be granted to any "college, school, university extension center, Chautauqua circle, literary society, reading course, study club," etc.

In all instances where no such library exists a petition must be signed by twenty-five resident taxpayers. If the woman's club mentioned contains twenty-five resident taxpayers who will sign said petition, this would be sufficient, but the woman's club is not entitled to the privileges of the act unless it complies with the provision of the act and files the petition required by the law. The signers of this petition must be resident taxpayers, but it is not required that they be members of the club, school, or association which desires the privileges of the act.

I think this fully answers your inquiry.

Yours truly,

MILTON REMLEY,
Attorney-General.

TAXATION—CITIES AND TOWNS—BOARD OF HEALTH FUND—Cities of the second class and incorporated towns have no authority to levy tax for a board of health fund.

DES MOINES, Iowa, June 25, 1896.

E. H. Swasey, County Attorney, Denison, Iowa:

DEAR SIR—Yours of the 17th inst. came duly to hand, in which you ask my opinion upon the following question:

"Can a city of the second class, or incorporated town, levy or cause to be levied, a tax for a board of health fund other than as a part of the general 10 mills levied in such corporation provided in section 496 of the code of 1873?"

You refer to the practice in your town in levying such a tax, and say: "Since the decision of *Staples v. Plymouth County*, 62 Iowa, 364, the validity of such levies has been questioned and the payment of such corporation tax refused."

Section 21 of chapter 151 of the Eighteenth General Assembly makes it the duty of the county to pay the expense of quarantining and caring for one infected with small-pox or other sickness dangerous to public health. All other expense of the local board of health must be paid by the township trustees or the city council of the city. Under section 561 of McClain's code, provision is made for the township trustees levying a tax to pay the expense incurred by the board. There is no such provision is regard to levying a special fund by cities or towns. Yet the cities or towns must pay the expense of the local boards of health, except such as the statute requires the county to pay.

In the absence of a provision authorizing a special tax for this purpose, I do not think cities or towns would have authority to make a levy. The right to levy a tax must have its basis in the law. Without a provision of the statute authorizing a tax to be levied, it is null and void.

My conclusion is that the expenses of the local board of health not paid by the county are to be paid by the city out of the general fund, and the city has no authority to levy a special tax therefor.

Yours respectfully,

MILTON REMLEY,
Attorney-General

INSANE PATIENTS—The county of which an insane patient is a resident, and not the state, is chargeable with the maintenance of such person at the insane hospital.

DES MOINES, Iowa, June 26, 1896.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—In reply to the inquiry which you make upon the statement of facts submitted by Dr. Gershom H. Hill, superintendent Iowa hospital for the insane at Independence, I would say that it does not appear to me that the support for the patient can be charged to the state at large.

It appears from Dr. Hill's letter that Mrs. Belu was the wife of a German Lutheran minister; that she was in the hospital a little over two years ago, and was supported for that time by Harrison county, where her husband was then preaching, but he moved to Sibley, Osceola county, where she became insane last winter. The family had relatives in Le Mars. The husband took her and the children to Le Mars, where he filed an information with the commissioners, leaving the children with relatives at Le Mars. She reached the hospital March 7th, and was discharged, recovered, on May 5th.

A few well recognized principles of law may be stated. The settlement of the wife is that of her husband.

A settlement once obtained continues until another settlement is obtained. The commissioners of insanity must find where the settlement of the insane person is, and state the same in their warrant, committing the insane person to the hospital. If Mr. Belu moved from Harrison county to Osceola county, and remained there one year without warning to depart, by section 4122 of McClain's code, he acquired a residence in Osceola county,

and Osceola county would be liable for the expense of caring for Mrs. Belu under section 2201 of McClain's code. If, however, he acquired no settlement in Osceola county, Harrison county would still be liable.

Under the facts stated, I cannot determine which county is liable, but one or the other of them certainly is, and the state should not be charged with her support. Yours respectfully,

MILTON REMLEY,
Attorney-General.

CRIMINAL LAW — PROSECUTIONS AGAINST CORPORATIONS— How prosecuted before a justice of the peace.

DES MOINES, Iowa, June 26, 1896.

M. W. Herrick, County Attorney, Monticello, Iowa:

DEAR SIR—Your favor of the 17th inst. came duly to hand. Absence from home and engagements in other duties have prevented an earlier reply.

You ask, "How can sections 2410 and 2412 of McClain's code be enforced against railway corporations and express companies? The offense punishable under either section is only a misdemeanor and I can find no way to proceed against a corporation criminally, except by indictment. For a violation of the section 2412, liquors may be seized and destroyed. Section 5711 of the code prescribes the manner of procedure on indictment."

In regard to this I would say that the absence of a provision authorizing a notice to be served upon the corporation in case an information is filed for a misdemeanor which is prescribed by section 5711 of McClain's code in case of an indictment, suggests that the method on indictment is not applicable to an information for a misdemeanor.

I fail to find any provision for the arrest of a corporation before a justice of the peace Sections 2410 and 2411, however, authorize proceedings against the officers, agents or employes of any such company. A corporation acts through its agent, and if the agent does the act in the name and on behalf of the company, he is criminally liable. I think the remedy against the agent and employes is probably all that was intended to be given to a justice of the peace. It will be a sufficient remedy if every employe or agent of the company who aids and assists in violating the law, is prosecuted and punished; it would secure an observance of the law on the part of the company. Yours respectfully,

MILTON REMLEY,
Attorney-General.

THE BRIDGE ACROSS THE MISSISSIPPI RIVER AT FT. MADISON IS REAL PROPERTY.

DES MOINES, Iowa, June 26, 1896.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—In response to your inquiry concerning the question presented by Mr. Walljasper, auditor at Ft. Madison, I would say I think there can be no question but that the bridge across the Mississippi river, at Ft. Madison, is real property. Section 808 of the code (1281 McClain's code) so onsiders it.

In *Oskaloosa Water Co. v. Board*, 84 Iowa, 407, it was held that the water company's plant at Oskaloosa, although upon leased ground, was real property for the purpose of taxation.

Section 808 has been construed in *Missouri Valley & Blair Bridge Co. v. Harrison Co.*, 74 Iowa, 283. Independent of the statute, by the common law a bridge, which is a permanent structure attached to real estate, could not, under any circumstances, be considered other than realty. Some people become confused in such matters because of the fact that the capital stock of a company which owns the bridge in the hands of the stockholders is considered as personal property. But there is a vast difference between the capital stock of a corporation and the property owned by the corporation.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—COLLECTION OF TAXES—STATUTE OF LIMITATIONS—The statute of limitations does not prevent the collection of taxes by distress and sale, though it might bar an action for the recovery of a judgment for the said taxes.

DES MOINES, Iowa, June 26, 1896.

C. F. Stookey, County Attorney, Shellsburg, Iowa:

DEAR SIR—In reply to your inquiry asking my opinion as to whether or not the collection of taxes on personal property which have been delinquent for more than five years is barred by the statute of limitations. It is stated that the tax has been carried forward from year to year as required by section 1326 of McClain's code.

I would say that section 1347 of McClain's code makes the tax upon personal property a lien upon any real property owned by him or to which he may acquire a title. It differs in regard to being a perpetual lien upon the tax levied upon the real estate itself. (*Bibbins v. Clark*, 90 Iowa, 230.)

The statute in regard to personal property does not say how long the lien shall continue nor is there a direct provision barring the collection of the tax at any time. The statute of limitations limits the bringing of an action within the time specified. (See section 3734 of McClain's code.) Theoretically, at least, the action is brought when the tax list is placed in the hands of the treasurer and the amount stated therein. The action of the officers, including assessors, board of equalization, board of supervisors, in making the levy is an adjudication of the amount that is due from the individual to the state and these acts constitute due process of law in taking the property of the person against whom the tax is levied. The tax list is the treasurer's sufficient warrant for distress and sale of personal property. (Section 1339.)

It is made the duty of the treasurer to collect the unpaid tax for previous years which appear upon his books. (Section 1328). The treasurer may sell any personal property upon which the tax is levied or any other personal property or real property belonging to the person to whom the tax is assessed. (Section 1347.)

Chapter 29 of the Fifteenth General Assembly, section 1, recognizes the continuance of the right of the county to collect personal property taxes.

It provides: "Where personal property tax has remained delinquent for four years or more, it shall be the duty of the board of supervisors to remit all the penalties and interest that may have accrued on such delinquent taxes."

I do not consider that any action is necessary to be brought to enable the treasurer to recover the personal property tax, if the person to whom it is assessed and levied has personal property or acquires real estate from which it can be collected. It is the treasurer's duty to take his tax list and to distrain personal property and sell the same in the manner provided by statute to pay such taxes. It is to all intents and purposes a judgment already when it appears upon the tax list and has been legally placed there.

I am aware of the decision of the supreme court in the case of *Burlington v. Burlington & Missouri River Railroad*, 41 Iowa, 134. In that case the city of Burlington waived its sovereign right to proceed in the statutory manner to enforce the payment of the taxes. It resorted to the court, brought an action in the court as a person, and the court rightly held that the statute of limitation which applied to the bringing of actions prevented the maintaining of the action.

So in the case of *State v. Henderson*, 40 Iowa, 242, it was held that since the county was liable to the state for the delinquencies in the taxes, the suit on the defaulting treasurer's bond was really an action by the county and the statute of limitations would run against the county.

I have no doubt that if the county were to bring an action to recover taxes delinquent more than five years, under the various decisions of the court it could not recover a judgment because of the statute of limitations. By so doing it would waive what is to all intents and purposes a judgment already. Becoming a party litigant in a court of justice the county must bring itself within the rules to entitle it to maintain an action, and its action would be governed by the rules of the law relating to such courts.

It is very different, however, when the county proceeds to enforce the payment of a tax in the manner provided by statute and against which there is no limitation fixed by the statute. A certified copy of the tax list in the hands of the treasurer or his deputy, takes the place of an execution issued upon a judgment. There is no provision of the statute limiting the treasurer in making his levy upon the personal property to collect such taxes.

The conclusive presumption arising from the statute of limitations is that the debt has been paid. This presumption is by statute made to arise only in case an action is brought in the court. If the legislature had intended any limitation to apply to taxes which may be collected by the treasurer, it would have so enacted.

My conclusion is that the statute of limitations does not prevent the treasurer from collecting delinquent personal property taxes by distress and sale so long as the tax remains unpaid.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

SCHOOL ELECTIONS — AUSTRALIAN BALLOT LAW — The Australian ballot law is not applicable to either regular or special school elections—Special school elections or meetings should be organized like the annual meeting, and the meeting thus organized can provide for the manner of conducting the election so as to prevent interference.

IOWA CITY, Iowa, June 29, 1896.

Hon. Henry Sabin, Superintendent Public Instruction, Des Moines, Iowa:

DEAR SIR—Your favor of the 26th inst. at hand, asking my opinion upon the following questions:

"Is the special meeting referred to in section 1822, code of 1873, one that can and should be organized like the annual meeting? If so, may the meeting thus organized so control its proceedings as to prevent confusion, electioneering, and interference with voters, in the room in which the meeting is held? Also, should the voting be done in the presence of the meeting thus organized, and in the room in which the meeting is held?

"If you are of the opinion that the special meeting is not like the annual meeting in its organization, but that it is simply and practically an election, then should such election be governed by sections 1063p, 1063z, 1063aa, and 1063bb, McClain's code?

"Is there any way in which electioneering in the immediate vicinity of the polls may be lawfully prevented?"

The question which I will first consider is whether what is known as the Australian ballot law, being chapter 33, acts of the Twenty-fourth General Assembly, is applicable to school elections. Section 1 of the act is as follows: "In all elections to be held after November 1, 1892, in the state for public officers (except those elected at school elections), the voting shall be by ballot, printed and distributed at public expense as hereinafter provided, and no other ballots shall be used."

It will be observed that the election referred to is the election for public officers, except those elected at school elections. An election upon the question of issuing bonds is not embraced in express terms within this exception, but the rule stated in the entire section relates only to the election of public officers.

This section, then, does not require in express terms the election upon questions other than the election of public officers, to be conducted according to the Australian ballot law. Unless there is some other provision in the law, then the voting upon the question of issuing bonds is not required to be in accordance with the provisions of said chapter 33

Section 16 of the act provides the form of ballot: "Whenever a constitutional amendment or other public measure is proposed to be voted upon by the people." This may be said to refer to the form of ballot when such questions are voted upon at an election at which public officers are elected. The latter part of section 2 of chapter 33 is as follows: "The term, 'general election,' as used in this act, shall apply to any election held for the choice of national, state, judicial, district, county or township officers, whether for the full term, or for the filling of a vacancy. The term, 'city election,' shall apply to any municipal election held in a city or incorporated town."

Without discussing the question of how far chapter 33 is applicable to

the election upon the submission of a public measure at a special election, I can find nothing in the act or the law that induces me to believe that the legislature intended chapter 33 of the acts of the Twenty-fourth General Assembly to be applicable to any school election. It does not come within the definition of a general election or a city election. There is no term or expression in the entire act that indicates that the legislature had in mind any other elections than those embraced within the terms, "general elections" and "city elections"

Section 1822 of the code, as amended by the Eighteenth General Assembly, provides: "The directors of any independent district may submit to the board of their district at an annual or special *meeting*, the question of issuing bonds as contemplated by the preceding section, * * * which question shall be voted upon by the electors." This contemplates that the meeting of the electors of the district shall be such a meeting as is contemplated for the annual meeting, and the manner of taking the sense of the electors upon the question of issuing bonds should be in the manner as provided by law for the voting at the annual meeting. The powers of the annual meeting are set forth in section 1717 of the code of 1873, as amended by section 2823 of McClain's code.

It will be noticed that such section does not provide the manner in which the vote shall be taken. There are different decisions of the supreme court which sustain the view that the meeting contemplated seems to be in the nature of a deliberative assembly, which may adopt and dispose of measures before it as they are reached in a summary manner, if it deemed best so to do. It has been held that an election does not necessarily have to be by ballot. These decisions, however, have no reference to chapter 7 of the Eighteenth General Assembly, nor chapter 51 of the Twenty-second General Assembly.

It is provided in the act amending section 1789 of the code, that: "In all independent districts having a population of 300 and upward, the polls shall remain open from 12 o'clock M. to 7 o'clock P. M" From this it is to be inferred that the election at such meeting shall be by ballot, and judges of such election should probably be those persons referred to in section 2935, McClain's code, and the election to be conducted as provided by the electors assembled in such meeting.

I do not overlook the provisions of chapter 8 of the Eighteenth General Assembly, which provides the manner in which such elections in independent school districts having a population of not less than 15,000 inhabitants must be conducted. I am aware, also, that in the case of *Seaman v. Baughman*, 82 Ia., 216, in the argument of the case, the supreme court seems to treat chapter 8 as if applying to all independent districts, but that point was not before the court for determination. The suggestion only arises in the argument of the case. I can see nothing in said chapter 8 to indicate that it was intended to apply to independent districts generally, but only to those having 15,000 inhabitants or more.

My conclusions, then, from a careful examination of the question, may be stated as follows:

First.—The special meeting referred to in section 1822 of the code of '73, is one that can and should be organized like the annual meeting.

Second.—The meeting thus organized can so control its proceedings and

provide for the manner of conducting the polls so as to prevent confusion, electioneering and interference with voters in the room in which the meeting is held.

Third —The voting should be done in accordance with the provisions made therefor by the meeting, and at the place where the meeting is held.

Fourth —That the provisions of sections 1063p, 1063z, 1063aa and 1063bb were not intended by the legislature to apply to school elections, whether for public officers, or on the question of issuing bonds.

Fifth.—That the question of electioneering in the immediate vicinity of the polls is one which may be controlled by the meeting after its organization.

In stating these conclusions, I cannot refrain from expressing the wish that the legislature had made the provisions of the law with reference to school elections more plain The many amendments made from time to time do not seem to have changed the theory of the meeting of the electors of a school district. The theory of the law still is that it is something in the nature of a deliberative assembly; such an assembly in which the people meet in their sovereign capacity, and proceed in such a manner as they deem best, except as has been modified by section 1789 of the code of 1873, as amended by chapter 51 of the Twenty-second General Assembly.

I would also say that, while in my judgment the manner of conducting the polls and the order to be observed thereat is largely within the discretion of the meeting after its organization, yet it is incumbent upon the meeting not to make any arbitrary rules or restrictions which would deprive any elector of a fair expression of his voice at the polls. Everything must be conducted in a spirit of fairness, with the due regard to the rights of others, and to obtain a real expression of the wishes of the electors of the district. Yours respectfully,

MILTON REMLEY,
Attorney-General.

PROCEDURE — INSURANCE DISCRIMINATIONS — A proceeding against a corporation for a violation of the statutes against discriminating in writing life insurance should be by civil action.

IOWA CITY, Iowa, July 1, 1896

J. M. Grimm, Esq., County Attorney, Cedar Rapids, Iowa:

DEAR SIR—Your favor of the 26th ult. at hand, in which you ask my opinion as to whether the action to be brought under sections 1 and 2 of chapter 35, laws of the Twenty-fifth General Assembly (McClain's code, supplement, sections 1760a and 1760b), shall be a civil action or an indictment.

In regard to this I would say that the language is, "Every corporation or officer or agent thereof who shall violate any of the provisions of this act. shall be fined in any sum not exceeding $500, to be recovered by action in the name of the state," etc.

While it is true the use of the word, "fine," would seem to indicate a criminal proceeding, yet the language, "to be recovered by action in the name of the state," plainly indicates that it shall be a civil action. Section

3784 of McClain's code provides where actions to recover fines or penalties shall be brought. This relates to civil actions. It is an extraordinary provision by which a civil action shall be brought to recover a fine, and the amount of the fine is not definitely fixed by the statute. For instance, in endeavoring to recover a fine in a civil action under this section, a jury would be called to determine how much the recovery should be for anywhere from nothing up to $500. Notwithstanding all incongruity of the provision, I can arrive at no other conclusion than that the action must be by civil action in the name of the state.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

A LOCAL BOARD OF HEALTH—Has authority to make regulations as to muzzling dogs at a time of a mad dog scare.

IOWA CITY, Iowa, July 1, 1896.

W. F. Kopp, Esq., County Attorney, Mt. Pleasant, Iowa:

DEAR SIR—Your favor of the 16th ult. came duly to hand, but at a time when I was engaged in other matters and could not give it my attention.

You ask my opinion upon this question: "Can the trustees of a township acting as a local board of health, at a time of a mad dog scare, make regulations requiring all persons to keep their dogs tied or muzzled for a certain length of time, and authorize anyone to kill any dog found upon the highway not muzzled during said time?"

In reply to this I would say that section 556 of McClain's code gives to the township trustees power to make whatever regulations they deem necessary for the protection of public health. The following section requires notice of all such regulations to be published and posted. Section 559 authorizes the trustees to employ all such persons as may be necessary to carry into effect the regulations adopted and published according to the powers vested in the trustees, etc.

I am of the opinion that the township trustees, as a local board of health, are authorized to make any reasonable regulation which will tend to preserve public health. If dogs affected with hydrophobia are in a neighborhood, it does not occur to me that it would be an unreasonable provision to require the owners of dogs to keep them tied or muzzled during the time that they may be affected with the disease. Under the section last referred to, viz: section 559, the board is authorized to employ all such persons as may be necessary to carry into effect the regulations. If this power exists then why should not the board of health have power to authorize the public generally to assist in enforcing such regulations?

While it may appear to be a harsh measure to kill every dog unmuzzled, and in cases great injustice may be done by so doing, consideration of public policy in times of public danger demands speedy action to be taken, and I would not like to say that under some circumstances the order to kill summarily all dogs found unmuzzled was an unreasonable one. Every regulation of this kind must stand the test of reason.

In case a mad dog had been roaming through a neighborhood for some days while he was so affected, and there was a likelihood of a number of

dogs being bitten and affected with hydrophobia, it would seem to me to be only a reasonable precaution against the spread of hydrophobia to enforce such a regulation requiring all dogs to be tied or muzzled, even if every canine in the community had to be exterminated.

There may be cases where such a regulation would be unreasonable, but that matter is left largely to the discretion of the local board of health. You will observe that plenary power is given to the local board of health, and if the conditions are such as in their judgment warrant or justify the measure stated, I could not say their action was unlawful.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

IMPRISONMENT — CONCURRENT TERMS — Where a convict is imprisoned under two sentences and no provision being made therein that one shall commence when the other expires, held, that one would stand suspended until the other had been served.

IOWA CITY, Iowa, July 2, 1896.

Hon. P. W. Madden, Warden of Penitentiary, Anamosa, Iowa:

DEAR SIR—In regard to the question which you presented to me for my opinion relative to the imprisonment of Joseph Bush, I would say it appears from the records of the Johnson county district court that he was indicted for two offenses. He was convicted on each and on the 22d day of September, 1895, a judgment that he be imprisoned three and five years respectively in the penitentiary at Anamosa, was entered. Each judgment in the case was made independent of the other, and no order whatever was made, as is contemplated may be made, under section 4508 of the code. The question you ask is whether the imprisonment of Bush under each judgment runs concurrently with the other.

In regard to this I would say that if it were an open question, under sections 4508, 4513 and 4514 of the code, in the absence of an order providing otherwise, I would incline to the opinion that the imprisonment runs concurrently, but it has been determined otherwise by the supreme court in the case of *Mieir v. McMillan*, 51 Iowa, 240. The court in that case says that "two terms of imprisonment in the nature of things cannot run concurrently. The only effect of so considering it would be to remit one term."

This case has not been overruled, and it must be accepted as the law of the state. Hence, there is only one thing for you to do. On the two warrants of commitment which you have, in the light of this decision, it would be clearly your duty to hold Joseph Bush until he has been confined according to law for the term of eight years.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

POWER OF CITY COUNCIL AS TO STREETS—The city council has authority to narrow or change a public highway established by the board of supervisors before the city was incorporated.

DES MOINES, Iowa, July 7, 1896.

J. M. Grimm, County Attorney, Cedar Rapids, Iowa:

DEAR SIR—Yours of the 3d inst. at hand, in which you ask my opinion as to whether the city council has a right to narrow or change a public highway which had been duly established by the board of supervisors before the town was incorporated? You also enclose a certain letter and copy of the records of the incorporated town, from which I am unable to determine whether the action taken by the town council did actually have the effect to narrow the street, but it becomes immaterial so far as the legal question which you propound is concerned.

Under section 623 of McClain's code (464 of the code of '73), cities and towns are given by the statute full authority and power to "lay off, open, widen, straighten, narrow, vacate, extend, establish and light streets, alleys," etc. This section has been construed a number of times by the supreme court, and I may say that the streets and alleys of an incorporated town or city are absolutely under the control of the council. The fee of the streets is in the city, and the town has exclusive control of such streets.

By section 1443 of McClain's code (953 of the code of '73), a public highway within the corporate limits of any incorporated town or city is subject to all regulations of other streets in such town or city.

Under section 726 of McClain's code (527 of the code of '73), it is provided: "The city council shall have the care, supervision and control of all public highways, bridges, streets, alleys etc., within the city."

In the case of *Gallagher v. Head*, 72 Iowa, 173, these several statutes have been construed, and the supreme court holds that the city council has full control of the streets within the city, to the exclusion of the authority of the board of supervisors; that the board of supervisors has no power to establish a highway within the limits of an incorporated town or city.

In *Marks v. Woodbury County*, 47 Iowa, 452, it was held that road supervisors of a township had no authority to work the roads or streets within the limits of an incorporated town, and that a road tax levied by the board of supervisors could not be collected within an incorporated town.

I do not think there can be any doubt but that a public highway within the limits of an incorporated town or city is as much a part of the streets of the city or town as any other street, and is under the exclusive control of the city or town, and that the city council has full authority to narrow the street when in its judgment it sees fit.

I do not wish to be understood as saying that when private rights are invaded by an action of the city council that there is no remedy at all. In the exercise of the power which the city or town council undoubtedly has, due regard should be had to the interests of the community and the rights of the citizens.

I return the papers you enclosed.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PLACE OF SUIT FOR SUPPORT OF A BASTARD CHILD—Where, after being delivered of a bastard child, the woman removes to another county, suit for maintenance of the child should be brought in the county wherein it was born.

DES MOINES, Iowa, July 10, 1896.

T. R. Mockler, County Attorney, Harlan, Iowa:

DEAR SIR—Yours of recent date at hand, in which you state: "A woman living in this county was delivered of a bastard child in this county, and the putative father was, and is, at the present time, a resident of this county. The woman, since the birth of the child, has moved with her parents to Harrison county, and since her removal to said county has commenced suit under section 6113 of McClain's code in this county." You ask: "Is this the proper county in which to bring suit?"

I think that it is. The cause of action arose in your county. The statute authorizes the suit to be brought in the county where the woman resides at the time she is delivered of the bastard child. It is held by the supreme court that the proceeding is a civil action.

I think the language of section 6113 refers to the county in which the woman resided at the time of her delivery. The phrase, "in the county where she resides," as it appears in the fourth line of the statute, must be considered with reference to the first part of the same sentence, which is, "when any woman residing in any county of the state is delivered of a bastard child."

It is true the theory of the prosecution in such a case is that the county may be held harmless from the support of a pauper The fact that since the birth of the child the mother may have taken the child into another county does not of itself relieve your county from the cost of supporting such child if it becomes a public charge. Steps may be taken by such other county to prevent the mother and child from acquiring a settlement. In that case, Shelby county would still be liable.

I cannot think a construction of the statute which would authorize a party having a cause of action to move to the utmost parts of the state and there maintain her action against a defendant would be a reasonable one. The evident intention of the legislature was that proceedings should be brought in the county where the woman resided at the time she was delivered of her bastard child. Yours truly,

MILTON REMLEY,
Attorney-General.

INSPECTION OF OILS—WHAT SHOULD BE INSPECTED—The oil inspectors are not authorized to inspect naphtha in the hands of one who uses it solely for the manufacture of gas.

DES MOINES, Iowa, July 10, 1896.

Hon. Luther A. Brewer, State Oil Inspector, Cedar Rapids, Iowa:

DEAR SIR—Your favor of the 7th inst. at hand, in which you ask my opinion as to what should be done in a case where the Standard Gas company, of Independence, and the Atlantic Gas company, of Atlantic, refuse to pay the fee for inspecting naphtha which they use in the manufacture of gas?

You state that you consider the amendment made to the oil inspection laws by the last legislature requires the inspection of such oils. You also state that you enclose their letter which sets forth their views, but unfortunately such letter was not enclosed.

I am sorry that you did not state more definitely the process of reasoning which led you to the conclusion that such oils should be inspected. Chapter 185 of the acts of the Twentieth General Assembly, as amended by the Twenty-fourth General Assembly is, I think, with some typographical errors, contained in the pamphlet issued by the state board of health, except the amendment by the last legislature That amendment is by adding to the first section of the chapter the following words: "For the purposes of this act, naphtha, benzine and gasoline shall be deemed illuminating oils."

Now the question arises whether the law, as thus amended, authorizes the inspection of the oils used by manufacturers for purposes other than illuminating purposes. If you will examine section 1 of chapter 185, you will observe: "It shall be the duty of such state oil inspector, by himself or his deputies hereinafter provided for, to examine and test the quality of such oils offered for sale by any manufacturer, vendor or dealer, * * * and it shall be lawful for the state inspector or his deputies to enter into or upon the premises of any manufacturer, vendor or dealer of such oils, and if they find or discover any kerosene oil or other product of petroleum kept for illuminating purposes, that has not been inspected and branded according to the provisions of this act, they shall proceed to inspect and brand the same. The remaining clauses of the section make it lawful for the manufacturer, vendor or dealer to sell the oil so tested and approved as an illuminator, and make it unlawful for the owners thereof to sell such oil or product of petroleum for illuminating purposes, which has been rejected.

It will be observed that it is the oil kept on hand only by manufacturers of oil, vendors, dealers of oil for illuminating purposes which the state inspector is authorized to inspect.

There are provisions in other sections of the chapter which impress me very strongly that there was no thought in the mind of the legislature that oils used in manufacturing should be inspected. It is only the oil of dealers and manufacturers of oil that the inspector is authorized to inspect. Selling oils, which have not been inspected, for illuminating purposes, is made a criminal offense under section 7. Using oils, for illuminating purposes, which have not been inspected, is likewise made a criminal offense. (Section 8) But section 8 contains a proviso that gas or vapor from oil which has been rejected may be used for illuminating purposes when the oil from which the gas or vapor is generated is contained in a closed reservoir outside of the building illuminated or lighted by said gas, and the last proviso in said section 8 is in harmony with the central idea running throughout the entire law, which is this: that it is only such oils as are used directly for illuminating purposes which the state inspector is authorized to inspect, and the sale and use of such oils not for illuminating purposes is not prohibited by the statute.

I do not see that the amendment made by the last legislature changes the law with reference to the duties of the inspector, or would authorize

the inspector to inspect oils used for the manufacture of gas by a gas light company. They are not manufacturers of oil or vendors or dealers in oil. It is unquestionably true that if they were engaged in selling oils for illuminating purposes the inspector would be authorized to inspect naphtha, benzine or gasoline, but such gas light company does not come within the class of persons whose oils must be inspected by the state inspector.

Unless my attention were called to some statute which has escaped me, and I think there are none, I would not advise you to attempt to enforce the collection of the fees to which you refer. I think you would surely fail. If there is any section or clause of the statute that you have in mind upon which your claim is based, I would be pleased to have you call my attention to it.

Yours very truly,

MILTON REMLEY,
Attorney- General.

CRIMINAL EMBEZZLEMENT—What constitutes the crime of embezzlement.

IOWA CITY, Iowa, July 11, 1896.

W. L. Smith, Esq., County Attorney, Humboldt, Iowa:

DEAR SIR—Your favor of the 7th inst. at hand in which you ask my opinion upon a state of facts as follows:

"P, having a note of $300 against a third party, pledged it as collateral security to H to secure a loan of $100 from H. P endorsed the note, either in blank or to H. H sold the $300 note which he held as collateral security, and has failed to pay what he received over and above the $100 which P owed him."

The question is whether H is guilty of embezzlement.

In order to constitute embezzlement, the relation between the parties must be a confidential one such as agent, clerk, servant, employe, attorney for or collector. (Section 5215 of McClain's code.) In the case stated there is no such relationship. P trusted H with property as security. He had it in his power either to endorse the note so that H could not have sold it and parted with the title, or he could have taken security from H that the $300 note would be returned to P when he paid the $100 that he borrowed of H.

It is a conversion of the fund and a moral wrong, but not a crime under our statute. The note did not come into H's hands by virtue of his employment as agent or attorney of P; hence, it is not embezzlement. P, of course, has his civil remedy.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF EDUCATION — POWERS — COMPENSATION OF MEMBERS—The board of education has no authority to direct the county auditor to issue warrants for books for which it has contracted — What members of the board are entitled to compensation for time spent while acting in that capacity.

IOWA CITY, Iowa, July 11, 1896.

C. W. Crim, Esq., County Attorney, Estherville, Iowa:

DEAR SIR—Your favor of the 6th inst. duly at hand, in which you ask my opinion upon the following questions:

First.—"Does the board of education have power to direct the county auditor to issue warrants for books for which they may contract, or should the warrants be issued by the board of supervisors acting in the capacity of a board of supervisors?"

In regard to this I would say that chapter 24, acts of the Twenty-third General Assembly, providing for county uniformity of text-books and providing that the county superintendent, county auditor and the county board of supervisors shall constitute a board of education, says in the ninth section: "When the list has been so selected, they shall be used in all the public schools in said districts, and the board of education may arrange for such depositories as they may deem best, and may pay for said school books out of the county fund and sell them to the school districts at the same price as provided for in section 1 of this act, and the money received from said sales shall be returned to the said county fund by the board of education monthly"

There is nothing in the act, directly or indirectly, repealing section 451 of McClain's code, which expressly provides: "The auditor shall not sign or issue any warrant except upon the recorded vote or resolution of the board of supervisors authorizing the same, except jury fees," etc. If the later statutes give the board of education the right to draw warrants upon the county treasurer, it must be a repeal or modification to some extent of said section 451. The language of section 9 of said chapter 35 by itself would indicate that the board of education may pay from the county fund for the books.

It is unfortunate that the language was not more explicit in providing the manner of making these payments, but I cannot see how it can be claimed that section 451 of McClain's code is repealed or modified by this act. I do not think the auditor would be justified in drawing a warrant on the order of the board of education, but there ought not to be any friction in the matter. The board of education is required to keep a record of its proceedings. It selects the text-books which are to be used; it determines the number of books which shall be purchased; it makes a contract for the purchasing. These books are to be delivered to depositories which the board selects. It is seldom, if ever, that the books will be delivered while the board of education is in session. When the books are delivered and received by the board of education, either by the president, secretary or agent, or depositaries which are the agents of the board of education, then a bill for the books actually delivered at the contract price should be filed with the board of supervisors, and the board of supervisors, who are

authorized to allow and settle claims against the county, should, by resolution of the board, authorize a warrant to be drawn. The board of supervisors comprises a majority of the board of education, and having knowledge of the contract by which the county fund is bound, they would be under obligation to audit and pay the claim. In this way alone could the business of the county be kept in hand.

Possibly the thought of the legislature was that the board of supervisors could at any time organize as a board of supervisors and transact business as such. I think the manner suggested is the preferable one.

Second.—"Is the board of education, acting as such, entitled to compensation for their time, and if so, is the auditor entitled to pay as a member of this board, aside from his fees and salary as auditor?"

There is no provision of law for pay for members of the board as such. Undoubtedly the members of the board of supervisors who are, because of their position, required to perform the labor necessary as *ex officio* members of the board of education, would be entitled to have their per diem allowed at the next meeting of the board of supervisors; and the same may be said of a county superintendent. It is a part of the duties of his office to sit as a member of the board of education, and he, too, is entitled to $4 per day while discharging the duties of the office of county superintendent. The county auditor receives his salary from the county in like manner, but I do not think he is entitled to any pay outside of that which pertains to his office as auditor.

It is well settled in this state that a public officer cannot recover compensation not provided for by law. (*Howland v. Wright County*, 82 Iowa, 164.) The law making no provision for compensation of the members of the board of education as such, but enjoining duties upon the board of supervisors, county superintendent and county auditor, whatever pay they receive must be under the provisions of the law providing for their salaries as such officers. The county superintendent would not be authorized to receive $4 a day as county superintendent, and $4 for the same day while acting as a member of the board of education. The same is true of the other members of the board of education.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INTOXICATING LIQUORS—REGISTERED PHARMACIST HOLDING PERMIT—CHANGE OF FIRM OF WHICH HE IS A MEMBER—Effect of such change.

IOWA CITY, Iowa, July 11, 1896.

C. W. Crim, Esq., County Attorney, Estherville, Iowa.

DEAR SIR—Your favor of the 9th inst. at hand in which you ask my opinion upon the following question:

"William Doe makes application for a permit of the district court as a registered pharmacist to sell intoxicating liquors, stating among other things that he is transacting business under the firm name of John Doe &

Son, and the permit is granted. John Doe has an interest in the business at this time, but afterward retired. Must William Doe apply for a new permit?"

I am not aware that there is any decision of our courts upon this question. Upon principle and reason I would say that if a permit were granted to the firm in the name of John Doe & Son, and John Doe & Son signed the bond, then it would be necessary to apply for a new permit after John Doe had retired from the firm.

If, however, the permit were granted to William Doe and the bond were furnished by William Doe, I cannot see any necessity for a new application. The statute authorizes a resistance when the application for a permit is heard. Any citizen can go into court and show that the person making application is not a suitable person to be entrusted with the handling of intoxicating liquors. If the application is made in behalf of the firm, the sterling qualities of one man may be a sufficient guarantee to the community that the law will be strictly complied with so long as the sale of liquor is under his supervision. If this reliable member of the firm withdraws from the firm, those remaining may not have the confidence of the community, and the community should be permitted to resist the granting of the permit to those not worthy to be entrusted.

If, however, the application were made by an individual and a permit were granted to him in his individual capacity and not the firm, there appears to me no good reason why the withdrawal of a man from the firm who was not entrusted with the sale of intoxicating liquors should avoid the permit granted to the individual member who remains.

Yours truly,

MILTON REMLEY,
Attorney-General.

INSPECTION OF OILS—Naphtha, in the possession of a dealer in oils, even though he proposes to sell it to a gas company for the manufacture of gas, should be inspected and the fees for inspecting the same collected—Gasoline in the hands of a dealer should be inspected.

DES MOINES, Iowa, July 16, 1896.

Hon. Luther A. Brewer, State Oil Inspector, Cedar Rapids, Iowa:

DEAR SIR—Your favor of the 14th inst. at hand, in which you ask:

"Suppose 100 barrels of naphtha are in the possession of a dealer in oils and he proposes to sell the lot, or any portion, to a gas company. Would not these 100 barrels be subject to inspection under the laws of Iowa, and would it not be the duty of the state inspector and his deputies to collect the statutory fees? And how about gasoline that is not sold or used for illuminating purposes? Are we authorized to collect fees?"

In the opinion which I furnished you on July 10th, I did not intend to be understood as saying that any oil or product of petroleum, naphtha, benzine or gasoline included, was not subject to inspection in the hands or possession of a dealer in oils, or a manufacturer of oils. You will note in the opinion I stated: "It will be observed it is the oil kept on hand by manufacturers of oils, vendors or dealers in oil for illuminating purposes which

the state inspector is authorized to inspect." And again: "It is unquestionably true that if they were engaged in selling oils for illuminating purposes, the inspector would be authorized to inspect naphtha, benzine, or gasoline"

I would add that if any dealer in oils has in his possession any naphtha, benzine or gasoline, it is the duty of the state oil inspector to inspect the same under the provisions of section 1 of chapter 185 of the Twentieth General Assembly, as amended, and I would say it is equally as clear to my mind that wherever he is authorized to inspect the oils he is authorized to collect the fees for such inspection, and I would answer both of your questions in the affirmative.

I think, however, that where a gas company has in its possession naphtha to be used in the manufacture of gas, or any party has the low grades of oil for fuel purposes and is not engaged in the manufacture of oils or selling the same, then the state inspector would not be authorized to inspect such oils in their possession or demand the fees therefor.

Yours truly,

MILTON REMLEY,
Attorney-General.

INTOXICATING LIQUORS—MULCT LAW—STATEMENT OF CONSENT GOOD FOR WHAT LENGTH OF TIME—The statement of consent of the voters of a city to the operation of the bar does not have to be filed after every general election.

IOWA CITY, Iowa, July 17, 1896

A. J. Holmes, County Attorney, Boone, Iowa:

DEAR SIR—Yours of the 15th inst. is at hand, and you ask my opinion upon the following statement of facts:

Section 17 of chapter 62 of the acts of the Twenty-fifth General Assembly, recites the conditions which shall constitute a bar to the penalties previously prescribed by law for the sale or keeping for sale, of intoxicating liquors, "after the written statement of consent signed by the majority of the voters residing in said county who voted at the last general election, shall have been filed with the county auditor." Referring to cities of 5,000 or more inhabitants, section 18 provides that in order that any city of less than 5,000 inhabitants may come within the provisions of said section 17, "A written statement of consent shall be filed with the county auditor signed by 65 per cent of all the legal voters who voted at the last preceding election."

Query: Does the expression "preceding general election," refer to the one immediately preceding the statement of consent, or does it refer to the one last preceding the offense in the prosecution of which it is relied on as a bar? Section 19 providing for a counter petition which will abrogate the previous consent filed contains similar language as to the requisite majority of voters, "as shown by the last general election." This would seem to indicate that the construction placed upon the two former sections by the legislature was that the effect of the consent petition continued from subsequent elections to such time as it would abrogate in the manner provided

in section 19, but if this is true and the courts should give the same construction to sections 17 and 18, would the protection afforded by the bar extend to the person who had not commenced to do business as a liquor dealer until after one or more elections following the petition of consent had intervened?

In regard to this, I will say that when a statement of consent of the majority of the voters residing in the city, or a like statement of consent signed by 65 per cent of the voters who voted at the last preceding general election in the county, has been filed with the auditor, this must be considered as the expressed will of the voters of the city or county, that intoxicating liquors may be sold in the city or county in accordance with the provisions of the mulct law. This establishes the right of persons to sell by complying with the provisions of the mulct law, and this right continues until the consent is withdrawn in the manner provided in section 19 of said chapter. In my judgment, the petition referred to in section 19 must contain the names of a majority of the voters of the said city or town, or county as the case may be, as shown by the election last held previous to the filing of such petition. Upon the filing of such petition referred to in section 19, the consent given by the statement of consent which had been filed under sections 17 and 18 must be considered as withdrawn and of no effect, but the consent will be considered as continuing until it is withdrawn in the manner provided for by section 19. The wishes of the people of the city or county instead of being determined by ballot at the polls, is determined by the petitions which are signed, or by the statements of consent. The statement of consent having been given, it establishes a status or condition under which it is lawful for anyone to sell intoxicating liquors who complies with the other provisions of the mulct law. I do not think that another election intervening between the filing of the statement of consent and the commencement of business by a saloon-keeper, affects his right to claim the benefit of the bar against prosecution. It appears to me that a fair construction of the statute is that the consent given is a general consent to all persons who comply with the other provisions of chapter 62 to engage in the sale of liquors so long as that consent is not withdrawn in the manner referred to in section 19 of the chapter. I can give no other construction to the section referred to.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INTOXICATING LIQUORS — INJUNCTION — MULCT LAW — CONTEMPT — Though one has been enjoined he is not subject to a prosecution for contempt for selling intoxicating liquors in compliance with the provisions of the mulct law.

IOWA CITY, Iowa, July 18, 1896.

T. C. Clary, County Attorney, New Hampton, Iowa:

DEAR SIR—Yours of the 16th inst. at hand, in which you ask my opinion upon the following questions:

A party was enjoined from maintaining a nuisance, that is, selling intoxicating liquors contrary to law. The injunction was obtained on the ground

that a sufficient number of names did not appear upon the consent petition. The injunction was granted against the premises and the owner of the same. If subsequent to the granting of the injunction a sufficient number of legal signers have signed the consent petition, could the party enjoined open up said building, and again sell intoxicating liquors in the same, if he strictly complied with all the terms of the mulct law? Would he be liable for contempt if he again sells liquors, or in other words, can a party who has been enjoined, notwithstanding the same, again engage in the liquor business and sell in the building enjoined, doing away with the existence of the injunction, if he complies with the mulct law?

Replying to the first question, I will state that the injunction, from your statement, restrains the owner from maintaining a nuisance, that is, selling liquors contrary to law. If this is all that the decree of the court provided, I do not think that it would be a contempt for the person enjoined to sell intoxicating liquors lawfully thereafter. If the conditions are changed, either by obtaining a valid petition or a change of law so as to permit the lawful sale of intoxicating liquors, then such sales would not constitute a nuisance, and he is not maintaining a nuisance by selling lawfully. He, of course, sells at his peril. If the new petition which is signed should prove insufficient, or if he fails to file a new bond, or the consent of property owners within fifty feet, or in any respect fails to comply strictly with the mulct law, he would be liable for contempt.

If the decree provided for the abatement of the nuisance, he could only use the building by complying with the provisions of section 2389 of McClain's code.

Second.—Your second question is practically answered above, except that I wish to add by selling lawfully he does not do away with the existence of the injunction. The injunction continues forever, and whenever, in the future, he violates the law by maintaining a nuisance in the building or by maintaining a nuisance elsewhere in the judicial district, he can be punished for contempt.

In my judgment, the injunction, being as stated by you against maintaining a nuisance, it continues in force forever, but selling liquor in a legal manner is not a nuisance and hence a legal sale does not subject the seller to punishment for contempt for violating the injunction.

Yours respecfully,

MILTON REMLEY,
Attorney-General.

REGISTERED PHARMACIST—INTOXICATING LIQUORS—PHYSICIAN'S PRESCRIPTION—1. A registered pharmacist cannot legally dispense intoxicating liquors upon a physician's certificate—2. One not a registered pharmacist may be a proprietor of a pharmacy, but should employ a pharmacist to perform certain duties therein.

DES MOINES, Iowa, July 23, 1896.

Chas. W. Phillips, Esq , Secretary Pharmacy Commission:

DEAR SIR—You ask my opinion upon the following question: "Can a registered pharmacist not holding a permit legally disperse intoxicating liquors on a physician's prescription?"

In answer I would say that under the provisions of chapter 35 of the acts of the Twenty-third General Assembly, a registered pharmacist cannot legally dispense intoxicating liquors in any manner unless he holds a permit authorizing him so to do. It would make no difference whether the intoxicating liquor was sold on account of the fact that a physician had prescribed it for the purchaser or not.

You also ask whether a man who is not a registered pharmacist can be the proprietor of a drug store or pharmacy and employ a registered pharmacist to run and manage the same for him?

In answer to this question I would say that I see no objection whatever to one who is not a pharmacist, owning a pharmacy, if he employs a registered pharmacist to perform those duties which none but registered pharmacists can do under the law.

Yours truly,

MILTON REMLEY,
Attorney-General

BOARD OF EDUCATION — PURCHASE OF SCHOOL BOOKS — Under facts stated an alleged contract for the purchase of school books held not to bind the board — If after the passage of a resolution to adopt certain books the resolution is rescinded, the board must advertise for bids before it can adopt other books.

IOWA CITY, Iowa, July 25, 1896.

A. N. Wood, Esq., County Attorney, Grundy Center, Iowa:

DEAR SIR—Your favor of the 23d inst. at hand in which you enclose a copy of the proposition of Ginn & Co., to furnish certain school books to the county board of education of Grundy county, and also a copy of an alleged contract entered into by the board of education and said Ginn & Co., for furnishing Fry's geography and other books. You state that, by a vote, the board adopted Fry's geography, and the president and secretary were authorized to execute a contract. You further state that no bond was given by Ginn & Co., and none was demanded by the board as required by section 7, of chapter 24, acts of the Twenty-third General Assembly. You state further that the geographies heretofore used in the schools and adopted some five years ago by the county board of education were Butler's geographies, and you ask whether the board can rescind its action and adopt some other geography, and if so, is it necessary to advertise for bids as required by section 5 of said chapter.

In regard to this I will say that the contract, a copy of which you furnished me, recites that in consideration of the adoption of the school books named by the board of education of Grundy county, Iowa, for the term of five years, it is hereby agreed, etc. The president and secretary of the board have not signed the contract, but certify that at a regular meeting of the board, "The above text-books were adopted for use in the schools of Grundy county for the period of five years, to be supplied on the terms above stated."

I have been unable to find a syllable in the law establishing a uniform system of text-books which authorizes the board of education to adopt a system of text-books for a period of five years, or authorizes the board of education to enter into a contract for five years. The only reference to a five-year period occurs in section 6 of said chapter 24, and you will notice that it is a limitation on the powers of the board to change the text-books that have been actually adopted before the expiration of five years, unless authorized to do so by a majority of the electors present and voting at a regular annual meeting in March. The provision that the text-books shall not be changed more frequently than once in five years, by no means authorizes the board to make a contract for five years, or to bind itself or its successor to purchase of a particular firm for a specified price for the period of five years. I do not think the board is authorized to make such a contract, and it is very questionable whether what is called a contract is, in effect, a contract.

You will notice that there is no obligation stated in the alleged contract for the board of education to purchase books of the said Ginn & Co., or for any definite time. It may be urged that section 6 of the act precludes the board from now changing its mind. The provision is: "It shall be unlawful for any board of directors or county board of education * * * to displace or change any text-book that has been regularly adopted and introduced under the provisions of this act before the expiration of five years." Your letter states, however, that the books in question have not yet been introduced. This provision is made for the benefit of the patrons of the schools, and not for the benefit of any publisher, whomsoever. Fry's geography, from the statement of facts, has not been introduced. The prohibition, then, of section 6 does not apply to this case. In my judgment, had the board attempted to bind itself or its successor to a five-year contract, it would be an act *ultra vires*. I am clearly of the opinion that it is not authorized by a resolution to bind its successor for a period of five years, or bind the county, the statute giving the majority of electors the right to direct a change within five years.

Another thought: the provision of the law contained in section 4 is wholly ignored in the alleged contract. Under section 4, if the pub ishers of books furnish the same to another district or state board at a lower rate than that specified in the contract, then such books should be furnished at such lower rate to the county board of education. The provision of the alleged contract in regard to this is: "If any reduction of the list price of these books is made during the term of their use in said schools, there shall be a corresponding reduction in the contract prices of the said board of education." The list price is a very different thing from what is often done by special contract. The provisions in this respect do not comply with the law.

The contract does not obligate the board of education to take any books. The obligation would arise from the adoption of such books under the law, if any. The view I take of the law is that the board may rescind its action at any time before the books are introduced.

I am of the opinion that the board may rescind the resolution adopting Fry's geography, but if this is done, it will be necessary to advertise for bids again.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSPECTION OF OILS—An oil inspector is not authorized to inspect naphtha, benzine or gasoline consigned to a gas company, found at a railroad station, whether it is shipped from within or without the state.

DES MOINES, Iowa, August 4, 1896.

Dr. J. F. Kennedy, Secretary State Board of Health:

DEAR SIR—Your favor of July 24th at hand, in which you ask my opinion upon the following question:

"Suppose a state inspector of oils finds at a railroad station fifty barrels of naphtha, benzine or gasoline consigned to a gas company and which has not been inspected, and which was shipped from a point within the state, would the inspector be authorized to inspect such oils? If so, would the same rule apply to such oils shipped from without the state and likewise found at a railroad station?"

In regard to this I will say that section 1 of chapter 185, of the acts of the Twentieth General Assembly, is amended by chapter 94 of the acts of the Twenty-sixth General Assembly by adding at the end of the section the following words: "For the purpose of this act, naphtha, benzine and gasoline shall be considered as illuminating oils." This amendment makes it the duty of the oil inspector to test or inspect such oils where found as provided in the said section.

The duties of the inspector are set forth in section 1. If, under the provisions of section 1 as it existed prior to the amendment, the inspector was not authorized to inspect oils in the hands of the consumer or at a railroad station, he would not be authorized to inspect the oils at such place because of the amendment made by the last legislature.

The first question, then, to determine is: what oil is the inspector authorized to inspect? The answer is found in said section: "It shall be the duty of such state inspector, by himself or his deputies hereinafter provided for, to examine and test the quality of all such oils offered for sale by any manufacturer, vendor, or dealer, * * * and it shall be lawful for the state inspector, or his deputies, to enter into or upon the premises of any manufacturer, vendor, or dealer in such oils, and if they shall find or discover any kerosene oil, or any other product of petroleum kept for illuminating purposes, that has not been inspected and branded according to the provisions of this act, they shall proceed to inspect and brand the same."

I have looked in vain for any authority of the oil inspector to enter upon the premises of the consumer or a "railroad station" for the purpose of inspecting oils found therein. It goes without saying that the inspector only has the authority that is derived from the statute. If there is a syllable in the law requiring the consumer of oils to have the same inspected, I am unable to find it. It is true, under section 8 of the acts of the Twentieth General Assembly, chapter 185, it is made a penal offense for a person to knowingly use any coal oil, kerosene oil, or product of petroleum for illuminating purposes, which has not been tested: "Provided, however, that gas or vapor from oils may be used for illuminating purposes when the oils from which such gas or vapor is generated are contained in a closed reservoir outside of the building illuminated or lighted by the gas." This proviso makes it lawful to use benzine, naphtha, or gasoline which will not

stand the test provided by law for purposes other than direct illumination.

The statute requiring the inspection of illuminating oils is made for the protection of the public, and is not intended, primarily or otherwise, for the benefit of the oil inspector or his deputies. If gasoline, naphtha, or benzine are found on the premises or in the possession of a manufacturer of illuminating oils, or a dealer in illuminating oils, it is the duty of the inspector to inspect, but if found elsewhere, either in the hands of the consumer or in transit, I find no provision of law authorizing the inspector to inspect the same.

Section 4 of the act as amended by chapter 149 of the Twenty-first General Assembly contemplates that the owner or party calling on the inspector shall pay the fees for inspection. Penalties are provided for manufacturers or dealers selling or attempting to sell in this state any illuminating oils, etc., which have not been inspected.

It will be noticed in section 6 of the act there is evidently a clerical error: "Any person or persons, whether manufacturer, *vendor* (it should be, instead of vendee, as it appears), or dealers shall sell or attempt to sell any illuminating oils * * * which have not been inspected as provided by this act, shall be guilty of a misdemeanor." I would also call your attention to the fact that the word, "purchase," as it appears in the second line of said section in McClain's code does not appear in the original, nor has said section been amended. Penalties are thus provided for the manufacturer or dealer for selling oils not inspected, and the manufacturer or dealer is expected to call upon the state inspector to inspect all oils in his possession. If he fails to do so, he is liable, but nothing contained in the statute makes the purchaser liable for purchasing oils not inspected, although he is liable for knowingly using such oils not inspected, for the purpose of direct illumination.

I do not think the inspector would be authorized to inspect naphtha, benzine, or gasoline consigned to a gas company, found at a railroad station, whether it was shipped from a point within the state or without the state. A dealer in oils, however, would be subject to the penalties of the statute for shipping from a point within the state such oils to a gas company.

Yours respectfully,

MILTON REMLEY,
Attorney-General

BONDS—FIDELITY COMPANY AS SURETY—May become surety on but one mulct saloon-keeper's bond — May become surety on a bond given by a text-book publisher to a county board of education — A county officer may refuse to accept bond of a surety company.

DES MOINES, Iowa, August 4, 1896.

J. M. Grimm, County Attorney, Cedar Rapids, Iowa:

DEAR SIR—Your favor of the 31st ult. at hand, in which you ask my opinion upon the following questions:

First.—"Whether or not a fidelity company, legally authorized, may become surety on more than one mulct bond?"

Paragraph 2, of section 7, chapter 63, laws of the Twenty-fifth General Assembly, provides: "Said bond shall be signed by himself (the seller of intoxicating liquors), as principal, and two sureties, who shall qualify each in double the amount of the bond, and neither of whom shall be surety on any other like bond."

A fidelity company, duly organized under the law, is an artificial person. It is an entity, and under this provision, if it becomes surety on one bond, I do not think the clerk would be authorized to accept another bond with the company as surety thereon, unless the bond otherwise complies with the law, having two sureties thereon.

I have nothing to say in regard to the wisdom of this law, but, in view of its provisions, I do not think the clerk could accept a fidelity or surety company on two of such bonds.

Second.—"Whether or not a legally authorized fidelity company may become surety on a bond to a county board of education in the matter of the adoption of text-books, as provided by law?"

This refers evidently to the bond which the publisher furnishes upon the signing of a contract with the board of education.

In my judgment, section 329 of McClain's code is broad enough to authorize such a company becoming surety on a bond to the board of education. You will notice the language is broad and comprehensive. It seems to cover not only official bonds, that is, bonds of public officers, but bonds to secure the faithful performance of any duty. I think the second question should be answered in the affirmative.

Third—"Whether or not a county officer has any option to distinguish between personal and surety company's bonds as to the sufficiency thereof?"

Again referring to section 329 of McClain's code, it says: "Any officer, who is now or shall hereaftor be required to approve the sufficiency of any bond or undertaking, may, in the discretion of such officer, in lieu of the security now required by law, upon satisfactory evidence, accept such bond or undertaking and approve the same whenever the conditions of such bond or undertaking are guaranteed by a company or corporation duly organized or incorporated within this state, under the laws thereof, or authorized to do business in this state," etc.

It will be noticed that the acceptance of a fidelity or surety company as surety in lieu of the personal surety, with qualifications required by section 327 of McClain's code, is left to the discretion of such officer. He may refuse to take such a company as surety. Before accepting a company as surety, he must have satisfactory evidence of its ability to respond. A clerk is not released from responsibility of accepting an insufficient bond because of affidavits made by the sureties as to qualifications.

There is a certain amount of personal liability in the approval of any bond by the clerk, and he may, if he desires, demand that two sureties sign the bond possessing the qualifications required by law. I do not think the clerk, or officer whose duty it is to approve a bond, should interpose captious objections, but, in this particular matter, he has a discretion in regard to the kind of security he will accept.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

VACATION OF STREETS—Under facts stated, an individual held not to acquire title to a city street.

DES MOINES, Iowa, August 5, 1896.

J. M. Grimm, County Attorney, Cedar Rapids, Iowa:

DEAR SIR—Your favor of the 25th ult. and the 4th inst. at hand, enclosing plats of parts of fractional block 17 of Greene and College addition to Cedar Rapids, Iowa, and parts of blocks 1 and 2 of Hedges and Crissman's addition to Cedar Rapids. You state that the streets were named as indicated on the plat, and what is designated as Coe street is now known as Thirteenth street, this street running northwest and southeast intersecting the section line obliquely. The plat shows that the additions were so platted as to form a continuous street of Thirteenth on the plat, the plats of the second addition supplementing each other. The plat of Greene and College addition left a triangular piece of ground northwest of the section line and southeast of the alley platted in said block 17, which in your letter you say was practically of no use to the public as a street.

The plat of Hedges and Crissman's addition, however, shows that a street was left southeast of this triangular piece so as to make on the plat a continuous street eighty feet wide between Second avenue and Third avenue. It appears that W. G. Rowley procured the title to five feet of land off the northeast side of lot 7, block 1, of Hedges and Crissman's addition; also fractional lots 1 and 2 of block 2 of the same addition; also fractional lots 15 and 16 of block 17, Greene and College addition. These last four fractional lots as shown by the plat, form two lots 60x140 feet, extending from Third avenue to the alley northwest thereof. Mr. Rowley has filed a deed of vacation of the lots owned by him, and claims that it vacates that portion of Thirteenth street between the alley and Third avenue. He has also filed a plat of W. G. Rowley's addition to Cedar Rapids, in which the ground occupied by the street vacated is platted.

The question you ask is: "Does Rowley by his vacation acquire title to the street, and can the recorder of deeds legally certify that Rowley is the owner in fee simple of all the property described in the plat sought to be recorded?"

In regard to this I will say that if I am correct in the statement of facts above given, which I assume from the plat and your letter is the correct statement of facts, and these two additions were laid out so as to supplement each other and form, as they appear upon the plat, regular blocks and lots and streets, although the land north of the section line was owned and platted by one party and the land lying south of the section line was owned and platted by another party, I have serious doubts about the authority of Mr. Rowley to vacate the street in question. When one lays off land into lots, blocks and streets and plats the same and has the plat recorded, he thereby dedicates to the public the streets indicated on the plat. When this is done and the street, or any part of the same is used and occupied by the public and work done thereon is accepted by the public, the streets become the property of the town or city in fee simple.

The provision of the statute for the vacation of a plat, being sections 798, 799 and 1000 of McClain's code, was intended primarily for the owner of real estate to reconsider his act when it might be done without prejudice to the rights of another party. His grantees may also do so under like conditions.

There have been several cases before the supreme court involving the right to vacate a portion of a plat by the grantees of the original owner, but in each case the lots have not been used for other than agricultural purposes and the streets had not been opened or used.

The proposition which your statement of facts presents amounts to simply this: does one person, owning a lot on each side of a public street, have authority under this statute to vacate the town plat of his two lots and take the street therein, and does he thereby become the owner of the street?

It is clear to my mind that the legislature never intended such results from the adoption of these three sections above quoted. If it be true that it may be done, then the city or town owning the streets in fee simple are powerless to prevent it. If it may be done in a street that has not yet been worked to its full length, by the same process of reasoning, it may be done in one of the business streets of the city. This shows the absurdity of the position.

If I have obtained the correct view of the situation, I do not think the recorder would be justified in certifying that Mr. Rowley owned the real estate embraced within the street attempted to be vacated.

A different state of facts might lead to different conclusions For instance, if there had been no property platted south of the section line, and that part of the street lying south of the alley in question was what you call, "a dead end of the street," and of no use to the public, possibly his right to so vacate the street would exist under the ruling in the case of *Conner v. Iowa City*, 66 Iowa, 419. But as I understand it, the facts are different from the Conner case, and I would not like to extend the doctrine of the Conner case so as to make it lead logically to such results as above stated.

I return you the plats as requested

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BUILDING AND LOAN ASSOCIATION LAW EXAMINED AND CONSTRUED.

DES MOINES, Iowa, August 6, 1896.

Hon. W. M. McFarland, Secretary of State, Des Moines, Iowa:

DEAR SIR—I have your two favors of the 28th ult. and the 1st inst., which I will consider together.

In yours of the 28th ult. you ask: "Whether the provision of the following article is permitted under the law, to wit: 'COUPON NOTES.—When deemed advisable by the board of directors of the association, it may issue coupon notes, or similar obligations, to bear interest at a rate not exceeding 8 per cent per annum, payable quarterly or semi-annually?' "

In yours of the 1st inst. it is stated: "Some of the building and loan associations who filed their articles have incorporated therein provisions for maturing stock at a fixed period, using among other expressions the following: 'The stock of class C shall be payable in 84 monthly installments of 60 cents each; during the first year there shall be deducted from class C stock payments $1.84 per share, and 7 cents per month per share

shall be charged against the profits each month thereafter for 72 months.' 'The stock of class E, jr., shall be payable in 112 monthly payments of 60 cents each, and shall be redeemed at the par value thereof when 112 months have elapsed and 112 payments have been made from the date of the issuance thereof and in accordance with the terms and conditions thereof.' 'At the expiration of 84 months this stock shall be treated as matured, unless sooner withdrawn.' ''

You ask my opinion upon the following questions:

First.—"What authority, if any, has the council to require a modification of the plans of building and loan associations, which are presented by the articles of incorporation?

Second.—"Is it necessary for the articles to show that the maturing of the stock is one of the objects of the association?

Third.—"Can an association incorporate in its plan of doing business a provision for the payment of stock before the date of maturity other than by the withdrawal of the members, or can the association treat stock as being matured before it would become par, the same to be done by the action of the officers?"

To properly answer these questions it would be necessary to consider the nature of the associations known as building and loan associations, or savings and loan associations, and the purpose of their organization Such associations have been in existence practically for the last 100 years, but have not been very common in this country until the last forty or fifty years. The original purpose and plan of all such associations was to enable parties with limited incomes to pay into the association a specified sum weekly or monthly, which sum should be loaned to the members of the association for the purpose of enabling them to build homes for themselves. The plan involved a subscription to the capital stock of one or more shares and a division of the profits *pro rata* among the shareholders, and when the amount paid in and the accumulated profits equaled the par value of the stock subscribed thereto, then the stock became matured and the association had finished its course. Each stockholder then received the face value of the stock subscribed, and if he was a borrower, for the full amount of the stock subscribed, his notes and obligations were surrendered to him.

"It was originally assumed that all the stockholders would at some period become borrowers to the full extent of their presumptive interest in the association's finally accumulated funds. It was not intended to allow capitalists under pretense of philanthropy or any other ground, to obtain for their money a greater interest than could be got through the ordinary channels of investment."

Endlich on Building Associations, 2d edition, sec. 17.

While there have been many innovations upon the original plan, yet this central thought runs throughout all legislation upon the subject, and the decisions of the courts. Because of the purpose and object of building associations, and to encourage the same, the loans made to members, notwithstanding a high premium is often bid for obtaining the loans, are by statutes of most states declared not to be usurious.

In construing the law it will be necessary to keep in mind the recognized principles governing the building and loan associations at the time the statute was enacted. One of these principles is that there must be

mutuality among the members, both in regard to the payment of the expenses and the sharing of the profits. Another principle is that when the payments upon the stock with accumulated profits, equal the amount of the stock subscription, or the par value of the stock, the stock is to be matured and must be canceled.

Thompson on Building Associations, pp. 4 and 118.
Endlich on Building Associations, 2d edition, p. 105.

Paid-up stock, which is an innovation on the original plan, is an exception to this rule.

I think it may also be stated as a cardinal principle of the law of building associations that the object of the organization must be kept continually in view and the interests of the subscribers of the stock who have a limited income, should be fully protected; that an opportunity of gradually discharging the contract involved in the subscription to the corporate stock and receiving the money thus paid together with its accumulation, is an essential feature without which the institution cannot claim to be a building association. It necessarily results from this that any plan of organization which in effect simply enables capitalists, through the medium of the building association, to loan money to borrowers at a usurious rate of interest, receiving for themselves large returns under the guise of dividends, is not in reality a building association.

For many years it was doubted whether paid up stock or "single payment stock," as it is sometimes called, was a feature permissible in building associations. It has, however, been recognized as proper for a building association to issue such stock. In effect, it is simply borrowing money, but it has been usual to have a fixed dividend for such stock not to exceed the rate of interest permitted by law to be charged.

In the case of *People, ex rel., v. Preston*, 35 N. E. Rep., 979, articles of incorporation which permitted full paid up stock and limited the dividends to 8 per cent, with the right on the part of the association to retire the stock, were approved by the court. These forms of stock other than regular installment stock, were permitted by the court because of a supposed benefit which would accrue to those who are seeking to build homes, or save their weekly earnings.

The purpose of building and loan associations was never speculative. I find no instance where such associations were authorized to issue bonds or borrow money on bonds. The purpose was to invest the monthly savings of its members in a gross sum so as to secure g eater returns than small investments of individual members could do, but in no instance do I find articles of incorporation approved which authorize the borrowing of money and issuing coupon notes in order that money might be loaned at a profit by the association.

Our statute does not expressly authorize the borrowing of money, and I think it would be inconsistent with the principles which govern building and loan associations to permit it to be done. This is in accordance with authority.

Stiles Appeal, 95 Pa., State, 122.
State v. Oberlin, 35 Ohio, 258.

I do not mean to say that in case of need of money for temporary purposes for furthering the object of the association a temporary loan might

not be made. It has been held that there is an implied power so to do. But this is very different from issuing coupon notes or bonds for the purpose of securing money to make loans in excess of the amount received from payments made by the members.

Second.—While the original plan of building associations did not contemplate the issuance of paid up stock, or any stock except the installment stock to be paid monthly, yet, at the time of the adoption of chapter 85 of the laws of the Twenty-sixth General Assembly, other kinds of stock were in common use, and are recognized in the acts in question. Section 9 provides that stock may be issued to members to be paid for in single payments, stated payments and monthly payments. The same section also recognizes what is known as "guaranty stock." We must accept, then, such kind of stock as a part of the scheme of building associations of the state of Iowa.

It will be noticed, however, that the statute does not attempt to define the rights of the holders of the different kinds of stock thus stated. While this is true, I cannot think it was the intention of the legislature, by the recognition of these classes of stock, that the fundamental principles governing building associations should be wholly ignored. The statute does not attempt to prescribe the plan upon which building associations shall be organized. It requires, however, a distinct, plain statement of the plan to be set forth in the articles of incorporation.

Section 5 provides that the articles of incorporation, with the by-laws of the association, shall be presented to the executive council, and if they find they are in conformity with the law, they shall attach thereto their certificate of approval. It will be noticed that the approval of the council is conditioned upon their finding the articles of incorporation are in conformity with the law. It does not say: "In conformity with this *act*." I apprehend that the purpose of submitting the articles of incorporation to the council was that the plan should be inspected by the council, and, if in the judgment of the council, the plan would work a fraud or deception upon the public and upon the persons who may become stockholders, it would be the duty of the council to refuse to approve such plan.

Section 18 of the act directs the auditor in certain cases to advise the attorney-general of the result of the examination, and it makes it the duty of the attorney-general to take the necessary steps to wind up the affairs of the building and loan association when the examination shows that it is conducting its business illegally or in violation of its articles of incorporation, or by-laws, or is practicing deception upon its members or the public, or is pursuing a plan of business that is injurious to the interests of its members, or its affairs are in an unsafe condition.

In my judgment, if the plan of business stated in the articles of incorporation would naturally lead to any of the results named in section 18, it would be the duty of the council to disapprove the plan. It would be absurd to require the council to approve a plan of business which, when launched, the auditor and attorney-general would be required to wind up. But beyond this, I do not think the council would be authorized to interfere with the plan, provided the plan is plainly and distinctly stated in the articles of incorporation so that no reasonably prudent man becoming a member could be misled or deceived thereby.

It is my opinion that the council is authorized to require such modifications of the articles of incorporation as may be necessary to plainly and distinctly set out the plans of the association in every respect, as required by section 4, of chapter 85, and in addition to this, may require such plans to be presented as will lead to none of the results stated in section 18 of the act.

Third.—"Is it necessary for the articles to show that the maturing of the stock is one of the objects of the association?"

The idea of the maturing of the stock is so inseparably connected with the scheme of building associations that I would not like to say that it is absolutely necessary that this object be stated in so many words in the articles of incorporation. The general purpose contemplated by section 1, of chapter 85, is that of furnishing money to its members. I think that it should appear from the articles of incorporation in some place that the stock should be matured whenever the payments made thereon and the accumulated profits equaled the par value of the stock. The Canadian statute expressly provides: "No member shall receive or be entitled to receive from the funds of such society any interest or dividends by way of annual or periodical profit upon any share or shares in the society until the amount or value of his share or shares shall have been realized."

While this provision is not engrafted into our statute, it seems very plain to me that the installment stock does not mature until what is sometimes called "the book value" of the stock shall equal the par value. The maturity of the stock then necessarily follows from loaning money to the members upon the building association plan.

Hence I do not think it absolutely necessary to have a statement that the maturing of the stock is one of the purposes, if it sufficiently appears that the association is a building association and its purpose is to loan money to its members.

Fourth.—"Can an association incorporate in their plan of doing business a provision for the payment of stock before the date of maturity other than by the withdrawal of the members, or can the association treat stock as being matured before it becomes par, the same to be done by the action of the officers?"

This involves the question whether an association is authorized to issue stock agreeing to pay the par value thereof after so many months of stated payments. It is evident that no plan of building association can be approved unless there is mutuality; that is, each member must receive his equitable proportion of the profits and bear his equitable proportion of the expenses. Suppose a class of stock were issued which the association obligated itself to pay the par value of after the payment of stated payments for eighty-four months, and at the end of that period it is found that the earnings of the company, together with the payments, do not equal the par value. From what source is the balance of the money necessary to pay the par value of the stock to be derived? It must of necessity be taken from the general funds of the company. If dividends have been equitably declared and credited to said stock during the eighty-four months, such stock has received all it is equitably entitled to. It would be manifestly unjust to take anything from other stockholders to force the maturity at a given date.

It may be said that a guaranty stock may be provided for such purposes. I confess I am unable to see the utility of a guaranty stock, but the statute recognizes such stock. If a larger dividend is paid to the owners of guaranty stock than is just and equitable for the purpose of compensating them for the risk assumed in forcing the maturity of the stock, these larger dividends diminish the profits which would otherwise be due to the install ment stock, and this is indirectly taking the profit from one class of stockholders and giving it to another. If any plan may be devised which would secure funds to pay the par value of such stock at a fixed date, when the book value is not equal to the par value, without directly or indirectly taking them from the other stockholders, I would not say that such a provision would be illegal. But on the other hand, if directly or indirectly, the profits due to the other classes of stockholders were diminished by reason of this guaranty on the part of the company I can conceive of no principle of law by which such a provision could be upheld.

Some companies attempt to provide for fulfilling the promise thus made to the stock which shall mature at a fixed time, by providing that the guaranty stock shall make up any difference between the book value and the par value of such stock at the time it is forced to maturity, and this is possibly what was intended to be the purpose of guaranty stock, but if it is hedged about in such a way that practically the holders of guaranty stock assume no real liability, and in consideration of the pretended liability which they assume they receive a greater share of the profits than is just, I can still see that an injustice may be done other stockholders, and the spirit of the law violated.

I frankly admit I do not see a way whereby an association can agree to mature its stock at a fixed date without directly or indirectly giving such stock a preference over the other classes of stock and at the expense of the other classes, and unless some way is provided whereby this injustice to other classes shall not be done, in my judgment the council would be justified in refusing to approve the plan. This comes plainly within what is contemplated under section 18.

I do not wish any inference to be drawn from my reference to the original plan of building associations, that the issuing of paid up stock or guaranty stock is illegal. Possibly the law might well have been made more specific and have so guarded the powers to issue such stock that the holders thereof could not receive greater dividends than the rate of interest allowed by law. But we must accept the law as it is, and in the light of the existing circumstances at the time it was adopted. Plans of building associations, including the issuance of paid up and guaranty stock having been adopted, and the law recognizing the right to issue such stock, I do not question the right to incorporate the issuing of such stock in the articles of incorporation. It is probably beyond the power of the executive council to prevent the issuing of such stock if it were so disposed. If the articles plainly state the plan and the rights of the holders of such stock, so that persons of ordinary intelligence could not be deceived thereby or misled, I doubt the authority of the council to interfere. If, on the other hand, however, the entire plan of business presented by the articles of incorporation is such

that it will inevitably or probably be injurious to the interests of its members, using the language of section 18, then, in my opinion, the council would be authorized to interfere.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

VACATION OF STREETS—Under facts stated an individual held not to acquire title to a city street.

IOWA CITY, Iowa, August 10, 1896.

J. M. Grimm, Esq., County Attorney, Cedar Rapids, Iowa:

DEAR SIR—Your favor of the 7th inst. at hand, making more explicit the statement in regard to Thirteenth street between Second and Third avenues.

In regard to this I would say that the deed of vacation shows that he claims to be the owner of lots 1 and 2 in block 2, and a strip of land five feet in width off the northeasterly side of lot 7 in block 1 in Hedges & Crissman's addition to Cedar Rapids, and a strip or parcel of land eighty feet in width lying between blocks 1 and 2 in Hedges & Crissman's addition to Cedar Rapids. This shows upon its face that the eighty feet between blocks 1 and 2 was intended and platted for a street. It is not numbered on the plat as a lot or part of a block, and was evidently designed to be an extension of Thirteenth street, formerly Coe street.

If I understand it, the triangular part of the street sought to be vacated was platted as part of Green & College addition. The deed of vacation seeks also to vacate the plat of 15 and 16 of fractional block 17 of Green & College addition. The question, then, might divide itself into two parts.

First.—Whether vacation of the plat of lots 16 and 17 would necessarily vacate the street lying southwest of lot 16?

Second.—Whether because he purchased lands in another addition or plat, his right to vacate the street in Green & College addition plat would be strengthened?

I have serious doubts about the propriety of answering these questions in the affirmative. The question involves no less a question of fact than a question of law, and I would not like to give a definite opinion as to the conclusion of law as applied to the facts without being more conversant with the facts.

I am very clear, as stated in my favor of the 5th inst., that the sections in regard to the vacation of town plats were not intended to be used as a means of giving a person owning lands on both sides of the street the fee simple to the street. If Mr. Rowley obtained the title to the strip eighty feet wide between blocks 1 and 2 of Hedges & Crissman's addition after the plat was made, and it appears to have been made and recorded, he could only have obtained that title from the city. If that piece of land was not intended for a street, and the plat did not indicate it, then he must have obtained title from the original proprietors of the addition. The right to vacate a town plat is a conditional right. There can be no abridgment or destruction of any of the rights or privileges of other proprietors in said plat. Whether any other person's land is affected by the attempted vacation, I have no means of knowing.

Under the circumstances, I do not see how I can be more explicit. I will say, however, that under all the facts presented by the entire correspondence I have such doubt about his ownership of the land which was formerly in Thirteenth street that I could not advise the auditor to certify that he is the owner.

I return you the plats and my opinion of August 5th as requested.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BUILDING AND LOAN ASSOCIATIONS—LIFE OF CORPORATION—Life of a corporation may be extended by an amendment to its articles of incorporation—Kind of stock determined by provision of articles of incorporation and not by its name—Manner and effect of change of articles of incorporation to meet requirements of the new law.

DES MOINES, Iowa, August 13, 1896.

Hon. W. M. McFarland, Secretary Executive Council, Des Moines, Iowa:

DEAR SIR—Your two favors of the 10th inst. at hand, in which the executive council ask my opinion upon the questions hereinafter stated:

First.—"Where the articles of incorporation of a building and loan association provide for issuing 'guaranty stock,' but in no section or article thereof is contained any provision for said stock being liable for losses, or other sufficient guaranty, is said stock entitled to be treated as such by the executive council in the examination of the articles of incorporation of building and loan associations for the purpose of approving the same?"

In regard to this, I am of the opinion that the character of the stock determines the kind. The council is not bound by the name given in the articles of incorporation, but must look to the character of the stock described by the articles of incorporation to determine what it should properly be called.

The supreme court, in *Smith v. Skow*, 66 N. W. Rep., 893, considering the mulct tax, says: "It matters not that the legislature in the statute speaks of this license or charge as a tax. That does not make it a tax"

If the legislature cannot make a license a tax by calling it a tax, certainly the incorporators of a building and loan association cannot make guaranty stock out of other stock by calling it guaranty stock. If the guaranty stock in reality guarantees nothing, it is not guaranty stock. You cannot change the character or quality of an article by giving it a name not sanctioned by the usage of the language.

Second—"Whether building and loan associations, reincorporating or amending their articles of incorporation to comply with chapter 85, laws of the Twenty-sixth General Assembly, can extend the time of their corporate existence twenty years from the date of their adoption or amendment?"

Under section 1609 of McClain's code, corporations have the power "of perpetual succession." Section 1619 provides that corporations "may be

renewed from time to time for periods not greater, respectively, than was at first permissible." The manner of the renewal is nowhere expressed in the statute. Section 1615 of McClain's code provides that the changes may be made in the articles of incorporation at any annual meeting or special meeting of the stockholders called for that purpose. If changes are made in the articles of incorporation which extends the duration of the corporation from "time to time," for a period not greater than was at first permissible, I think it is such a renewal as is contemplated by section 1619. Such renewal may be made by an amendment to the articles of incorporation made at any time, and is only conditioned upon the requirement that those wishing to renew shall purchase the stock of those opposed to renewing, at its fair current value.

Hence, I am of the opinion that the time of corporate existence may be extended for twenty years from the date of the adoption of the amendments.

Third.—"In case an association does reincorporate in order to continue the business begun under the old articles, what provision should be made therefor?"

I am of the opinion that the new articles of incorporation, if they are new entirely, or the amendments, if they are called amendments, should be adopted at a meeting of the stockholders, which meeting shall be called at the time and in the manner required by the old articles of incorporation, and it should distinctly appear in the articles which are filed that such is the case. It becomes then a continuation of the old incorporation, and simply changes the form of doing business in accordance with the amendments which are adopted. A record of the meeting, and of the entire proceedings, should be kept in the records of the association. The fact that the meeting was called in accordance with the provisions of the old articles of incorporation should distinctly appear, either as a preamble, or in some manner in the articles which are presented.

Fourth—"In case an association does reincorporate, and no provisions are to be made, or are made for the continuing of the business begun under the old articles, will it be necessary to have 100 shares of new stock subscribed before doing business?"

I cannot conceive of a reincorporation of an old company with no provision being made for the continuing of the business of the association reincorporated. If no provision is made for the continuing of the business begun under the old articles, then, in effect, it becomes a new corporation without connection with the old, and the business of the old must necessarily be wound up, and the new corporation begun anew, and being thus a new association, it would be necessary to have 100 shares of new stock subscribed, as required by the law, before commencing business. Certainly there can be no rights predicated on the old organization when the old organization is ignored in the new.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

LIABILITY OF COUNTY—INSANE PATIENT—Where an insane patient is properly sent to an insane hospital the superintendent thereof has no authority to transfer the patient to another insane hospital at the expense of the county afterwards found liable for his support.

DES MOINES, Iowa, August 14, 1896.

James A. Howe, County Attorney, Des Moines, Iowa:

DEAR SIR—Your favor of the 13th inst. at hand, in which you make the following statement of facts, and ask my opinion thereon, viz.:

"Sometime ago one J. B. Smith was found insane in Shelby county, taken into custody, adjudged insane by the commissioners of insanity of Shelby county, and by them sent to the insane asylum at Clarinda, where he has since been and is now confined. It was ascertained that his residence had been in Polk county. Shelby county is in the Clarinda district; Polk county is in the Mt. Pleasant district. Upon notice the auditor of Polk county acknowledged the residence of Smith to be in Polk county and admitted the liability of Polk county for his support at the insane asylum at Clarinda. The superintendent of the insane asylum at Clarinda now demands that Polk county, at its own expense, transfer this patient from Clarinda to Mt. Pleasant. I herewith enclose you correspondence that fully explains the matter.

"Will you please advise me if, in your opinion, under the statute of this state, Polk county is required to make this transfer at its own expense?"

In reply I will say that since Shelby county is in the district from which this patient was sent to the Clarinda hospital, unquestionably the patient was properly and rightly received in the hospital at Clarinda. The statute nowhere specifies the counties which belong to each hospital district. Dividing the state into districts is done by order of the governor and the superintendents of the hospitals, as provided in section 1432 of the code. It appears to be a matter of indifference to the public generally in what hospital a patient is received and treated. The commissioners of insanity of Shelby county could not legally have sent a patient from that county to any other hospital than the Clarinda hospital, under the existing rules. If I understand the rules made by the governor and the superintendents of the hospitals, the superintendent at Clarinda could not refuse to receive a patient sent from Shelby county, on the ground that his residence was in Polk county, which is outside of the Clarinda hospital district. The fact that the statute makes the county of settlement liable for the expense of sending the patient to the hospital and the support while there, does not change the rule of law in regard to the sending of the patient to the hospital or his reception by the superintendent thereof.

I think, then, it can be confidently affirmed that J. B. Smith, the patient, was properly and legally sent and received at the Clarinda hospital, and so long as he remains there, Polk county, acknowledging that his place of residence is in Polk county, is liable for the support of the patient while there, and also the expense of sending, which liability is admitted by Polk county. While there he is entitled to the same treatment and consideration as if his settlement had been in Shelby county.

The real question, then, is whether the superintendent has authority to transfer the patient to Mt. Pleasant at the expense of Polk county? There

is no statute that I can find giving him authority so to do. If he has the right, it must be based upon the rules which have been adopted by the superintendents and the governor. These rules which have been adopted must be published in order to have the force and effect of law.

Under chapter 48 of the Twenty-fourth General Assembly, the superintendents and the governor are authorized to make rules for the transfer of patients from one hospital to another. I have seen no rule published relating to such transfer. The rules are not recorded in the executive office and I do not know whether any have been adopted upon that subject. In the absence, however, of a rule authorizing the superintendent to transfer him to Mt. Pleasant, simply because his residence is in Polk county, I am of the opinion he would have no authority so to do.

I do not pass upon the question whether the superintendents and the governor would be authorized to make a rule which would place the liability upon a county of the state for the expense of so transferring the patient to Mt. Pleasant, simply because the Clarinda hospital may be crowded at the present time. If it had been the intention of the statute that the county of the settlement should pay the expense of conveying the patient to the hospital in the district in which the county of settlement is situated, then the statute should properly have provided that the commissioner of the county where the insane person was apprehended should send him to the proper hospital in the first instance.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INTOXICATING LIQUORS—MULCT LAW—STATEMENT OF CONSENT—The per cent of voters necessary upon a statement of consent must be based upon the votes cast, and cannot be reduced by showing that certain voters have died or removed.

IOWA CITY, Iowa, August 19, 1896.

H. P. Hancock, Esq., County Attorney, West Union, Iowa:

DEAR SIR—Your favor of the 16th inst. at hand, in which you ask for my construction of section 18, of chapter 62, acts of the Twenty-fifth General Assembly, the question being:

"Whether the 65 per cent shall be based upon the poll books alone, or whether the clause therein, 'residing within such county,' etc., will permit a reduction by a showing by affidavit or otherwise that persons who had voted at such election had died or removed from the county since?"

The language of the section is this: "A written statement of consent shall be filed with the county auditor, signed by 65 per cent of all the legal voters who voted at the last election (as shown by the poll list of said election), residing within such county and outside of the corporate limits of cities having a population of 5,000 or over."

The last clause above quoted I construe to refer to the territory within which the poll lists are to be considered. No poll lists can be taken into account except such as those in districts within the county and outside of the corporate limits of a city or cities therein.

A poll list of such election is the criterion by which it must be determined whether or not the person was a legal voter. There is no provision or statute for the correction of the poll lists. It is conclusive evidence as to those who were legal voters at the last general election residing in the territory referred to in the last clause.

If the clause in parentheses were put after the subsequent clause above quoted, the meaning might be made plainer. It would then read, "65 per cent of the legal voters who voted at the preceding election residing within such county and outside of the corporate limits of cities, etc., as shown by the poll list of said election."

This, in my judgment, is what is meant. I do not, therefore, think that it would be competent to receive any other evidence as to the ones who voted at the last election within the district outside of the corporate limits of cities and within the county, nor can the names of persons who have removed or died be stricken from the poll lists.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—EXEMPTION TO WIDOW OF SOLDIER OR SAILOR—All widows of the class entitled to exemption irrespective of the value of the homestead.

IOWA CITY, Iowa, August 20, 1896.

G. W. Dawson, Esq., County Attorney, Waterloo, Iowa:

DEAR SIR—Your favor of the 18th inst. duly at hand, in which you ask my construction of paragraph 8, section 1271 of McClain's code with reference to the question whether, if the homestead of the widow of a soldier exceeds in value the sum of $500, it is exempt from taxation to the extent of $500, or whether all of the homestead is subject to taxation.

Section 1271 provides: "The following classes of property are not to be taxed, and they shall be omitted from the assessments herein required: * * * *Eighth.*—The homestead, not to exceed $500 in value, of the widow of any federal soldier or sailor who died during the late war," etc.

There are but two constructions of this possible. One is that the clause, "not to exceed $500 in value," is a description of the class of homesteads that are to be exempt. The other view is that the homestead of the person named to the extent of $500 in value shall be exempt. While taxation is the rule and exemption the exception, and exemptions must be strictly construed, yet the laws exempting from taxation, like the laws exempting property from execution, must receive such a construction as reasonably and fairly carries out the intention of the legislature.

I cannot think it was ever the intention of the legislature to exempt from taxation the homestead of one widow that was worth $500, and to tax another widow on the full value of her homestead because it was assessed at $510, and unless I am forced by the language to accept that construction, I could not do so. I do not think that the language requires that construction.

The provision of the statute may be stated that the following classes of property will not be taxed: the homestead not to exceed $500 in value.

Taxation being the rule, the excess of the homestead above $500 in value is to be taxed, and the homestead to the extent of $500 is to be exempt.

This, I think, is the fair construction of the statute, and I do not question that it was the intention of the legislature at the time the statute was passed.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

JURORS—DUTIES OF COUNTY AUDITOR AND JUDGES OF ELECTION—What the list furnished by the auditor to the judges of the election should contain.

IOWA CITY, Iowa, August 25, 1896.

W. M. Chamberlin, Esq., County Auditor, Davenport, Iowa:

DEAR SIR—Your favor of the 24th inst. at hand in which you ask my construction of section 6, chapter 11, laws of the Twenty-sixth General Assembly, in the following particulars:

First.—"When is the list to be furnished?"

I think that the list referred to should be furnished by the clerk immediately before the time for sending out the poll-books by the auditor. The time at which the auditor is required to furnish the poll-books to each precinct is not definitely fixed. (McClain's code, section 1076.) The ballots, however, "shall be delivered to the judges of election at the polling place in each precinct not less than twelve hours before the time fixed by law for the opening of the polls" (Section 15, chapter 33, Twenty-fourth General Assembly.) The poll-books certainly ought to be sent by that time.

Second.—"Are talesmen, that is, persons who were drawn from the city during the past year and who served for one trial only, jurors within the meaning of the law, and therefore ineligible to be returned as jurors or talesmen during the coming year?"

In my opinion the list of persons who have served as jurors in the preceding year should include the names of all the talesmen who have actually served during the preceding year. Certainly a talesman who is accepted and sworn as a juror and sits on the trial of a case has served as a juror. The practice under the old law (section 317) was in accord with this view of the case. *Barnes v. Newton*, 46 Iowa, 567, while not directly in point, inferentially sustains this view. Hence, I do not think the judges should return the name of one who has served as talesman.

Third.—"Can a person who has served as grand juror during the past year, serve as petit juror or talesman during the coming year, or should his name not be returned by the judges?"

The language of the statute leaves this question in doubt. Ordinarily the word, "jurors," without the prefix, "grand," refers distinctly to petit jurors If it be said that one is serving on the jury, the idea is conveyed that he is serving on the petit jury. Most of the provisions of section 6 evidently refer to petit jurors, but from the language therein used I cannot say that no reference is made to grand jurors. The intent and purpose of the change of the law is two-fold: to secure competent jurors for the business of the court, shutting out what is called professional jurors, and second, to protect the citizens from being burdened by jury service.

While I have very serious doubts whether it was intended that one serving as a grand juror during the year past should not be returned on the list for petit jurors, and there is no special reason which occurs to me which requires this interpretation, yet, because of the general language used and the purpose of the law, I am inclined to the view that it would be better to furnish the names of all who have served as grand or petit jurors, or talesmen, to the end that such names may be omitted from the list of jurors for the succeeding year.

Fourth.—"'During the preceding year,' in said section, what does this mean? When does it begin or end?"

You will notice in section 4 of the act it is provided: "There shall annually be made lists from which to select persons to serve as grand and petit jurors and talesmen for the year commencing on the 1st of January following." It may be said, then, the jury year extends from January 1st to January 1st. The names which are to be furnished the auditor and by him sent to the judges of election are the names of those persons who have served as jurors during the year in which the lists are prepared. That is, in preparing the list of persons to serve as jurors during the year 1897, a list of those who have served during the year 1896 must be furnished.

I am aware that there may be jurors called to serve during the months of November and December during the current year after the lists are prepared. These names, from the necessity of the case, cannot appear on the lists. It may be the name of one or more of such persons may be returned on the jury list for next year. Section 8 of the act provides: "No grand juror shall be summoned or shall serve as grand juror for two consecutive years," and if the name of a person is drawn who has been a grand juror during the preceding year, his name is rejected. So it is ground for challenge of a petit juror that he has served as a juror in a court of record during the preceding year. (Section 6.)

By section 10, petit jurors shall not be required to attend as petit jurors more than one term in the same year. These safeguards would not have been necessary had the law been drawn so that under no possible circumstances could the name of a juror who has served in the preceding year be returned on the list of jurors for the next year.

Fifth.—You also ask whether the law contemplates that the names of all jurors in the county shall be given to the judges of election of each precinct, or only the names of those residing in the precinct to which the names are sent.

I have no doubt that the latter view is the correct one. There would be no reason for requiring the names of all the jurors residing in one township to be sent to the judges of election of another township. I do not think a fair construction of the language so requires.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

OFFICIAL BALLOT—RIGHT OF A POLITICAL PARTY TO A TICKET ON THE BALLOT.

DES MOINES, Iowa, August 28, 1896.

Sam S. Wright, County Attorney, Tipton, Iowa:

DEAR SIR—Your favor of the 26th inst. at hand, in which you ask my opinion upon the following question:

"Can a party who has cast the required 2 per cent of the vote of the state and has failed to cast 2 per cent in the county at the last preceding election, nominate a county ticket by regular convention in the county; or must it be done by petition, and if done by petition, can the same county ticket be placed under the title of two or more parties?"

In regard to the first part of the question, I think the language of section 4, chapter 33, acts of the Twenty-first General Assembly, requires it to be answered in the negative. The language is: "Any convention of delegates, primary, caucus, or meeting representing a political party which at the general election next preceding, polled at least 2 per cent of the entire vote cast in the state, or division thereof, or municipality for which the nomination is made may, in the state or division thereof, or municipality in which the convention, primary, caucus, or meeting is held, as the case may be, by causing a certificate of nomination to be duly filed, making one such nomination for each office to be filled at the election."

If a party polls 2 per cent of the vote in the state, it may have the ticket nominated at the state convention for state officers put upon the ballot throughout the entire state. If in a congressional district that party did not cast 2 per cent of the vote of the district, then the nomination should be put upon the ballot by petition. The same is true of every other division of the state

In regard to the latter part of the question: Section 5 of the acts above named provides that the name of any candidate whose name may appear in any other place upon the ballot, shall not be so added by petition for the same office. It therefore follows that if a name is on a ticket which is placed on the ballot by the nomination of a convention of a party casting more than 2 per cent of the vote that such name cannot appear again on the same ballot by petition. Yours respectfully,

MILTON REMLEY,
Attorney-General.

COST OF PAVING STREETS AROUND CAPITOL—The city of Des Moines has no authority to assess any part of such paving to the state—The state should pay its just proportion, but no more.

DES MOINES, Iowa, August 27, 1896.

To the Executive Council of the State of Iowa:

GENTLEMEN—In regard to the matter of the application of the city of Des Moines for the expense of paving on the streets adjacent to the capitol, which has been referred to me, I will say, that under the general laws of the state the city has no power to assess against the property of the state

any of the expense of grading, paving, or anywise improving the street. Whatever the state pays is paid as a matter of justice and equity.

Section 16, chapter 126, of the Twenty-sixth General Assembly, "appropriated the sum of $10,000, or so much thereof as may be necessary, to be paid on vouchers approved by the executive council, for paying the cost of paving the streets on the east, south and west of the capitol grounds, and for the purpose of repairing the sidewalks along said streets, and for repairing sidewalk along the south side of the capitol grounds."

This evidently does not mean for paving the whole of the street. If it does, the sum appropriated was grossly inadequate therefor. The claim which has been presented by the city of Des Moines is made out against the state on the same basis under the ordinance and the law as if the state was a private property owner.

In addition to this, what is called an "approach" on the east side of the capitol building facing on East Capitol street, is charged up to the state. The amount of this is about $375. An examination, however, shows that there has been charged for intersections more than a just proportion. I do not think anyone can question the equity of the rule which requires the owners of every block in the city to pay no more than the cost of paving to the middle of the streets surrounding the block, including one-fourth of the intersections at the corners of the block. If every block in the city pays under this rule, all blocks will pay alike. By letting the contract for three streets on three sides of the capitol grounds, and including in that contract the entire cost of the intersections of East Walnut street and Ninth and Eleventh streets, and to the street line on Tenth street, and the paving of the alleys where they intersect East Ninth and East Eleventh streets, there has been included more than an equitable proportion of the intersections charged in this contract.

The street lines of the capitol grounds form three sides of a square. Outside of this, about eighty feet distant, is the street line of the opposite blocks. It is hard to convince a person that the street line of a smaller square contains more front feet than a larger one. This is met by the assertion that the lines of the outside square or parallelogram are intersected by streets against which no assessment can be made, but these streets belong to somebody. The fee of the street is in the city of Des Moines.

It is claimed that part of Eleventh street which intersects with East Capitol should not be assessed against the city as the owner of East Capitol, because the street is not private property, but public property. The same objection exists against assessing anything to the state, because it is all public property.

The state is not bound by any rule or plan for laying off the work of paving adopted by the city council, which it may have the power to enforce against its own citizens, when those rules or plans work a practical inequity. If the state, therefore, pays what is its just proportion, I think that is all that should be asked.

I would recommend that the cost of what is called the "approach" to the east side of the capitol be paid by the state; also the cost of the pavement to the middle of each street, and one-fourth of the cost of the intersections on Walnut and East Ninth and East Eleventh streets be paid by the state.

In regard to the amount assessed against the lots on which the soldiers' monument is situated, although there is something in excess of its equitable proportion claimed against it, it does not amount to sufficient to raise any serious question about. I would, therefore, recommend that the claim for that pavement be paid as made.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INTOXICATING LIQUORS—LIENS.—The lien of a judgment resulting from the violation of the laws in relation to the sale of intoxicating liquor takes effect from the rendition thereof and does not affect existing liens.

DES MOINES, Iowa, August 27, 1896.

E. P. Johnson, County Attorney, Decorah, Iowa:

DEAR SIR—Your favor of the 24th inst at hand, in which you ask my opinion upon the following question:

"An innocent mortgagee holds a mortgage on property which after execution of the same is rented for a saloon. In case the law is violated, will judgment and injunction defeat the rights of the mortgagee?"

Under section 1558 of the code of 1873 (2419 of McClain's code), judgments, fines, costs, and judgment for damages because of the sale of intoxicating liquors are made a lien on the premises on which they are sold; that is, a lien upon the interest of the seller or the owner of the premises, provided he had knowledge that the premises were used for that purpose. The lien is not extended to the rights which innocent parties may have in the premises. An innocent mortgagee has rights in the premises which cannot be affected by the act of the mortgagor or a tenant of the mortgagor. The lien of the judgment upon the premises attaches only on the rendition thereof, and is subordinate to that of a mortgage previously executed.

Goodenough v. McCoid, 44 Iowa, 659.

The supreme court has also held that the lien of the mulct tax is inferior to a mortgage.

Smith v. Skow, 66 N. W. Rep., 893.

In view of these decisions, I do not think that the rights of the mortgagee in the case stated by you would be defeated by a judgment, but all such judgments would be inferior to the mortgage. Of course, if the mortgage is not given in good faith, a different question might arise.

Yours truly,

MILTON REMLEY,
Attorney-General.

BOARDS OF HEALTH—The regulations made by the state board of health should be endorsed, published and then enforced by the local boards.

IOWA CITY, Iowa, August 29, 1896.

Dr. J. F. Kennedy, Secretary State Board of Health, Des Moines, Iowa:

DEAR SIR—Your favor of the 27th inst. received, in which you ask my opinion upon the following question:

"Can local boards of health enforce regulations made by the state board of health without such regulations having been previously adopted by such local boards? If so, what is the process and what is the penalty?"

Section 16 of chapter 151 of the acts of the Eighteenth General Assembly is repealed and a substitute enacted therefor by chapter 59, laws of the Twenty-fifth General Assembly. As thus amended, the local board of health is required "to make such regulations respecting nuisance, sources of filth, causes of sickness, rabid animals and quarantine, not in conflict with the regulations made by the state board of health, and on board of any boats, or in harbors or ports within their jurisdiction, as may be necessary for the public health and safety." Such regulations are required to be published, and when so published, they have the force and effect of law and for a violation of the same the offender shall be fined not less than $25 for each offense.

Section 2 of chapter 151 defines the powers of the state board of health. It is provided: "They shall have power to make such rules and regulations and such sanitary investigations as they may from time to time deem necessary for the preservation or improvement of public health." The same section makes it the duty "of all police officers, sheriffs, constables and other officers of the state to enforce such rules and regulations so far as the efficiency and success of the board may depend upon their official co-operation." There is no statute imposing any penalty for the violation of the rules and regulations of the state board except in some particular cases. The general rules and regulations of the state board, it appears, must be enforced by the local boards.

It is the duty of the local board to enforce the rules and regulations of the state board under the provisions of section 2, above quoted, and to do this, such rules and regulations should be endorsed as adopted by the local board, and published according to the provisions of chapter 59, laws of the Twenty-fourth General Assembly.

The theory of the law seems to be that the state board shall act largely through the local boards, and the local boards must carry out the rules and regulations of the state board and would be liable for not doing so, but the private citizen only becomes criminally liable in violating the rules and regulations which have been published by the local board.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BUILDING AND LOAN ASSOCIATIONS—**The executive council should not approve the articles of incorporation of a building and loan association if it believes that they are calculated to mislead or deceive.**

DES MOINES, Iowa, September 3, 1896.

To the Executive Council of the State of Iowa:

GENTLEMEN—Yours of the 2d inst. at hand, in which you state certain objections that arise in your minds to the approval of certain articles of incorporation of a building and loan association now pending before you, and upon the facts stated you ask the following question, viz.:

"In view of the above statement, and the belief of the executive council, that the methods adopted by the association, especially in providing for the payment of expenses, are not clear and explicit, but are calculated to deceive, should the council approve the articles in the present form?"

I think there can be but one answer given to this question. The purpose of the law relating to a building and loan association, like the law relating to banking, life insurance, fire insurance and kindred subjects, is to protect the people of the state from being imposed upon, duped, deceived and defrauded out of their earnings. So few people have the time or opportunity, even if they have the ability, to carefully investigate the plan of organization and methods of operation of any of the many corporations that are soliciting the patronage of the public. It is within the observation of all that unless there are proper guards placed around such organizations, many of them prey upon the unsophisticated and despoil the unwary, to the detriment of the good of society. It is cruelty in its worst form to take the scanty earnings of a trusting laboring man or woman for a number of years, holding out hopes that are never realized and giving nothing substantial in return, except sore disappointment.

Believing, as I do, that the law was intended to prevent such things, I will say as emphatically as I know how, that if after a careful examination of the articles of incorporation of any building and loan association, they are, in the judgment of the council, calculated to mislead or deceive, the council should never approve them. I think the council would betray a public trust by doing so.

To be more explicit, within certain lines I think the greatest latitude in regard to the plans of organization and conducting the business should be allowed to the companies, but certainly the liberty does not go to such an extent that in carrying out the plans, apparently in accordance with the articles of incorporation, a great moral wrong will be perpetrated on the members. The plans may appear to be each stated in the forms of law; *i. e.*, each requirement of the law may be stated, and stated so plainly that a well trained lawyer may not be misled or deceived thereby, and it may not be said of any particular article that it is plainly contrary to law, yet if all taken together are so framed that a positive wrong is permitted thereby, and the very evils which the law was intended to prevent are accomplished, I do not think such corporation should be turned loose to defraud the unwary.

Referring to the facts stated, I cannot say as a matter of law that stock payments of 35 cents per month, or less even, is unlawful by itself, but if it is so laden down with charges for expenses, etc., that it cannot, from the

nature of the case, mature during the expectation of life of a middle-aged man, and other provisions are such that the stockholder will surely be disappointed and be liable to loss by reason of forfeitures, then such stock will prove a delusion and a wrong be perpetrated.

So in regard to charging up as a part of the expense what in most companies is collected as a membership fee, I cannot say that the law requires a membership fee to be charged, and if it is plainly stated, so there is no need of a reasonably prudent man being deceived thereby, that $1, or any stated sum, is taken from the first payments made, by the association to reimburse it for expenses of procuring the stock subscription, I would not like to say it is illegal. But if this provision, in connection with others, is plainly misleading and deceptive, then it should be rejected.

But these questions are not questions of law so much as questions of fact, to be determined by sound judgment, aided by a careful study and knowledge of the practical workings of such institutions.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COMPENSATION OF PUBLIC OFFICERS—DEPUTY SHERIFF—BAILIFF—One cannot fill the office of deputy sheriff and bailiff at the same time.

C. W. Piersol, County Attorney, Ida Grove, Iowa:

DEAR SIR—Your favor of the 8th inst. at hand, in which you ask my opinion upon the question:

"Can a deputy sheriff, who receives no compensation from the county, draw his per diem as bailiff of the district court?"

I assume that you intend to inquire about a case where the sheriff has a deputy and pays him out of the earnings of the sheriff's office. In counties having a population of less than 28,000, the sheriff receives fees for the services rendered both in criminal and civil cases, and the board of supervisors is authorized to allow him a salary, of not less than $200 per year, nor more than $400, to pay him for his services in attending the district court. He is authorized to appoint one or more deputies to attend to the business, or assist therein, pertaining to his office.

Under section 341 of the code it is made the sheriff's duty to attend the district court while it is in session, and he shall be allowed the assistance of such number of bailiffs as the court may direct. The bailiffs shall be appointed by the sheriff and shall be regarded as deputy sheriffs, for whose acts the sheriff shall be responsible.

In *Bringolf v. Polk County*, 41 Iowa, 545, the supreme court held that if bailiffs are employed in the service of papers in which a fee is allowed by law, they, and not the sheriff, are entitled to the fees which must be taken into account in fixing the amount of their compensation. This will prevent the sheriff from performing his duties by the bailiffs paid by the county, and at the same time recovering fees for the services performed by them.

I do not think that the law contemplates that the county shall pay

bailiffs for doing the sheriff's duties. It is the duty of the sheriff, by himself or deputy, to attend the session of the district court, and if the sheriff attends in person and his deputy is engaged in serving subpœnas, writs, and attending to the sheriff's duties proper, I cannot see how he can claim compensation as bailiff.

If such a claim is made the board of supervisors would be justified in requiring him to make a report of the fees he had earned in serving processes, and taking such fees into account in determining what other, if any, compensation shall be allowed him.

I think the office of deputy sheriff and bailiff are incompatible, and that no person can fill the two offices at the same time.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

FISHING—What is natural outlet of lake or slough.

DES MOINES, Iowa, September 10, 1896.

Geo. E. Delavan, Esq., Fish Commissioner, Estherville, Iowa:

DEAR SIR—Your telegram of the 4th inst., dated at Sabula, was sent to me while I was out of the state. I could not then reply. On my return I reply thereto by mail.

You ask, "If a man owns all land surrounding a small lake or slough not meandered, that occasionally overflows and is stocked with fish from the Mississippi river, has he the right to seine fish from said lake or slough at a time when there is no water connection with the Mississippi? Four weeks ago a skiff could be rowed from the Mississippi river into the slough."

In regard to this I will say that section 10 of chapter 34 of the acts of the Twenty-third General Assembly, provides: "Persons * * * owning premises on which there are waters having no natural outlets or inlets through which such waters may become stocked with fish or replenished with fish from public waters, shall absolutely own such fish as they may contain."

Section 2 of the act makes it unlawful to seine in any waters of the state. Private waters of the character referred to in section 10 cannot be considered waters of the state in which it is unlawful to seine.

The sole question then involved is whether there is a natural outlet or inlet to the lake or slough through which the stock of fish may be replenished from public waters of the state. This is largely a question of fact. I do not think that an occasional overflow of the river, or even a periodical overflow, although fish may thereby be transferred from the river to the lake or slough, constitutes a natural outlet or inlet. A natural outlet refers to a continuous stream or connection between the lake and the public waters. It is true that water may become so low that for a time being there may be no water flowing from the outlet or inlet. This would not prevent its being an outlet or inlet, but where there is a lake, wholly within the land of a private person, which was not meandered, without any natural channel for the water to pass from one to the other, I do not think it becomes unlawful for the owner

of the land to take the fish in such manner as he deems proper, simply because at times the water of the river, when high, may overflow the land between the lake and the river and fill up the lake.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—The number of mills that may be levied for ordinary county revenue including the support of the poor.

IOWA CITY, Iowa, September 14, 1896.

B. F. Ross, Esq., County Attorney, Onawa, Iowa:

DEAR SIR—Your favor of the 11th inst. at hand, in which you ask my opinion upon the following question:

"In our county we can levy a 6-mill tax for county revenue under section 796 of the code. Under section 1381 of the code we can levy 1 mill for the support of the poor. What is the highest levy that we can make under these sections? Would the total extreme limit of levy under both these sections be 6 mills or 7 mills?"

Sub-division 2 of section 796 of the code of 1873, and section 1381 as it appears in the code of '73, were enacted in the code of '73 contemporaneously. Various amendments have been made to both sections. The last amendment to section 1381 was made by the Seventeenth General Assembly, chapter 166.

Sub-division 2 of section 796 of the code of '73 was repealed and all the acts amendatory thereto were repealed by chapter 43 of the Twenty-third General Assembly, and a substitute enacted therefor. This chapter stands, then, as the last expression of the legislative will. It is, I believe, correctly stated in McClain's code in section 1270. The enactment of this substitute was also subsequent to any amendment of section 1381 of the code, or section 2168 of McClain's code.

The law as stated in section 2168 of McClain's code is not an exact statement of the section as it has been subsequently amended, but it is sufficiently exact for the purposes of the question you propound. If there were any real conflict between sections 1270 and 2168 of McClain's code, the former, being the last legislative enactment, must prevail. I do not think, however, that there was any conflict between the two sections.

I do not agree with the statement of your letter that you are authorized to levy a 6-mill tax for county revenue under section 796 of the code. The language is: "For ordinary county revenue, including the support of the poor * * * In counties having a population of 20,000 or less, excepting * * * such levy may be 6 mills or less." Your county having less population than 20,000, as I interpret the language, it would be authorized to levy for ordinary county revenue a tax of 6 mills, less whatever amount had been levied for the support of the poor.

This language is a limitation upon the power of the board of supervisors. The total levy for the support of the poor and ordinary county revenue is limited to 6 mills. The language of the statute does not

authorize a levy of 6 mills for ordinary county revenue if any tax has been levied for the support of the poor, but the two levies combined must not exceed 6 mills.

This clause, "including the support of the poor," occurred in the section as it was incorporated in the code of 1873. It was also in the revision of 1860, and in the code of 1851, and in every codification or enactment of a substitute, the phrase, "including the support of the poor," has been incorporated in the section. The other language of the section, "not less than 4 mills nor more than 6 mills," clearly indicates that the legislative intent was that the total tax levied for ordinary county revenue and the support of the poor together should not exceed 6 mills in counties having a population of 20,000 or less.

I am, therefore, of the opinion that the 6-mills tax is the aggregate amount that may be levied for both ordinary county revenue and the support of the poor.

I have not overlooked the decision of the supreme court in the case of *Lucas County v. The Chicago, Burlington & Quincy Railway Company*, 67 Iowa, 541. The question presented by your inquiry was not involved in that case. There is some language in the opinion which seems to consider the tax authorized by section 1381 of the code as a special tax. So it may be considered, but when the special tax is levied, it must be deducted from the amount which may be levied for ordinary county revenue under section 796. The court did not by inference even hold that the county might levy a tax for county purposes to the full amount of 4 or 6 mills, as the case may be, and in addition thereto, levy a special tax. I cannot arrive at any other conclusion by all the rules of interpreting statutes than that above stated.

Yours truly,

MILTON REMLEY,
Attorney-General.

INTOXICATING LIQUORS—MULCT TAX—A party must pay the mulct tax upon each piece of property upon which intoxicating liquor is either sold or kept for sale.

DES MOINES, Iowa, September 16, 1896.

T. C. Clary, Esq., County Attorney, New Hampton, Iowa:

DEAR SIR—Your favor of the 12th inst. came duly to hand. You ask my opinion upon the following question:

"A party residing here in town, under the mulct law, is engaged in retailing intoxicating liquors. He has a saloon, and pays a tax of $600 per annum. He has a retail liquor dealer's license, and also a wholesale liquor dealer's license. He keeps a cold storage room on other premises and has stored in said cold storage room, large quantities of liquors that he sells as a wholesaler. The question is, should he be compelled to pay an additional tax also, on the premises where he stores the liquor. He takes the orders in his saloon on other premises and uses the cold storage room simply for the purpose of storing liquor. Should a party be compelled to pay, or should a tax be assessed against property where the liquors are only stored for convenience?"

Section 1 of chapter 62, laws of the Twenty-fifth General Assembly, provides: "There shall be assessed against every person, partnership or corporation engaged in selling, or keeping with intent to sell, any intoxicating liquors, and upon any real property and the owner thereof, within or whereon intoxicating liquors are sold or kept with intent to sell in this state, a tax of $600 per annum " It will be noticed that the tax shall be against the real property and the owner thereof, within or whereon intoxicating liquors are sold or kept with intent to sell within the state. It is not necessary that the liquors should be sold on the property in order to make it liable for the tax, but if any liquor is kept thereon, with intent to sell in the state, the property is liable for the tax.

Each piece of property used for either of the purposes stated is liable for the tax Because both pieces of property, disconnected as they are, belong to the same person, or are used by the same person for the purposes above stated, does not reduce the tax which the statute says should be imposed.

Suppose the contrary rule prevailed. Upon which piece of property would the $600 tax be assessed; upon the saloon or upon the cold storage? Suppose the real property in which the saloon was kept were owned by one man and the cold storage owned by another; how would the tax be divided? He is conducting two businesses; one a retail liquor business, and another a wholesale liquor business. He finds it necessary in conducting his business to occupy different premises for these two businesses, and I can see no reason, in the nature of the case, why each property should not be required to pay the tax which the statute fixes.

In order to bring the case within the rule where the single assessment for $600 should be imposed, "the said selling or keeping for sale of intoxicating liquors shall be carried on in a single room, having but one entrance or exit, and that opening upon a public street." (Section 17, chapter 62.) It would not be claimed that the cold storage house and the saloon were one room and have a single entrance or exit.

Suppose a different construction were put upon the statute, and we should say that, having paid a tax on the saloon, he is entitled to keep his liquors in a cold storage, or in other premises, from which he sells at wholesale. Would the same rule apply in case he had another saloon in a different part of town, and if two saloons may be run by paying but one tax, why not three, four or a dozen? I have no doubt that the intent of the legislature was that every premise which was used in the traffic of intoxicating liquors should be required to pay the tax which the statute provides. There may be cases where this would appear to work an unnecessary hardship, but we must accept the law as it is written. Any other construction would lead to evasions and absurdities.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

OFFICIAL BALLOT—Where a portion of the delegates bolt the party convention and nominate another ticket, those who remain have the better right to have their ticket appear on the ballot under the party appellation.

DES MOINES, Iowa, September 16, 1896.

G. W. Dawson, Esq., County Attorney, Waterloo, Iowa:

DEAR SIR—Your favor of the 13th inst. at hand, in which you ask my opinion upon the following statement of facts:

"The democratic party, through its representatives, held a county convention, regularly called by that party. During the convention they got into a squabble over the money question, and the silver men, who, it is claimed, were in the minority, withdrew from the convention and called a separate convention of their own in another part of the building and nominated county officers. The sound money men who remained in the regular convention nominated a county ticket. The sound money party filed its nomination papers with the county auditor a short time before the silver men filed their nomination papers. The auditor received them both and filed them in their order. Both now claim that they are the regular democratic party, and each demands that their candidates be placed on the regular democratic ticket. The question is, which nomination papers the auditor should recognize and place under the head of democratic ticket."

Section 14, chapter 38, acts of the Twenty-fourth General Assembly provides: "All nominations by any political party or group of petitioners shall be placed under the party appellation, the title of said party or group as designated by them in their certificates of nomination or petition, and if none be designated, then under some suitable title." It is evident that the statute does not contemplate that two tickets shall be placed upon the ballot bearing the same party appellation. From the necessities of the case, the auditor must determine himself. If objections, however, are made, then the question is determined by the county auditor, clerk of the district court and county attorney. It is largely a question of fact which faction is entitled to the party appellation of democrat.

Under the statement of facts given, it would appear that the democrats who remained in the convention which was regularly called, are entitled to the party appellation of democrat. The others bolting from the convention, which I assume was called in accordance with the usages of the party, cannot insist that they constitute the party. In the absence of other evidence, the auditor would be justified in assuming that the ticket first filed under the party appellation of democrat is the ticket nominated by the democratic county convention, and having filed one under the party appellation, another could not properly be placed upon the ticket under the same party appellation.

The statement of facts, however, does not leave this presumption to stand alone. It shows that the one who filed its nomination papers first was the regularly constituted party convention. If the auditor signifies his intention so to act, then the parties objecting thereto may file objections and make a contest before the tribunal provided for.

Yours truly,

MILTON REMLEY,
Attorney-General.

TRANSPORTATION OF A DISINTERRED BODY—REGULATION OF BY STATE BOARD OF HEALTH—The state board of health may require one transporting a disinterred body across the state to procure a special permit so to do.

DES MOINES, Iowa, September 17, 1896.

Dr. J. F. Kennedy, Secretary State Board of Health, Des Moines, Iowa:

DEAR SIR—Yours of September 2d came duly to hand, in which you enclose the rules and regulations of the state board of health, form 98B and 104B, and ask:

"Suppose it is desired to transport a disinterred body dead of a disease, the transportation of which is not prohibited, from a point in Illinois through the state of Iowa to a point in the state of Nebraska, in such a case would it be necessary to obtain a special disinterment permit from the Iowa state board of health in order to transport the body through this state, it being understood that in all other respects the regulations of the states of Illinois, Iowa and Nebraska regarding the transportation of corpses have been fully complied with, and it being further understood that the states of Illinois and Nebraska have no requirement respecting the disinterment of bodies?"

I am at a little loss to understand the exact point upon which my opinion is desired. I do not think, if a construction of the rules is intended, and the regulations which you enclose me clearly state the same, that there can be any reasonable doubt that the transportation of a disinterred body from whatever disease death may have been caused, is by the rules prohibited.

If the inquiry is in regard to the necessity for such rules and regulations being adopted, I beg to state that such question is not a question of law so much as what is, in the judgment of the board of health, necessary for the protection of the public health. I assume that the board, in adopting such rules and regulations, adopted none but those they thought necessary.

I assume, however, that the thought of the question is whether the Iowa state board of health has authority to adopt rules and regulations for the transportation of bodies disinterred in the state of Illinois, transported through the state of Iowa to the state of Nebraska, it being conceded that death was not caused by an infectious disease.

In regard to this, I do not think that the fact that the body is received from another state, and passes through the state, makes any difference in the authority of the board to regulate the transportation. It is undoubtedly one of the police powers of the state which has never been surrendered to the federal government to protect the public health. Under the interstate commerce clause of the constitution, there has been no successful attempt to defeat the police laws of the state looking toward the public health and safety.

A refusal to permit the transportation of a body that has been disinterred could hardly be considered an interference with interstate commerce. If, in the judgment of the state board of health, which under our statute has full power to make rules and regulations respecting such matters, it is dangerous to public health to permit a disinterred body to be transported along the lines of railroad in the state, or through the state, it, in my judgment, has authority to make such regulations.

The question whether the transportation of such a body is actually dangerous to public health, is one for the good judgment of the board to determine. The fact that Nebraska and the state of Illinois have made no regulations in regard to the transportation of such bodies, does not prevent the Iowa state board of health making any regulations it may deem necessary.

Hence, my answer to the question, as I understand it, would be that under the rules and regulations which you submit to me, they having been adopted in the exercise of the lawful powers of the board, it would be necessary, in order to lawfully transport a body disinterred in another state across the state of Iowa, to comply with the requirements and regulations of the board by procuring a special permit.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PRISONER SERVING TWO SENTENCES, HAVING BEEN SENTENCED UNDER DIFFERENT NAMES—One sentence begins when the other ends.

IOWA CITY, Iowa, September 21, 1896.

Hon. P. W. Madden, Warden Anamosa Penitentiary, Anamosa, Iowa:

DEAR SIR—Your favor of the 18th inst. at hand, in which you enclose two commitments of Benjamin Pixley, dated September 24, 1894, the sentences aggregating two years and one-half imprisonment. Also a transcript of a judgment rendered October 15, 1894, sentencing C. Johnson to the penitentiary for one year and a half; you state that C. Johnson and Benjamin Pixley are one and the same person, and ask, when does the term of imprisonment of C. Johnson, *alias* Pixley, begin under the last judgment?

I call attention to the fact that if there is a commitment under the last judgment it has not been sent to me, and something more than a simple transcript of a judgment seems to be required as your authority for holding the party. Assuming, however, that you have a proper commitment of C. Johnson, the rule of the supreme court, in the case of *Mear v. McMillan*, 51 Iowa, 214, seems to cover the case, and the term of imprisonment of C. Johnson under a proper commitment would begin at the expiration of his term of imprisonment under the two previous commitments. The supreme court says, in the case referred to, that there is no such thing as concurrent imprisonment.

I return the commitments as requested.

Yours truly,

MILTON REMLEY,
Attorney-General.

TAXATION—SUPPORT OF THE POOR—The amount that may be levied for the support of the poor.

IOWA CITY, Iowa, September 21, 1896.

D. W. Hurn, County Attorney, Mason City, Iowa:

DEAR SIR—Your favor of the 17th inst. is at hand, in which you ask:

"In your opinion, can the board of supervisors of a county with a population of 20,000, levy a poor tax under section 1381, code, when the county

revenue is insufficient to support the poor, or is its only authority to levy a tax for the poor contained in sub-division 2, section 796, code?"

I have had occasion to investigate the question lately. Under section 1381, as amended by the Sixteenth, Seventeenth and Twenty-first General Assemblies, when the revenue of the county proves insufficient for the support of the poor the board of supervisors may levy, in a county having less than 14,000, a poor tax of 1 mill; in a county having over 14,000, a tax of 1½-mills. Sub-division 2, section 796, is a limitation in the amount counties of the different classes may levy for ordinary revenue, including the support of the poor. A county having a population of 20,000 or less may levy ordinary county revenue, including for the support of the poor, a tax of 6 mills. If it has levied 1½-mills it could only levy 4½ for ordinary county revenue.

I think the two sections should be construed together. While the law originally contemplated that the support of the poor should be paid out of the county funds, yet the provision of the law is such that the board may designate what part of the aggregate levy of the 6 mills or 4 mills, as the case may be, may be set apart for the support of the poor.

I am aware that a different view is sometimes taken of this, but the history of the legislation sustains the views that I have expressed, and I can see no other way to harmonize the two sections.

Yours truly,

MILTON REMLEY,
Attorney-General.

SURVEYOR'S NOTES—The transcript of the field notes of the government survey, found in the auditor's office, should govern the county surveyor.

IOWA CITY, Iowa, September 21, 1896.

Alex. Brown, Esq., County Attorney, Keosauqua, Iowa:

DEAR SIR—Your favor of the 18th inst., in which you ask my opinion upon the following state of facts, at hand:

The field notes of the original survey on file in the county agree with the established corners fixed in dividing a section, that is, the county surveyor, by the field notes on file, finds the corners fixed by the original survey, the distance between them agrees with the notes on file, and these have been used and followed for the past fifty years or more. Recently an outside surveyor called in to survey this line sends to the secretary of state for a copy of the notes of the original survey; these notes do not agree with the notes on file in the county; the difference is very material. The question is, what is the duty of the county surveyor; shall he adopt and be governed by the notes in the office of the secretary of state or shall he stand by the notes he has?

Section 112 of the code of 1851 required the county judge to procure for his county a copy of the field notes of the original survey of his county by the United States. This was required in the revision of 1860, section 248 When the office of county judge was abolished, the records of the judge remained in the auditor's office. Under section 3146 of McClain's code the board of supervisors is authorized to procure a copy of the

government survey belonging to said county. Different sections make such field notes competent evidence in the courts with the same force and effect as the original. Section 506 of McClain's code (code of 1873, section 371) makes it the duty of the surveyor to furnish himself with a copy of the field notes of the original survey of the same land, if there be any in the office of the county auditor, and his survey shall be made in accordance therewith. The surveyor need not look farther than to the copy or transcript of the field notes which is found in the auditor's office. I think the section above referred to plainly indicates his duty in the matter.

Yours truly,

MILTON REMLEY,
Attorney-General.

ELECTIONS—TOWNSHIP TRUSTEES AND CLERK.—Election, where held—Who should act as judges and clerks—Who entitled to vote for the township officers named.

DES MOINES, Iowa, September 29, 1896.

J. T. Carey, Esq., County Auditor, Denison, Iowa:

DEAR SIR—Your favor of the 26th inst. at hand. I have great delicacy in complying with your very courteous request, because the law does not contemplate that I should give opinions to any but state officers and county attorneys. County auditors may ask for the official opinion of the county attorney, and sometimes it would appear very discourteous for me to express an opinion to county officers. But you say there is no feeling over the matter and all parties desire my views, and I assume this includes Mr. Swasey, the county attorney, and hence will briefly state my views upon the questions asked.

You state: "Denison is a city of the second class and has been duly divided into wards, and some of the township trustees live in the city and some in the township outside of the city. The corporation is situated in one township, but does not comprise a township itself." This latter point is not made very clear in your statement, but I infer it is so from what is said.

You ask, *first*.—"Can the voters of the township outside of the corporation hold their election and do their voting within the corporate limits, or must it be outside of the corporate limits?"

Section 1054 of McClain's code gives authority to hold the election inside of the city limits in the court house, or in some other building the board of supervisors may provide. Section 530 of the code gives the township trustees authority to designate the place where the election will be held. Without carefully examining the question, I would not like to say that the trustees have not the power to provide a room, but think it is best, if the election is held elsewhere than at the court house, that the board of supervisors provide the place. At first blush it strikes me that the provision in regard to the supervisors providing a room is not intended to restrict the power granted in section 530 of McClain's code, but it is intended to require the board of supervisors, if they do not wish the court house to be used for election purposes, to provide another room.

Second.—"Can the township trustees of a township residing within the corporate limits, act as judges and clerks of election for and where the voters residing outside of the corporation vote?"

Section 1067 of McClain's code provides that the trustees and township clerk shall be judges and clerks of election. There seems to be no exemption in the law to meet the case that you put, yet there is an impropriety in the trustees residing within the corporate limits of the city acting as judges. I think it would be better for them to refuse to act and let the vacancies be filled.

Third.—"Can they (the trustees and clerks) act as judges and clerks at the polling place within the corporation or in the ward where they reside?"

The elections in the wards must be conducted by the persons named in section 19, chapter 33, laws of the Twenty-fourth General Assembly, and not by the township trustees and clerks.

Fourth.—"Can the township clerk and trustees be voted for by electors residing within the corporation?"

Certainly, if the state of facts assumed to be true is correct. The city is a part of the township, and all electors in the township, which includes the city, can vote for such township officers.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

THE BOARD OF SUPERVISORS HAS NO AUTHORITY TO TRANSFER MONEY FROM THE BRIDGE FUND TO THE COUNTY FUND.

DES MOINES, Iowa, October 3, 1896.

Hon. E. C. Ebersole, County Attorney, Toledo, Iowa:

DEAR SIR—Your favor of the 2d inst. at hand, in which you ask my opinion upon the question whether the board of supervisors has any authority in law to transfer money from the bridge fund to the county fund? You also state that you have not been able to say to them that they have lawful authority so to do.

I think it may be stated as a rule without exception that where the board of supervisors is authorized to levy a tax for a specific purpose and a limit is placed on the amount which may be levied, that such limitation is equivalent to a provision that no greater amount than is raised from such fund shall be spent for that specific purpose. In some instances there is a direct provision prohibiting a diversion of the fund as, for instance, in the case of the tax for the support of the insane, and heavy penalties provided for a violation. (Sections 2229, 2230 of McClain's code.)

There are a number of funds for which the board of supervisors is authorized to levy a tax, and a limit is placed on the amount which may be levied for each purpose. If authority exists to transfer at the pleasure of the board from one fund to the other, it in effect breaks down the distinction between the different funds, and the law might then be changed by fixing a gross sum which the board should be authorized to levy.

The board may now levy 4 mills for county purposes, 3 mills for county schools, 3 for bridges, 1 for county roads and three-fourths of a mill for soldiers' relief, besides some other taxes. These especially named amount to 11.3 mills. I cannot construe the law to mean that 11.3 mills may be levied for the purposes named, or any of them, and that, say, 10 mills may be used for county purposes, if the board desires. And yet the right to transfer from one fund to another at the pleasure of the board would practically be placing this construction upon the law.

The board of supervisors has no authority for a levy of a tax except such as is expressly given by the statute. Authority to levy a tax for one purpose by no implication carries with it the right to expend that tax for some other purpose They are the agents of the county with authority defined by statute. The whole theory of the law and the principle running throughout the entire legislation is that the tax levied for a specific purpose shall be used for that purpose and none other

Under section 1270 of McClain's code, in counties which are authorized to levy a tax of 4 mills for ordinary county revenue, including the support of the poor, the legislature intended to place a limit upon the amount which may be expended for county purposes, including the support of the poor, and to transfer from another fund collected for a specific purpose, would, in my judgment, be unauthorized by law. The statute recognizes that emergencies may arise which require a greater expenditure for county purposes than 4 mills, but it is left to the electors of the county to determine this by a special vote. So in regard to the bridge fund or the fund for the erection of county buildings in excess of $5,000, the proposition must be submitted to the voters of the county. There have been special statutes enacted authorizing in certain cases the transfer from one fund to another; for instance, the domestic animal fund and the county road fund, by chapter 42 of the acts of the Twenty-sixth General Assembly.

These considerations confirm me in the opinion that each fund must be expended for the purpose for which it was levied and for that alone, except in cases where the law specially authorizes a transfer.

I agree with the conclusion that you reached.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

JUDGES OF ELECTION—The trustees of an incorporated town and not the trustees of the township are the trustees who are ex officio judges of election.

DES MOINES, Iowa, October 8, 1896.

W. L. Smith, Esq., County Attorney, Humboldt, Iowa:

DEAR SIR—You favor of the 17th inst. at hand, in which you ask my opinion as to the construction of the following clause in section 19, chapter 33 of the acts of the Twenty-fourth General Assembly, viz.: "In municipalities the councilmen or trustees shall be *ex officio* judges of election."

You call attention to the fact that Springvale township is territorially coincident with the incorporated town of Humboldt, with the further fact

that within said township there are three township trustees, the real question being whether the township trustees or councilmen are to be *ex officio* judges of the election. You also call attention to chapter 10 of the Twenty-fourth General Assembly, abolishing the office of township trustees in cities of less than 7,000 inhabitants when the city constitutes a civil township by itself; also state that the population of Humboldt is 1,240.

In regard to this I will say that the town of Humboldt is what is called in law an incorporated town. Section 648 of McClain's code provides that the corporate authority of incorporated towns shall be vested in one mayor, one recorder and *six trustees*, to be elected by the people. The officers named constitute the town council.

In cities of the first and second class, the members of the city council are in different places in the law referred to as councilmen, trustees and aldermen. These three terms as applied to cities are treated in the law as if they were synonymous. For instance section 1716 of McClain's code refers to the members of the council in one place; in another they are called trustees, and in still another they are referred to as aldermen. I do not, however, recall any place where the members of the council of an incorporated town are referred to in any other terms than "trustees."

Bearing this in mind, and the further fact that the term, "municipalities," in the section in question refers to both cities and incorporated towns, the term, "councilmen," as it occurs in the clause quoted, refers to the members of the city council in cities, and the word, "trustees," refers to the members of the town councils in incorporated towns. So that in either case, the members of council in cities and the members of the council in incorporated towns shall, under the provisions of section 19 of said chapter 33, be *ex officio* the judges of the election.

In my opinion the word, "trustees," in said clause has no reference whatever to the township trustees. This becomes more evident by the language used in the following sentence. It is this: "In township precincts, the clerk of the township shall be *ex officio* the clerk of the election in the precinct in which he resides, and the township trustees shall be *ex officio* judges of the election," etc. Thus the trustees of an incorporated town and the trustees of a township are contrasted and the distinction between the two is made apparent.

I have no doubt that the trustees of the incorporated town of Humboldt are the proper ones to be judges of the election.

Yours truly,

MILTON REMLEY,
Attorney-General.

RIGHT OF PRIVATE PARTIES TO INSPECT PUBLIC RECORDS —When an instrument is filed with the county recorder, and indexed by him, it becomes a public record, and anyone interested therein may inspect it.

DES MOINES, Iowa, October 9, 1896.

O. C. Meredith, Esq., County Attorney, Newton, Iowa:

DEAR SIR—Your favor of the 8th inst. at hand, in which you ask my opinion upon the following question:

"When instruments are filed with the county recorder, and indexed,

are those files a part of the public records, and subject to inspection by any person before they are spread on record, or are those files the private property of the recorder until they are spread on the record?"

Under our recording acts, the recorder is required to make certain entries upon the index books upon the filing of an instrument in the recorder's office. He is also required to note upon the instrument the day and the hour at which the same is filed. (See McClain's code, sections 3905, 3906, and 3114, 3115.)

From the time that the entries are made upon the index books, the world is charged with constructive notice of the rights of the grantee conferred by such instrument, notwithstanding the fact that the instrument is not actually recorded. This, however, is not true if the instrument is withdrawn from the recorder's office and never recorded. (See *Yerger v. Barz*, 56 Iowa, 77)

It may be stated as a principle of law which is in harmony with our recording acts, that one is charged with constructive notice of any fact of which he may, by reasonable inquiry, obtain knowledge. The theory of our recording acts is, that when an instrument is deposited with the recorder, it cannot be recorded the very instant it is filed. A reasonable time is allowed for recording after the filing, but the constructive notice begins from the hour of making the proper entry upon the index books.

Such entries serve as notice of the rights of the grantee during the time intervening between the filing and the actual recording. When an instrument is recorded, its record dates back to the time of the filing and indexing. The law contemplates the instrument itself being deposited with the recorder; it shall be open to the inspection of the public, who may, by examining the index book, ascertain that it is on deposit with the recorder.

It would be a very unjust rule to say that one is charged with notice of what is contained in a written instrument, who has no means of obtaining a knowledge of what is contained therein. For instance, a description of the personal property in a chattel mortgage or bill of sale is not required to be entered upon the index book Unless the instrument itself is open to the inspection of creditors, they can never know from the index what property is conveyed or mortgaged before it is actually recorded. I am very clear that no court would hold an attaching creditor charged with notice of a mortgage on personal property if the recorder should refuse to permit an inspection of the mortgage in his hands before it is recorded.

A recorder has no personal interest either in the records or in the instruments filed in his office for record. Until the instrument is recorded, it stands to reason that if it is to convey notice of the rights of the grantee therein named to the public, it becomes and remains a public record until such time as it is recorded. The instrument is left with the recorder to be made a part of the public record; the instrument itself being a public record is open to the inspection of any person interested therein until such time as the recorder can spread the same upon the record.

Any other view would open the door to fraud and injustice, which the recording laws are intended to prevent. These views are in harmony, in my opinion, with the whole theory of our law, and nothing in the language of the law requires a contrary view to be taken.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

JUDGES OF ELECTIONS—POLITICAL PARTIES REPRESENTED—Of the two largest political parties, the smaller should have at least one representative on the election board.

DES MOINES, Iowa, October 12, 1896.

Wm. Wonn, Esq., County Attorney, Audubon, Iowa:

DEAR SIR—Your favor of the 10th inst. at hand, in which you state that all the township trustees and clerks in your township belong to the republican party, and the board of supervisors, at their last meeting, appointed E. A. Beason to take the place of one of the republican members of the board; that Mr. Beason was, prior to this election, a democrat, but since the Chicago convention has affiliated with, and belongs to, a party known as the national democratic party, for whom no votes were cast at the last election, nor have they a county ticket or a township ticket in this county at the coming election. A petition has been presented to the board of supervisors requesting the appointment of a man upon said election board who belongs to the democratic party, which at the last election cast 1,114 votes, it being the party casting the next highest number of votes at said election, and which has regularly nominated candidates upon the ticket for both county and township officers for the coming election. This (you say) leaves the party casting the next highest number of votes at the last election unrepresented on the board. Is the statute which provides for the organization of said board, to-wit, section 19, chapter 33 of the Twenty-fourth General Assembly, mandatory or simply directory? Is an election board formed from new parties or parties in the minority, a legal election board? Would votes received by such board be counted if the counting of them would change the general result of election in either the precinct, the county or state? Has the board of supervisors the authority to reform the board so as to comply with the section above referred to?

Upon your statement of facts Mr. Beason has ceased to be a member of the democratic party. The law requires, under the facts which you have stated, that the democratic party should have a representative on the board. I will not, at the present time, enter upon the discussion whether it is mandatory or directory, giving the full significance to these terms as they are generally used, nor would I like to say that an error of the board would vitiate an election, unless it were shown that some fraud was committed, or some wrong done.

The policy of the law is to give expression to the vote of the electors which is cast, and not to throw out any precinct because of any failure to comply with the strict letter of the law, unless some fraud or wrong is thereby done. I have no doubt that if the board discovered their mistake in appointing one who does not belong to the party, that they would have power to correct their mistake. While it may be a debatable question whether a person, because of bolting one or two candidates on a ticket, loses his party affiliation, yet your statement of facts asserts that Mr. Beason does not belong to the democratic party, but belongs to the national democratic party.

That being the case, I have no doubt that the board should appoint one who is a fair representative of the democratic party. Irrespective of the question whether courts would refuse to count the votes cast in the precinct,

or count them, the utmost fairness should be observed in the constitution of the election boards, and in all matters pertaining to the election, the spirit of the law should be carried out as far as practicable.

Yours truly,

MILTON REMLEY,
Attorney-General.

OFFICIAL BALLOT—A candidate whose name appears on the ballot by reason of having been nominated by a party convention cannot have his name appear a second time by petition.

DES MOINES, Iowa, October 24, 1896.

Hon. E. C. Ebersole, County Attorney, Toledo, Iowa:

DEAR SIR—Your favor at hand, in which you ask my opinion upon the proper interpretation to be given to the proviso in section 5, chapter 33, acts of the Twenty-fourth General Assembly, the question being whether the name of a person who has been duly nominated by a party convention, and the proper certificate of nomination has been filed by the officers of such convention, can have his name put upon the ballot a second time by petition.

This matter has been before me a number of times and I have had occasion to examine the question in all possible phases. I can reach no other conclusion than that under no possible circumstances can the name of a candidate whose name appears on the ballot, because of his nomination by a party convention, appear the second time on the ballot because of any petition or petitions.

The language of the statute is plain, and need not be misunderstood. It is: "Provided that the name of any candidate whose name may appear in any other place upon the ballot, shall not be so added by petition for the same office."

It will be noticed that section 4 of the act provides the manner of filing certificates of nomination made by the convention of parties casting 2 per cent of the vote in the state, district, county, etc. But section 5 of this act relates alone to the method of securing a place on the official ballot by one who has not been nominated by a regular party convention. The different sentences of this section provide the number of qualified voters of the state, or some division thereof required as petitioners, in order to entitle the name to be put upon the ballot by petition. Then comes the general proviso quoted above. It is broad and comprehensive. There is nothing in the language limiting its application to any class of candidates, or to any particular office. "Any candidate" means any candidate whatsoever, for any office whatsoever.

It has been suggested by some that because there is only a semicolon before the word, "provided," that the proviso relates alone to the sentence to which it is attached by the semicolon. I do not think there is any force in this suggestion, because, first, that method of punctuation is generally adopted, and, so far as I know, the proviso is never held to relate only to the last sentence of the section; second, there is no reason why the legislature should intend to prevent the name of a candidate in a city, town, precinct or ward from being added a second time by petition, and permit the

name of a candidate for a county, district or state to be added. The reason of the adding would be stronger for the last named candidates than for the smaller divisions of the state; third, the rules of punctuating statutes forbid that punctuation should change the evident meaning and intent of the statute. Courts would disregard punctuation entirely; it is no controlling factor in construing a statute (Sec. 23, Am. and Eng. Enc. of Law, page 334); fourth, the language of the entire section precludes the thought of thus limiting the proviso to the last sentence before it. If the proviso had been written out in full at the end of each sentence preceding it, the meaning would be no plainer than it is now. The familiar rules of language, and the interpretation of statutes, require us to give to it the same meaning as if it had been also attached in full to each sentence. I have not a particle of doubt in regard to this matter. In no case coming under my observation has a different rule been adopted.

Yours truly,

MILTON REMLEY,
Attorney-General.

ELECTIONS—ASSESSOR—WHEN A SEPARATE BALLOT MAY BE USED.

DES MOINES, Iowa, October 26, 1896.

H. S. Richardson, Esq., County Auditor, Anamosa, Iowa:

DEAR SIR—Your favor of the 20th inst. at hand, and also a letter from your county attorney, asking me to give the opinion which you request.

I am not sure that I quite understand the situation. You say: "Fairview township has two voting precincts; one *includes* Anamosa, which is incorporated; the other, Stone City, which is not incorporated. In filing the nominations for the township ticket, one political party names the assessor; the other does not. Of course, the tickets for the precinct which includes Anamosa cannot have the assessor on. Now, the question is, whether or not the tickets for the other precinct should have the assessor's name on, or should they vote for the assessor the same as the other precinct, by using a special ballot?"

I infer from your statement of facts that the people of the township outside of Anamosa vote at the same precinct as the voters of Anamosa. Section 1044 of McClain's code, as amended by chapter 60 of the acts of the Twenty-fifth General Assembly, applies to Anamosa, it having a population of more than 2,000 inhabitants Then it would seem that Anamosa should vote by wards. Hence, I am uncertain as to the true situation, inasmuch as your question pre-supposes that Anamosa does not vote by wards. Section 1084 of McClain's code, in my judgment, applies to those incorporated towns or cities which have less than 2,000 inhabitants, and there is but one voting place for the voters of the incorporation and territory outside of the incorporation.

You will notice section 34 of chapter 33 of the acts of the Twenty-fourth General Assembly, by which the provisions of the Australian ballot shall not apply so far as they conflict with chapter 71 of the acts of the Seventeenth General Assembly, being section 1084 of McClain's code. I am not

sure, in view of this section 34, that it becomes necessary, in any case where a separate ballot box is required, to put the name of the assessor upon the official ballot. It appears that two ballots are needed in such a case; one, the official ballot with the names of all candidates on except assessors and road supervisors; another ballot with the names of the candidates for assessor on.

If, however, the city of Anamosa voted by wards, and a special ballot were prepared for Anamosa, then the rest of the township outside of Fairview which elects an assessor by itself, should properly have the name of the assessor on the official ballot; and this would be true even if the polling place for such territory outside of Anamosa were within the city limits of Anamosa, as is authorized by section 1074 of McClain's code.

I think the rule would be that every precinct where the ballots for assessor are not required to be put in a separate box, that the name of the assessor should be put upon the official ballot, and in voting precincts where a separate ballot is required, then the name of the assessor should not be upon the official ballot, but a separate ballot should be prepared. And in this latter case, I am clear that the certificate of nomination for assessor is required to be filed with the county auditor because of section 34 above referred to.

Because of the doubt in my mind as to the real import of the question, I am unable to make my answer more definite.

Yours truly,

MILTON REMLEY,
Attorney-General.

OFFICIAL BALLOT—Writing in name of a candidate where no blank appears for the same.

DES MOINES, Iowa, October 30, 1896.

H. C. Liggett, Esq., County Attorney, Hampton, Iowa:

DEAR SIR—Your favor, without date, addressed to the attorney-general at hand and contents noted. The attorney-general is absent from the city, and I find he will not be here until after election. As a consequence I write you in regard to the matter submitted

In the letter written by County Auditor Krag, he asked the opinion of the attorney-general upon certain instructions which he contemplated posting up on election day. In regard to the statement contained in the third paragraph that appears upon the card sent to us, I would say that I believe the law is correctly stated. A voter has the right to write in the name of any person he may desire to vote for, if there is a blank line appearing in the ballot upon which said name may be written.

The fourth and last paragraph appearing upon said card of instructions is the only one that I can see any objection to whatsoever. From Mr. Krag's letter, I understand that he means by that paragraph to tell the voter that in a case where a ballot is entirely filled with names, and there is no blank space appearing upon the ballot, that the voter is authorized to write in the name of the person he desires to vote for, and by making a cross in the square placed in front of said name, thus vote for the man

whose name is by him written in. It seems to me that it is hardly necessary to instruct the voter that he may do this, as his following the instructions may bring about a contest or cause a large number of ballots to be thrown out.

Now, as to the correctness of the method above referred to, I would say that under the decision in the case of *Whittam v. Zahorik*, 59 N. W. Rep., 57, it might be held that the writing in of the name and the placing of a square in front of it, would be the marking of a ballot in such a way that it could be identified, or that it would be the marking of a ballot in a way unauthorized by law, and thus cause the said ballot to be thrown out on that account. This is the reason that I do not think it advisable to take the chances.

On the other hand, it has been held in Illinois, in the case of *Sanner v. Patton*, 40 N. E. Rep., 290, that a name may be written in as above indicated and a square placed in front of it, and that a vote so cast for the man whose name is so written in will be held a legal vote, and if an individual so voted for should receive a majority of the votes cast, he would be declared elected to the office for which he had been voted for.

The Illinois ballot law is very similar to ours but cases cited by that court in the rendering of the decision, are cases decided under ballot laws which authorize more freedom in the writing in of names than the law in this state.

In view of the foregoing I would say that while the policy stated by the auditor may be correct, yet it is not the safer, and for that reason, it might be better not to pursue it. Yours truly,

JESSE A. MILLER,
Assistant Attorney-General.

NOTE —The provision of the statute authorizing the writing in of a name is so changed by the new code that the rule announced in the Illinois case would, in all probability, now apply.

PUBLIC OFFICERS—COUNTY ATTORNEYS—DUTIES—For whom county attorneys are not required to defend suits nor give official opinions.

DES MOINES, Iowa, November 4, 1896.

G. H. Martin, Esq., County Attorney, Spencer, Iowa:

DEAR SIR—Your favor of the 31st ult. at hand. You ask my opinion upon several questions, which I will condense as follows:

First.—Is it a part of the duties of the county attorney to give opinions to the board of directors of school district townships, or to defend suits brought against such districts?

In regard to this I will say that the law makes it the duty of the county attorney to appear in all cases and proceedings in the courts of his county in which the state or his county is a party. This, I think, fully contemplates that it shall be his duty to appear and defend the interests of the state or county whenever they may be involved in any suit in the courts of his county of which he has knowledge. Section 269 of McClain's code requires

the county attorneys, without compensation, to give opinions and advice to the board of supervisors and to other civil officers of their respective counties. I would consider the phrase, "civil officers of their respective counties," to be equivalent to, "county officers." Any officer, then, that may properly be classed a county officer would be entitled to receive gratuitously the opinions and advice of the county attorney. I do not think however, there can be a question that the board of directors of school district townships or independent school districts cannot be in any sense considered as county officers, and hence do not think it a part of the duties of the county attorney either to defend suits brought against school district townships or to give opinions to such officers. If he does so, it is because of his good nature. Sometimes he may with propriety do so, but he is under no legal obligations, in my judgment, either to give opinions or defend such suits.

Second.—You say your firm has been solicited to commence an injunction proceedings to restrain the township trustees and highway supervisor in one of your townships from working a certain highway. The highway was established on a section line between sections 6 and 7 in such township and through a mistake as to the true location of the section line the highway has been worked and traveled along a line different somewhat from the true section line. Under a recent decision of your district court the corners and boundaries of the section have been relocated and re-established, and the highway as now traveled is not traveled on the section line, where the board of supervisors established the highway. It is your duty as county attorney to advise the township officers and the superintendent of the highways what their rights are and, if necessary, to defend a case for them?

This question involves more doubt. In a certain sense the township trustees are county officers. Sections 1034 and 1037 of McClains code specifies who shall be considered county officers—that is, they are paid by the county, although not expressly declared to be county officers. I would not like to say that township trustees and road supervisors are such county officers, for all purposes, and ordinarily I do not think it would be the county attorney's duty to give an opinion to them or to defend suits brought against them. Still a case may arise, and the one you name may, because of the interest of the county in the highway, be such a case, wherein it would not be proper for the county attorney to be employed against the township trustees and road supervisor. It might be that it would be necessary to have some one indicted for obstructing the highway and it would certainly be embarrassing and contrary to professional ethics for the county attorney to accept a retainer in a case which would preclude him from defending the interests of the county in the public highways when called upon by his duties of the office so to do. I think it would be better to err by refusing to accept a retainer in such a case than to be compelled to occupy any questionable position thereafter.

Most of these controversies, however, are only between adjacent land owners, and if the facts of the case justify the conclusion that no substantial interest of the county is involved nor could be involved, then I would see no objection to the county attorney accepting retainer for one of the parties.

I do not think any fixed rule can be laid down in advance.

There are matters wherein it would unquestionably be the duty of the county attorney to defend the township trustees; for instance, where an

appeal is taken from the action of the trustees, as a board of equalization. In such a case the interests of the county are directly involved, and I do not question that it would be his duty to appear in such a case, but in the local affairs, exclusively within the direction of the township trustees, I cannot think the statute intended that the county attorney should, without compensation, either give opinions or defend suits for the township trustees or highway supervisors

Yours truly,

MILTON REMLEY.
Attorney-General.

TAXATION—CORRECTION OF ERRORS—The auditor having improperly transferred a tax assessed against "A" to "B" should, upon the discovery of his mistake, re-transfer the tax so that it may stand against "A."

IOWA CITY, Iowa, November 7, 1896.

L. E. Francis, Esq., County Attorney, Spirit Lake, Iowa:

DEAR SIR—Your favor came duly to hand in which you state the following facts:

On the 1st of January, 1895, "A" owned a stock of merchandise. On the 7th day of February, 1895, he sold the same to "B." On the 10th day of February, 1895, the stock was assessed in "A's" name, and on the 1st of May, 1895, he filed with the county auditor a statement of such sale. On that date the said auditor transferred said tax to the purchaser of said stock, where it now remains. "A" had at all times real estate.

You ask, first, was the change properly made by the auditor from "A" to "B;" second, if not properly made can the said auditor, under section 841, change the same back to "A" and enforce collection against him?

In regard to this I will say that the provisions of chapter 35, laws of the Twenty-fourth General Assembly, to which you refer, apply only to cases where the person owning the personal property has no real estate. Where a party has real estate upon which the tax becomes a lien then the provisions of said chapter have no application whatever.

You will notice that the chapter does not purport to repeal any other statute. Section 1288 of McClain's code requires personal property to be listed and assessed in the name of the owner on the 1st day of January. Upon such assessment it is determined how much the owner of the property shall pay for public uses. This tax becomes a debt; no demand is necessary, and there exists a personal liability on the part of the property holder to pay such tax, but under the frequent decisions of the supreme court a tax was not a lien upon personal property until it was actually seized. Chapter 35 creates a lien, in the case named, in the hands of the purchaser or vendee and it is intended to prevent a person selling a stock of goods or all his personal property *en masse* and thus defeat the payment of the taxes. And it is intended to require the purchaser, for his own protection, to make some provision for the payment of the debt due the state by the seller. I do not understand that said chapter relieves the seller from his personal liability to pay the tax, but in any event, in the case that you state, "A" had at all

times real estate and the auditor was not authorized, under the circumstances, to make a transfer of the tax to "B." He should now treat it as if such transfer had not been made, and having made an incorrect entry in the tax book outside of the provisions of 841 of the code (1322 McClain's code) he would be authorized to make the proper correction and clearly so under and by virtue of the provisions of this section. I do not think that the provisions of said chapter 35 can be applied to any case that does not come strictly within the terms thereof, and, if the purpose of the act is kept in mind, I do not think anyone holding real estate can reasonably claim that he is released thereby from the obligation to pay the tax. I doubt very much, in view of the provisions of other sections, whether one who owns no real estate would be released from the debt he owes the state by reason of selling his personal property after the 1st of January. To refer to your illustration; "A" holding personal property, "B" has money. "A" is assessed on his personal property and "B" on his money. If "B" is compelled to pay "A's" taxes on the personal property he will then have to pay double taxes and "A" is released. I would not accept this as the intent of the legislature unless I am forced to do so by the language of the statute.

Your letter contained one or two other enquiries which are embraced in the above. Yours truly,

MILTON REMLEY,
Attorney-General.

ELECTIONS—OFFICIAL BALLOT—THE BOARD OF SUPERVISORS AS A BOARD OF CANVASSERS has no authority to reject certain votes because it appears to them that the names of the parties voted for were improperly put upon the ballot.

DES MOINES, Iowa, November 10, 1896.

D. H. Myerhoff, Esq., County Attorney, Corning, Iowa:

DEAR SIR—Your letter of the 29th ult. came to hand during my absence. In your letter you make the following statement of facts:

"The certificates of nomination of the township officers of Quincy township were held by the county auditor to be insufficient and inoperative because of their not being filed twenty days before election. Two of the central committeemen of the township filed new nomination papers, together with affidavits, as required by section 9 of chapter 33 of the acts of the Twenty-fourth General Assembly."

The question asked in your letter was whether the auditor would be authorized in putting the names of the candidates for township officers upon the official ballot. By telephone yesterday you add to the question the further statement of facts: "The names of the township officers were placed by the county auditor upon the official ballot. No objections were filed by any person. Such ballots were used at the election in Quincy township, and the ballots were counted and returns made for justices and constables voted for at such election; and now objections are made before the board of supervisors as a board of canvassers to counting the votes thus cast for the persons whose names appear on such ballots." You ask my opinion upon the

question whether the board of supervisors has any authority to reject the votes cast for the candidates for justices and constables named on such ticket.

In regard to this, I will not at the present time enter into a discussion of the question whether the auditor properly put the township ticket thus nominated on the official ballot, or not. I will only say that section 9 is quite comprehensive, and I incline to the view that it should be construed so as if all vacancies were to be filled. An error had better be made in placing a ticket on the ballot than in rejecting one, but that question has been passed because the township ticket was actually printed upon the ballot.

The board of supervisors, as a canvassing board, are ministerial officers. They have no power or authority to inquire into the question of whether the ballots were in the form which the law prescribed. Their sole duty consists in canvassing the returns as sent to them by the judges of election. But independent of this question, there are a great number of cases determined by the different supreme courts of the United States which hold that the voter cannot be disfranchised or his vote disregarded because of a mistake or error of some election officers, either in the manner of printing the ballot, or conducting the election. Mistakes on the part of the election officers which work no fraud or real prejudice, have by all courts been disregarded.

In *Bragdon v. Navarre*, 60 N. W. R., 277, the Michigan supreme court says: "The voter, finding the ticket upon the ballot, cannot be required to determine its regularity at his peril. This might involve a necessary knowledge of facts difficult to ascertain. He may safely rely upon the action of the officers of the law, whom he has a right to suppose have done their duty."

When the elector votes the ticket that the officers whose duty it is to furnish the ticket have given him, his vote must be counted. See—

Miller v. Penoyer, 31 Pacific Rep., 830;
Bowers v. Smith, 17 S. W. R., 761;
Allin v. Glinn, 29 Pacific Rep., 670;
State v. Gay, 60 N. W. R., 676.

It has been held that neither a canvassing board nor a court in a mandamus proceedings can inquire into the regularity of the nomination of the candidates, or the sufficiency of their certificates of nomination. (*State v. Vancamp*, 54 N. W. R., 113.) Objections to the ticket must be made before it is voted. (*State v. Norris*, 55 N. W. R., 1086.)

In the case which you present, had not the ticket been printed upon the official ballot, the electors of Quincy township would have had an undoubted right to write in the names of the candidates for the respective offices upon their ballots. Finding the names of the persons for whom they wished to vote upon the official ballot, they were justified in using such ballot to express their choice for the offices named. It would be unconscionable, then, to refuse to give expression to their vote because of the act of the county auditor, even if it were unauthorized.

My conclusion is that the board of supervisors, as a board of canvassers, has no authority or right to inquire into the regularity of the nomination, or reject any votes because it may appear to them that certain names were put upon the ballot improperly.

Second.—That as an original proposition of law, votes cast upon the official ballot prepared by the properly constituted election officers, must be counted and not be rejected because of an error or mistake of the officers in preparing the ballot, and if such question could be considered by the board of supervisors, it must be resolved in favor of counting such votes.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COMPENSATION OF PUBLIC OFFICERS—Mayors of cities of the second class and incorporated towns.

DES MOINES, Iowa, November 12, 1896.

James Carroll, Esq., County Attorney, Oskaloosa, Iowa:

DEAR SIR—Your favor of the 11th inst. at hand, in which you ask my construction of sections 1 and 2 of chapter 6 of the Twenty-sixth General Assembly. You state:

"We have in this city an ordinance providing a salary of $800 for the mayor of said city of Oskaloosa, and said mayor presents the board of supervisors a bill for fees for cases tried since the passage of said chapter 6, and claims his fees under the former law, which this act repeals. If not entitled to compensation under such act, at what time did he cease to be allowed such compensation? What force and effect does the section of the code, which provides that an officer's salary shall not be increased or diminished during his term of office, have upon the question, the mayor's term of office having begun before the said chapter 6 was passed?"

Your statement of facts does not disclose whether the ordinance provided that the salary of $800 for the mayor should be in lieu of fees. Section 2 of said chapter 6 of the Twenty-sixth General Assembly, provides: "Mayors of cities of the second class and in incorporated towns where no salary is provided by ordinance, in lieu of fees, shall receive for holding a mayor's or police court or discharging the duties of a justice, the compensation allowed by law for similar services by such officers, to be paid in the same manner."

If your ordinance does not provide that the salary shall be in lieu of fees, then the mayor would be entitled to receive compensation from the county for the duties which he discharged as *ex-officio* justice of the peace under the provisions of said section. But if the ordinance does provide that the salary shall be in lieu of fees, then he is not entitled to receive fees as a justice of the peace from the county.

Said chapter 6 took effect the 4th day of July, 1896, and in the case last cited he would not be entitled to receive fees for cases tried since July 4th last.

Section 1 of chapter 7, of the acts of the Twenty-fourth General Assembly, having been repealed, he could claim nothing thereunder since the repeal took effect.

You ask what effect section 491, of the code of 1873, or 671 of McClain's code, has upon the question? You will notice that said section is a limitation on the power of the council of a city or town. It prohibits the town

increasing or diminishing the salary or emoluments of an officer of said city or town during the term for which he shall have been elected. This does not limit the power of the legislature to change the compensation or liability of the county for services rendered it. The right and power of the legislature to pass any law is limited alone by the constitution. If there were any conflict between section 491 of the code of '73 (671 of McClain's code), and chapter 6 of the acts of the Twenty-sixth General Assembly, the said section 491 would, to that extent, be repealed, because said chapter 6 is the last expression of the legislative will. There is nothing really in conflict, for the reason which I have stated.

Hence, I do not think that said section 491 has any bearing upon the true construction to be given to said chapter 6.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

ELECTIONS — REGISTRATION BOARD — COMPENSATION — The members of the board are entitled to compensation for each calendar day they may be employed in either registering voters or in preparing the alphabetical lists.

DES MOINES, Iowa, November, 12, 1896.

James Carroll, Esq., County Attorney, Oskaloosa, Iowa:

DEAR SIR—Your favor of the 11th inst., in which you ask my opinion upon the following question, is at hand:

"Are the registers of election entitled to more than five days' compensation for services performed under the registration law, when their work requires six, seven or eight days in order to properly complete the registration according to law?"

In regard to this I will say that section 1055 of McClain's code requires the board of registration to be in session three days in the years of presidential elections, and two days for elections in other years. Section 1057 requires the board to be in session the Saturday preceding every election; section 1061 requires them to be in session election day. Section 1048 requires the performance of certain duties within three days after the last day of registration, and in section 1059 it is provided during the days when the registers are in session, they shall, when not actually engaged in registering voters, prepare the alphabetical lists and complete their labors with all reasonable dispatch. But if such alphabetical lists and the duties required by section 1048 cannot be completed during the days they are in session as a board of registration, they must continue the work until it is done, and it must be done within three days.

The next sentence of section 1059 prescribes the compensation; it is in this language: "They shall receive as compensation $2.50 per day for *each calendar day upon which they shall be employed* for all services required of them under this act." If they are necessarily employed for days other than the days on which they sit as a board of registration, I see no reason why this language is not comprehensive enough to give them pay for all

such days. There is no limitation to the number of days they are actually registering voters, but it is "for each calendar day upon which they shall be employed," and if they are employed more than the five days, or four days, as the case may be, during which they register voters, I think the fair intendment of the legislature was that they should be paid for the additional days.

If this were not true, instead of the phrase, "upon which they shall be employed," we would naturally look for different language, such as, "for each calendar day in which they register voters," or a gross sum would have been fixed as their compensation.

I can give no other construction to the section than as above stated.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

STATE TREASURER — AUTHORITY — STATE WARRANTS — The treasurer has no authority to demand the endorsement of warrants presented for payment when he refuses payment for lack of funds.

DES MOINES, Iowa, November 13, 1896.

D. P. Davidson, Deputy State Treasurer, Des Moines:

DEAR SIR—Yours of to-day at hand asking my opinion upon the question whether or not "the state treasurer is legally required to demand endorsement of warrants by persons presenting them when we do not pay them, but merely stamp them 'presented for payment?' "

In regard to this I will say that section 78 of the code of '73 (section 87 of McClain's code) provides: "If there is no money in the treasury from which said warrant can be paid, he shall, upon request of the holder, endorse upon the warrant the date of its presentation and sign it, from which time the warrant shall bear interest at the rate of 6 per cent per annum," etc.

The law does not prescribe the form of a warrant drawn on the state treasurer by the auditor. Section 8 of chapter 82 of the laws of the Twenty-second General Assembly, provides: "Each warrant shall bear on the face thereof its proper number, date, amount, name of payee, and the reference to the law under which it is drawn." It will be noticed that it does not specify whether the warrant shall be drawn to the order of the payee, or to payee or order Section 87 of McClain's code requires the endorsement by the state treasurer to be made upon the request of the holder. We have a right to assume that this provision was made with the knowledge of the custom in regard to the issuing of warrants, and the transfer of the warrants from one person to another, and it is fair to assume that the term, "holder," as it occurs in said section, means the legal holder.

If, then, a warrant is presented by an endorsee in the regular course of endorsement from the payee, I have no question that he would be entitled to have endorsed on the warrant the date of its presentment for payment. There is, to my mind, no good reason why the holder by proper endorsement should be required to endorse the same to the state treasurer or any

person else in order to have the endorsement which the statute requires the treasurer to make. If the holder and owner of a warrant is required to endorse the same to the state treasurer, then he parts with the legal title thereof, and it must be re-endorsed to him in order to reconvey to him the legal title.

The treasurer has no interest or property in the warrant, and I do not think is authorized to require the owner to make any transfer or endorsement to him of the same, as a condition precedent to the treasurer doing his plain duty under the statute.

Suppose a warrant were endorsed to the state treasurer when it was presented for payment, and the state treasurer should fail to return it to the owner with the proper endorsement made; would the state treasurer be liable on his bond? I think not, for the reason that it is no part of his duties as a public officer. I doubt the policy of adopting any custom that would make the state treasurer a trustee for private parties without security. The law does not contemplate such proceedings as a condition precedent to securing the endorsement of a state warrant so that it may draw interest in the hands of the holder.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

JUDGE OF DISTRICT COURT APPOINTED TO FILL VACANCY may hold court until his successor qualifies as required by law.

IOWA CITY, Iowa, November 25, 1896.

Judge John A. Story, Greenfield, Iowa:

DEAR SIR—Your favor of the 23d inst. at hand. This matter probably would not come strictly within the duties of my office, but I have never refused, where the judges have asked my views, to express them.

The same question was presented to me a year ago, and arose between elect Judge Banks, of Keokuk, and A. J. McCrary. The only difference was that Banks wished McCrary to finish the term of court he was then holding, and the question was whether he could legally do so. Section 1256, McClain's code, provides that every officer elected or appointed for a fixed term shall hold his office until his successor is elected and qualified. The next section provides that the appointments shall continue until the next election at which the vacancy can be filled, and until his successor is elected and qualified. See, also, section 6, article 11, of the constitution. The state canvassing board must, on the Thursday following the fourth (4th) Monday after the day of election, open and examine the returns, with power to adjourn in certain cases. (Section 1115.) Said board shall issue a certificate and deliver the same to the person elected when he has qualified. (Sections 1118 and 1119.) In all cases the certificate of election is presumptive evidence of his election and qualification. No one is entitled to assume the functions of the office until he has received his certificate and been qualified as required by law, and, until he has qualified, the one appointed holds over.

I do not think there can be any question but that you would be entitled to hold court until your successor had received his certificate of election and been qualified as required by law.

Yours truly,

MILTON REMLEY,
Attorney-General.

ELECTION EXPENSES—SPECIAL POLICE—The city and not the county is liable therefor.

IOWA CITY, Iowa, December 5, 1896.

Hon. A. J. Holmes, County Attorney, Boone, Iowa:

DEAR SIR—Your favor of the 30th ult. at hand in which you ask my opinion upon the following question:

"The question has arisen here as to whether the municipality or county is liable for the payment of men so detailed at the general election. The city of Boone contends that officers detailed as above provided, should be compensated by the county, for the reason that the general election law indicates that the county is to bear the expense of general elections. Boone county contends that inasmuch as these officers are appointed by the city, the city should compensate them."

In regard to this I will say that the general expenses of the general election are to be paid by the county under various provisions of the statute. Prior to the enactment of the Twenty-first General Assembly, requiring the registration of voters in the cities under the provisions of section 612 of code of 1873 or 1053 McClain's code, the judges of the election were authorized to direct a constable to attend the place of election and preserve order, or appoint one or more specially by writing. This undoubtedly applies to cities as well as country precincts. The enactment of chapter 161 of the acts of the Twenty-first General Assembly, which was afterwards amended by section 9, chapter 48, of the Twenty-second General Assembly, required special duties of the election officers and made special provisions, applicable alone to cities where registration was required. By the statute as thus amended, section 1053 McClain's code, "The city council is authorized and required to detail and employ on the nomination of the principal political committee of each political party, recognized as the two leading parties, * * * from two to four special policemen for each precinct, and duly empower them for the occasion * * * to prevent the violation of any of the terms, provisions and requirements of this section." The use of the language, "employ two to four policemen," in the absence of any provisions in regard to pay, clearly indicates that the city is to pay them. There is no direct provision that the county shall pay the persons thus employed by the city. Afterwards, by what is called the Australian act, the provisions of section 1053 McClain's code, were extended so far as preventing voters from soliciting votes within one hundred feet of the voting place, and in some other features, to all of the voting precincts in the county. The appointment of peace officers in the country precincts and in the city precincts is authorized, however, by the provisions of sections 1073 and 1053 of McClain's code, there being no change of the law in regard thereto nor in regard to the manner of payment.

I recognize the injustice of requiring a city to pay for special police on election days at the general election in which there is no city officer elected; but thus the law seems to be written. There is apparently a lapse of legislation in this respect. The city pays its proportionate share, and my observation leads to the opinion, in most cases, more than its proportionate share of the county taxes, and I can conceive of no good reason why it should pay an undue proportion of the expense of a general state and county election, but the law seems to require it.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

WHAT CONSTITUTES KEEPING A HOUSE OF ILL FAME.

DES MOINES, Iowa, December 10, 1896.

W. E. Gray, Esq., County Attorney, Rockwell City, Iowa:

DEAR SIR—Your favor of the 27th ult. came to hand, in which you ask my opinion as to the correctness of the 12th instruction of a series of instructions which you enclose. The instruction inquired about is as follows:

"To constitute keeping a house of ill fame, it must be the resort of other women for lewd purposes than its keeper, when its keeper is a woman. Hence, if you find from the evidence that no other woman than defendant resorted to the house in question for lewd purposes, then you will acquit defendant."

In regard to this I will say that there is some language in the text-books which seem to justify this instruction. It is said in section 1449 of II Wharton Criminal Law: "A bawdy house (or a house of ill fame as it is sometimes called) is a house kept for the reception of persons who choose to resort to it for the purpose of illicit sexual intercourse, and is indictable at common law But the house must be resorted to in common with other women than its keeper, when a woman. It is immaterial whether indecent or disorderly conduct is perceptible from the outside."

The authority for this statement is given as *State v. Garrity*, 46 N. H., 61; *Commonwealth v. Lambert*, 12 Allen, 177; *Caldwell v. State*, 17 Conn., 467.

An examination of these cases shows that not a single one sustains the text. The question was not involved in any one of them. *State v. Garring*, 75 Me., 591, is cited in the American and English Encyclopedia of Law as sustaining such doctrine, in addition to the cases named. In this case it was an indictment for keeping a disorderly house or house of ill fame for the purposes of prostitution and lewdness. The state called various witnesses and proved that girls were kept in the house; that men and women were taken there at all times of the night, for the purpose of showing it was resorted to for the purposes of prostitution and lewdness. The court sustains the admission of such evidence, and adds this sentence: "Without such resorting, the offense could not be committed," but the question as to whether men resorting to the house to commit acts of lewdness with the keeper, who was a woman, was not involved in the case and was not passed upon.

In the case of *State v. Garrity*, 46 N. H., 61, it does not appear the question of keeping a house of prostitution was involved at all. The disorderly house kept appears to have been a place for drinking, and the question was whether or not to sustain the indictment for keeping a disorderly house it was necessary to show that the whole building was devoted to the illegal purposes charged in the indictment. The court answered it in the negative.

The opinion, however, refers to the case of *Regima v. Pierson*, 1 Salk., 382, in which it was held that if a lodger who had only a single room in which she accommodated lewd people and permitted acts of prostitution, she may be indicted for keeping a bawdy house as well as if she had the whole house.

Much that is said in the text-books on this subject is because of the particular statutes of the different states. Most states provide for the indictment of disorderly houses or houses of ill fame as nuisances, as may be done under our statutes (Section 5472, McClain's code.) One of the questions arising under such statutes is whether the acts complained of amounted to a disturbance of others. Courts of different states hold differently in regard to this, but this statute is very different from section 5322 which makes it a crime for a person to keep a house of ill fame, resorted to for the purposes of prostitution and lewdness. (See *State v. Odell*, 42 Iowa, 85; *State v. Alderman*, 40 Iowa, 375.)

The case of the *State v. Lee*, 80 Iowa, 75, is sometimes quoted as sustaining the doctrine of the instruction. The district court in that case instructed the jury that a single act of illicit intercourse in the house, or any number of acts with the proprietor alone would not make the place a house of ill fame, but that it must have been used for that purpose more than once by others than the proprietor. You will see that the complaint was that the charge to the jury was not sufficiently full, in that it did not require the jury to find that the place in question was one resorted to for the purposes specified by the statute. The court says: "We think the charge as a whole properly instructed the jury that in order to find the defendant guilty they must find that the place was resorted to for the purposes of prostitution and lewdness." Then is quoted the language given above. The supreme court does not expressly approve the language of the charge, but in effect says that the appellant has no reason to complain. It was because the charge plainly stated that the jury must, in order to convict, find that the place in question was one of resort for the purposes specified in the charge. It is seen that there was evidence tending to show that the place was resorted to by men and women of lewd character, and the supreme court was not called upon to determine the question whether acts of illicit intercourse with the keeper alone would render it a house of ill fame

In the case of *State v. Young*, 65 N. W. R., 160, the alleged husband of the prostitute was convicted, and appealed. The case of *State v. Lee*, was invoked in the contention that he could not be convicted unless other women than his alleged wife resorted to the place. The court, without approving or disapproving the language quoted from *State v. Lee*, holds that the appellant was the proprietor, and the law was not applicable to his case. It sustained, however, a conviction where only one woman, the wife of the proprietor, received lewd persons.

In the case of the *State v. Russell*, 64 N. W., 281, there was but one

woman in the case, and she was the sole occupant of the room or house for which she was indicted for keeping. This question was presented in that case to the supreme court, although the indictment was so drawn that it was determined to be under section 5326 of McClain's code. It was claimed that she could not be held under that section because the house which she was said to resort to was her dwelling house. In order to sustain a conviction, the house used and occupied must be a house of ill fame. If acts of illicit intercourse with the proprietor alone, there being no other inmates, does not make it a house of ill fame, then the place resorted to, used and occupied by Maggie Russell, did not bring it within the class named in the statute. If the theory of the instruction which you sent me is correct, then there could have been no conviction in the case of *State v. Russell.*

The words, "house of ill fame", in section 5322 are descriptive of the kind of house. The character of house is established by showing that persons of either sex visited the place for purposes of lewdness. The character is fixed, whether the keeper be the sole prostitute, or there are many inmates. The character of the evidence required to convict under this section is very different from that necessary to sustain the indictment in section 5472 of McClain's code.

If the doctrine of the instruction referred to is correct, then it is a crime under this section for a woman having one assistant to permit lewd men to visit their house and have illicit intercourse with the two women, but if the one assistant is discharged and she continues her nefarious business herself, then it ceases to be a crime. Another illustration: and if a dozen women in one house carry on their illicit traffic, it is a crime, but let each one of the women go by herself into a separate house and carry on the same illicit traffic, and it ceases to be a crime.

The doctrine of the court's instruction is so repugnant to my idea of reason and right that I cannot give it the approval of my judgment. I can never believe it to be the law until the supreme court says so, which it has not done. It certainly is not common sense.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

LOTTERY—A "SUIT CLUB" into which the element of chance enters constitutes a lottery.

IOWA CITY, Iowa, December 18, 1896.

W. L. Smith, Esq., County Attorney, Humboldt, Iowa:

DEAR SIR—Your favor of the 17th inst. at hand, enclosing a card of membership in a "suit club," on the back of which is printed the scheme. It is as follows:

"Every member of this club will be entitled to choice of any $25 suit in my shop upon the payment of $1 per week for twenty-five consecutive weeks. Or, if the holder of this certificate, No. ....., is declared a winner at any weekly drawing to be held at my shop every Saturday evening, at 8:30 o'clock, beginning December 19, 1896, the holder hereof will be entitled to suit as above without further payments.

"Each member required to make weekly deposits in advance of every drawing, or they will not be entitled to participate.

"No payments will be refunded.

JOHN M. TOUR."

You ask my opinion as to whether or not the scheme thus presented, if carried out, is a violation of section 4043 of the code of 1873.

In my opinion the scheme is a lottery, pure and simple, and without any disguise. (See 2d Wharton, Criminal Law, section 1491 and the cases cited.) The case of *State v. Moren*, 51 N. W. Rep., 618, to which you refer, is clearly in point, and is a clear statement of the law

Assuming that there are only twenty-five members of this club, and that each member continues to pay until each one has secured a suit, then the dealer has disposed of twenty-five suits, receiving therefor an average price of $13. It will be seen that the winner at the first drawing gets a suit worth $13 for $1, and so on for the first twelve drawings each winner receives a suit for less than the average price. The unfortunate ones who do not receive a suit until after the thirteenth drawing pay more than the fair value thereof. If there are more than twenty-five parties in the club the dealer receives still a greater price for the suits sold. Every one parts with his money in the hope of getting something for nothing, hoping to be a winner and draw a prize which costs him but the price of a ticket. Others who do not win lose their money or pay more for a suit than it is worth.

There are numerous cases which hold that all such schemes are a violation of the law against lotteries. Yours truly,

MILTON REMLEY,
Attorney-General.

FINES—HOW COLLECTED.

IOWA CITY, Iowa, December 19, 1896.

C. W. Crim, Esq., County Attorney, Estherville, Iowa:

DEAR SIR—Yours of the 16th inst. at hand, in which you ask, "What is the proper method of collecting a fine after trial? May it be collected by execution as provided in section 5251 of McClain's code, or should it be by action brought as on a bond?" referring me to McClain's code, section 3784 and sections 4606-7.

In regard to this I will say that a fine imposed after a trial is a judgment, and the proper method of collecting the same is by issuing execution and collecting the same thereon as in case of any other judgment. There are certain penal statutes which contemplate that a fine or forfeiture shall be collected by civil action. The civil action determines whether the party is liable to the fine or forfeiture. In such a case, suit may be brought to recover the same, but after the fine is once imposed after the trial, it is a judgment of itself and a finality. You would not be authorized to bring a suit thereon until fifteen years had elapsed, and no good purpose could be subserved thereby You would only have a judgment, anyway.

If, however, a bond has been given with sureties, under the conditions of which the surety is liable for the payment of the fines, and such surety

had not had his day in court, in case the principal debtor is insolvent and it cannot be collected of him, you may proceed upon the bond. This would require an action to be brought thereon in order to enforce collection against the surety. Yours truly,

MILTON REMLEY,
Attorney-General.

PRACTICE AND PROCEDURE—FORECLOSURE OF SCHOOL FUND MORTGAGES.

IOWA CITY, Iowa, December 21, 1896.

J. W. Hallam, Esq., County Attorney, Sioux City, Iowa:

DEAR SIR—Your favor of the 12th inst. at hand, in which you state:

"We are contemplating a number of foreclosures of past due school fund loans," and you ask my opinion as to whether notice must be given in a newspaper as provided for in section 3033 of McClain's code, or whether it will be safe to ignore that section and proceed under section 3010.

Section 3033 was adopted in 1862, at a time when there were many contracts outstanding for the sale of school lands. The conveyance of land by the purchaser from the state was made by the assignment of contracts. These assignments were very frequently left unrecorded. The main purpose of the statute evidently was to notify the present owner of the land, who might be unknown to the county authorities, that something was due upon the contract.

While the section also embraces mortgages to the school fund, yet I apprehend the primary purpose of the statute was to give due notice to the owners of the lands under contracts of purchase.

The section appears to be of but little practical utility at the present time, although I recall one instance where the interest was unpaid on the school fund mortgage for many years. The owner of the land holding under a warranty deed, knew nothing of the mortgage, and his land was sold from him; the maker of the note had become insolvent. This would not have been done had this statute been complied with by the auditor. I am satisfied that in every county in the state this section is disregarded. It should not be, although in the present condition of affairs in the state it appears to be of no practical utility.

I do not think that a disregard by the auditor of the duty thus imposed by section 3033, deprives the court of jurisdiction in case suit is brought under section 3010. The debt becomes due according to the terms of the note and mortgage. Section 3033 does not extend the time or prevent the maturity of the debt, and suit brought on past due school fund notes and mortgages does not abate by reason of the failure of the auditor to publish the notice required by section 3033, and I think you are perfectly safe in bringing suit to foreclose without waiting for publication of the notice provided for in section 3033.

There may be cases where the mortgagor has conveyed the mortgaged premises to parties who knew nothing of the mortgage, and the failure of the auditor to publish notice as required may justify the court in making an equitable order in regard to the payment of the interest after the time

such notice ought to have been given; and if the owner of the land can show prejudice by failure to give such notice, it is possible that the court would be justified in giving equitable relief on account thereof, but the failure to give such notice cannot justify the recovery of the full amount due from the original maker, nor does it abate the suit until such notice shall be given.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

FISHING—It is unlawful for one to build a house on the ice and keep a stove therein to warm by, the fishing being done some distance from the structure.

IOWA CITY, Iowa, December 21, 1896.

Hon. George E. Delavan, Fish Commissioner, Estherville, Iowa:

DEAR SIR—Your favor of the 8th inst. came duly to hand. You ask my opinion whether, under section 1, chapter 80, laws of the Twenty-sixth General Assembly, it is lawful for one to build a house on the ice and keep a stove in the house for the purpose of warming up by, the fishing being done several rods distant from the house.

Section 1 is as follows: "No person shall have, erect or use, while fishing through the ice, any house, shed or other protection against the weather, or have or use any stove or other means for creating artificial heat." The law is entitled, "An act for the better protection of fish."

To interpret a statute, it is often important to ascertain the fault to be remedied. It was notorious that on our northern lakes many houses or huts were erected which were warmed by a stove, and the fishing was done through a hole cut in the ice within the hut. Persons thus spent whole days in taking fish, while they suffered no inconvenience from the inclemency of the weather. Others would have their house on the ice, and holes would be cut through the ice outside of the house, through which fishing was done.

The act in question evidently does not intend to prohibit all fishing through the ice, but is intended to limit the amount of fish to be caught by confining the fishing to mild days, or such times as parties are willing to stand out in the cold and fish. To erect a house upon the ice close to the place where the party is engaged in fishing, and have the house heated with artificial heat to protect against the cold, and attend to hooks dropped through the ice a few rods distant, is an attempt to evade the law and defeat the purpose for which it was enacted.

The term, "while fishing on or through the ice," means more than while actually holding the rod in the hand, or while drawing the fish out of the water. It means while engaged in fishing. It would be correct use of language to say that one, when in the house getting warm after being out setting his hooks, was fishing, although at that particular time he may be getting warm; still he is engaged in fishing that day.

I have no doubt that the course suggested by you is not only a violation of the spirit of the statute, but a violation of its terms.

I was so occupied that I could not give an opinion by return mail, as you requested.

Yours truly,

MILTON REMLEY,
Attorney-General.

INDICTMENT—COPY—FEE—The county attorney has no right to a fee for furnishing the accused with a copy of the indictment.

IOWA CITY, Iowa, December 21, 1896.

W. F. Kopp, Esq., County Attorney, Mt. Pleasant, Iowa:

DEAR SIR—Your favor of the 15th inst. at hand. You ask:

"What compensation, if any, is the county attorney allowed for furnishing the defendant a copy of the indictment? Does the rule, 10 cents per 100 words, to be taxed as costs, apply?"

I do not think the rule applies. All the rules of practice embrace a copy of the indictment in a criminal case. Under section 5718 of McClain's code, the arraignment may be made by the court, or the clerk or the county attorney and delivering him a copy of the indictment. Section 5676 of McClain's code requires the clerk to furnish the defendant or his counsel a copy of the minutes of the testimony without charge. Nowhere that I have discovered is there a provision for a charge for a copy of the indictment.

A copy of the indictment should properly be made out by the clerk, and whether the clerk would be entitled to charge for the same and tax it as a part of the costs, I have serious doubt. I think it clear, however, that really it does not authorize the same. It is doubtful whether section 5033 contemplates that he should charge therefor, although, strictly speaking, such copies would come under the clause, "for all copies of records or papers filed in his office, transcripts and making complete record, 10 cents for each 100 words," and may authorize the clerk to charge for the copy of the indictment under a subsequent clause in the same section. But this I do not determine. I think it clear, however, that the county attorney has no just claim for such compensation.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

SOLDIERS' HOME—AUTHORITY OF BOARD OF COMMISSIONERS to make money allowance to commandant for maintenance of himself and family—Commandant's bond.

IOWA CITY, Iowa, December 22, 1896.

Hon. A. T. Birchard, Treasurer Soldiers' Home, Marshalltown, Iowa:

DEAR SIR—Your letter to Mr. Miller of recent date, calling attention to a request for an opinion made October 30th, has come to hand. I have taken up the matter as soon as I could do so. You state the following facts:

"The present commandant of the Iowa soldiers' home was elected in May, 1895, for one year. Now this question arises: When he removes from the main building with his family to the cottage made for him, has our board any authority to make an appropriation of money as an allowance for maintenance for himself and family? Heretofore he and his family have been subsisting at a private table in the home at the expense of the state, and when he removes the question of making a money allowance brings up the question of our authority, and also the question as to whether or not the bond given by the commandant when elected in May, 1895,

one year, is good and binding upon the sureties as long as the board see fit to allow him to hold the place after a re-election." You desire my opinion upon these two points presented.

It will be observed by section 2798 of McClain's code, that "the commandant for said home shall be appointed by the board and shall serve as such during the pleasure of the board of commissioners. * * * The salary shall not exceed $1,200 per annum." It is fair to assume that the legislature had in contemplation the almost universal custom in institutions where the superintendent or managing officer is required to reside in the institution, so as to be at all times on hand to give the affairs his personal attention. I think, almost without exception, the custom has been in this state and other states in such cases, for the managing officer and his family to receive their board at the table set by the state, and from the supplies purchased for the support of the institution. This being true, in fixing the amount of salary, it is fair to presume that the legislature intended this to be the net sum over and above what would be comprehended within the term, "board of the commandant and his family while they resided at the home."

Hence, I do not think that the authority of the board was exceeded in permitting the commandant and his family to eat at the table set at the expense of the state.

A somewhat different question, however, arises when he removes to a cottage. The Twenty-fifth General Assembly made an appropriation for a residence for the commandant. It must be presumed that it was intended the residence should be without a charge therefor for rent. While residing in such residence, I do not think, in view of the universal custom, that it would be inconsistent for the commandant and his family to eat at the table set for the employes of the home. But I see nothing in the statute that would authorize an appropriation of money to pay for his family expenses while residing in the cottage. The statute says: "His salary shall not exceed $1,200 per annum."

The wardens of the penitentiaries, by an express provision of the statute, have furnished them house rent, fuel and lights for themselves and their families, but no further allowances of any character are permitted.

I do not think that the board of commissioners would be authorized to make an allowance in money for the support of the commandant and his family in the cottage. Under the circumstances, I do not think it would be improper for the fuel purchased by the state to be used, and for the lights; nor would it be improper for them to receive their table board from the table, although the statute is not plain upon this.

In regard to the bond, I think a new bond ought to be given. The term of office being fixed in the bond, I doubt very much whether the sureties could be made liable for any delinquencies after the expiration of the time. Of course, I cannot speak definitely in regard to this without seeing the bond. I have not sufficient knowledge to express an opinion satisfactory to myself in regard to this. The statute does not require a bond to be given by him, and there may be doubt as to whether there would be any liability on the bond. Where the law does not require a bond to be given by a public officer, such a bond has been held by our supreme court to be without consideration, and I am not clear that the bond is worth anything in any

event. The treasurer must give bond. If the commandant's bond is of any validity whatsoever, it certainly should be renewed, or the sureties consent that their liability shall continue so long as he remains in office.

Yours truly,

MILTON REMLEY,
Attorney- General.

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1. EFFECT OF FILING PETITION FOR A REHEARING IN A CRIMINAL CASE. 2. COMPENSATION OF CLERK OF DISTRICT COURT.

IOWA CITY, Iowa, December 26, 1896.

Geo. C. Olmstead, Esq., County Attorney, Webster City, Iowa:

DEAR SIR—Your favor of the 23d inst. at hand. There has been no petition for rehearing served in the case of *State of Iowa v. Baldwin & Wright.* I knew nothing of the notice of such petition having been served. The service of the notice upon you, in such a case, is hardly sufficient, but the time is long since expired for filing the petition and none has been filed. In addition to this, filing the petition for rehearing does not suspend proceedings in a criminal case unless the court or one of the justices so orders. So you will have no difficulty in issuing a commitment and executing judgment upon them.

You ask my opinion as to whether the board of supervisors is obliged to pay the clerk of the district court anything in addition to his salary for his services in probate matters. Is the statute mandatory or directory?

In regard to this I will say, the language of section 248, McClain's code, does not seem to be either mandatory or directory, but permissive. It is left to the sound discretion of the board of supervisors whether any sum shall be paid in addition to the salary. If any sum is paid it is limited by two things: first, the fees collected; no sum in excess of the fees collected in matters of probate and guardianship could be allowed by the board. Second, no greater sum than $300 per year. But the whole matter is left to the wise discretion of the board. If the board is satisfied that the salary of the clerk is sufficient for the amount of work required of him, then it may make no allowance whatever.

You further ask: Is the clerk entitled to anything in addition to his salary for his services in drawing naturalization papers?

Making a record in cases of naturalization is a part of the duties of the clerk. There is no provision of law anywhere, that I am aware of, that authorizes additional compensation for this branch of his duties. I know of no reason why he would be entitled to additional compensation for his duties in this respect, more than for additional compensation for any other duty that the law requires at his hands.

Yours truly,

MILTON REMLEY,
Attorney-General.

OFFICIAL NEWSPAPER—COUNTY PRINTING—CIRCULATION—Who are bona fide subscribers.

DES MOINES, Iowa, December 28, 1896.

A. G. Lawrence, Esq., County Attorney, New Hampton, Iowa:

DEAR SIR—Yours of the 12th inst. came duly to hand. It was impossible for me to give it earlier attention because of the press of other matters. You ask my opinion upon the question:

"Is a person a *bona fide* subscriber to a newspaper whose name is obtained to a subscription by reducing the price thereof to 25 cents, for the purpose of obtaining the county printing?"

Section 428 of McClain's code requires "publishers of newspapers to give the names of the several postoffices and the number and names of the *bona fide* yearly subscribers receiving their papers through each of said offices, living within the county." I think it is very evident from this that the law intends none to be considered *bona fide* yearly subscribers except such as are obtained in the usual course of business, and who actually and in good faith make a subscription to the newspaper for the purpose of receiving the paper.

It is difficult to say what price a publisher shall receive for his paper, or whether he shall make reductions of price to one which he does not make to another; but it is evident to my mind that a subscription taken for the sole purpose of swelling the list of subscribers to the end that the paper may be selected as the one in which to publish the proceedings of the board of supervisors, which would not have been received had not the publisher made a reduction in the price, cannot fairly be considered a *bona fide* yearly subscriber.

Suppose it should appear that the paper was sent to each of 100 or more subscribers at a cent apiece for a year, or for one-tenth of a cent. It is evident that such subscriptions are not *bona fide*. Just where the limit shall be, I am unable to say. I would not like to say there could be no reduction for the purpose of obtaining new subscribers, but where new subscribers are obtained at a normal sum and below cost, the only incentive being, on the part of the publisher, to receive the county printing, I cannot think such subscribers can be considered *bona fide* subscribers.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CONTEST OF ELECTION OF COUNTY ATTORNEY—The county attorney is a county, and not a state, officer and the formation of the contest court must be governed by the statutes relating to contesting the election of county officers.

DES MOINES, Iowa, December 29, 1896.

George W. Korte, Esq., County Attorney, Carroll, Iowa:

DEAR SIR—Your favor of the 23d inst. came to hand, in which you ask my opinion upon the question, whether a court of contest, where the office of county attorney is involved, shall be organized under the provisions of section 1165 of McClain's code, or whether section 1185 of McClain's code

provides the method. The doubt in regard to this is occasioned by the sweeping act of the Twenty-first General Assembly, chapter 73, section 10, which provides: "Wherever the term district attorney occurs in the laws of Iowa, it shall hereafter mean county attorney, and all laws now in force regulating the duties of district attorneys in criminal matters and proceedings, are applied to county attorneys within their respective counties.

Before the adoption of such law, the district attorney was considered a state officer. In a district comprising more than one county, the vote was canvassed by the state board of canvassers. Without referring to the different sections, I will state that the provision of law in regard to canvassing the vote, required the canvassing of the vote for any officer who was elected from a district composed of more than one county, to be made by the state board of canvassers. District judges and district attorneys being elected by more than one county, their vote was canvassed by the state board. These officers were paid from the state treasury and were state officers

This being true, section 1185 of McClain's code and the few sections following were applicable to a contest for the office of district attorney. The amendment to the constitution by which the office of district attorney was abolished and the office of county attorney was created (section 13, article 5 of the constitution) and the adoption of chapter 73, acts of the Twenty-first General Assembly, made the county attorney distinctively a county officer. He is elected by the qualified electors of each county. His duties relate largely to the business of the county, and he is paid by the county. The electors of no other county can vote for him.

Under the general rule for the canvassing of the vote cast at an election, I know of no provision which requires the state board of canvassers to canvass the vote for county attorney. His certificate of election is given by the county board of canvassers. Under section 1185 of McClain's code, it is provided: "The court, for the trial of contested state elections, shall consist of three judges." This, I understand, means the contests involving the election of state officers. The previous section, it is true, as amended by said chapter 73, provides: "The election of any person to the office of county attorney may be contested by an eligible person who received votes for the same office," but this does not necessarily refer to the manner of constituting the court or the place of making the contest, as provided in the subsequent sections.

The first question to be determined, then, is whether the county attorney is a state officer or county officer. By all the tests referred to, I have no doubt he is a county officer. Section 1161 of McClain's code provides: "The court, for the trial of contested county elections, shall be thus constituted," etc. The provisions of sections 1161 to 1183 inclusive, are therefore applicable to a contest for the office of county attorney, because by statute they are so expressly declared, if we are correct in concluding that the county attorney is a county officer.

It will be noticed that the provisions for forming a trial court of contest for a state office, do not, in express language or necessarily by implication, include the office of county attorney. It would be a strained and unnatural construction of the language, to hold the provisions of section 1185 and those following, applicable to such a contest. These sections require the court

to consist of three judges selected by the secretary of state, as the clerk of court, residing nearest the seat of government, and the trial to be held at the seat of government.

There is apparently no good reason for requiring the contesting parties, their attorneys and all their witnessess, to go to the capitol to try a contest of such a nature. It would be expensive and unadvisable, and no possible good could be subserved.

I am clearly of the opinion that the office of county attorney is distinctively a county office and not a state office, and that a contest between those claiming to be elected to such office, must be commenced, tried and determined in the manner provided by sections 1161 to 1183 inclusive of McClain's code.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

DELINQUENT PERSONAL PROPERTY TAXPAYERS—The law does not require the publication of a list of such persons.

DES MOINES, Iowa, December 29, 1896.

George S. Tracy, Esq., County Attorney, Burlington, Iowa:

DEAR SIR—Your favor of the 13th inst. came duly to hand. I was then engaged in other matters and could not give it attention earlier. You ask my opinion upon this question: "Is it legal for the county treasurer, under instructions from the board of supervisors to publish a list of all persons who are delinquent in the payment of their personal property tax."

If you mean to ask whether the law *requires* such publication, I will say in answer that I know of no statute requiring the publication of a list of persons who are delinquent in the payment of their personal property tax. The personal property tax is collected by distraint, unless the owner thereof has real estate upon which it can be made a lien. After the seizure of goods, a notice of the sale thereof is required to be given, as required by section 1340 of McClain's code; but this is very different from publishing a list of the delinquent personal property taxpayers.

If you mean to ask whether it would be an illegal act for the board of supervisors to authorize the publication of such list, I would answer this by saying that while there is no law directing the publication of such list, there is no law prohibiting it. I do not see that the publication of such list would do any good or any harm. I do not think any law is violated by publishing it, unless, possibly, the useless expenditure of money in paying therefor. I do not think the law contemplates that such lists shall be published. If there had been an intent that such lists should be published, the statute would have said so, as it does in regard to the publication of the names of those delinquent on principal or interest of school funds. (See section 3033 of McClain's code.) The absence of some similar provision in regard to the personal property tax, makes it clear to my mind that such publication was not contemplated.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

A COUNTY IS NOT LIABLE FOR A DEFENDANT'S WITNESSES' FEES IN A CRIMINAL CASE unless the court order that said witnesses be paid by the county.

DES MOINES, Iowa, December 30, 1896.

John B. Sullivan, Esq., County Attorney, Creston, Iowa:

DEAR SIR—Your favor of the 28th inst. at hand, stating that you will assume the duties of the office January 4th, and that a matter comes up for the consideration of the board in January, and you ask my opinion in regard to the construction of section 5095 of McClain's code, with especial reference, however, to the question whether the county is liable for witnesses subpœnaed for the defendant in a criminal case, without an order of court, in a case where the defendant is discharged.

In order to fully understand the purpose of the statute, it is well to recall the evil that was intended to be remedied thereby. Before the enactment of chapter 207 of the acts of the Eighteenth General Assembly, many persons who were arrested on a criminal charge would subpœna many witnesses, principally their friends, and keep them in attendance upon court for several days for the sole purpose of having their fees as witnesses charged up for the county to pay. I know one case where a worthless scoundrel subpœnaed over fifty of his chums and kept them in attendance four or five days, and then, when the case was called for trial, plead guilty.

You will observe that the section in question is in two parts, the first providing: "No witnesses for the defense shall be subpœnaed at the expense of the county, except upon an order of the court, or judge before whom the case is pending, and then only upon a satisfactory showing that the witnesses are material and necessary for the defense." Under this clause, if an order were made for the subpœna of the witnesses, in case they failed to give material testimony, they would still be entitled to have their fees taxed as costs and paid by the county. The second clause of the section provides that the board of supervisors shall in no case audit or allow any claim for witness fees for the defendant in criminal cases, except upon an order or judgment of the court, or judge thereof, and such order may be made at the time of trial or other disposition of the case, and upon such showing as the court may require.

Under this clause, the court is authorized to order the fees of any witness who appears and gives material evidence for the defense, to be paid by the county, even if such witness was not included in the order previously made. This last clause has been construed in *Jones County v. Linn County*, 68 Iowa, 63.

This clause, however, prohibits the board of supervisors allowing any claim for witness fees for the defendant, unless the court has made a specific order that the same shall be paid, and it is, in my judgment, immaterial whether the defendant is found guilty or not guilty. The intention of the statute evidently was to place the control of the fees which should be paid to the defendant's witnesses, entirely within the control of the court, who hears the testimony and is in a position to judge whether the witnesses were subpœnaed in good faith, or not. This is in accord with

the general principle that the court has full control of the taxing of costs in any case, and where costs have been unnecessarily made by a party in a civil action, the court may tax the same to him.

I understand this section to mean that sometime during the trial, or upon the final disposition of a criminal case, the court should make a specific order in regard to what witnesses for the defense, if any, shall be paid by the county, and in the absence of such order the board of supervisors are not authorized to audit or allow any claims for witness fees in that case, and this is true whether the defendant is found guilty or not guilty.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CRIMINAL LAW—INDICTMENT—WHERE PROPERTY IS STOLEN FROM A RAILROAD COMPANY it is not necessary to charge in the indictment that the corporation is duly organized.

DES MOINES, Iowa, January 1, 1897.

J. W. McGrath, Esq., County Attorney, Eagle Grove, Iowa:

DEAR SIR—Your favor of the 28th ult. at hand, and contents noted. You ask: "Where property is stolen from a railroad company, would you charge in the indictment that it was the property of a corporation duly organized?"

In the case of *State v. Semotan*, 85 Iowa, 57, the ownership of the building insured was laid in a corporation. On this trial the state failed to prove, other than by parol, that the owner was a corporation. The supreme court says that it was not necessary to produce the articles of incorporation, and cites Wharton on Criminal Procedure, section 164. In closing the opinion the court says: "The indictment states that the offense was committed upon the hall in the town of Vining, and it appears to us that this describes the offense with sufficient certainty; so that, if the ownership of the property were erroneously stated to be in a corporation, the variance was not fatal." The allegation was not material, and if not material, it might as well be omitted.

In *State v Jelinek*, 64 N. W. R., 259, the ownership of the building broken and entered was laid in a number of individuals, but the evidence showed it to be in a corporation. The name of the corporation was not stated. The supreme court, in the course of the opinion, says: "It appears that no prejudice resulted to defendant from a failure to aver the name of the corporation owning the building." There is no material difference between a case of breaking and entering and larceny, as far as stating the corporate capacity of the person injured is concerned.

If I were drawing an indictment, I would merely charge that the railroad company (naming it) was the owner of the goods stolen, or the car broken and entered. I believe the better plan is not to add that it is a corporation. But if you do add that it is a corporation, leave out the allegation that it is duly organized. Under the rule as laid down in Wharton, Criminal Evidence, sections 102a, 164a and 254, I think you can prove the existence of the corporation by general reputation.

In Polk county there are a good many prosecutions for stealing from the railroad companies. The practice is to merely name the railroad company, leaving out the allegation that is is a corporation, and allege near the close of the indictment that a more particular description and designation of the party from whom said property was stolen is to the grand jury at this time unknown. It seems to be a good rule to pursue.

Yours truly,

MILTON REMLEY,
Attorney-General.

CRIMINAL LAW—DRAWING OF GRAND AND PETIT JURIES—Effect of certain irregularities upon the legality of the jury so drawn.

IOWA CITY, Iowa, January 2, 1897.

J. M. Wilson, Esq., County Attorney, Centerville, Iowa:

DEAR SIR—Your favor of the 1st inst. at hand, in which you ask my opinion upon the following question:

"Our grand and petit juries were not drawn in strict accordance with the jury law passed by the Twenty-sixth General Assembly in the following respect: More than one grand juror was drawn from a civil township, and the drawing took place on the 19th of December, and our term of court begins on the 4th of January—less than twenty days, as the law provides. What course ought I, as county attorney, to take in the matter."

In regard to this, I would say, that chapter 61 of the acts of the Twenty-sixth General Assembly does not take effect until the 1st of January, 1897. The language of section 24, which repeals chapter 70 of the acts of the Twenty-fifth General Assembly, leaves some doubt upon the question whether the juries for the courts beginning less than twenty days after the 1st of January shall be drawn under said chapter 70 of the Twenty-fifth General Assembly or under chapter 61 of the Twenty-sixth General Assembly. The clause "and shall not affect the trial of any cause pending on the 1st of January, A. D. 1897, wherein a jury may have been selected, drawn and empanelled under the acts of the Twenty-fifth General Assembly," would indicate, by inference, that any cause in which the jury had not been selected would be affected by said chapter; still, I hardly think this inference would annul the general provision that a repeal shall not take effect until the 1st of January, 1897. But be that as it may, the provision as to drawing the juries at least twenty days prior to the 1st day of each term is common to both statutes.

I do not think the failure to draw the grand jury at least twenty days before the term is such a deviation as would justify the court in setting aside the panel and ordering a new panel to be drawn. See *State v. Karney*, 20 Iowa, 82; *State v Bryant*, 41 Iowa, 596; *State v. Knight*, 19 Iowa, 94. The principle to be deduced from these cases is that any deviation from the manner prescribed by the statute which does not affect the substantial rights of the defendant shall be disregarded. I am unable to see how the substantial rights of the defendant could be affected by a failure to draw the grand jury until five days after the time specified by the statute. I

think it best, however, in all cases to comply strictly with the provisions of the statute. The case of *State v. Beckley*, 79 Iowa, 368, and the case of *State v. Russell*, 90 Iowa, 569, hold that the deviation from the provisions of the statute in these cases was material, and that the indictment should be set aside. The question in neither of these cases was with reference to the time of the drawing of the grand jury. If the panel should be set aside it would be competent for the court to order a new panel to be drawn immediately, which, so far as the defendant is concerned, would presumably be no more favorable to him than one drawn fifteen days before the term. In the case of *State v. Beste*, 60 N W. Rep., 112, the drawing of the grand jury had been set aside at the March term. There was plenty of time to have drawn the grand jury in the usual way before the June term, and the court ordered a precept issued to the body of the county for a grand jury to serve at that term of court. Such action was sustained by the supreme court. Hence, if the court at your coming session should set aside the drawing of the grand jury and immediately order another grand jury to be drawn, no defendant could, on that account, have any indictment found set aside. I see no benefit that could arise to any defendant indicted by the grand jury drawn December 19th, or any prejudice to him, by cause of the drawing of the grand jury on said date, and do not think that the deviation from the strict provision of the statute can affect any substantial right of any person indicted.

Under the circumstances, however, I think you would do well to call the attention of the court to the facts stated in your letter. If any one is under bonds or held to appear, such person must challenge the grand jury or waive the challenge If a challenge is waived, the question cannot arise, in case indictments are found, in the case of those who waived. If there are likely to be a number of cases presented to the grand jury where no opportunity to waive is offered to the persons whose cases are investigated, I would prefer that the court would set aside the drawing and order a new grand jury to be drawn. This leaves no question open. The expense to the county in trying several criminal cases may amount to a considerable sum, and it is better not to base a conviction upon a question which is not perfectly plain, and one which can be corrected at so little expense as it would require to draw a new grand jury. I suggest this, not because I think any defendant would be prejudiced by the deviation from the provisions of the statute to which you refer, in case he were indicted by the present grand jury, but simply to avoid the possibility of incurring useless expense in case the supreme court should take a different view of the question. In criminal matters it is always best to avoid the raising of nice questions, upon which minds might differ, when it can be done with so little expense as it may be done in the present case.

Yours truly,

MILTON REMLEY,
Attorney-General.

COLLATERAL INHERITANCE TAX—CONSTRUCTION OF THE STATUTE.

IOWA CITY, Iowa, January 4, 1897.

Hon. John Herriott, Treasurer of State, Des Moines, Iowa:

DEAR SIR—In regard to the inquiry made by Mr. T. M. Dougherty, with reference to the duties of the executor under chapter 28 of the Twenty-sixth General Assembly, which you have referred to me. I beg to say that the said chapter 28 is somewhat indefinite in regard to the method of procedure. A part of the uncertainty, however, arises by grouping together different cases in which the collateral inheritance tax shall be paid, and endeavoring, for the sake of brevity, to make the language apply to each of such cases.

Under section 1 of the act, it may be said there are two classes of property which are subject to the tax. First, that which passes by will or by the death of an intestate, and second, such property as passes to collateral heirs by deed, grant, or gift, which takes effect after the grantor's or donor's death. I notice a misprint or clerical error in the tenth line on page 36; the word, "donor," in said line should read, "donee."

Under section 2 of the act, it is made the duty of the executor, administrator or trustee (trustees may be appointed by will or by deed) to file an inventory of all the real estate liable to such tax, evidently, in the office of the clerk of the probate court of the county.

Under section 12, it is also made the duty of such executor, administrator or trustee to file with the treasurer of state a description of such real estate, etc.

Under section 3 of the act, the amount of the tax shall be calculated upon the appraised value of the real estate, and such tax shall be paid, by the person entitled to the real estate, within fifteen months from the approval by the court, of such appraisement. This language indicates that the court shall, after the filing of the appraisement, approve the same

This, then, forms the basis for ascertaining the tax. Sections 4, 5, 6 and 7 of the act, relate to the particular cases or conditions therein named, and for the purposes stated in Mr. Dougherty's letter need not be considered at this time.

Under the will of Samuel Rowley, deceased, it seems that all of his personal and real property passes to his executor, viz., Mr. Dougherty. This being true, under section 8 of the act, Mr. Dougherty must deduct the amount of the tax from the legacies before they are paid, and he would be responsible if he failed so to do.

Under section 9, he should pay the tax to the state treasurer within one year. A difficulty arises because of this provision, for section 1 provides the tax shall be 5 per centum of the value of the property, above the sum of $1,000, after the payment of all debts. It is impossible, under the law, to determine what the debts of the estate may be until the expiration of a year.

In case the real estate of the deceased is devised in such a manner that the title does not pass to the executor, nor the possession, or in case the decedent has by deed conveyed real estate before his death to take effect after his death, as contemplated in section 1 of the act, then under section 11 of the act the executor may procure an order from the court for the sale

of such real estate, or as much thereof as may be necessary to pay the tax, for which provision is made in section 3; but where the real estate of the deceased passes to the executor, as in the case of Mr. Samuel Rowley, deceased, then there is no need of any action under section 11. The treasurer of the state also has authority, under section 11, to make application for the sale of real estate, if such a devisee or grantee refuses to pay the tax.

In my judgment the intent of said chapter 28 is, that the executor or administrator, as the case may be, shall first file an inventory and cause an appraisement of the real estate of the decedent to be filed with the clerk of the court, of all property which he may know of or think is liable to the payment of this tax.

He shall, *second*, inform the treasurer of state of the existence of such tax and furnish a description of the real estate, as provided in section 11 of the act.

He shall, *third*, retain 5 per cent of all the money which is subject to the tax, before he pays the same out to the legatees of the will or to the heirs in case the decedent is intestate.

Fourth, it is his duty to collect the tax from the devisees of real estate, the title of which passes directly to the devisee or from the donee or grantee, in case the deed has been executed before the decease

Fifth, he shall pay all such tax, for which he is liable, or which it is made his duty to collect, to the state treasurer within one year or as soon thereafter as the amount of tax can be determined.

I think Mr. Dougherty has furnished such a statement as is contemplated by section 11 of the act. The estate being devised to him he is authorized and required to make the payment of the tax due on both the personal and real property whenever it can be ascertained. In this case there will be no necessity for the application, either by the executor or the treasurer of state, to the court for an order to sell the real estate under sections 3 and 11 of the act, because the executor must pay such tax before his accounts can be settled. (Section 14 of the act.) The provisions of sections 3 and 11, with reference to the application to the court for an order to sell the real estate apply only to those cases where the land passes directly, either by devise or grant, to the person named in the will or deed. It would be well to suggest to Mr. Dougherty that he state to the court in his reports his contemplated action in regard to the payment of the tax and deducting it from the shares of the legatees, and procure the approval of the court, as contemplated, before he actually pays out the money I return you letter and statement of Mr. Dougherty.

Yours truly,

MILTON REMLEY,
Attorney-General.

OBSTRUCTING FLOW OF WATER UPON A PUBLIC HIGHWAY—A road supervisor cannot maintain a civil action for damages caused thereby.

IOWA CITY, Iowa, January 4, 1897.

F. H. Swasey, County Attorney, Denison, Iowa:

DEAR SIR—Your favor came duly to hand some little time ago, but press of business has prevented earlier reply.

You ask, in substance, whether a civil action can be maintained by a

road supervisor for damages done to the highway by reason of a farmer having cut and trimmed trees along the public highway and allowing the branches to remain therein, obstructing the flow of the water through the ditch at the side of the road and causing the ditch to be filled with debris washed from the hillside, and throwing the water into the road and upon the approach of a county bridge.

The general rule of law may be stated that a public officer is not authorized to bring suit for the public unless he is specially authorized by statute so to do. The road supervisor may bring suit to recover poll tax or the penalty for not working the road. (Section 1499 McClain's code). A public officer whose duty it is to collect a revenue or fund may bring an action to recover the same, in his own name, for the use and benefit of the public. *Wells v. Stomback*, 59 Iowa, 376.

The question which naturally arises is, whether the statute authorizes the supervisor to bring an action to recover damages done to the public highway? I know of no such statute. There is no provision for the supervisor recovering damages, nor does the fact that he collects the road tax create any inference that he is authorized to collect damages. It seems that there ought to be some remedy for such a case. The township is not a municipal corporation (*West Bend v. Munch*, 52 Iowa, 132,) and cannot sue. It is made the duty of the township trustees or the road supervisor to work the highway, and the injury to which your question refers makes additional labor and expense to the taxpayers of the township, but I confess I fail to see where the law gives any remedy. I think it clear that the recovery for such damages is not made one of the duties of the road supervisor.

The people of the township are all interested. They are not members of any corporation, but as citizens each is interested in diminishing the amount of taxes that must be paid. The fund and labor of the people of the township must be expended in repairing the damages, still I know of no section of the statute that would authorize suit to be brought unless it is section 3754 of McClain's code, but I think it very doubtful whether this section applies to a case of this kind. It is fortunate that the law does not make provision for such cases.

Chapter 40 of the acts of the Twenty-fourth General Assembly provides a remedy when the trimmings of osage oranges hedges are not removed from the public highways, although it is somewhat obscure what the remedy is. The theory that the township trustees might certify up the cost of such removal as a tax against the land, comes to me. I would not like to say, however, that they may do this, but the thought occurs that the legislature in attempting to provide a remedy for a similar case, recognized the fact that no remedy existed prior to such legislation.

I confess I do not see a way clear to maintain the action to which you refer.

Yours truly,

MILTON REMLEY,
Attorney-General.

MULCT TAX—Authority of county treasurer to sell property at tax sale for less than the entire amount of mulct tax.

DES MOINES, Iowa, January 5, 1897.

R. Shaw Van, Esq., County Attorney, Denison, Iowa:

DEAR SIR—Yours of the 4th inst. at hand, in which you ask my opinion upon the following question:

"There are places of business which have been taxed under the mulct law, and no part of such tax has been paid. They are now closed, and the property has been advertised for tax sale, and, for want of bidders at the regular sale, the sale was adjourned. There were no bidders the second time the property was offered for sale. Can the treasurer now sell the property for what he can get bid for it, if it is less than the full amount of the tax?"

Section 13, of chapter 62, of the Twenty-fifth General Assembly, provides: "All the provisions now or hereafter in force, for the assessment, levy and collection of taxes, shall apply to and govern the tax provided for by this act, except as herein otherwise provided." The act in question makes no provision in respect to the matter about which you inquire. Then the provisions of the statute in regard to the collection of ordinary taxes will apply.

Sections 1361, 1362 and 1363 of McClain's code provide for the sale of property to the highest bidder when it has heretofore been advertised and offered at public sale and passed for want of bidders for two years or more. If the property to which you refer has been advertised and passed for two or more years for want of bidders, then the treasurer may sell the same to the highest bidder, by giving the notice as required in said sections. Otherwise I do not think he would be authorized so to do.

The treasurer must, in all respects, comply substantially with the law, and no authority has been given him to sell property for less than the full amount of the tax, except as above stated.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

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1. COUNTY TREASURER—OFFICIAL BOND—LIABILITY. 2. IT IS NOT THE DUTY OF THE COUNTY ATTORNEY to appear for the receiver of an insolvent state bank, who has been appointed in a proceeding instituted by the attorney-general.

DES MOINES, Iowa, January 6, 1897.

C. H. Whitney, Esq., County Attorney, Harlan, Iowa:

DEAR SIR—Your favor of the 4th inst. at hand, in which you ask my opinion under certain facts stated by you as to the duty of the county board of supervisors with reference to making a settlement with the county treasurer. You state:

"A resolution was passed in January, 1895, authorizing the county treasurer to deposit county funds to an amount not exceeding $25,000 in the Harlan bank, then a private banking institution owned and carried on by

C. J. and D. M. Wyland. At the time such resolution was passed, notice of the organization of the Harlan State bank was being published, and the bond which was filed securing the deposits in said bank to the county treasurer in Shelby county, appears to have been executed by C. J. and D. M. Wyland, and by the Harlan State bank

"After the passing of the resolution above referred to, no action has been taken by the board of supervisors, and no further authority has been given by them for the deposit of the county funds in the Harlan State bank, and no other or further bond has been executed securing the treasurer for the deposit in such bank. At the time of the failure of the Harlan State bank, the treasurer had on deposit there about $13,000."

It is impossible to give an opinion upon the above state of facts which would be of any value. Many other elements might enter into the question besides those stated. It is not perfectly plain from the statement, in what bank the deposits were secured by the bond; whether in the Harlan bank or the Harlan State bank. I infer, however, the former. Section 1400 of McClain's code provides the methods by which the county treasurer may be released from liability for depositing money in banking institutions. These provisions should be substantially complied with.

It does not appear from the statement that the bond filed was approved by the board of supervisors. This fact, in case the bond were not sufficient, might make the treasurer liable for any loss occasioned by making the deposit. But there may other facts exist which would amount to an approval of the bond, or a ratification of the treasurer's approval, whereby the county would be estopped from denying their approval of such bond.

I do not think the change in the name of the bank would *ipso facto* render the treasurer liable for having deposited in the Harlan State bank, especially under the facts stated, that at the time the resolution was passed it was generally known, and presumably known to the board of supervisors, that the bank was being reorganized as a state bank, and was being controlled by substantially the same parties. I do not think any court would hold that the county board of supervisors, by passing a resolution authorizing the treasurer to deposit the funds in a certain bank, and having knowledge that, acting under the supposed authority of such resolution, the money was deposited in the bank intended by the resolution, because the name of the bank was incorrectly stated in the resolution, the treasurer should be held for any loss. I cannot give a clear statement of what the board of supervisors should do with reference to settling with the county treasurer, without knowing all the facts.

I will say, however, I do not think that where the county treasurer, under such circumstances, in good faith attempts to carry out a resolution of the board and does just what the board of supervisors intended to authorize him to do, any fine spun theory should be adopted to hold the county treasurer for losses for which he is not morally responsible. If he were guilty of negligence or wilfulness, which does not appear from your statement, a different rule should be applied, but in the absence of these things I do not think it right, after a loss has occurred because of the mutual mistake of all parties, to resort to technical rules to make one bear the loss. In such matters the "Golden Rule" is not a bad rule of law to adopt.

Second.—A receiver having been appointed for the Harlan State bank in an action instituted by the attorney-general to wind up the affairs of the bank, you ask:

"Is it the duty of the county attorney to appear for the receiver in such action?" And you say: "It is claimed by some that it is his duty to appear so as to prevent the payment of attorneys who may be employed by the receiver out of the funds which are in his hands."

In regard to this I will say that the state has no interest, whatsoever, involved in this bank. Under section 2585 of McClain's code it is the duty "of the attorney-general to commence proper proceedings to have a receiver appointed and the institution wound up." This does not require the attorney-general, after the receiver is appointed, to act as counsel for the receiver The receiver becomes an officer of the court, gives bonds for the faithful performance of his duty, and is responsible for his acts, or those acting under and for him. He has a right to select his own counsel and advisers, and neither the attorney-general nor the county attorney could, by virtue of their offices, foist themselves upon him, he being unwilling. Under section 268 of McClain's code the county attorney shall appear for the state and county in all cases and proceedings in the courts of his county to which the state or the county is a party.

In the matter of the receivership, neither the state nor the county is a party. It is unquestionably the duty of the county attorney, under the direction of the board of supervisors, to look after the interests of the county as a creditor of the bank. This relationship might disqualify him from being the best adviser for the receiver. The receiver is under no obligation to employ the attorneys of the different creditors.

I do not think that you are called upon by your position to appear for the receiver. The matter of the employment of counsel rests wholly with the receiver, and the payment or compensation for such counsel rests with the receiver, subject to the approval of the court.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COUNTY TREASURER—OFFICIAL BOND—LIABILITY.

IOWA CITY, Iowa, January 11, 1897.

C. H. Whitney, Esq., County Attorney, Harlan, Iowa:

DEAR SIR—Your favor of the 7th inst. received, in which you refer to mine of the 6th inst. and say:

"I find on further investigation that subsequent to the resolution referred to in my former letter and at the succeeding session of the board of supervisors a bond was filed, executed by the Harlan State bank by its president and cashier, with several sureties thereon. That said bond was approved by the county treasurer and by the board of supervisors." You ask, whether, in such circumstances, the treasurer is relieved from responsibility from loss for such deposit in accordance with the resolution of the board.

Assuming that the treasurer acted in perfectly good faith and believed the bond to be good, he would, in my judgment, be relieved from responsibility. If, however, the treasurer knew the insolvency of the bank or the

insufficiency of the security offered by the bondsmen, a different question might arise. This, however, is not embraced in your enquiry. I have no doubt, in the absence of malfeasance on the part of the treasurer, he is not liable for the money deposited.

You also state that a petition of intervention has been filed in the receivership by the county treasurer, asking that this deposit be decreed by the court to be a preferred claim against the funds of the Harlan State bank, and in such action Shelby county has been made a party with the treasurer. You also say that the board of supervisors has informed you that it has not authorized such action to be brought in the name of the county and that it has no intent and does not intend to waive any rights thereby to begin proceedings against the sureties on the bond above referred to.

It does not occur to me that such a proceeding would waive any rights against the sureties on the bond. I think it would be well for the county to be governed by the wishes of the sureties It is the duty of the county to make the burden as little as possible against the sureties, and I would suggest, inasmuch as I have not a full statement of all the facts, that it might be well to get an agreement from the sureties, if they desire such proceedings to be commenced and carried to termination, that they will indemnify the county from loss in attorney's fees or costs in such proceedings. I do not think there would be any obligation on the part of the county to commence such proceedings in order to hold the sureties, and am not clear that the proceedings begun by the treasurer would jeopardize the county's right; but inasmuch as the case may be continued some time by consent of parties who are claiming to act for the county, with the knowledge of the county, I think it would be a safe course to have the sureties sign a stipulation consenting that such action should be brought, and agreeing to hold the county harmless as above suggested, and in case they refuse to sign such a stipulation then an action might well be brought against them at once.

Yours truly,

MILTON REMLEY,
Attorney-General.

STATE VETERINARY SURGEON—EXPENSES DURING YEAR MORE THAN APPROPRIATION—AUTHORITY OF EXECUTIVE COUNCIL TO ALLOW DIFFERENCE.

DES MOINES, Iowa, January 6, 1897.

To the Executive Council, Des Moines, Iowa:

GENTLEMEN—Your favor of the 2d inst. at hand, stating that the state veterinary surgeon presented a claim for services and expenses, and asks the executive council to allow the same under the provisions of section 120 of the code, the annual appropriation of $3,000 having been used up some time in October last, and desiring my opinion whether or no the veterinary surgeon can use the appropriations for 1897 sufficient to pay for work done in excess of the appropriations of 1896, said work having been performed in 1896.

In regard to this I will say that chapter 189 of the laws of the Twentieth General Assembly, makes an annual appropriation of $3,000, "or so much thereof as may be necessary for the uses and purposes herein set forth." This appropriation is intended to be the limit of the expense to the state for carrying out the provisions of the act by which the veterinary surgeon was appointed. Under section 120, the executive council has authority to allow accounts for "such other necessary and lawful expenses as are not otherwise provided for." Chapter 189, having made provisions for the expenses of the state veterinary surgeon, it is very questionable whether the executive council, under section 120, would have any authority to supplement the appropriation thus made by additional appropriations.

I regard "the sum of $3,000 annually appropriated, or so much thereof as may be necessary for the uses and purposes herein set forth," as stated in section 8 of said chapter 189 of the acts of the Twentieth General Assembly, as a limitation on the expenditures which are authorized under such act. This appropriation is not cumulative; *i. e.*, $3,000 per annum is not placed to the credit of the department of the veterinary surgeon. If any part thereof shall not be necessary in any one year, then it cannot be considered as having been appropriated. It would not, in my judgment, be legal to expend $6,000 in one year, and nothing the next year.

If any part of the appropriation available for the year 1897 can be used to pay for work in 1896, the question arises, how much can be so used? If $100, why not $200, $500, $1,000 or $3,000? It cannot be said that it may not be necessary to expend all of the appropriation for 1897 during the year 1897; and, if all the appropriation be used to pay for work done in 1896, then nothing could be done in 1897. To take future appropriations to pay for work done during the past, would be more objectionable in principle than to use any unexpended balances in years that are past. Neither, in my judgment, would be authorized by the law, and it would be setting a dangerous precedent for the executive council to allow the appropriations available for the year 1897 to be anticipated and be paid out for work done in 1896.

I have no doubt that the state veterinary surgeon performed the work needed to be done, and conscientiously endeavored to do his full duty, and made no useless expenditures, and I have no question about the correctness of his bill. In similar cases, where the work required of a public officer requires a greater expenditure than the money appropriated to pay therefor, it is usual to ask the legislature to make an appropriation for the deficiency. This, I think, would be the proper course in this case.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—INSANE TAX—What amount and for what purpose same may be levied.

IOWA CITY, Iowa, January 8, 1897.

D. W. Telford, Esq., County Attorney, Mason City, Iowa:

DEAR SIR—Your favor of the 5th inst. is at hand, in which you ask my opinion upon the following question:

"Does the board of supervisors of the county have authority to levy any

more insane tax than is necessary to pay the amount charged to it by the state auditor, and the necessary expense of conveying patients to and from the hospital, as provided in sections 2227 and 2229 of McClain's code?" You state that your county has built a hospital for the incurable insane and the authorities at Independence have notified your county that fourteen patients from your county must be removed at once, and the county has sufficient funds in the insane account to care for same, and are short on general and poor funds.

Section 2227, McClain's code, provides for the levy of a tax to pay the expense of caring for and treating patients sent from the county to the insane hospitals of the state, and also to pay the expense incident thereto. This tax is usually called the "insane tax;" more correctly speaking, it should be called the "insane hospital tax."

By sections 2229 and 2230 of McClain's code it is expressly provided: "The tax levied and collected for the purpose named in this act shall not be diverted to any other purpose, nor transferred to any other fund." Section 2230 provides a penalty for members of the board of supervisors or any county treasurer who violates the provisions of section 2229. You will notice that said sections are sections 3 and 4 of chapter 183 of the laws of the Seventeenth General Assembly. The purpose of that chapter was to provide means of raising funds to reimburse the state for the expense of keeping the county patients in the insane hospitals. I am not unmindful of the provisions of sections 2199 and 2202 of McClain's code, but the expense therein authorized to be incurred I think should be paid out of the county fund.

Because of the number of insane, it seems that the problem of caring for them has outgrown the statutes made for their care and support. I think, however, that the central idea of building the state hospitals is not so much the custody of the insane as furnishing a place for their treatment, so that they may recover, and while thus being treated they become a charge to the county. An impression prevails, however, that whenever an unfortunate becomes insane that the state or the county should care for him, and his relatives are absolved from further responsibility in the matter. I do not think this impression is justified by our laws, but it explains the popular idea that the so-called "insane tax" can be applied to the purposes of caring for the insane outside of the hospital. In my judgment sections 2229 and 2230 of McClain's code are conclusive upon the question.

I am strengthened in this view because in nearly every instance where the board of supervisors is authorized to levy a tax, there is a limit placed by law upon the amount of the levy. In regard to the insane hospital tax, however, there is no limit upon the rate per cent of the levy, but by this section the limitation is made to the actual expense of caring for the insane patients of the hospital and costs incident thereto. The county, then, has no right to levy a larger tax than may be needed to raise the sum due the state and costs incident thereto.

I agree with you that some change in the laws in this respect may well be made by the legislature. Yours truly,

MILTON REMLEY,
Attorney-General.

DRAINING MEANDERED LAKE—RIGHT TO DAM UP DRAIN.

IOWA CITY, Iowa, January 11, 1897.

George E. Delavan, Fish Commissioner, Estherville, Iowa:

DEAR SIR—Your favor of the 8th inst. at hand, in which you state the following:

"A number of farmers in Winnebago county have been draining Lake Rice, a meandered body of water covering about 600 acres of land. The citizens of Lake Mills have petitioned me to give them permission to dam up this drain. Is there any law besides section 6, chapter 34, of the Twenty-third General Assembly, and chapter 63 of the Twenty-first General Assembly, touching upon this point?" You add, "Some portions of Lake Rice are thirty feet deep, and it is a beautiful body of water. The farmers have dug a ditch about three miles long, and are draining it for the purpose of taking the fish, but more especially to secure about 300 acres of land for hay purposes."

In reply, I would say that chapter 63 of the Twenty-first General Assembly was amended by chapter 108 of the Twenty-second General Assembly. I think the law as amended is correctly stated in section 2319 of McClain's annotated code (3d volume). By this, "Any city or incorporated town which is bounded in whole or in part by any meandered lake or chain of lakes of this state, or any board of supervisors of the county in which said lake or chain of lakes is situated, is hereby authorized and empowered to construct and maintain across any outlet or inlet of such lake, a dam to obstruct the passage of fish," etc. This contemplates that a dam may be built across a natural outlet so as to maintain the water to the natural and ordinary level of the lake.

There is no authority whatsoever for any person to drain a meandered lake so as to draw off the water, either for the purpose of taking the fish or to get possession of the land under the lake. I have no doubt that the meandered lakes of Iowa belong to the state. A person who drains the lakes commits a public wrong. Independent of the statute, I have no doubt that any person especially injured would not only have a right to obstruct the ditch and thereby cause the water to rise to its natural ordinary level, but would also have a right to maintain an injunction against any person who has or threatens to dig a ditch so as to draw off the water. For a private person to maintain such an action, however, he must suffer some special injury greater than the general public. I have no doubt that the board of supervisors would be authorized to fill up this ditch, and am not clear but that it would be your duty, under the general powers given to you under section 2307 of McClain's code, to close up the ditch or order it to be done. I am inclined to the view, further, that any private citizen would have a right to go upon the property of the state and close up this ditch so as to raise the water of the lake to its normal condition. The ditch, in effect, is a nuisance, and any person is authorized to abate the nuisance if it can be done without a breach of the peace.

Yours truly,

MILTON REMLEY,
Attorney-General.

A COUNTY IS LIABLE FOR COSTS MADE IN A SEARCH WARRANT PROCEEDING.

IOWA CITY, Iowa, January 14, 1897.

C. W. Crim, Esq., County Attorney, Estherville, Iowa:

DEAR SIR—Your favor of the 13th inst. at hand, in which you ask my views upon the following question: "How are costs incurred under search warrant proceedings to be paid?"

I think without doubt the proceedings under chapter 50 of title 25 are of a criminal nature. The fact that the law is under title 25, which treats of criminal procedure, is not alone conclusive; because, for instance, chapter 56, relating to illegitimate children, also appears under title 25, and that has been held not to be a criminal proceeding, and the county is not liable for the costs, but you will notice a very marked difference between the two proceedings.

Chapter 50 provides for the issuing of a warrant, which must be issued upon information filed before a magistrate. It runs in the name of the state. The entire proceeding is an adjunct or a means of enforcing the criminal laws of the state. In case the property is seized the court retains control of it for the purpose of using it in evidence on the trial of the criminal case (Section 6150.)

A public officer, including a justice and constable, can, in civil matters, demand fees in advance. In criminal matters such fees could not be demanded in advance, the county or the state being sponsor for the payment of such fees in case they cannot be collected from the defendant. From the general language employed in chapters 50 and 51 I do not think a constable or magistrate could refuse to perform the services demanded until the fees were paid in advance. Applying every known test to such proceeding, I think it must be called a criminal proceeding. This being true, the costs should be paid as in other criminal cases. Sections 6053 and 6054, McClain's code, refer to the owner of the property found being required to pay a reasonable and necessary expense incurred in the preservation and keeping thereof. This does not refer to the ordinary costs of the suit. This does not, in my opinion, refer to who should pay the costs of issuing the warrant or of serving the same, or of entering up the judgment. To my mind it means the county shall pay the storage and labor of the constable or officer in keeping the property until the owner is found.

Yours truly,

MILTON REMLEY,
Attorney-General.

TAXATION—WHO ENTITLED TO EXEMPTION ON CERTAIN PERSONAL PROPERTY—WHAT CONSTITUTES THE COST TO THE COUNTY IN CRIMINAL PROSECUTIONS.

IOWA CITY, Iowa, January 14, 1897.

W. F. Kopp, Esq., County Attorney, Mt. Pleasant, Iowa:

DEAR SIR—Your favor of the 16th inst. at hand, in which you ask my opinion upon the following questions:

First.—"What does the phrase,' His farm produce harvested within one

year previous to the listing,' in paragraph of section 1271, McClain's code, mean? Does it simply exempt the produce raised by the taxpayer himself on his own farm, or does it also exempt the produce purchased by the taxpayer if harvested within one year previous?"

In my opinion, "his farm produce harvested within one year previous to the listing," refers alone to the produce which he has raised himself, either upon his own farm or rented land, and does not refer to the produce which he has purchased from other people.

If he invests his money in grain or hay raised by other people his money could not be listed, and to list the property bought with that money is no injustice to him. In other words, the exemption is in favor of the producer alone and not in favor of the purchaser.

Second.—"What does the phrase, 'expense to the county for criminal prosecutions during the year,' in section 254, McClain's code, include? Does it include the entire cost of the petit jury while a criminal trial is in progress, or does it simply include the statutory jury fee taxed as costs? Does it include the costs of grand jury and witnesses summoned before it?"

I think it includes all sums of money which the county is required to pay out because of criminal prosecutions, and this, of course, includes the pay of the entire panel of the petit jury while a criminal case is on trial, as well as the expenses of the grand jury and the witnesses summoned before the grand jury. The fact that the law only authorized $6 per day to be taxed against the defendant in a criminal case does not determine the cost to the county of such criminal case. The trial of one criminal case might consume the entire term; twelve or more jurors might be kept in attendance for two weeks; the county would have to pay these jurors and the amount paid is certainly the expense to the county of that case.

Yours truly,

MILTON REMLEY,
Attorney-General.

THE COUNTY AND NOT THE STATE IS LIABLE TO AN ATTORNEY who, having been appointed to defend a criminal in the district court, appears for him in the supreme court.

DES MOINES, Iowa, January 19, 1897.

E. F. Simmons, Esq., County Attorney, Fairfield, Iowa:

DEAR SIR—Your favor of the 15th inst. at hand, in which you ask my opinion of a certain claim filed by C. W. Coykendall, for services rendered in the case of *State v. Richard Taylor*, in the supreme court, he having filed a claim with the county for $50. You ask my opinion as to who shall determine the amount to be paid; whether it is left wholly with the board of supervisors, or whether the state pays it, or does the supreme court make the allowance?

In reply, I will say that the case is not disposed of in the supreme court, this being the first term, and the arguments not complete. There is no fund of the state to pay such claims, nor is it a claim that can be made against the state. The supreme court makes no allowances. The only authority for allowing a claim is that under section 5110 of McClain's code.

Taken in connection with section 5109, and being a continuation of the same subject, it is evident that any sum that may be allowed must be paid by the county.

In *Bailies v. Polk County*, 58 Iowa, 357, the court affirms a judgment against the county on a similar claim. It would be proper for the board of supervisors to allow such sum as they deem proper, observing, however, the rule laid down in *Bailies v. Polk County*.

Yours truly,

MILTON REMLEY,
Attorney-General.

OFFICIAL NEWSPAPERS — COUNTY PRINTING — How the third newspaper, in counties where there may be three, may be selected—The power of the board of supervisors to reconsider its action after having selected the newspapers.

DES MOINES, Iowa, January 20, 1896.

D. W. Telford, Esq., County Attorney, Mason City, Iowa:

DEAR SIR—Your favor of the 16th inst. at hand, asking my opinion upon the following questions:

First.—"Does the law require the board, in selecting a third paper where such county has over 17,000 population, under section 428 of McClain's code, and where there are two papers asking for such county printing as said third paper, to observe the rule in selecting said third paper as is required in the selection of the first two mentioned in said section; *i. e.*, should the board fix a day and require lists to be filed, and select the third paper to do the county printing from the one showing the largest *bona fide* list; or can they select said third paper without regard to circulation?"

My interpretation of section 428 of McClain's code is that the board of supervisors is required to select two newspapers in which to publish the proceedings of the board of supervisors, and must pursue the manner therein specified for the selection of the two newspapers which the board is required to select It is provided, however, that in counties having a population of 17,000 inhabitants or more, a third newspaper may be selected. The selection of a third newspaper is wholly discretionary with the board. If, in their judgment, the interests of the county or the taxpayers require the selection of a third newspaper, they are authorized to select such a paper.

There is only one limitation upon their discretion, viz.: no more than two of the papers thus selected shall be published in the same town. The statute is silent upon the manner of selecting the third newspaper.

If the selection of a third newspaper is left entirely to the discretion of the board, and the statute is silent upon the manner of selecting such third paper, it follows as a natural consequence that the method or manner of making such selection is within the discretion of the board. It is a principle well recognized that where the law imposes a duty upon an officer or board, and is silent upon the manner of discharging that duty, the officer or board has full discretion in regard to the manner in which such duty shall

be discharged. How much more is this true where the duty is not made obligatory but discretionary with the board.

The board of supervisors having selected two papers in which to publish the proceedings in the manner required by law, it may be that a paper published in another part of the county would reach largely a class of taxpayers that did not take either of the papers thus selected. It may have a less number of subscribers than still another paper published elsewhere, whose subscribers were largely the same people whose names appeared on the lists of the first two papers selected. The intent and policy of the law may be better subserved by selecting the paper having the less number of subscribers.

I think the legislature intended to leave the selection of the third paper entirely to the sound discretion of the board, both as to whether a third paper shall be selected and as to the manner of making its selection. No paper can claim the right to be selected as the third paper, nor can it be heard to complain that it was not selected, because the law does not require the board to select a third paper. The discretion of the board could not be controlled by a paper not selected.

Second.—"When two papers have asked to be selected as the third paper under said section, and the board made their selection at the January session without fixing a day for hearing, and without requiring lists to be furnished, and without regard to circulation, and without notice to papers, has the board power to reconsider its action as to selecting said third paper, and fix a date and require lists to be filed at the same session, and then make a selection?"

The entire matter of selecting the third paper being within the sound discretion of the board, if it has taken such action as its discretion has dictated, there is no occasion for reconsidering its action for the purpose of having lists of *bona fide* subscribers furnished; but, if it wishes to reconsider its action, such reconsideration would be governed by the same rules as other matters before the board are determined. I would not like to say that the board had no power to reconsider actions inadvisedly taken. I am not prepared to say the paper selected as a third paper in which to publish the proceedings, by reason of such selection, acquired such a vested right to publish such proceedings as would preclude the board from reconsidering its action Undoubtedly, if the third paper had published the proceedings thus far before the reconsideration, it would be entitled to receive pay therefor, but I am inclined to take the view that the board has power to reconsider any action taken which does not amount to a contract.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—IN WHAT TOWNSHIP CERTAIN PERSONAL PROPERTY SHOULD BE ASSESSED.

DES MOINES, Iowa, January 20, 1897.

Buckman B. Foster, Esq., County Attorney, Manson, Iowa:

DEAR SIR—Yours of the 18th inst. at hand, in which you ask my opinion upon the following question:

"A, doing a banking or mercantile business, and residing in one township of this county, is feeding a herd of cattle or other stock in a different township of the same county. In what township shall the live stock be assessed; the township where the live stock is kept, or the township where the owner resides and does business?"

Section 1279 of McClain's code provides: "When a person is doing business in more than one county, the property and credits existing in one of the counties shall be listed and taxed in that county, and the credits not existing or pertaining especially to the business of any county, shall be listed and taxed in that where the principal place of business may be." Section 1302 of McClain's code requires that the assessor shall list every person in his township, and assess all the personal property and real property therein, etc.

In *Rhyno v. Madison County*, 43 Iowa, 632, the supreme court, in discussing this question, says: "The nature of the subject is such that it is not practical to lay down a general rule which will furnish a safe guide. Every case must be determined from its facts." The principle, however, which is laid down in that case and other cases, may be stated to be this: personal property shall be assessed at the place of the residence of the owner, unless it is used in connection with a business carried on in some township or place other than the residence of the owner.

Now apply this rule to the facts stated. A, although a banker or a merchant, and carrying on a business at his place of residence, may also have another business, viz., that of feeding stock, which he carries on at some other place. If he is carrying on such business in another township, such stock should be assessed in such other township. If, however, the stock was intended to be kept but for a few weeks or a short time in such other township, and was intended to be brought back to the residence of the owner, as was true in the Rhyno case, then such stock should be assessed in the township of the residence of the owner. If A owned the farm whereon his live stock was being fed, or had the farm rented and had no other place of carrying on the business of feeding live stock, then I think such cattle should be assessed in the township where they are being fed.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BUILDING AND LOAN ASSOCIATIONS—1. Power of state to regulate and control—Rights of stockholders and debtors where articles of incorporation are changed to conform to change in the law. 2. No authority to invest funds in the stock of another association. 3. When the bonds of the officers should be renewed.

DES MOINES, Iowa, January 21, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines:

DEAR SIR—Your favor duly at hand, in which you ask my opinion upon the following questions:

First.—"Domestic associations organized and doing business several years

or months previous to the taking effect of chapter 85, laws of the Twenty-sixth General Assembly, and reorganized under the new law and making material changes in their plan of business—reducing or increasing the amount charged for expenses, premium and interest on loans, fines, etc., and now doing and obtaining new business and being governed by the articles of incorporation and by-laws recently adopted under reorganization: question—Can these associations be required to change the contracts entered into prior to reorganization to comply with and be governed by the plan of business, rates of premium and interest, rates of expense, etc., of such articles of incorporation and by-laws under the reorganization, or must contracts previously entered into by these associations be carried out in strict compliance with the terms and provisions of these contracts?"

The inquiry embraces a number of questions, and it is impossible for me to give an answer that will be of universal application because of the different subjects embraced in the inquiry, and the various provisions of the articles of incorporation of different associations. The inquiry, however, naturally resolves itself into two parts; first, as to the power of the state to regulate and control corporations organized under its laws: and second, as to the rights of the stockholders in such corporations as between themselves and the corporation, and the rights of debtors of such corporations in case changes in the articles of incorporation are made necessary by a change of the law of the state.

In regard to the first, I will say there can be no doubt of the power of the state to regulate and control corporations organized under the laws of the state. This is expressly reserved by statute (section 1640 of McClain's code). All corporations being creatures of the law, must comply with the provisions of law, and must make any change in their articles of incorporation which the law may require. The statute may prescribe the method by which the business of the corporation shall be carried on. I do not know that it can be said that corporations can be compelled to change their methods of business or their articles of incorporation, inasmuch as the provisions of law are rather prohibitory than mandatory. The state, however, has power to prevent them doing business in any other way than the law prescribes. It is optional with a corporation to change its articles of incorporation and plan of business so as to comply with the law, or to wind up its affairs and go out of business. The state can require them to go out of business in case they fail to comply with the provisions of law.

Let me say here I do not think that building associations, after reorganization under the provisions of chapter 85, can carry on two kinds of business, one under the provisions of the old articles of incorporation, in transacting business with the stockholders who became such prior to the reorganization, and another plan of business under the new or amended articles of incorporation. The adoption of amended and substituted articles of incorporation precludes the idea of continuing operations under the articles of incorporation which have been repealed. Such associations must, in their own way and in such manner as may be agreed upon, conduct all the business in accordance with the provisions and plan of the articles of incorporation adopted in conformity with chapter 85, acts of the Twenty-sixth General Assembly. How such association may bring its former stockholders upon the same plane as those who take stock subsequent to its

reorganization is a matter that must be adjusted by the corporation itself. The state, it is true, has a right to insist that the business carried on by the association shall be in accordance with the articles of incorporation which have been approved by the executive council. In case a building association is unable to do this because of supposed rights of its earlier stockholders, then it is not in a position to continue business, but should wind up its affairs as soon as possible.

Second, as to the rights of the stockholders as between themselves and the rights of the debtors of building associations: the rights of the stockholders in a corporation depend largely upon the articles of incorporation. A change in the articles of incorporation made in the manner provided for herein is as binding on the stockholders who do not consent as upon those who do consent thereto. This has been so held in several cases from our own supreme court and is unquestionably the law. If, therefore, the amendments or changes in the articles of incorporation made by the reorganization of a building association are made in the manner provided by the original articles, then the stockholders are bound by such amendments and their rights and liabilities are determined by the articles as amended.

Some articles contain no provision for making amendments thereto. In such a case material amendments cannot be made thereto so as to cast a greater burden upon the stockholders without their consent. In such a case, if the corporation attempted to do business on a different plan, placing an additional burden upon the stockholders without their consent, any such stockholder would have a right to apply to a court of equity to close up the business of the association.

Your inquiry includes an inquiry as to whether the reorganized association can be required to change contracts entered into prior to the reorganization, rates of interest, rates of expense, etc. I do not think that a building association has any power or right to require a borrower to pay a greater rate of interest or a greater amount of premium for the loan than that contracted for at the time the loan was made. Such borrower stands in the relation of debtor to the association. The association cannot impose a greater burden upon its debtors because of the fact that it changes its articles of incorporation so as to prevent it making loans upon such terms in the future. The debtor, or anyone contracting with the association, has a right to carry out the contract according to its terms and his burden cannot be increased without his consent. The fact that the debtor may also be a member of the corporation would not necessarily change his liabilities as such debtor. While his liabilities and rights as a stockholder may be modified or changed by an amendment to the articles of incorporation legally made, yet the rule, in my judgment, would be different in regard to his rights as debtor. He stands in a dual relation to the corporation; first as stockholder and second as debtor. His rights and liabilities in the relation first named may be affected by changes in the articles of incorporation legally made, in some cases without his consent, but in the capacity of a debtor, his rights and liabilities must remain fixed by the contract.

If the corporation cannot change the rates of interest, premium, etc., without the consent of the debtor, it goes without saying that the state auditor would have no authority to require them to.

I assume that the purpose of your inquiry is to obtain a basis upon which you, as auditor, or those under you, making an examination of the business

of building associations, may ascertain the legal liabilities and assets of such associations. Upon this assumption I will add further: First, the stock of the association represents the liability of the association to its stockholders. In determining, then, the liability of the association on such stock, I am of the opinion that it should be determined by the provisions of the articles of incorporation adopted at the reorganization. The stockholders who continue with the company upon its reorganization must be presumed to have consented to the changes in the articles of incorporation by which their rights against the corporation are determined. Second, in ascertaining the amount of the assets, interest and premiums should be computed on the different loans in accordance with the terms of the contract under which the loans were made, notwithstanding the fact that the change in the articles of incorporation prevents any more loans being made on such terms.

You make the further inquiry:

Second.—"Associations are permitted, under the law, to loan funds of the association upon first mortgages upon real estate and their own stock. I find, by the examiner's report, that some of the associations have in their possession, stock of other building and loan associations and are carrying the same as an asset of the company, thereby creating a corresponding liability of the company. Can such assets and liabilities be accepted by the auditor of state as proper assets and liabilities of these associations?"

Under chapter 85, acts of the Twenty-sixth General Assembly, I have no doubt that building and loan or savings and loan associations have no authority to invest the funds of such associations in the stock of any other building association, or stock of any kind. They have authority to loan only to members and upon first mortgage security, or the stock of the association. Prior to the taking effect of chapter 85, of the Twenty-sixth General Assembly, the right of building and loan associations to purchase stock of any kind would depend largely upon the provisions of their articles of incorporation. If the articles of incorporation, at the time such stock was purchased, authorized such purchase, then such stock may properly be considered an asset of the company.

There is no question in my mind that any stock of any other building association which was purchased with the funds of the company since chapter 85 took effect, should not be accepted by the auditor as a proper asset of the association, and the same is true of any stock procured prior to the taking effect of said chapter 85, which was not authorized by the articles of incorporation under which the association was then operating

If any association were duly authorized by its articles of incorporation to invest its funds in stock of another building association, and such stock is still on hand at the present time, I do not think such association is authorized to continue to invest this money in such stock by making monthly payments thereon. Such association should dispose of any such stock as soon as possible, and bring itself within the provisions of said chapter 85. Except in the case above stated, any investment of the funds of the association in the stock of another association, would be unauthorized and illegal, and such stock could not be accepted by the auditor as a proper asset of the company.

Third.—"The law requires all officers signing checks or handling funds of the association to give bonds for the faithful performance of their duties,

and many of the officers have filed official bonds, with personal security. At what time will these bonds expire, and at what time should they be renewed? At the end of the fiscal year for which the officer is elected, or will they be good indefinitely, or so long as the officer holds his position?"

I am of the opinion that the bonds of all officers should be renewed whenever there is a re-election. The officers have been elected for a fixed time, and the sureties presumably undertake to be responsible only for that time, and a new bond should be given when such officers enter upon another term.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICERS—AN ASSESSOR HAS NO AUTHORITY TO APPOINT A DEPUTY.

DES MOINES, Iowa, January 22, 1897.

W. G. Harvison, Esq., Assistant County Attorney, Des Moines, Iowa:

DEAR SIR—Your favor of the 20th inst. at hand, in which you ask my opinion upon the following question:

"Has an assessor power and authority under our law to appoint a deputy?"

Section 1238 of McClain's code specifies the officers who may appoint deputies. I understand the rule to be that the authority to appoint a deputy must be given expressly by statute. Assessors are not named among the officers who may appoint deputies in the section above referred to. I am aware of no statute of this state which, either in express terms or by implication, authorizes the appointment of a deputy by an assessor.

I do not mean by this to say that an assessor may not have another under his direction perform certain ministerial or clerical duties, but, in my judgment, some of the duties of the assessor are of such a nature that they cannot be delegated to another. As is said in *Ring v. Johnson County*, 6 Iowa, 265, with reference to a county judge: "No objection is perceived to another's performing a ministerial act under his order and direction."

In *Snell v. City of Ft. Dodge*, 45 Iowa, 564, an assessment was upheld, although made originally by one not the assessor, but made under his direction and approved afterwards by him, but such person who did the work was not a deputy.

The clerical part of an assessor's duty he might with propriety permit to be done by another, of course at his own expense, but the determination of the value of the property to be assessed is something more than a ministerial act. Section 528 of McClain's code as amended provided for the election of three assessors in cities having a population of over 10,000, if the city council think necessary. The enactment of this statute was evidently for the purpose of furnishing help in the discharge of the duties of assessor in the more populous cities. There appears to have been no thought, either that the assessor had authority to appoint a deputy, or that it would be appropriate to authorize the appointment of a deputy by an assessor.

In my opinion, the assessor has no such power under our law.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICERS—CLERK OF THE DISTRICT COURT—COMPENSATION.

DES MOINES, Iowa, January 22, 1897.

W. L. Smith, County Attorney, Humboldt, Iowa:

DEAR SIR—Your favor of the 19th inst. at hand. You ask my opinion in regard to the compensation to be allowed clerks of the district court. You call my attention to section 3784 of the code, and also to section 3, chapter 151, of the Eighteenth General Assembly, as amended by chapter 140 of the Nineteenth General Assembly, and ask whether the fees allowed by chapter 140 of the Nineteenth General Assembly are to be in addition to the amount specified in section 3784 of the code.

In regard to this I will say that the compensation of the clerk is derived from fees for different services, to be charged by him as clerk. Section 5033 of McClain's code provides a schedule of fees that he may charge. For his duties as clerk of the insane commission, he is also entitled to charge fees. For services in making a report to the state board of health he is entitled to charge fees.

Section 3784 of the code, as amended by chapter 18 of the Twenty-second General Assembly, is correctly stated in section 5036 of McClain's code. This section, as amended, places a limitation on the amount he may retain. All the fees received by him, up to the amount thus stated, he may retain. The fees in excess of the amount stated as the limit in section 5036 of McClain's code he must pay into the county treasury If the total amount of fees which he receives from all sources is not equal to the limit specified in said section, I think he would be entitled to collect the same from the county. But, in case the fees received do amount to the sum specified as the limit, I do not think he could recover.

The case of *Moore v. Mahaska County*, 61 Iowa, 177, is in point and a parallel case.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICERS—CLERK TO ASSIST COUNTY TREASURER—COMPENSATION.

DES MOINES, Iowa, January 22, 1897.

W. L. Smith, Esq., County Attorney, Humboldt, Iowa:

DEAR SIR—Your favor of the 18th inst. at hand, in which you say:

"In January, 1896, the board of supervisors passed a resolution allowing the county treasurer $1.50 per day for clerk hire for the time employed, and the clerk has filed the bill in her name, and been paid until now. She has a bill in now, and the board want to know if they have to pay it, or if it should go to the treasurer."

I cannot readily see any reason why her bill should not be paid. The resolution in effect authorizes the employment of a clerk at $1.50 per day. The county, by paying the bills heretofore filed, has recognized the employment of the clerk by the county, and that the county was her paymaster. The services were rendered for the county by the clerk upon the assumption that the county had agreed to pay. The county has, by payment heretofore, justified such belief, and I think on that account, the county is liable for the payment.

Had the county made no provision for the payment of clerk hire, the treasurer, in case of necessity, could have procured a clerk for temporary assistance, and the county would have been liable under section 1243 of McClain's code. I do not think the board would be justified in withholding the pay from the clerk, nor could it escape liability in case an action were brought. *Mahaska County v. Ingalls*, 14 Iowa, 170, and several other cases not so clearly in point, confirm me in this belief.

Yours truly,

MILTON REMLEY,
Attorney-General.

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1. SHERIFF—COMPENSATION for summoning a grand or trial jury.—**2. COUNTY ATTORNEY—OFFICE ROOM** where to be furnished.

DES MOINES, Iowa, January 23, 1897.

L. E. Francis, Esq., County Attorney, Spirit Lake, Iowa:

DEAR SIR—Your favor at hand, in which you ask my opinion upon the following questions:

First.—"Under section 6, chapter 94, of the Nineteenth General Assembly, it is provided under sheriff's fees: 'For summoning a grand or trial jury, for each person served, 60 cents, to be paid out of the county treasury, and that such sum shall be full compensation for such service.' Does the section quoted authorize the sheriff to collect from the county, 60 cents for each talesman brought into court during the trial of cases to fill up the panel, or is it merely intended to apply to the regular jurymen?"

The term, "a grand or trial jury," referred to in said section, in my judgment, refers to the panel. Twelve men are drawn and summoned to attend as a grand jury. The trial jury, otherwise called the petit jury, is likewise summoned from which to select jurors for the trial of cases in court. The trial jury here refers to the panel, evidently, and not to the twelve men who sit to try any particular case. These trial jurors remain during the term, or until excused.

The number served ranges from twenty to thirty-six people, according as the judge may determine the number needed. The section in question, evidently, refers to summoning these men who are to serve on the grand or the trial jury, and, in my judgment, does not refer to summoning talesmen. The summoning of talesmen is often done by bailiffs who are paid by the county, so much per diem.

I would not like to say what would be the rule where a special venire is issued, but limit my answer to the question asked.

Second.—"Chapter 83 of the Twenty-sixth General Assembly, amending section 3844 of the code, provides for the furnishing of fuel, stationery and office room for the county attorney, etc. Now, does this mean that the board of supervisors may furnish a room for the county attorney at the court house, which he is obliged to take, or may he look where he will for such office, and the county furnish him such office at a place other than the court house?"

In regard to this, I will say that the law does not specify where the office of the county attorney shall be furnished. I have no doubt that it

was in the mind of the legislature that the office room should be furnished at the court house when it could be done. In case there is no room at the court house, I have no doubt the supervisors are authorized to furnish it elsewhere, and I see nothing in the law which would prohibit them from furnishing a room in another part of the town, if, in their judgment, it was deemed best.

I do not think it was intended that where the county had a court house, with suitable rooms therein for an office for the county attorney, that another office room elsewhere should be furnished him. Such matters are left to the sound discretion of the board, and it is practically of little importance. The board fixes the salary of the county attorney. If they should furnish him with an office, fuel, etc , elsewhere, so as to make it convenient for him to transact business, other than for the county, then the board would naturally take the advantage which he obtained from receiving office rent in fixing the amount of his salary. The law does not contemplate that the county attorney should do no business for other parties than the county, or devote his whole time to the service of the county. If the office rent that he receives elsewhere inures to his personal benefit, then such circumstances would naturally be taken into account by the board of supervisors in determining what his salary shall be.

I do not see anything in the law to prevent the board of supervisors doing whatever, in their judgment, may appear just and right, and for the best interests of all parties.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

MIDWIVES—CERTIFICATE FROM THE STATE BOARD OF MEDICAL EXAMINERS—WHEN NECESSARY.

DES MOINES, Iowa, January 25, 1897.

Dr. J. F. Kennedy, Secretary State Board of Medical Examiners, Des Moines, Iowa:

DEAR SIR—Your favor came duly to hand, in which you call my attention to the provisions of chapter 104 of the acts of the Twenty-first General Assembly. You desire my opinion upon the following question:

"Whether or not midwives in practice subsequent to the passage of the act, are under its provisions required to procure a certificate from the state board of medical examiners, or are under any restrictions, whatsoever. Also whether there is any provision in said chapter for the practice of midwifery, except by duly authorized physicians and by women designated in the exception specified in section 8."

The title to the act is: "An act to regulate the practice of medicine and surgery in the state of Iowa." Section 1 of the act provides: "Any person practicing medicine, surgery or obstetrics in any of their departments within this state, shall possess the qualification required by this act." Section 8 of the act makes the following definition: "Any person shall be deemed as practicing medicine, surgery or obstetrics, or to be a physician within the meaning of this act, who shall publicly profess to be

a physician, surgeon or obstetrician and assume the duties, or who shall make a practice, of prescribing or of prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal by any means whatsoever."

It will be noticed that this embraces three classes of persons; first, those who publicly profess to be physicians, surgeons or obstetricians, and assume the duties; second, those who make a practice of prescribing or prescribing and furnishing medicine for the sick; third, those who publicly profess to cure or heal by any means whatsoever. Following the definition above given, we find this language: 'But nothing in this act shall be construed to prohibit students of medicine, surgery or obstetrics from prescribing under the supervision of preceptors, or gratuitous service in case of emergency; nor shall this act extend to prohibit women who are at this time engaged in the practice of midwifery," etc.

In this limitation to the definition given above is the first place in the act where the word "midwife" occurs. In arriving at a true interpretation of the law, as well as of any writing, it is important to obtain a clear idea of the meaning of the terms used. The question arises, what distinction, if any, is there between an obstetrician and a midwife, or obstetrics and midwifery? If these two terms mean one and the same thing, then why the use of the different terms in the language quoted.

I am aware that some lexicons define the terms as if they were synonymous. Thomas' Medical Dictionary defines a midwife to be: "a woman who delivers a woman with child; a female obstetrician." Dungilson's Medical Dictionary defines a midwife as: "a female practicing obstetrics." Obstetrics is defined by the same author to be: "the art of midwifery; midwifery in general," and an obstetrician is defined to be: "an accoucheur." The Standard dictionary defines a midwife to be: "a woman who makes a business of assisting at childbirth."

To many, from an examination of the lexicons alone, it might appear that obstetrician was a general term including male and female practitioners, and that the term midwife means a female obstetrician. But language is a growth. Words and terms, by their use from year to year, acquire a different shade of meaning from that formerly given. The meaning becomes more limited or more enlarged. What was used in a general sense may acquire a more specific meaning. This is illustrated by the word, "obstetrician," as it is now understood. Its derivation shows that at first it referred to one who stood by at the time of childbirth to wait upon and look after the woman in labor. It did not necessarily imply any great amount of medical skill. I think I may say without fear of contradiction, that now the term is used to indicate one possessed of the knowledge of the female organism, anatomy, physiology, pathology, rules and methods of practice, and of the use of implements and aids which modern medical science has taught as necessary in parturition. In other words, the meaning of the term, "obstetrician," has grown.

On the other hand, the term midwife originally meant any woman who assisted at childbirth. Before the race became as effeminate as it now is, when life was spent more out of doors in the open air, the birth of a child was not such a critical event in the life of a woman. The women of those races and tribes who live largely out of doors and engage in more rugged

pursuits, experience but little difficulty in childbirth. The woman who stood by to render any friendly aid if needed was called a midwife. The meaning of this term has not grown as has obstetrician. The two terms have grown apart in meaning Any woman who assists at the birth of a child acts the part of a midwife. She may have no knowledge which is taught by the science of obstetrics, have no medical skill, may be unlearned so far as the books are concerned, but from experience and practice may know the proper thing to be done in case of simple, natural childbirth.

In view of this, I do not think that what is commonly understood by the term, "midwife," is embraced within the definition of physician as given in the language quoted above. The only doubt of the legislative intent that has occurred to me is occasioned by what may be called the exception. It says, "Nor shall this act extend to prohibit women who are at this time engaged in the practice of midwifery."

It may be said that this implies that the legislature thought that such an exception was necessary in order that women practicing midwifery should not be included within the definition above given. I admit there is some force in this suggestion, but I do not think that the legislature ever intended to prevent a woman who is not a physician, assisting at the birth of a child, nor do I think the legislature ever intended to make it necessary to call a physician at every childbirth. In almost every neighborhood there are women who have officiated on such occasions many times, and in simple cases of childbirth, are competent to render all the assistance necessary. They do not make a business of obstetrics; do not claim to be obstetricians. I do not think there is anything in the statute which would preclude them from, in a neighborly way, rendering such aid, or from accepting compensation for their services.

In view of the exception above stated, I am inclined to think that a woman who makes it her sole business to act as an obstetrician, who advertises herself to be skilled in the art of obstetrics or midwifery, in other words, claims to be a professional midwife so as to be brought within the class known as obstetricians, if she has commenced such business since the enactment of said chapter 104, can be required to procure a certificate from the state board of medical examiners.

I think that said chapter 104 was never intended, nor does it regulate the practice of midwifery as distinguished from obstetrics as explained above. I feel very confident that the legislature never intended by said act to make it impossible for a woman at childbirth to receive aid or assistance unless she would call upon a regular physician, holding a certificate from the state board of medical examiners.

I am confirmed in this view by the provision of section 9, which prescribes penalties. It will be noticed that it provides: "Any person who shall practice medicine or surgery within this state without having complied with the provisions of this act, * * * shall be deemed guilty of misdemeanor." It does not prescribe any penalty for practicing obstetrics or midwifery. The terms used in defining what a physician is in section 8, are not sufficient, in my judgment to bring a midwife within the class described in section 9, as practicing medicine or surgery. Hence, there has been no penalty provided by the legislature to punish a woman who attends at childbirth as a midwife.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

MIDWIVES — STATE BOARD OF HEALTH HAS NO AUTHORITY to make certain rules as to how midwives shall perform their duties.

DES MOINES, Iowa, January 25, 1897.

Dr. J. F. Kennedy, Secretary State Board of Health, Des Moines, Iowa:

DEAR SIR—Your favor of recent date at hand, enclosing me a copy of the rules and regulations adopted by the state board of health of Illinois, which you say is organized and operating under a statute almost identical with chapter 151 of the Eighteenth General Assembly of Iowa. You ask my opinion as to whether or not the Iowa state board of health has power, under our law, to make rules similar to those adopted by the Illinois state board of health.

I have not examined the act under which the Illinois state board of health is acting, and do not undertake to pass upon the question, not even by inference, as to whether or not the Illinois state board of health has exceeded its authority in adopting such rules. The rules submitted to me, however, appear to be of comprehensive direction to midwives as to the manner of performing their duties, covering nearly every conceivable case, the last rule being this: "Midwives must conscientiously guard the secrets of their patients, and must only divulge them if the law requires them to do so."

In reply to your inquiry, I beg to state that I know of no statute of the state of Iowa which gives to the board of health authority to make such rules and regulations. You call my attention to the following clause of section 2 of the act under which the board was organized: "They (the board) shall have power to make such rules and regulations and such sanitary investigations as they may, from time to time, deem necessary for the preservation or improvement of public health." If the board of health has authority to enact such rules, it is not under this clause of the law.

If I were to concede that this clause of section 2 gave the state board of health power to legislate and make laws and regulate all matters affecting public health, yet, in my judgment, under well settled principles, it would have no authority to legislate upon the subject proposed. By what is called the Medical Practice act, or chapter 104 of the Twenty-first General Assembly, the legislature has enacted a law upon the subject of the practice of medicine, surgery and obstetrics. It must be conclusively presumed, in the absence of some statutory provision showing a contrary purpose, that the laws adopted by the legislature upon that subject were all that it deemed necessary.

Excessive indulgence in intoxicating liquors affects the health. The legislature has enacted a law regulating the sale. Because the board might deem such laws insufficient for the purpose, I do not think it would be authorized to supplement the laws enacted by the legislature by rules and regulations which they may adopt. Any subject upon which the law-making power has legislated, cannot be considered one upon which boards created by the legislature may legislate.

Suppose your board thought the practice of certain schools of medicine was injurious to the public health; could it be claimed it had the right to prohibit physicians of such schools practicing? Suppose certain remedies and manner of treating diseases were by the majority of the board thought

to be injurious to the patient; would it be claimed that on that account this board could prohibit such practices, and determine that none other than those methods recommended by the board should be used? I cannot think that any such powers were intended to be given by the legislature to this board.

I do not think that the general terms used in section 2, such as: "The board of health shall have the general supervision of the interests of the health and life of the citizens of the state," and, "they shall have authority to make such rules and regulations, and such sanitary investigations as they may, from time to time, deem necessary for the preservation or improvement of public health," will justify the conclusion that the board is given unlimited authority to legislate upon every subject that enters into the question of public health.

In regard to quarantine, they are given ample jurisdiction. In some matters referred to in said section, I think their duties are merely advisory and educational. They may gather statistics in regard to marriages, births and deaths; they may make sanitary investigations. I will not at this time undertake to say the extent to which the board may go in making rules and regulations which shall have the force and effect of law. I am clear, however, that there is a limit to the power of the board. Virtue, sobriety, plain food, regular habits of life of the individual are all conducive to health. Any rule or regulation which inaugurates or compels correct methods of living among the masses, would be a means of improving public health.

If, under the clause quoted, the state board of health may make every rule and regulation which they deem necessary for the improvement of public health, there is no end to the subjects upon which they may make regulations, controlling even the manner of life of the individual. This appears to me is unwarranted by the act of the legislature, and would be usurpation of power. Yours respectfully,

MILTON REMLEY,
Attorney-General.

DOGS — A PER CAPITA DOG TAX which takes the property of one citizen and gives it to another is unconstitutional.

DES MOINES, Iowa, January 27, 1897.

Hon. C. S. Ranck, Senate Chamber:

DEAR SIR—In reply to your request for my opinion upon the constitutionality of chapter 70, laws of the Twentieth General Assembly, I beg to state that I do not doubt the authority of the legislature to levy a per capita tax upon dogs, provided such tax be levied to raise a revenue for public purposes. The act in question, however, does not purport to raise a fund for the use of the public. The primary object and purpose is to raise a fund from which to pay private individuals for losses sustained by said individuals for which the public is in no manner responsible. It is true the last clause of section 6 provides that in certain contingencies a part of the fund thus collected may be transferred to the county fund. The purpose of the act, however, is stated in the title as above explained.

A person losing domestic animals by the ravages of dogs has no claim upon the county therefor. He may have a claim against the owner of the dog, but if the owner of the dog is unknown or is not financially responsible then he is in exactly the same condition as every other person when a loss is suffered for which he has no recourse against any person. I know of no rule of law or ethics that would require you to pay for an injury suffered by me because of the wrong of a third party.

The question then resolves itself into this: is a law levying a tax for private purposes constitutional? The complete and exhaustive discussion of this question by Judge Dillon in *Hanson v. Vernon*, 27 Iowa, 28, holding that the legislature cannot touch the property of the citizen for any private use, has received the approval of all courts and the profession ever since. There are numerous cases which hold the same doctrine. The question has become so well settled by a long line of authorities that I do not think it can be doubted at the present time.

In view of the last clause of section 6, I would state that the Minnesota supreme court has held that where the purpose for which an act provides for taxation is partly public and partly private, and the amount to be raised from each cannot be distinguished and severed the act is void. (*Coates v. Campbell*, 37 Minn., 498.)

It may be said that *Hanson v. Vernon*, referred to above, was overruled by *Stewart v. Board of Supervisors*, 30 Iowa, 9. It is true the question involved in the first case was determined differently in the latter, but the doctrine announced in the first case was sustained in the latter, except that in the latter case the supreme court held that aid voted to railroads was a public use and not a private. In *Stewart v. The Board* the court says: "That the legislature has no constitutional authority to take the private property of A and give it to B, there can be no reasonable doubt."

I have no doubt in my own mind that that part of chapter 70, acts of the Twentieth General Assembly, which takes the property of one citizen and gives it to another, is unconstitutional, but do not dispute the right of the legislature to levy a per capita tax on dogs or on any class of property for public purposes. Yours respectfully,

MILTON REMLEY,
Attorney-General.

CLERK OF DISTRICT COURT—What fees may be charged in a certain case.

DES MOINES, Iowa, January 29, 1897.

T. S. Brannan, Esq., Clerk District Court, Ida Grove, Iowa:

DEAR SIR—Your favor of the 28th inst. at hand, in which you enclose a request of the county attorney for my opinion upon the following facts:

A transcript of a judgment was sent to you from Clinton county. Afterwards an execution was issued from Clinton county and placed in the hands of the sheriff of your county and he made a levy. Judgments were settled between the parties and the satisfaction of the judgment in each case was sent to your office. The question is, what amount of fees are you entitled to under the facts stated?

Section 5033 of McClain's code provides: "A clerk shall be entitled to charge and receive the following fees: for filing and docketing transcript of judgment from another county, 50 cents; for taxing costs, 50 cents; for entering satisfaction of judgment, 25 cents " I do not see any authority for any further costs to be charged under said section under the facts stated, but that paragraph of said section quoted above fairly, to my mind, authorizes you in charging and receiving fees as above stated in such a case.

It may be said that the taxing of costs under the circumstances required but a small amount of work. The costs, however, whether much or little, are required to be taxed. In many cases, the taxing of costs is very laborious, and 50 cents is no compensation. The statute evidently strikes at an average.

I think you are authorized in each case of that kind to charge $1.25 and no more. Yours respectfully,

MILTON REMLEY,
Attorney-General.

BUILDING AND LOAN ASSOCIATIONS—CERTIFICATES TO DO BUSINESS—FEES—How frequently certificates must be procured and what fee to be paid.

DES MOINES, Iowa, February 2, 1897.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—The two questions upon which you desire my opinion, for the sake of brevity, will be considered together. The questions are as follows:

First.—"Section 5, chapter 85, of the laws of the Twenty-sixth General Assembly, provides for a certificate of the auditor of state to be issued to domestic-local, foreign, and domestic associations, to transact business. What length of time will these certificates cover? In other words, at what time are they renewable? Section 24 of said chapter makes reference to the renewal of such certificates for foreign and domestic building and loan or savings and loan associations, but omits any reference to domestic-locals.

Second.—"Section 24 provides that the auditor of state may charge domestic building and loan or savings and loan associations $25 for each certificate of authority and each renewal thereof. Associations having paid said fee in November or December, 1896, for said certificate, and foreign building and loan or savings and loan associations having paid the $100 for certificate of authority, at what time will the renewal fee be due from said associations?"

Section 1 of said chapter 85 makes a classification of building associations. They are: Domestic-locals, domestic, foreign. Throughout the entire act the distinction between these classes of building and loan associations is maintained. The provisions of law in any section which, by the terms, are made applicable to only one class cannot, by implication, be extended to another class. Some sections relate solely to one class. For instance, sections 19 to 23 inclusive, relate alone to foreign building and loan associations.

The certificate authorizing the association to transact business, which shall be issued by the auditor, evidently refers to all the kinds of building

and loan associations referred to in said section 1. The authority to do business to which the auditor certifies, must be presumed to be a continuing authority unless there is something in the act showing a different intent and purpose.

I find nothing whatever in the act indicating the authority thus given to do business should be limited to any period of time, except in section 24 there is a provision that "foreign building and loan associations shall pay the sum of $50 for each certificate of authority, and each annual renewal thereof." This indicates that the legislature intended that the class of building and loan associations known as foreign associations shall procure annually a certificate of authority to do business. In providing the fee to be paid by the domestic building and loan associations, the language is: "The sum of $25 for each certificate of authority and each renewal thereof." Domestic-local associations are required to pay no sum whatsoever for their authority to do business.

Considering all the provisions of the act, my judgment is that the certificates of authority to do business must be obtained by foreign building and loan associations annually; but, with domestic building and loan associations, or domestic-local building and loan associations, the certificate of authority once given, they are authorized to do business without an annual renewal of such certificate.

The authority to do business by such corporations may be terminated, first, by a substitution of the articles of incorporation, which requires a re-examination by the executive council; second, a revocation of the authority to do business by the auditor, as provided for in section 15 of the act; third, the expiration of the time provided by the articles of incorporation for the duration of the same; fourth, the voluntary or involuntary closing up of the business of the company. A renewal of the certificate may be granted, in case they wish to re-engage in business, for which a fee of $25 should be charged to a domestic association. There being no time fixed in section 24 for the issuing of these renewals to foreign building and loan associations, other than is expressed in the word, "annual," I am inclined to the opinion that the renewal should be made on the day and month on which the first certificate was issued. In other words, the renewal fee for the certificate of authority will be due from a foreign building and loan association one year from the date of the original certificate or the last renewal.

My conclusions are, first, that foreign building and loan associations should pay the annual renewal fee every year on the day and month on which the certificate was first issued; second, that domestic and domestic-local associations having received a certificate authorizing them to do business, may continue such business without a renewal of the certificate until such time as their authority may be terminated as above stated; third, that domestic building associations are not required by the statute to pay annually the sum of $25 for the renewal of their certificate to do business.

It has been suggested that members of the legislature intended to provide in section 24 for the annual payment of $25 by domestic building and loan associations. If that be true, it was unfortunate that it was not so

stated, but I know of no rule of law which would justify injecting the provisions of the statute made in regard to one class of building associations into the provisions made in regard to another class. I do not think the statute will bear any such interpretation.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—BENEVOLENT SOCIETIES—EXEMPTION—Real property must be occupied in order to entitle a benevolent society to the exemption.

DES MOINES, Iowa, February 4, 1897.

A. W. Enoch, Esq., County Attorney, Ottumwa, Iowa:

DEAR SIR—Your favor of the 2d inst. at hand, in which you ask my opinion upon the following question:

"Whether land or lots owned by any secret society in their name, where the same are lying without any building upon them, are exempt from taxation, or does the fact that the same are held with the intention to build thereon a building to be used by the society, exempt such land or lots?"

I assume that the secret society referred to is such as would come under the head of benevolent societies, such as Masons, Odd Fellows, etc. I think the question must be answered in the negative.

Almost the identical question was presented to the supreme court in *Nugent v. Dilworth, treasurer*, 63 N. W. R., 448. The court in that case held that property not in actual use by the society or church for the purposes of such church, was liable to taxation. The reasoning of the court in that case leads to the conclusion that in order to exempt real estate from taxation it must be in use by the church or society, and be devoted to the purposes for which the church or society is organized.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

GRAND JURY—WHERE FIRST GRAND JURY DRAW IS SET ASIDE it is not necessary to draw a new grand jury for each term, the first one properly drawn should serve the remainder of the year.

DES MOINES, Iowa, February 6, 1897.

H. C. Liggett, Esq., County Attorney, Hampton, Iowa:

DEAR SIR—Your favor of the 5th inst at hand, in which you desire my opinion upon the following question:

"The precept for the grand jury drawn under chapter 61, acts of the Twenty-sixth General Assembly, having been set aside because of some [illegible], a new grand jury was drawn under the provisions of section [illegible]. Question is whether the grand jury thus drawn under order of the [illegible] their office for one year, or must a new grand jury be drawn each term in the year?"

I know of no case in which the question has been directly involved before the supreme court of this state. The case of *State v. Beste*, 91 Iowa, 561, determines the converse of one of the propositions involved in the answer to your question. In that case, at the first term of court in the year, the court sustained a challenge to the panel of the grand jury and ordered a new grand jury to be drawn. At the next term, the grand jury thus drawn did not appear, and the court ordered a new grand jury to be summoned in accordance with the law then in force. The supreme court held that the action of the court at the second term in ordering a new grand jury to be drawn, was right.

It does not follow, however, that had the grand jurors drawn under order of the court at the first term appeared at the second term, they would have been disqualified. We are, therefore, left largely to the language of the statute.

Section 11 provides that when the precept under which they are summoned is set aside, the court may "direct a sufficient number drawn and summoned in the manner above provided." The drawing may proceed forthwith, and the jurors drawn may be required to appear immediately, or at such time as the court may fix.

Grand jurors and petit jurors are officers of the court. When, because of any defect in the selection, the office becomes vacant, the language above quoted directs how such vacancy may be filled. The drawing is to be in the manner provided for the original drawing, and the persons so drawn step into the vacancies left by the failure to draw the jury properly.

Section 13 provides that twelve persons from which the grand jury is empaneled need not be summoned after the first term, but must appear at each succeeding term during the year, etc. The court holding that the twelve drawn by the clerk, auditor and recorder are not the proper twelve from which to empanel the jury, another twelve are selected to take their places, who are the twelve from which the grand jury is empanelled. This latter twelve answers the description contained in section 13, and, under the provisions of said section, it is their duty to appear at each succeeding term.

There are a number of cases that I have examined, while not directly in point, justify the conclusion that the drawing under order of the judge in the same manner from the same boxes, is simply to fill the vacancy caused by the setting aside of the precept which was issued on the first drawing. No prejudice could result in adopting the course above suggested.

I think to hold a drawing at each succeeding term necessary, would do violence to the intent of the statute, and would impose an unnecessary cost upon the counties which would accomplish no good.

Yours respectfully,

MILTON REMLEY,
Attorney-General

THE STATE BOARD OF HEALTH HAS NO AUTHORITY to hold a state sanitary convention and pay the expenses thereof out of the annual appropriation.

DES MOINES, Iowa, February 10, 1897.

Dr. J. F. Kennedy, Secretary State Board of Health, Des Moines, Iowa:

DEAR SIR—Your favor of the 9th inst. at hand, in which you ask my opinion upon the following question:

"Would the state board of health be justified under sections 10 and 12 of chapter 151, laws of the Eighteenth General Assembly, in appropriating any part of its annual appropriation in holding sanitary conventions—in payment of bills for postage, printing, hall rent, and the traveling and other expenses of the members of the board while engaged in or preparing for such conventions—the sole object of the convention being to educate the people, and arouse a healthy sentiment in favor of sanitation, and of practical measures for protecting the public health?"

In regard to this I will say that section 12 of the act referred to, makes an appropriation of "$5,000 per annum, or so much thereof as may be necessary to pay the salary of the secretary, meet the contingent expenses of the office of secretary and expenses of the board, and the cost of printing, which together shall not exceed the sum hereby appropriated."

It will be noticed that $5,000 is not appropriated absolutely, but only so much thereof as may be necessary for the purposes named. If the board is authorized to incur the expenses named in your inquiry, it must be under the following clause of said section, viz.: "the expenses of the board."

I think it undeniable that the expenses of the board referred to herein mean such expenses as are incurred in the discharge of their duties. The question arises then whether holding conventions for the purposes named, the payment of bills for postage, printing, hall rent, are a part of the duties of the board. The general powers and duties of the board are specified in section 2 of the act. If the power to hold such conventions is anywhere given in section 2, it is in the first sentence thereof, which is as follows: "The state board of health shall have the general supervision of the interests of the health and life of the citizens of the state."

While a healthy sentiment in favor of sanitation and the education of the people in regard to practical measures for protecting public health are certainly very desirable, yet I do not think the general language quoted above justifies the conclusion that the holding of such conventions to educate the people along the lines proposed is contemplated by the statute. The people may be educated by publishing books or the dissemination of literature, or by schools, and if we place a construction upon the language which would enable us to answer your inquiry in the affirmative, there would practically be no end or limitation to the enterprises that the board might engage in for the purposes of improving the public health.

I cannot escape the conviction that the first sentence of section 2 of the act rather limits the jurisdiction of the state board of health to those measures which prevent the spread of contagious diseases, or to such measures as have a direct, and not a remote, influence upon the public health.

Hence, I am of the opinion that the state board of health would not be justified in expending any part of the appropriation for the purpose stated in your inquiry.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC LIBRARY—VOTING ON QUESTION OF ESTABLISHING SAME—1. At what election the question may be submitted—2. Women may vote upon the question—3. How the women may be supplied with ballots.

DES MOINES, Iowa, February 13, 1897.

C. W. Crim, Esq., County Attorney, Estherville, Iowa:

DEAR SIR—Your favor of the 5th inst. duly at hand, in which you ask my opinion upon the following questions:

"Can the matter of voting on the question of a public library, under section 461, code of Iowa, be submitted at a special election, or must the same be submitted at the general municipal election? If submitted at the regular spring election, are women entitled to vote on the question, as provided in chapter 39 acts of the Twenty-fifth General Assembly? If they are entitled to vote, how are they to be supplied with ballots under the provisions of sections 14 and 16, chapter 33, of the Twenty-fourth General Assembly?".

In regard to the first branch of the question, I will say that the last sentence of section 461 requires the proposition to establish a free public library to be submitted to a vote of the people before the council acts in the matter or appropriates any money for that purpose, and at the municipal election of said city or town, the question shall be: "Shall the city or town council, as the case may be, accept the benefits of the provisions of this section."

This language, because of the use of the definite article, "the," before the words, "municipal election," is a little obscure. Section 6 of chapter 17, of the acts of the Fourteenth General Assembly, makes use of the phrase, "submit to a vote of the people at any municipal election of said city or incorporated town," etc. The main point of the acts is to have the proposition submitted to a fair vote of the people before any money is appropriated. If the people, by their votes, favor the establishment of a library, the council would be authorized to act. I would not like to say that the proposition could not be submitted at a special election, but have no doubt that at any annual municipal election the proposition may be submitted.

In regard to the second part of your question there is more doubt. The proposition to establish a free library carries with it the power to increase the tax levy. It is because of the fact that an additional burden will be laid upon the people by establishing a library that the assent of the majority of the voters is first required. While the proposition to increase the tax levy is not required to be stated in the question submitted, yet it is the real question that the people vote upon. If it were not for the fact that the establishment of the library does increase the amount of tax to be levied and paid, there would be no necessity of submitting it to the people. There is no instance in the statutes that now occurs to me where the naked question of increasing the tax levy need be submitted to the people in that form, except in paragraph 2, of section 1270, of McClain's code, but that is a county election, and not a city or municipal election, or school election.

I think the fair construction of the clause in chapter 39, acts of the Twenty-fifth General Assembly, "for the purpose of increasing the tax levy," is that upon any proposition which involves in it an increase of the amount of tax required to be paid, the right of women to vote exists. Any other construction would practically abrogate the clause of the statute above quoted.

If this construction is incorrect, I can think of no instance in which women could vote under the provisions of the clause above quoted. I think the women have the right to vote upon the question of establishing a free library.

In regard to the third part of your question, the law appears to be silent. Sections 14 and 16 of chapter 33, of the Twenty-fourth General Assembly, provide the manner of stating the public measure to be voted upon on the ballot. Section 14 contemplates that the constitutional amendment or other public measure submitted to the vote of the people, shall be put upon the same ballot that contains the list of the candidates. At the time of the enactment of chapter 39 of the laws of the Twenty-fifth General Assembly, no provision was made for different ballots for the women who may choose to vote, nor was any provision made for any separate ballot box. If the proposition is printed upon the ballot with the list of candidates for city officers, and these ballots are given to the women voters and put in the same box, it would be impossible to tell whether the women voted for the officers of the city or not. If the women are entitled to vote, as I think they are, then it becomes the duty of the election officers to provide a means whereby such votes may be made effective

I will suggest that the best way out of the dilemma is to have a number of ballots struck, upon which there is nothing but the proposition to the voters. These ballots can be given to the women who vote. They can be put in the same ballot box. There is no unfairness in this to any person. The rights of the women who vote are protected, effect is given to their vote, and I think such method is in harmony with the spirit of the law, although there is no direct provision upon it. Yours truly,

MILTON REMLEY,
Attorney-General.

TOWN COUNCIL—VACANCY—One elected at the general election to fill a vacancy holds for the remainder of the unexpired term.

DES MOINES, Iowa, February 13, 1897.

Andrew Miller, Esq , County Attorney, Forest City, Iowa:

DEAR SIR—Your favor of the 4th inst. at hand, and while I am in duty bound under the law to give written opinions to you as county attorney upon any matter relating to the discharge of the duties of your office, it requires some stretch of imagination to see how the question of filling a vacancy in the town council pertains to the duties of your office. The point upon which you ask my opinion may be summarized as follows:

A member of the town council resigned shortly before an annual election. At such annual election, another was elected to fill the vacancy caused by the resignation. The question is whether the one thus elected holds for the unexpired term of the trustee who resigned, or only until the next annual election.

Article 6, section 11 of the constitution of the state, as well as section 1257 of McClain's code, provide that one appointed to fill a vacancy shall hold the office until the next annual election. It also provides that in all

cases of election to fill vacancies in offices occurring before the expiration of the full term, the persons who are elected so hold for the residue of the unexpired term.

Section 700 of McClain's code provides how a vacancy shall be filled. There is no appointing power to fill a vacancy in the council, but the council shall order a special election to fill the same. This takes the place of an appointment by the governor, or the appointing power whoever it may be. The person thus elected at a special election holds under the same terms as if he were appointed, or, in the language of the statute, "until the next annual election." Then, at such annual election, the vacancy is permanently filled by the election of someone who shall hold for the residue of the unexpired term.

Under the facts stated, the person elected at the annual election would hold for the unexpired term of two years.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COMPENSATION OF PUBLIC OFFICERS—A CITY MARSHAL, AS AN OFFICER OF THE SUPERIOR COURT, is not entitled to a salary from the county wherein the court is situated.

DES MOINES, Iowa, February 15, 1897.

T. H. Johnson, Esq., Deputy County Attorney, Ft. Madison, Iowa:

DEAR SIR—Your favor of the 28th ult. came duly to hand at a time when I was fully occupied with supreme court work and could give no earlier attention to it. You ask my opinion upon the construction of section 775 of McClain's code in regard to the fees and compensation of the city marshal of Keokuk as executive officer of the superior court. You say he claims a salary from the county, and that one year the board of supervisors allowed him $400.

Section 775 is as follows: "The city marshal shall be the executive officer of the said court, and his duties and authority in court and in executing processes shall correspond with those of the sheriff of the county in the district court and with processes from that court, and he shall receive the same fees and compensation as the sheriff for like services."

This section defines the duties of the marshal as executive officer of the said court, and his authority in court and in executing processes. It provides further that he shall receive the same fees and compensation as the sheriff for like services For what services? For serving processes, writs, notices, the same commission on sales under execution; but I see no word in this statute that indicates that the marshal is entitled to a salary in addition to the fees which he earns by serving notices and performing the duties of his office.

Section 5062 of McClain's code authorizes the board of supervisors to give to the sheriff a salary of not less than $200 nor more than $400 per year for attending the district court, and other services. If we were to concede that the marshal, under the provisions of section 775, was entitled to a salary, the next question would be, who should pay this salary? The

county cannot be made liable for such salary unless the statute so provides. I find not one word in the statute which, by implication even, indicates that the county shall be liable therefor. The county is made liable for one-half of the salary of the judge. (Section 776.) It is made liable for the pay of the jurors (Section 779.) The city council is responsible for the pay of the clerk, (section 774,) but nowhere do I find any provision requiring the county to pay a salary to the marshal, and, in my judgment, the county is in no manner liable for the salary of the marshal; nor do I think, under section 775, is the marshal, as executive officer of the court, entitled to any salary. He may receive as marshal such salary as the city council by ordinance directs, but this is a matter with which the board of supervisors has nothing to do.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PRACTICE AND PROCEDURE — DEPOSITIONS — How letters rogatory or commissions to take depositions addressed by courts in foreign countries to the proper courts or persons in this country are to be executed in this state.

DES MOINES, February 17, 1897.

Hon. F M. Drake, Governor of Iowa:

DEAR SIR—In response to your request for information in regard to the provisions of law in this state showing the manner in which letters rogatory or commissions to take depositions addressed by courts in foreign countries to the competent courts in the United States, are to be executed in this state, which information is desired by the department of state at Washington, I beg to say we have no provisions of law in this state directing how such commissions shall be executed.

Our statutes are explicit in regard to the manner of taking depositions to be used in the courts of our own state. When letters rogatory or commissions are sent by courts in foreign countries to take depositions in this state, they usually contain directions as to the manner in which the depositions shall be taken, as well as the authentication thereof, which directions are followed by the person taking the depositions. The clerk or judge of any court of record, or notary public, or any person having authority to administer oaths, may be selected, either by his individual name and official style, or by the name of office of such person, to take depositions.

In the absence of directions as to the manner of taking depositions, the manner used in our own courts would be the one adopted, which is as follows:

First.—The caption, stating the authority under which the deposition is taken, and that the witness was duly produced, sworn and examined, and testified as follows:

(Then follows the interrogatories which are sent with the commission, written out consecutively, and the answers thereto written immediately underneath each, respectively.)

Second.—The whole deposition should then be read to the witness, and he subscribe the same and again swear that the answers made therein are true.

Third.—A certificate of the person taking the deposition should be attached, stating the time and place of taking the deposition; that the witness was duly sworn to testify to the truth; that the deposition was subscribed by the witness in the presence of the officer taking the same and again sworn by him; that neither party to the suit, their agents nor attorneys were present at such examination (unless both parties were represented, which fact should be stated).

It is usual to state that the officer taking the deposition is related to neither party in the suit, and is not interested in the event thereof, although the law does not require the same.

This certificate should be signed by the person taking the deposition in his official capacity, and if he have a seal, the seal of his office should be affixed. If he have no seal, then a certificate of the clerk of the district court should be furnished, certifying that the officer taking such depositions was duly authorized by law to administer oaths and his signature is genuine.

Some countries, as a further authentication, require a certificate by either the chief justice of the supreme court or the governor of the state, that such depositions are executed in due form of law of the state, but in regard to this our statutes are silent.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

MUTUAL BENEFIT ASSOCIATIONS—INCREASE OF AMOUNT OF ANNUAL DUES—As to whether a mutual benefit association can increase the annual dues of its members depends upon its articles of incorporation.

DES MOINES, Iowa, February 20, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—I herewith submit my opinion upon the question which you have referred to me, viz.:

"At the annual meeting of the members of a mutual benefit association which is operating under chapter 65, laws of 1886, can the members, if a quorum is present, by the adoption of an amendment to the articles of incorporation to the effect that the annual dues to be collected from the members shall be $5 instead of $3, as has heretofore been charged the members as such annual dues, legally thereafter collect $5 as annual dues from members who hold certificates of membership or contracts of insurance issued under the articles of incorporation providing that the annual dues charged shall be $3 per annum?"

The right to amend the articles of incorporation of any corporation must be exercised in the manner pointed out by the articles of incorporation themselves. One becoming a member of a mutual benefit association accepts and assents to the provisions of the articles of incorporation. If the articles of incorporation provide for the amendment thereof, and such amendments are made in pursuance of the provisions of the articles, then such amendments, in my judgment, would be binding upon every member, whether he assented to such amendments or not.

In other words, having joined or become a member of any corporation, he agreed to the articles of incorporation, and agreed to be bound by such amendments as may thereafter be adopted in the manner provided in the articles of incorporation, and he is bound by the amended articles of incorporation as effectually as if the same had been adopted before he became a member of such corporation.

In case, however, there is no provision in the articles of incorporation for the amendment thereof, or in case the amendment referred to by you was not made in accordance with the provisions of the articles, a different rule must be applied. The articles of incorporation are in the nature of a contract between the organization and the members. By such articles a member's rights must be determined. A member has, or is presumed to have, some substantial rights in a mutual benefit insurance association. His rights are determined by the contract, which is the articles of incorporation. The contract cannot be changed without his assent so as to make any additional burdens or liabilities upon him. Increasing the annual dues from $3 to $5 is an additional burden.

Your inquiry does not state whether the amendment to the articles of incorporation increasing the annual dues was made in pursuance of the provisions of the original articles of incorporation, or not. In my opinion, if the amendment were made in pursuance of the authority given in the articles of incorporation, each stockholder is bound thereby, whether he voted for such amendment or not. But, on the other hand, if there were no provision in the articles of incorporation by which the same could be amended, then any amendment imposing a greater burden upon the stockholder would not be binding upon him without his assent thereto, and the additional dues cannot be legally collected.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

NOMINATIONS FOR OFFICE BY PETITION—Several persons may be nominated by the same petition without a larger list of petitioners than one nomination would require.

DES MOINES, Iowa, February 20, 1897.

Hon. G. M. Craig, Senate Chamber:

DEAR SIR—Your request for my views upon the inquiry of Mr. McClure at hand. The question of Mr. McClure involves the construction of the following clause in section 5, chapter 33, acts of the Twenty-fourth General Assembly, viz: "Nominations of candidates for offices to be filled by the electors of a city, town, precinct or ward, may be made by nomination papers, signed in the aggregate for each candidate by not less than ten qualified voters of said city, town, precinct or ward."

The question is, whether, when five names for five different offices are on the same nomination papers, it is necessary for the same to be signed by fifty different persons, or ten names for each candidate named.

I think the nomination papers may be made out so as to include candidates for mayor, councilman, recorder and treasurer upon the same papers,

and if signed by ten or more qualified electors, the nomination papers are sufficient. Each signer, in effect, requests that each of the persons named for the respective offices be placed upon the ballot. The nomination of one does not conflict with the nomination of the others upon the same ticket. He signs for each of the persons thus placed upon the ticket, and each of the candidates are presented by ten or more persons signing such papers.

It cannot be said that any candidate named on the papers has less than ten signers under such circumstances. There is nothing in the law preventing one signing the nomination papers for mayor from also signing a nomination paper for treasurer, or councilman, or recorder, and there is nothing which I can find which requires a separate paper for each candidate named. I do not think it requires fifty petitioners, as suggested in Mr. McClure's letter. Yours respectfully,

MILTON REMLEY,
Attorney-General.

IOWA SCHOOL FOR THE DEAF — Upon what basis funds for the current expenses of the school should be drawn—When pupils are absent money cannot be drawn for their current expenses.

DES MOINES, Iowa, February 23, 1897.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Your favor of the 22d inst. at hand, requesting my opinion upon the proper construction of section 2776 of McClain's code. or section 1692 of the code of '73, relating to the current expenses of the Iowa School for the Deaf.

Whether requisitions giving the maximum number of pupils enrolled in that school for any quarter shall be the basis upon which funds shall be drawn from the state treasury, or whether the average number of pupils in said institution per quarter shall be the basis; also, whether during the vacation of said school, and the pupils absent from attendance during said vacation, money can be drawn from the state treasury as though they were in attendance, as in the previous quarter or subsequent quarter.

The language of section 2776 of McClain's code is as follows: "For the purpose of meeting the current expenses there is hereby appropriated the sum of $35 per quarter for each pupil in said institution." Section 2780 of McClain's code provides for the drawing of appropriations quarterly on requisition of the board, and adds, "only in such amounts as the wants of the institution may require." This is equivalent to adding to said section 2776, "or so much thereof as may be necessary."

The same language, making an appropriation for each pupil in such institutions, is found in section 2763 of McClain's code with reference to the college for the blind. The support for the industrial school (boys and girls), sections 2746 and 2749; the institution for feeble-minded children, section 2717; the orphans' home, section 2688; the state penitentiaries, section 6185, are by law all based upon the average for the preceding month. The support for the soldiers' home, section 2801, is based upon the average

number of inmates during the preceding quarter. In the hospitals for the insane the number of inmates on the 15th day of each month is taken as the average for the month, which is the basis used in drawing the appropriations. (Section 2177.)

The language, "for each pupil in said institution," as found in sections 2776 and 2763, is different from the language appropriating for the current expenses of other institutions. It will be noticed, too, that the appropriations for the other institutions based upon the number in attendance, are made for the general support of the inmates. (Sections 6185, 2801, 2717, 2688.) In regard to the state industrial schools, the appropriation is $8 per month for each boy and girl actually supported in such schools. This, in effect, is a general support fund.

The fund, however, appropriated under section 2776 is not so styled, and is for a specific purpose. To ascertain this purpose, we must look at other sections. There is a great similarity in regard to the provisions for the college for the blind and the Iowa school for the deaf. Section 2777 makes an appropriation "to meet the ordinary expenses of the institution, including furniture, books, school apparatus, compensation of officers and teachers." In section 2762 the word, "employes," occurs It is provided: "Every deaf and dumb citizen of the state shall be entitled to receive an education at said institution at the expense of the state." (Section 2773) Similar provisions are made for the blind. (Section 2767.)

The manner of providing for the clothing and transportation to the institution is found in section 2797, as amended by chapter 50, acts of the Twenty-third General Assembly. Section 2778 contemplates that articles may be manufactured and sold, and there is land connected with the institution upon which stock and produce are raised. Appropriations are made by nearly every general assembly for a repair fund, for furniture, bedding, etc (See chapter 139, acts Twenty-fifth General Assembly, chapter 129, acts Twenty-sixth General Assembly.)

Taking all these statutes and sections together, I think the term, "current expenses," as it occurs in section 2776, relates alone to the cost of furnishing food, and to what may be embraced within the term, "board of the pupils while they are in actual attendance upon the institution." It is not a general support fund which can be used for the general purposes of the institution. It is an appropriation of $35 per quarter for each pupil in the institution. But no appropriation is made for one not in the institution. If a child were there for one day during the quarter, it would be an absurd proposition to contend that the institution could, under this section, draw the full $35, the same as if it had been there during the whole quarter.

In my judgment, the institution is only justified in drawing for the actual time that the pupils are in attendance. This, in effect, is the same as the average number in attendance during the quarter. Pupils undoubtedly come and go; some enter during the last of the quarter; some who are present at the first of the quarter leave after a few weeks or a few days. I do not see how the number enrolled can be made the basis.

Suppose on the second day of a quarter 100 students were to depart after being in the institution only one day during the quarter; and suppose on the last day of the quarter 100 different students were to enter the school.

Then a case would be presented where 200 pupils would be enrolled and were only in actual attendance one day. In such a case, I do not think anyone would contend that $7,000 should be drawn from the state treasury for the current expenses of such pupils. Yet, if we adopt the theory that the maximum number of students enrolled is the basis, it would lead to such a result, however improbable in actual experience it might be.

When a pupil is not in attendance nothing is needed for the current expenses of that pupil; and this applies to the time pupils are absent on vacation. The ordinary expenses, outside of the board of the pupils, are met under other provisions of the statute.

I understand it is claimed that the custom of drawing for the maximum number of pupils at said institution obtained prior to the adoption of section 2780, and the phrase in said section, "the appropriation shall be drawn quarterly on the requisition of the board of trustees of the institution in the usual manner," authorizes a continuation of said custom. I do not think this inference can be drawn. The manner of drawing throws no light whatsoever upon the amount that shall be drawn.

It has been suggested that under this construction of the law there would not be sufficient funds for the support of the institution. This is a matter that must be determined by the legislature. I can only interpret the law as it is written, not make it.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

APPEALS IN CRIMINAL CASES BOND NOTICE—A defendant in a criminal case is not entitled to his liberty upon giving an appeal bond unless he also serves notice of appeal.

DES MOINES, Iowa, February 25, 1897.

W. T. Chantland, Esq., County Attorney, Fort Dodge, Iowa:

DEAR SIR—Your favor of the 24th inst. at hand, desiring my opinion upon the case stated in your letter as follows:

"In the case of the *State v. E. J. Chingren*, the defendant, after having been sentenced to the penitentiary for the term of three years by the district court of this county, filed an appeal bond and was released by the sheriff on the clerk's acceptance of said bond, though no notice of appeal had, or has to this day, been served on either the clerk or myself. Should the clerk accept the bond, or the sheriff release the prisoner under the circumstances?"

This question has been presented to me a number of times, and has also been presented to some of the district courts. Section 4523 of the code provides how appeals may be taken. Section 4524 provides when it shall be deemed to be taken. It is only when the notices required in section 4524 have been served and filed in the office of the clerk of the court in which the judgment was rendered, with evidence of the service thereof, endorsed thereon or annexed thereto, that an appeal shall be deemed to be taken. There is not a syllable in the law anywhere which authorizes a clerk to accept bond or bail on appeal, unless the appeal has been taken.

The question might arise whether the surety on the bond would be liable, when no appeal has been taken, but at all events, no clerk has any right to accept a bond which is not authorized by law, and he might make himself liable in case any injury should result because thereof. It is a vicious practice which I find has obtained in different parts of the state. Many clerks have never had their attention called to the matter, and have assumed that it was the right and proper thing to do. I have known cases to be kept out of the supreme court for a year or more while the man was out on bonds and no appeal taken. There were several cases from your own county where the same question was raised.

Under the circumstances, I would demand of the clerk that he issue a mittimus forthwith to send Chingren to the penitentiary in accordance with the judgment. If he refuses, which he probably will not do if his attention is called to the law, then I would suggest that you apply to the court or the judge of the court, for which provision is made in section 2923, and obtain a peremptory order directing the clerk to issue the mittimus. I understand this has been done in one or two cases in the district court, and every time the order has been made. The supreme court has no jurisdiction of a case until notice of appeal is served. In the cases referred to from your county, which were liquor cases, as soon as the court found there was no notice of appeal served, the cases were dismissed because the court had no jurisdiction.

It is an absurd position for an officer to claim the right to tie up a case by doing an unauthorized act where neither the district court nor the supreme court can have jurisdiction. Were I you, I would present the matter kindly to the clerk, point out his error, and convince him if I could; if not, then proceed with the application to the district court or judge.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

REGISTRATION—SCHOOL ELECTIONS—NOT REQUIRED even in independent school districts having 15,000 inhabitants.

DES MOINES, Iowa, March 3, 1897.

Hon. Henry Sabin, Superintendent of Public Instruction:

DEAR SIR—Your favor of the 2d inst. at hand, in which you desire my opinion upon the following question:

"Is section 3, chapter 8 of the laws of the Eighteenth General Assembly, providing a register of electors for school elections held in independent districts having a population of 15,000 or over, now in force, and does it apply to school elections held in such independent districts? If so, in what way or manner shall the judges provide for the reception of ballots from voters whose names do not appear on said registry lists?"

Prior to the act of 1880, there was no statute which made the registration law applicable to school elections. School elections, so called, were not considered in reality elections in the sense in which the term is commonly used. (*Seaman v. Baughman*, 82 Iowa, 216.) The law did not require the vote to be taken by ballot in the election of school directors or the determination of other questions.

Chapter 8, laws of the Eighteenth General Assembly, made some radical changes in the previous system in independent districts having not less than 15,000 inhabitants. It provided for the division of the district into not less than three polling places, for voting by ballot, and section 3 made the law with reference to the registration of electors applicable to such elections.

This is the only instance of school elections where the register of electors was required. This law has not, in so many words, been repealed. Chapter 2, title 5 of the code, however, has been repealed and chapter 161 of the laws of the Twenty-first General Assembly has been enacted in lieu thereof. This in turn was amended by chapter 48, laws of the Twenty-second General Assembly, and the two chapters constitute substantially all of the statute that there is upon the subject of the registration of voters.

Section 10 of said chapter 48 is as follows: "This act and the act to which it is amendatory are hereby declared inapplicable to elections held under and in accordance with the school laws of the state." Chapter 8, laws of the Eighteenth General Assembly, is a part of the school laws of the state. Elections held under said chapter are held under and in accordance with the school laws of the state.

Here, then, is a direct provision that the registration laws were inapplicable to elections held under the school laws. The only instance where the registration of electors was required for school elections was that named in said chapter 8, and unless the legislature had said chapter 8 in mind when section 10 of chapter 48 was enacted, said section 10 was wholly useless, and accomplished no results, good or bad.

Again, it is a general principle that every voter is entitled to vote at all elections. In all changes of the registration law, as well as in the Australian ballot law, there is nothing to indicate that it was the legislative intent that such laws should be applicable to so called school elections. In no place has any provision been made for correcting the register of electors, or providing who shall correct the same, or appointing a board of registration to sit on the election day for the purpose of corrections. There is no provision for a notice to be given to the electors so as to attend and secure their registration. If section 3 of said chapter 8 is still in force, many electors may be denied arbitrarily their right to vote at such elections, which is contrary to the spirit of our institutions and government.

My conclusion, therefore, is that section 3 of said chapter 8, laws of the Eighteenth General Assembly, is not in force, and is to all intents and purposes repealed by section 10 of chapter 48, laws of the Twenty-second General Assembly, and that a register of voters is not required to be used at school elections in independent school districts having 15,000 inhabitants.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

POWERS OF THE STATE—1. MAY COPYRIGHT THE PROPOSED CODE and the annotations of the same.—2. Cannot pass a copyright law.

DES MOINES, Iowa, March 5, 1897.

Hon. H. K. Evans, Secretary Joint Committee, Des Moines, Iowa:

DEAR SIR—In compliance with the request of the joint committee of the senate and the house of representatives, of which you are secretary, I submit to you herewith my opinion upon the following questions propounded:

Has the state a right to copyright the proposed code, with annotations of the same, and how far will such copyright protect from private competition in its sale; also as to the right of the state to pass a copyright law.

It has been held a copyright cannot be sustained as a right existing at common law, but as it exists in the United States, it depends wholly upon the legislation of congress.

Wheaton v. Peter, 8 Peters, 591.
Banks v. Manchester, 128 U. S., 244.

There are a number of decisions of the federal courts holding that to secure a copyright one must bring himself strictly within the provisions of the act of congress, which is found in section 4952 of the revised statutes of the United States. Some of the decisions are justly subject to the criticism that too narrow and illiberal a view is taken in holding that to secure the benefit of a copyright, one must comply literally and technically with every provision of the statute.

A doubt has been suggested in *Banks v. Manchester*, 128 U. S , 244, as to whether the state can be the holder of a copyright, by the use of the following language: "The state cannot properly be called a citizen of the United States or a resident therein, nor could it ever be in a condition to fall within the description in sections 4952 or 4954. The copyright claimed to have been taken out by Mr. DeWit in the present case being a copyright 'for the state,' is to be regarded as if it had been a copyright taken out in the name of the state. Whether the state can take out a copyright for itself, or could enjoy the benefit of one taken out by an individual for it as the assignee of a citizen of the United States or a resident therein who should be the author of a book, is a question not involved in the present case and we refrain from considering it."

The question raised, but not decided, in this manner has not been since passed upon by the supreme court. Technically speaking, the state is not a citizen of the United States; neither is a county, nor any municipal or political corporation. A corporation organized under the laws of a state, technically speaking, is not a citizen of the state or the United States, yet all of these have been treated and considered as citizens of the state for the purpose of bringing an action against them, or maintaining an action in the federal courts.

The state, in its sovereign capacity, may own property, real, personal or incorporeal; it can be the assignee of a right; it may maintain an action in the courts of the state or the federal courts as a person, and, before the law, stands as an individual. I can conceive of no good argument why the state may not become the assignee of a copyright, and may not own the same, or why it may not be the proprietor of any book which has been copyrighted, nor why, for the purpose of obtaining a copyright, it should not be considered a citizen of the United States as readily as a corporation created by the authority of the state. The suggestion that it may not obtain a copyright because it lacks the element of citizenship, with all due deference to the high authority which raises the query, does not commend itself to my judgment, and I cannot rid myself of the feeling that such a construction of the statute would be too technical and too narrow to ever become the settled law of the land.

If it should be held that the state cannot, because of the lack of citizenship, obtain a copyright in the first instance, I have too much respect for the learning, ability and exalted character of the supreme court of the United States to imagine for one moment that it would hold that the state could not become the assignee of a copyright duly obtained by a citizen of the United States.

An annotated code embraces the statutes enacted by the legislature, also references to the decisions of the supreme court construing or affecting different sections, a table of cases, indexes and notes prepared by the editor. A serious question has been raised, whether the acts of the legislature can be copyrighted. Drone on Law of Copyright, 164, says: "Statutes are within the same principle that govern judicial decisions. They are the property of the government which employs and pays those who make them. The government, if it chooses, may have them copyrighted, and only the government, or some person deriving title from it, has this right."

The court decisions to sustain the text are wholly English. I have found no American case holding in direct language that statutes may be copyrighted. Judge Brewer, in *Banks v. West Publishing Company*, 27 Fed. Rep., 50, concedes that the consensus of the English authorities is all in favor of the doctrine that the government may copyright its laws, but expresses his own view that it should not be done. The theory upon which it is contended that the statutes of a state and the decisions of the supreme court cannot be copyrighted is stated by Justice Blatchford in *Banks v. Manchester*, 128 U. S., 244–253: "Judges, as is well understood, receive their pay from the treasury, a stated, annual salary fixed by the law, and cannot themselves have any pecuniary interest or proprietorship as against the public at large in the fruits of their judicial labor. This extends to whatever labor they perform in their capacity as judges, as well as to the statement of cases and head notes prepared by them as much as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial consensus from the time of the decision in *Wheaton v. Peters*, 8 Peters, 591, that no copyright could, under the statute passed by congress, be secured on the products of the labor done by the judicial officers in the discharge of their judicial duties The whole work done by the judges constitutes an authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it be a declaration of unwritten law, or the interpretation of a constitution or a statute."

This is in accord with the opinion of Justice Sage in the same case reported in 23 Fed. Rep , 143, in which he says: "It is in accordance with sound public policy in a commonwealth where every citizen is presumed to know the law, to regard the authentic expositions of the law by the regularly constituted judicial tribunals, as public property to be published freely by anyone who may choose to publish them."

It is said in *Davidson et al. v. Wheelock et al.*, 27 Fed. Rep. 61: "They, the complainants, obtained no exclusive right to print and publish and sell the laws of the state of Minnesota, or any part of the legislative acts. The materials for such publication are open to the world. They are public records, subject to inspection by everyone under such rules and restrictions as will secure their preservation. They may be digested or compiled by

anyone, and it is true such compilation may be so original as to entitle the author to a copyright on account of the skill and judgment displayed in the compilation and analysis, but such compiler can obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him."

The learned judge cites no authority for the last clause above quoted, and I find none that will sustain it, save and except that quoted above from *Banks v. Manchester*.

I have observed that the cases which seem to hold that the decisions of the supreme court cannot be copyrighted, are based upon the fact that the acts of the legislature do not expressly authorize the statutes of the state to be copyrighted, or by statute indicate that the laws should not be free to any publisher.

The case of *Wheaton v. Peters* related to the reports of the supreme court of the United States. The right of the reporter to a copyright on his work was recognized, but it was held that the legislation of congress did not authorize the reporter to copyright the opinions filed by the court, and it was said that the members of the court, being in the employ of the government, had no proprietary interest in their decisions, and could not authorize the reporter to copyright the same. All of the decisions which have used language from which it is implied that the decisions of the court or statutes could not be copyrighted, are based upon the fact that there was no statute authorizing the same to be copyrighted.

Judge Blatchford in *Callaghan v. Myers*, 128 U. S., 617, says: "But although there can be no copyright of the opinions of the judges or the work done by them in their official capacity as judges, yet there is no ground of public policy in which a reporter who prepares a volume of law reports of the character of those in this case, can, in the absence of a prohibitory statute, be debarred from obtaining a copyright for the volume which will cover the matter which is the result of his intellectual labor, * * * even though the reporter may be a sworn public officer, appointed by the authority of the court of which he is made the reporter, and even though he may be paid a fixed salary for his labors; yet in the absence of any inhibition forbidding him to take a copyright for that which is the lawful subject of copyright in him, or reserving a copyright to the government as the assignee of his work, he is not debarred of the privilege of taking out a copyright which would otherwise exist."

The sole reason, then, for making a distinction between copyrighting the fruits of the labor of a judge paid by the state, and of a reporter paid by the state, is an undefined public policy. Under the English authorities, the state has a proprietary interest in the fruits of the labors of its officers. I doubt very much whether this doctrine of public policy will stand the test of reason, and strange it is that it should be announced and asserted by the courts of the United States with reference to the publication of the decisions or laws of a state. Were not this doctrine announced by such high authority, I would have believed that the legislature of a state was the sole judge of what should be the policy of the state, or what should be for the best interest of its citizens.

Surely the right to determine the policy of the state in promulgating and publishing its own laws was not granted by the federal constitution to

congress, or to the courts created by the acts of congress, and were it not for the high character of the court, I would have said such rights were reserved to the state. I still think the better doctrine is that the state may determine for itself how and by whom its laws shall be published, whether statutory laws, or the decisions of the courts.

In this connection, the language of the court in *Gould v. Banks*, 53 Conn., 415, is pertinent: "It is for the state to say when and in what manner it shall publish these reports, and the taking of a copyright in no sense offends the rule that judicial proceedings shall be public. The courts and their records are open to all."

Judge Story, in *Folsom v. Marsh*, 2 Story Reports, 100, 113, says, with reference to the letters of Washington: "But assuming the right of the government to publish such official letters and papers under its own sanction for public purposes, I am not prepared to admit that any private persons have the right to publish the same letters and papers without the sanction of the government for their own private profit and advantage. * * * Congress has indeed authorized the purchase of these manuscripts from the owner and possessor thereof and paid the liberal price of $25,000 therefor, and they have thus become national property. But it is an entirely inadmissible conclusion that therefore every private person has a right to use them and publish them."

This was a recognition of a right of the government, so fully recognized by the English authorities, to control the publication of any matter in which it has a proprietary interest, and this I believe to be the true principle.

Upon the question whether there may be a copyright of the annotations, indexes, notes, arrangement, etc., of the editor, I do not think there can be any difference of opinion. While there is doubt in regard to the right to copyright the statutes only, there can be none that that part of the annotated code which is the product of the labor, skill and research of the editor, may be copyrighted. The copyrighting of the reports by the reporter has secured to him, or his assignee, the exclusive right to publish the reports in that form, and to whatever has been added by his research and labor to the opinions of the court. This doctrine is so well recognized that I do not think it necessary to cite the authorities.

I am of the opinion, therefore, that the annotated code, arranged and prepared by an editor in the employ of the state, can be copyrighted by him for the state, and such copyright would prohibit its reproduction by private parties in that form. The fruits of the labor, skill and learning of the editor would be certainly protected thereby. I doubt very much, because of the utterance of the supreme court in *Banks v. Manchester*, whether the laws themselves can be copyrighted. The state must bring itself into a condition to be able to comply with the provisions of the copyright law of congress. This I have doubts as to its ability to do, because of the views of the supreme court as foreshadowed in *Banks v. Manchester*.

The question, however, has never to my knowledge been fairly presented to the supreme court of the United States. In *Banks v. Manchester* the circuit court found that the laws of Ohio did not authorize the reporter to copyright the opinions of the judges. This was a sufficient ground upon which to base the final decision of the case. If the court intended to commend the policy of the state of Ohio in leaving the opinions of the court

free for publication to anyone, as sound policy, and to limit the language used to the facts of that case, then no insuperable barrier to copyrighting the laws and opinions of the court is presented, if the legislature, by statute, directs it to be done. In *Wheaton v. Peters*, 8 Peters, 591, it was said: "No reporter has, or can have, any copyright in the written opinions delivered by this court, and that the judges thereof cannot confer on any reporter any such right." Why? Because the fruits of the labor of the judges belonged to the government, and no act of congress authorized the judges to give to the reporter the property of the government.

This is very different from holding that the government, state or national, has no power to protect its proprietary interest in the laws or opinions of its judges against piracy.

I think on principle and authority a state has this power, and also that the copyright law of congress should be broad enough (if it is not now) to enable the state to obtain a national copyright of its laws, judicial opinions and documents; but I frankly say the trend of the United States court's decisions seems to be against the right of the state to do so under existing laws

But if the statutes themselves may be published by other parties, with annotations thereof which are made by the independent labor of such other person, the publication for the state, however, would have the advantage, because it would be received as evidence of the law in all courts, and most likely be put upon the market at a lower price than one published by private parties for the profit of such publication.

In regard to your last question, "Has the state a right to pass a copyright law?" I will say that prior to the adoption of the federal constitution the states had such a right. Massachusetts and Connecticut enacted such laws. The inability, however, of the several states to secure to authors and inventors a natural right to the fruits of the mental labors was recognized, and a clause was inserted in the constitution giving power to congress to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries This clause was not in the first draft of the constitution. Curtis, in his History of the Constitution, volume 2, page 339, says the power to legislate on these subjects was surrendered by the states to the general government. Judge Story, however (Story on Constitution, section 1154), does not clearly express himself whether this power is exclusive or concurrent with that of the states. In *Livingston v. Van Ingham*, 9 Johnson, 507, the supreme court of New York inclined to the view that the power given to congress relates solely to authors and inventors, and not to those who introduce new inventions. The reasoning was based upon the idea that congress did not have exclusive power, but the power of congress was concurrent with that of the states.

I do not think so, however. By the rules of interpretation of the powers of congress laid down in I Story on Constitution, chapter 5 (see section 447 especially), which are abundantly sustained by the decisions of the supreme court, I am of the opinion that the grant of the power to copyright and patent confers upon congress the exclusive right to enact laws upon this subject. From the nature of the case, such laws must be national in their effect, and in my opinion the state has no right to pass a copyright law.

To refer to the authorities and the reasoning which leads me to this conclusion would unduly extend this opinion, already too long.

The state, however, has a proprietary interest in its laws, and it may prescribe rules and regulations for the publication thereof. I am not prepared to say that it may not prohibit the sale, within the state, of any publication of laws unless the same bears the stamp and authentication of the properly constituted officer of the state. It could prohibit counties or townships buying any other than the publication of the state. It could refuse to make other publications receivable in courts as evidence of what the law is.

The inherent power which the state has is such that without a copyright law of its own, by the enactment of suitable laws with that end in view, no private publisher would find it to his advantage to enter into competition with the state. Yours respectfully,

MILTON REMLEY,
Attorney-General.

FEES OF THE JUSTICE OF THE PEACE AND PEACE OFFICER in vagrancy cases.

DES MOINES, Iowa, March 6, 1897.

A. K. Hitchcock, Esq., County Attorney, Toledo, Iowa:

DEAR SIR—Your favor of the 5th inst. at hand, in which you ask my opinion upon the construction of section 2, chapter 99, laws of the Twenty-sixth General Assembly.

"In a case where two or more persons are arrested charged with vagrancy, is the fee of the peace officer, as fixed by the board of supervisors, not to exceed $1, etc., for all services, per person arrested, or $1, etc., for all services in the case, without reference to the number tried at once.

"Where the services were rendered during the months of January, February and March, the board of supervisors not having fixed the compensation prior to that time, can the board, at its regular meeting in April, determine the compensation of the justice of the peace and peace officer for the preceding months?"

Section 2 of chapter 99 is a substitute for section 6 of chapter 43 of the Twenty-third General Assembly. It is impossible for me to determine the question without knowing the resolution or order of the board of supervisors. The law does not prescribe a scale of fees, only the maximum, and the proper fees to be charged must be determined by the resolution of the board itself.

I will say, however, that section 5 of chapter 53 contemplates that where two or more persons assemble and congregate together within the state, upon being arrested together, they shall be jointly tried by the court. This was with a view of preventing as many separate cases being docketed and tried as there were tramps jointly arrested. If the resolution of the board is in harmony with the spirit of said section 5, it appears reasonable that the fees charged should be for each case, and not each person tried, in accordance with the provisions of section 5. But not knowing what the resolution of the board was, I can give no definite opinion in regard thereto.

In regard to your second question, the legality of fees charged and taxed as costs is determined by the law in force at the time the services were rendered. If the board of supervisors, under the provisions of this statute, had fixed no scale of fees which was in force in January, February and March, then the officers would be authorized to charge the fees provided by the general statute governing such matters, and if the fees charged were in accordance with the law, they were legal. No subsequent act of the board of supervisors could scale them down.

When the services were rendered, they became entitled to the fee lawful at the time. They had a property in such claim, and I do not think the board of supervisors, by afterwards adopting a different scale of fees, could divest them of this property.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

DUTIES OF COUNTY ATTORNEYS—OPINIONS given by them may be either oral or written.

DES MOINES, Iowa, March 8, 1897.

D. H. Myerhoff, Esq., County Attorney, Corning, Iowa:

DEAR SIR—Your favor of the 6th inst. at hand, in which you ask my opinion upon the following question:

"Is the county attorney required to give written opinions upon questions of law which may be required of him as such county attorney by county officers when the parties who ask the written opinion are present with him all the time, or at least a sufficient time for him to give an oral opinion?"

Under section 206 of the code of 1873, the district attorney was required to give his opinion in writing upon all questions of law submitted to him by any county officer within his district. In the change from the district attorney system to the county attorney system, which was put in force by chapter 73, acts of the Twenty-first General Assembly, there was a material change in the language of the statute with reference to giving opinions and advice to the board of supervisors and other civil officers of their respective counties.

As the law now reads, it is silent upon the question as to whether opinions shall be in writing or oral; opinions may be expressed either way. The law enlarges the number of persons who may call upon the county attorney for opinions beyond the number that could call upon the district attorney. The county attorney is required to give advice, which the district attorney was not. His jurisdiction does not extend beyond the county in which he resides, which was not the case with the district attorney.

There is contemplated by law a more intimate relation between the board of supervisors or county officers and the county attorney than under the old system with the district attorney. We cannot suppose that the words, "in writing," were omitted from the present law with no intention. It must be presumed that the intention was to relieve the county attorney from giving his opinions "in writing" unless he desired to so do.

I do not think he could excuse himself from orally giving an opinion of advice in any matter presented to him by saying that when he could do so,

he would prepare it in writing. Emergencies may arise where opinions and advice must be given without waiting to write it. I think it is optiona with the county attorney to give his opinions to the county officers in writing or orally, as he may deem best.

In many cases I think it would be better for the county attorney to give his opinion in writing so as not to have it perverted or misstated, and in many cases when it relates to the duties of an officer, it would certainly be convenient for such officer to have it in writing so as to refer to it as different cases may arise. Yours truly,

MILTON REMLEY,
Attorney-General.

TAXATION—Amount of levy that may be made for county purposes, including the support of the poor.

DES MOINES, Iowa, March 9, 1897.

J. M. Wilson, Esq., County Attorney, Centerville, Iowa:

DEAR SIR—Your favor of recent date at hand, asking my opinion upon the legality of a tax levy made by the board of supervisors of your county.

"A tax of 2 mills was levied for a poor fund and 4 mills for the ordinary county revenue with the understanding on the part of the board that they had a right to make the levy for these two purposes, 6 mills in the aggregate. Now, the question is, under section 2168 of McClain's code, can this county, having as it does, about 28,000, make such a levy, or is 5½ mills the maximum?"

I have had substantially the same question before me on several other occasions, and a careful examination of the whole matter and the history of the legislatio n has satified me that the provisions of paragraph 2 of section 1270 of McClain's code are intended as a limitation upon the amount that may be levied by the county for ordinary county revenue, including the support of the poor. Section 2168 of McClain's code has been amended several times, and such amendments appear to have been made without reference to the clause in paragraph 2 of section 1270, including the support of the poor.

The thought may have been in the minds of those who urged such amendments that the board of supervisors were especially authorized to levy a greater sum for the two purposes known as ordinary county revenue and the poor fund than heretofore. However that may be, the acts of the Twenty-second General Assembly, chapter 43, repealed all former laws and enacted said chapter in lieu thereof. This, then, must be considered as the last expression of the legislative will.

There seems to be nothing to prevent the board from transfering from the county fund to the poor fund or *vice versa*. The expenses of the poor may be paid from the county fund. In the construction of statutes upon the same subject matter, the rule of law is that such construction must be such as will give force and effect to both statutes. If we assume that section 2168 gives to the board of supervisors additional powers to levy beyond the limit fixed in section 1270, then we destroy the force and effect of the clause, "including the support of the poor." Said section 1270 limits the amount which may be levied by the board of supervisors for ordinary

county revenue, including the support of the poor. The provision in the last part of said paragraph 2, that the question of increasing taxation "in counties in which the levy is herein limited to 4 mills," may be submitted to the voters of the county, strengthens the idea that the board of supervisors cannot levy in excess of 4 and 6 mills, as the case may be, without being specially authorized by a vote to that effect.

I do not overlook the fact that there is language in the case of *Lucas County v. C., B. & Q. Ry. Co.*, 67 Iowa, 541, which seems to hold that the tax authorized by section 2168 of McClain's code is a special tax, but it does not appear in that case whether this tax, added to the tax for ordinary county revenue, exceeded the limit fixed in section 1270 of McClain's code, but at all events, this section has been re-enacted in its present form since that case arose, and must be considered the last expression of the legislative will.

I do not see how, on the assumption that the tax might be levied under both sections to the full limit, a tax of 2 mills can be upheld under section 2168. I am of the opinion that in counties having 28,000 inhabitants. the aggregate tax levied for ordinary county revenue, and for the support of the poor, cannot exceed 4 mills. I know that attorneys differ in regard to this question, but I know of no other way of harmonizing the two sections, and I think that if one examines the legislation, including the different amendments and the remodeling of each section, he will reach the conclusion that I do in this matter.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PROPERTY EXEMPT FROM TAXATION—A parsonage owned by a church organization though temporarily rented—An unused schoolhouse and grounds belonging to an independent school district.

DES MOINES, Iowa, March 10, 1897.

O. C. Meredith, Esq., County Attorney, Newton, Iowa:

DEAR SIR—Your favor of the 8th inst. at hand, in which you ask my opinion upon the following questions:

First.—"A church organization owns a church building and parsonage and holds regular services and employs a regular pastor. The minister is not occupying the parsonage, but it is rented and the rent is applied on an indebtedness of the church which is against the parsonage. Is the parsonage subject to taxation?"

In section 1271 of McClain's code, among the exemptions from taxation therein stated, are the following: "All public libraries, grounds and buildings of literary, scientific, benevolent, agricultural and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding 640 acres of land in extent, and not leased or otherwise used with a view to pecuniary profit."

This language has been construed by the supreme court in *Nugent v. Dilworth, treasurer*, 63 N. W. Rep., 448. In the opinion it is said: "The law means directly and not indirectly devoted to such purposes." The

reasoning of the court, as applied to the facts of this case, might seem to lead to the conclusion that the parsonage in question was not exempt from taxation. Strictly speaking, it is only property "not leased or otherwise used with a view to pecuniary profit" that is exempt.

I take it, however, that the language used in the opinion in the case of *Nugent v. Dilworth* is intended to apply to the facts of that case. There a lot was bought with the intention of building a church thereon. Afterwards a new site for the proposed building was selected, and the first lot was mortgaged for a sum of money which was used in the purchase of the new lot and the building of the church. The question was whether the mortgaged lot was exempt from taxation, the court holding that it was not; that it had not yet been devoted to the purpose of the church. It was, however, not rented.

Recognizing the doctrine that taxation is the rule and the exemption the exception, and that one claiming an exemption must bring himself strictly within the exception, yet I think another rule may be stated; that the construction of the law by which the exemption is claimed should not be made to defeat the intent of the legislature in enacting such laws. It has been for many years customary and usual for churches to have parsonages as a place of residence for their pastors. The contract between a church having a parsonage and the pastor is for a fixed salary with the use of the parsonage. In the nature of things, having the parsonage diminishes the amount of cash salary that must be paid. In a certain sense, then, every parsonage is rented. It is not for pecuniary profit to the individual members of the organization, but it is for the profit or advantage of the church organization.

This construction, then, would defeat the exemption of all parsonages, which I cannot think was the intention of the legislature. I have no doubt that a parsonage occupied by the pastor, the rent of which he receives as a part of his salary, is exempt from taxation. The question then arises, how much different is the rule where, because of the size of the family or other circumstances, the present pastor of the church is unable to occupy the parsonage, and it is rented to some one else, and the money received from rent devoted to paying expenses of the pastor's salary or the expenses of the church. Or suppose a church should permit another denomination or a literary society to use its building a part of the time, and use the money received therefrom for the purpose of the church, would such church edifice on that account become subject to taxation? I do not think so

I think it may be stated as a rule that the church building and the parsonage are to be considered exempt from taxation, and a temporary arrangement made in carrying out the legitimate purpose and object of the church by which, for a time, someone other than the pastor occupies the parsonage for which he pays rent, would not necessarily withdraw the parsonage from the class of property exempt from taxation. Any other construction would virtually defeat the evident intent of the legislature that such property should be exempt from taxation, and unnecessarily hamper and hinder a church organization in the use of the buildings which are exempt from taxation.

On the other hand, if the church permanently abandons the use of the parsonage as a parsonage and rents it from year to year for profit, then it might be subject to taxation.

Second.—"An independent district having purchased a schoolhouse site erected a schoolhouse thereon, using it for school purposes, the old schoolhouse and grounds being vacant, no income being derived therefrom. Is the old school and grounds subject to taxation?"

Such property, if exempt at all, is because of this clause in section 1271 of McClain's code: "All property of a county, township, city, incorporated town or school district, when devoted entirely to public use and not held for pecuniary profit." If it is vacant as you state, it is evident it is not held for pecuniary profit. The use that it had been put to was entirely a public use. If it should be sold, the proceeds would be entirely for the use of the public. It belongs to the public, and the property is devoted entirely to the public use, although, because of existing circumstances, the public may not receive a benefit from its use at the present time.

I do not think so fine a sight should be drawn in such matters as to lose sight of the intent and the spirit of the law, and really I can see no benefit to the community would result by assessing such property. The tax would have to be paid by the community. If situated in the city, the greater part of the tax paid would go to the city, and must be paid by the people of the city. It is true a little of the money paid as taxes would go to the state and some to the county, but the benefits of the taxation of such property to any person is more theoretical than practical.

In my judgment, it was not the intention of the law that such property should be taxed. Yours respectfully,

MILTON REMLEY,
Attorney-General.

LEGAL SETTLEMENT—HOW ACQUIRED.

DES MOINES, Iowa, March 13, 1897.

C. W. Crim, Esq., County Attorney, Estherville, Iowa:

DEAR SIR—Your favor of the 10th inst. at hand, in which you ask my opinion upon the following question:

"What is the meaning of the term, 'legal settlement,' as used in the fifth line of section 295 of McClain's code? In other words, how shall we determine the settlement of a person becoming insane?" You state the facts under which the question arises as follows: "A resident of the state of Illinois moved with his family to this county, where they made their home and earned their own living for the period of about eleven months, when he became insane, and, upon direction of the commissioners for the insane for this county, he was sent to the hospital at Independence, where he now remains, and probably will during the remainder of his natural life. Not having any property, he is kept at the expense of Emmet county. Shortly after his removal there his family, consisting of a wife and some small children, being unable to support themselves, became, and are now, county charges. And these facts bring up the further question of whether the support of the husband should be paid by the state or by the county, and also whether this family would fall within the provisions of the statute providing for the removal of poor persons from the state?"

By referring to section 2139 of McClain's code, we ascertain how a legal settlement may be acquired: "Any person having attained majority and residing in this state one year, without being warned to depart as hereinafter provided, gains a settlement in the county of his residence." So, by the same section, a married woman and the children have the settlement acquired by the husband.

Section 2142 provides how the county may prevent a settlement from being obtained by warning the person to depart. The person in question having obtained a residence, and continued that residence for eleven months before he became insane, he being removed by the authorities to Independence while his family remained in the county, would not change his residence. If, then, the residence has continued in the county for twelve months without a warning to depart contemplated in section 2142, his settlement in the county has become complete.

I think this is the only conclusion that can be reached from the statute, and it is in harmony with the common law in regard to settlements. The legal settlement, then, referred to is such a settlement as is provided in section 2139 of McClain's code.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

SCHOOL FUND MORTGAGE—STATUTE OF LIMITATIONS—Does not run against their foreclosure.

DES MOINES, Iowa, March 13, 1897.

M. J. Tobin, Esq., County Attorney, Vinton, Iowa:

DEAR SIR—Your favor of the 10th inst. at hand, in which you ask my opinion upon the following facts:

In the years 1871 and 1872, the auditor of Benton county made two loans of school funds, neither of which have been paid. Meanwhile other transfers have been made from the original mortgagors. You ask: "Does the statute of limitation run against the county in the matter, or have we the right to foreclose as against subsequent purchasers and lien holders?"

Sections 3041 and 3747 of McClain's code explicitly provide that the statute of limitations shall not apply to actions brought on any contract for any part of the school funds. The case of the *County of Des Moines v. Harker*, 34 Iowa, 84, is one very similar to your cases, and it is there held that the statute does not run as against the county for a foreclosure of school fund mortgages. The county is only the agent of the state for the management of the school funds. The fund belongs to the state, and may be transferred from one county to another by the state auditor. The county, in the management and preservation of the funds, simply acts as trustee or agent for the state.

I think without question the case above referred to, the principle of which has been recognized in other cases, settles the question beyond a peradventure.

Yours truly,

MILTON REMLEY,
Attorney-General.

TAXATION—Amount of levy that may be made for county purposes, including the support of the poor.

DES MOINES, Iowa, March 13, 1897.

Hon. Julian Phelps, Senate Chamber:

DEAR SIR—I hand you herewith a copy of my opinion of March 9, 1897, to J. M. Wilson, county attorney, in regard to the construction to be placed upon paragraph 2 of section 1270, of McClain's code.

I do not state therein all the reasons that lead me to the conclusion that the provisions of said paragraph were a limitation on the power of the board of supervisors to levy more than 4 and 6 mills respectively, for the ordinary county revenue and support of the poor. The present law has been a growth. Referring to section 2168 of McClain's code, the first sentence thereof is substantially the same as section 12, page 498 of the revised statutes of 1843. At that time the county commissioners were authorized "each year to levy a tax not exceeding 5 mills on the dollar for county and territorial purposes." (Revised statutes of 1843, page 446, sections 1 and 2.) The whole section was amended by the laws of the First General Assembly of 1847, section 18, page 139, which authorized the county commissioners to levy for county purposes a tax "not to exceed 4 mills on the dollar for county purposes."

This law remained until the code of 1851, when we find the county court is authorized "to levy for ordinary county revenue, including the support of the poor, not more than 6 mills on the dollar." This was an increase in the number of mills which could be levied for county purposes, and the 6 mills were more than could have been levied for both purposes theretofore. The section in regard to the expense of the poor house, etc., being section 844, is left unchanged as it appeared in the revised statutes of 1843.

The law, then, as it stood after the adoption of the code of 1851, unquestionably limited the aggregate levy for ordinary county revenue and the poor to the number of mills therein stated. It will be noticed that the code of 1851 raised the possible levy for county purposes from 4 to 6 mills, and inserted the clause, "including the support of the poor," so that I take it as unquestionably the intent of the legislature to limit the aggregate levy for ordinary county revenue and the levy for the support of the poor to 6 mills.

The two sections have been amended a number of times since. Repeals have been made of the section providing for the county revenue, and substitutes enacted therefor, but through all the changes and legislation upon the subject the clause, "for ordinary county revenue, including the support of the poor, not more than" the number of mills stated, has been preserved, and with it the central idea which obtained on the adoption of the code of 1851, that the aggregate levy for ordinary county revenue and the support of the poor should not exceed the amount therein stated.

The last change of the law upon this subject, as it now appears in McClain's code, section 1270, retains the same idea of limitation of the powers of the board, and I know of no way of construing these two sections so as to harmonize them other than as expressed in my opinion to Mr. Wilson.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

MULCT TAX—PENALTY—When the penalty and interest accrue on account of failure to pay the tax.

DES MOINES, Iowa, March 15, 1897.

Charles C. Clark, Esq., County Attorney, Burlington, Iowa:

DEAR SIR—Your favor of the 13th inst. at hand, in which you ask me in substance for my opinion as to when the penalty and interest on the tax provided for by chapter 62, acts of the Twenty-fifth General Assembly, accrue.

Section 11 provides the tax shall be paid on or before the 1st day of April and October of each year. In case of failure so to pay such installment, a penalty of 20 per cent shall be added, together with 1 per cent per month thereafter until paid. The provisions for a levy of a tax and the collection thereof are independent of whether or not the proper steps are taken to bar proceedings under the prohibitory statute in regard to the sale of intoxicating liquors. This tax is levied and collected from all who sell intoxicating liquors. One may sell and may be indifferent as to whether the proceedings under the statute prohibiting the sale of intoxicating liquors are barred as to him, or not It is optional with him whether he shall comply with the provisions of section 17 of said act, or not. If he does not comply with said provisions, he can be prosecuted under the provisions of the prohibitory statute.

This, however, has nothing to do with the collection of the tax provided for in the first two sections of said chapter. Penalties and interest can only be collected in accordance with the provisions of the statute. If a saloon-keeper wants to secure immunity from the prosecutions under the prohibitory statute, he is required to make the payments of said tax quarterly in advance. His failure to make such payments would only subject him to criminal prosecutions. If he does not so elect to make the payments in advance, he must pay them in semi-annual installments as provided in section 11, and at the times therein stated, and it is only in case of his failure to pay as provided in section 11 that the penalty of 20 per cent and the interest of 1 per cent a month shall be added.

There is no good reason that I can see for confounding the provisions of section 11 and the provisions of section 17 of the said act. The treasurer's duty in the matter is limited to the provisions of the act preceding section 17, and he can only collect the penalty and interest upon failure of a taxpayer to comply with the provisions of section 11.

The conclusions which you arrive at, as stated in your letter, are in harmony with my views. Yours respectfully,

MILTON REMLEY,
Attorney-General.

CRIMINAL LAW.—1. Right of a defendant to be present when an application for a change of venue is heard.—2. The trial court may order the return of the prisoner from the penitentiary pending further proceedings.—3. The county attorney is not required to follow a criminal case to another county upon a change of venue being granted.

DES MOINES, Iowa, March 16, 1897.

E. P. Johnson, Esq., County Attorney, Decorah, Iowa:

DEAR SIR—Your favor of the 10th inst. came duly to hand, and referring to the case of *State v. John H. Cater*, which was reversed in February, and the fact that a petition for change of venue has been filed, you submit the following questions, upon which you want my opinion:

First.—"Has the defendant a right to be present when the question of a change of venue is presented to the court for consideration?"

The statute requires the personal presence of a person indicted for a felony in court at the time of arraignment (section 4713 of McClain's code), during the trial (section 5736), at the rendition of the verdict (section 5846), and in pronouncing judgment (section 5882). His absence during the times thus required to be present would be error, except in some cases it may possibly be waived. There is nothing in the law requiring his presence on the hearing of an application for a change of venue, but the fact that it is not expressly provided that he shall be present, does not argue that he has no right to be present.

I think, without question, that a defendant in a criminal case has a right to be present, if he desires, at any step of the proceedings against him. If he demands it and the court would refuse to permit him to be present, I apprehend it would be an error. If he, or his attorney for him, did not demand it, then they could not complain that he was not present. The defendant has a right to witness any proceedings against him, to consult with his attorney and make suggestions, and on general principles, I apprehend it would be error to refuse to permit him to be present in court when any question affecting his case was on hearing. I think, however, it would be presumed that he did not wish to be present unless he demanded the right to be brought into court.

Second.—"Is it my duty as county attorney to direct the sheriff to forthwith bring the defendant Cater from the penitentiary at Anamosa back to Winneshiek county?"

The statute seems to be silent upon the question that you present. On principle, however, I would say that the court which sentenced him to the penitentiary would be the proper authority to make further direction. The direction of the supreme court is, under section 5927 of McClain's code, remitted to the clerk. Section 5928 provides that all proceedings which may be necessary to carry the judgment of the supreme court into effect must be had in the court to which it is remitted. It is clearly within the province of the court to direct the return of the prisoner to Winneshiek county, where the case is pending for further proceedings.

Third.—"Under section 5765 of McClain's code, if a change of venue is granted, is it my duty to prosecute the case in the county to which the

change is granted, or will it be the duty of the county attorney of the county to which the change is granted to prosecute the case to its final determination?"

The section referred to provides: "The court to which such change of venue is granted must take cognizance of the case and proceed therein to trial, judgment and execution in all respects as if the indictment had been found by the grand jury empanelled in such court." The county attorney is an officer of the court. Section 268 of McClain's code provides: "The county attorney shall appear for the state or county in all cases and proceedings in the courts of his county to which the state or county is a party," etc.

I do not think the statute makes it your duty to follow the case into another county and try the same there. It is, however, desirable that the county attorney who tries the case once, who was the counsel of the grand jury that indicted the party, shall assist upon a retrial of the case. Under section 270 of McClain's code, the county attorney of the county to which the case is sent on change of venue, with the approval of the district court, may procure such assistance as he shall deem necessary. In cases of this kind I think the county attorney of the county to which the case is sent could, with propriety, procure you to assist in the trial of the case.

In many cases the county attorneys do follow the cases to other counties. I think it is a good practice for them so to do, and as a rule more economical for the county which has the expenses of the trial to pay than if the case were turned over to the other county attorney.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

ROAD TAX—CONSTITUTIONALITY OF A PROPOSED STATUTE—Taxes should be raised in the district where the money is to be expended.

DES MOINES, Iowa, March 17, 1897.

Hon. J. H. Trewin, Senate Chamber:

DEAR SIR—Your favor at hand asking my opinion as to the constitutionality of section 3, page 292 of the black code, as amended by the house as per the proposed amendment, copies of which you send me.

It is embarrassing to give an opinion upon any measure pending before the senate or the house which has not yet been enacted into law, and especially upon a constitutional question. My attention was called to this matter some days ago, and I have given it as much investigation as time permitted.

Permit me to call your attention to some principles. In the Washington avenue case, 69 Penn., 352, Judge Agnew, after admitting the power to tax is unbounded by any express limitation of the constitution, and that it may be exercised to the full extent of the public exigency, says: "But nevertheless, taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must, therefore, visit all alike in a reasonably practicable way, of which the legislature may be judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people

in districts or by turns, but still it must be public in its purpose and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation."

Our own supreme court in *Morford v. Unger*, 8 Iowa, 82, says: "If there be such a flagrant and palpable departure from equity in the burdens imposed; if it be imposed for the benefit of others, or for purposes in which those objecting have no interest and are therefore not bound to contribute, it does not matter in what form the power is exercised, whether in an unequal levy of the tax, or in the regulation of the boundaries of the local government which results in subjecting the party unjustly taxed to local taxation, it must be regarded as coming within the prohibition of the constitution designed to protect private rights against aggression, however made, and whether under a color of recognized power, or not."

Many cases hold that a tax must inure to the benefit of the district or locality taxed. For citations see 25 Am. and Eng. Enc. of Law, page 98.

Cooley on Taxation, 106, says: "A state purpose must be accomplished by state taxation, a county purpose by county taxation, or a public purpose for any inferior district by a taxation of such district This is not only just, but it is essential. To any extent that one man is compelled to pay in order to relieve others of a public burden properly resting upon them, his property is taken for private purposes as plainly and as palpably as it would be if appropriated to the payment of the debts or the discharge of obligations which the person thus relieved by his payment might owe to private parties."

There are cases which hold a town cannot be taxed to discharge a burden imposed upon the county or upon the state. One district may not be taxed for the benefit of another taxing district.

I have no doubt that it is competent for the legislature to say what shall be the proper taxation district, even for local purposes, provided always, that it is reasonably just and equitable. If the law placed upon the county the burden of working all roads in the county, I apprehend there would be no question that such a law would be upheld. The section of the proposed code referred to as amended, does not propose to change the present system by which the burden of maintaining the highways of a township or a road district is removed from the said township or road district, nor are the road supervisors deprived of their right and duty to keep in repair the highways. The local taxation district or township and road district is still maintained. So in regard to the cities. The duty of the cities and towns to maintain streets and highways therein, and their liability for their neglect to do so, is left unchanged.

The proposed law, without removing the burden of the local taxation districts, proposes to place a burden upon the entire county which may not benefit all of the local taxing districts. To illustrate: One township may have, in the past, levied the full amount of road tax permissible and wisely expended the same, and have its roads in good condition, with stone culverts where needed; another township in the same county may have levied in the past the minimum tax and have spent that to no purpose, and consequently its roads are now in poor condition. It is hardly likely that any part of the county road fund would be expended in the district where the roads are in excellent condition, but on the other hand, it would be expended

in the township where the roads are not in good condition. I do not think it would be just and equitable to collect a tax from a township like the first named and expend it in the other township which may be in a distant part of the county.

Another illustration: Under existing laws, a township is made the taxing district for building schoolhouses. If a township has taxed itself liberally and built good schoolhouses, I do not think that a tax upon such township to aid in building schoolhouses in another township where they have poor schoolhouses would be justified. This is very kindred to the proposed law.

Under existing laws no part of the county road fund can be expended in the cities or towns without the consent of such city or town, and in view of the decision in *State v. Hunter*, 68 Iowa, 447, it is doubtful whether the board of supervisors can interfere with the working of the road by the road supervisors.

The examination which I have been able to make of the authorities all point to the one conclusion, that the proposed tax cannot be maintained without changing the present system of placing the burden of maintaining highways upon local districts. I wish to say, however, that the question is a very close one, and while I have given it as much thought and examination as time permitted, it is by no means an exhaustive examination of the subject, but so far, I have found no authority or case which seems to hold the contrary view. Yours respectfully,

MILTON REMLEY,
Attorney-General.

TOWNSHIP TRUSTEES HAVE NO AUTHORITY TO EXPEND THE ROAD TAX EXCEPT WHERE THE ONE-DISTRICT SYSTEM HAS BEEN ADOPTED.

DES MOINES, Iowa, March 22, 1897.

Wm. T. Chantland, Esq., County Attorney, Ft. Dodge, Iowa:

DEAR SIR—Your favor of the 20th inst. at hand, in which you ask the following questions:

"We have a township that has levied taxes for township purposes of 5 mills and for several years the sum of 2 mills has been set aside as a fund on hand, and now the trustees are expending the said fund for the improvement of the highways in the different road districts of the township by contract and without the consent of the district supervisors, although the township has never been made into one district according to the one-district law. What I desire to know is, can the trustees so order work in the districts, and can they so expend such a fund at all?"

The township trustees are, by section 1466 of McClain's code, given full control over the expenditures of the general township fund. What this general township fund is is stated in section 1465 of the code, and it is such a fund as is stated to be for the purpose of purchasing tools, machinery and paying for guide-posts mentioned in section 1464 of the code. The rest of the tax levied for highway purposes not set apart into this general township fund, is either collected by the road supervisor under section 1486, or by the county treasurer who pays the tax collected by him to the township

clerk, and from the township clerk, without any action on the part of the township trustees, it passes into the hands of the road supervisor. (*Henderson v. Simpson*, 45 Iowa, 419.)

The money tax levied upon the property of each district, except that portion set apart as a general township fund, whether collected by the supervisor or the county treasurer, shall be expended for highway purposes in the district, and no part thereof shall be paid out or expended for the benefit of any other district. (Section 1496 of McClain's code.)

The powers and duties of the road supervisor are defined in sections 1491 and 1512 of the code, inclusive. He is made liable for failure to keep the roads within his district in as safe condition as the funds and labor at his command will justify (section 1504), and for failure to perform his duty, he is made liable to a forfeiture under section 1512. Nowhere in the statutes can I find any authority for the township trustees expending any part of the road tax in working the highway, except when the one-district system is adopted under the provisions of chapter 200, acts of the Twentieth General Assembly. There are a number of cases which hold that the road supervisor has full authority and control over the work of the highway in his district, among them *State v. Hunter*, 68 Iowa, 447.

If this 2-mill tax is what is called the general township fund, the trustees have no authority in law to expend it for working the highway, and no part of such fund (if it could be so expended), raised in one district could be expended in any other district, and the question might arise whether they would not subject themselves to indictment for interfering with the plans of the road supervisor under the ruling in *State v. Hunter*.

Your second question is: can they expend such a fund at all? In regard to this, if it is the general township fund, it may be expended for the purposes stated in section 1465, and for no other purposes. If it is not needed for such purposes now, they need not set apart any of the road tax in the future for such purposes until this fund on hand is exhausted.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF SUPERVISORS—What constitutes the proceedings of the board—What report the county treasurer should make—What compensation a newspaper is entitled to for publishing the official ballot—Also, for publishing the governor's proclamation of the election—Said proclamation need only be published by the sheriff once, and in but one newspaper.

DES MOINES, Iowa, March 24, 1897.

W. F. Kopp, Esq., County Attorney, Mt. Pleasant, Iowa:

DEAR SIR—Your favor came duly to hand, in which you request my opinion upon the following questions:

First.—"What constitutes the proceedings of the board of supervisors according to section 428 of McClain's code? Should these proceedings when

published contain in full the reports to the board of the auditor, clerk, sheriff and recorder? If not in full, what part, or is a note of such reports sufficient?"

This may be answered in the language of the supreme court in *Hazelet v. County of Howard*, 58 Iowa, 377: "It appears to us too clear for argument that the treasurer's semi-annual report is not a part of the proceedings of the board within the meaning of this section. The proceedings of the board are its official acts, resolutions and orders upon the various matters which may come before it. The report of the treasurer is no more a part of the proceedings of the board than are road petitions, or statements and verifications of claims presented, and the like."

What is said in regard to the treasurer's report is equally true in regard to the reports mentioned in your inquiry. A brief statement of the official action of the board of supervisors upon any report or matter coming before it is sufficient.

Second.—"Does the expression, 'the reports of the county treasurer,' in section 428 refer to and mean the semi-annual settlements provided for by section 1401? How often should these reports be published? With what details should the receipts and expenditures be given in the treasurer's report?"

There is no other place in the statute that I can find where the report of the treasurer is referred to as such. Section 1401 does not require the treasurer to make a report showing the receipts and disbursements. It requires that the board of supervisors shall make a full and complete settlement with the treasurer. That settlement may be made, so far as this section appears, from an examination of his books, and without the treasurer making out a statement of the various funds. Section 5070 of McClain's code provides that he shall render an account of the money received by him for services to the board of supervisors at each session thereof. This refers to his fees, and as readily could be considered the section referred to as section 1401, so far as the language of the sections is concerned. I do not, however, think that the reports mentioned in section 428 refer to the last section named.

You will notice that section 428 of McClain's code is enacted as a substitute for sections 304 and 307 of the code of 1873. Section 304 of the code of 1873 requires the publication of "a full statement of the amounts of the treasurer's accounts at the last settlement on his balance sheet or account-current in making such settlement." I have no doubt, in view of the fact that chapter 197 of the acts of the Twentieth General Assembly repealed section 304 and made a new section to cover the subject matter of sections 304 and 307, that the use of the language, "the reports of the treasurer," was intended to mean the full statement of the amounts of the treasurer's accounts at the last settlement, as on his balance sheet or account-current in making such settlement; and, in this sense, section 1401 of the code is referred to.

You ask with what detail the receipts and expenditures shall be given in the treasurer's report. I think this would be largely within the discretion of the board of supervisors themselves The law does not specifically state. The most that seems to be required, taking the idea from section 304, which has been repealed, is the aggregate receipts for the different funds as shown by such a balance sheet as a careful treasurer would present.

Third.—"What do the last two lines of chapter 105, acts of the Twenty-fifth General Assembly mean? Do they mean that the space occupied by the official ballot shall, for the purpose of measurement, be considered as that much space set in solid brevier, or do they mean the space occupied by the official ballot shall, for the purpose of measurement, be reduced to the amount of space that would be required if the ballot were set in solid brevier?"

The standard for the measurement of legal notices is fixed by section 5112 of McClain's code as a square of ten lines of brevier type. For ten lines of brevier type the price shall not exceed $1 per square for the first insertion. Chapter 165 provides that the price for the publication of the official ballot shall be two-fifths of the regular rate provided by law for legal notices, and the space occupied by the official ballot shall be measured as brevier type set solid. It is the space that is occupied that shall be measured by the standard of brevier type set solid. There is no intimation that the number of words shall be counted and the payment made as if it were set solid in brevier type. It is very evident, to my mind, that for the publication of such ballot the publisher is entitled to receive two-fifths times as many dollars as there would be squares of ten lines of brevier type in the space occupied by the official ballot.

Fourth.—"In how many papers, and how often, should the governor's proclamation of the election be published? If the sheriff orders it published in more than the required number of papers, does that make the county liable for the publication of the proclamation in such additional papers?" You inclose a copy of the proclamation, the display headlines of which occupy four inches in the column, and ask: "Is the county liable for the space occupied by the large display headlines?"

At the bottom of the governor's proclamation is what is called the sheriff's proclamation, giving notice of the election of county officers, township trustees, etc.

The only statutes relating thereto are sections 1024 and 1025 of McClain's code. The sheriff's sole duty in regard to the proclamation is contained in these words: "The sheriff shall give at least ten days' notice thereof by causing a copy of such proclamation to be published in some newspaper published in the county." This evidently means ten days' notice of the election, and the manner of the notice is by causing a copy of the proclamation to be published. It is only required to be published in one newspaper at least ten days before election, and nothing in the statute requires its publication more than once in such newspaper.

I know of no statute requiring the sheriff to issue a proclamation. The compensation for such publication is fixed by section 5112 of McClain's code. Under the provisions of chapter 105, this must be treated as a legal notice, and the publisher, I think, is entitled to receive no more than $1 per square of ten lines of brevier type, or its equivalent.

I do not think a publisher is authorized to fill a half a column with display headlines, or even four inches of space, and charge as if it were solid brevier. The board should allow on the basis of $1 for ten lines for the proclamation of the governor, had the same been set solid in brevier type. The county is not liable for unauthorized publication.

Fifth.—You enclose a copy of the Free Press containing the official ballot, and ask: "Is it proper for the Free Press to charge the ballot rate for the space occupied by the head-lines and for all the space occupied by the auditor's certificate?"

I think this should be governed by the rules stated in answer to the last two questions. I will only add that it seems there should be some heading—something to show what the publication is for—and whether the Free Press or any other paper has used more space for the heading or designation of what the ballot is than is right and proper, is a question not in my province to determine.

Your 6th, 7th and 8th inquiries are not so much questions of law as questions of fact, or the application of the law to the facts. It is impossible for me to determine such questions for the board of supervisors, and without attempting to answer your questions in detail, I will say generally that I see no reason why the treasurer's report as it appears in the publication you sent me, is not all that is required by law.

In regard to the claim list, the rule laid down in *Brown v. Lucas County*, 62 N. W. R., 694, is reasonably plain. The board must determine on the evidence what amount of space of the claim list would be equivalent to one square of brevier type set solid.

If the board of supervisors, by its committee, hires a man as a foreman with hands under him to do a specified job of work, or work is done under the direction of a committee or of the board, I am not prepared to say that each person working under the foreman should file a separate claim. The board, as manager of the county's business, can make such rules and regulations for the payment of the men who do work under its direction as it deems proper. If the board should place a sum in the hands of one of the board as a committee, to be expended in certain work, I have no doubt it would have authority to do so, and such committee could pay off the workmen at the end of each day. Each day's work is not a separate claim against the county. The report of such committee as to how he expended the money would be sufficient. I do not know why such a rule might not be applied to a foreman acting as agent of the county in hiring hands and having work done.

This matter must be determined by the board, being guided by sound business principles and practical judgment.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

REWARD OFFERED BY THE GOVERNOR FOR ARREST OF FUGITIVE FROM JUSTICE—Who entitled to reward—Sheriff cannot accept it.

DES MOINES, Iowa, March 25, 1897.

Hon. F. M. Drake, Governor of Iowa:

DEAR SIR—I have carefully examined the claims of Eugene Stiles and John Baird to the reward offered by the governor for the arrest of L. H. Davidson, a fugitive from justice, charged with murder committed in Fremont county, and report to you my conclusions as follows:

First.—In regard to the claim of Eugene Stiles. Eugene Stiles was the sheriff of Fremont county at the time the murder was committed. The reward was offered by Governor Jackson November 17, 1894, and was "for the arrest and delivery to the proper authority of said L. H. Davidson, said reward to be paid upon his conviction."

The sheriff is the chief conservator of the peace of the county. It is made his duty to keep the same, to prevent crime, to arrest any person liable thereto, to execute all processes, and he may summon the power of the county (section 475 of McClain's code), or call out the militia (section 1549), and generally, it is made his duty to bring criminals to justice, especially where felonies have been committed. He is the proper officer in the county to take into custody and keep persons charged with crime. For performing his duty in this respect, he can claim the fees allowed by law. It is made a misdemeanor for him to take higher or other fees than are allowed by law (section 5120 of McClain's code), and a contract for other fees is void. (*Gilman v. Des Moines Valley Railroad Company*, 40 Iowa, 200.)

It is certainly against public policy to permit a sheriff, or any officer charged by a statute with the duty of arresting a murderer or other felon, to receive a reward offered by the executive for the apprehension and arrest of such person. Many times the reward is offered by the executive upon the representations made by the sheriff to the executive. Public policy forbids that any incentive or temptation should be given to a sheriff or other public officer to delay the proper discharge of his duties, or wink at the escape of a criminal, or to misrepresent to the executive in the hope that a reward might be offered which would inure to the benefit of the officer.

I would have no hesitation in saying that, on the ground of public policy, the sheriff of a county is not entitled to receive a reward offered by the governor. Permit me to say, however, that I see nothing in the records to indicate that Mr. Stiles was influenced in his actions by any considerations which the rule I have stated forbids. I have no thought that he acted otherwise than as a conscientious, upright officer should, but the rule being broad, must be applied to all cases. This rule is abundantly sustained by the authorities.

Again, the sheriff was not within the terms of the reward. He was the proper authority who should receive the criminal from the person who arrested him. Not being embraced within the terms of the reward, would prevent him from receiving the same.

It is to be presumed that Mr. Stiles as sheriff performed his duty; that it was done without hope or expectation of reward other than the fees allowed. The record shows he received from the state, for bringing the prisoner from California, $241.75. The statute authorizing a reward to be offered does not contemplate that it shall be paid to those whose duty it is to make the arrest.

My conclusion is that, as a matter of law, the claim of Mr. Stiles should be disallowed.

Second.—In regard to the claim of John Baird, the evidence shows quite conclusively that Davidson had been arrested for evading railroad fare, then going under an assumed name; that John Baird had his suspicions aroused as to the character of Davidson and made inquiry; that he wrote

to the sheriff of Fremont county, making inquiry as to whether Davidson was wanted there for a crime committed; that, after the receipt of the letter, the sheriff of Fremont county telegraphed to the sheriff of the county a description of Davidson, and told of the reward that was offered; that Baird, on the strength of the telegram, arrested Davidson and held him until the arrival of Sheriff Stiles with the requisition, and then turned him over to Sheriff Stiles as the proper authority to receive the prisoner. I think, without question, that the evidence shows that John Baird is fairly entitled to the reward.

Mr. Stiles makes the claim that there was a verbal agreement between him and John Baird, by which the reward should be divided between them. The preponderance of evidence is against the contention of Mr. Stiles in this matter—at any rate there appears to be no consideration for such agreement—and, were it not so, the principles of public policy referred to would preclude him from taking one-half, had such an agreement been made. He could not do indirectly what public policy forbids him to do directly.

I think the reward should be paid to Mr. Baird.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

EXTRA SESSION OF LEGISLATURE—WHEN NEW CODE MAY GO INTO EFFECT—The legislature has the power to provide when the new code shall become operative.

DES MOINES, Iowa, March 31, 1897.

Hon. H. K. Evans, Secretary Joint Committee:

DEAR SIR—I received in due time your favor of the 26th inst., in which you, in behalf of your committee, ask my opinion upon the following question:

"Can the extra session of the Twenty-sixth General Assembly, by legislative act, fix the time of the taking effect of the laws enacted thereat, or must the laws go into effect ninety days after the final adjournment of the session?"

This involves the interpretation of section 26, article 3 of the constitution of this state, which is as follows:

"No law of the general assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next, after the passage thereof. Laws passed at a special session shall take effect ninety days after the adjournment of the general assembly by which they were passed. If the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state."

A careful examination has failed to disclose any case wherein the exact question was determined. It is stated generally by the writers of constitutional law, that the power to enact laws includes the power, subject to constitutional restrictions, to provide when, in the future, and upon what conditions or event, they shall take effect. (Sutherland on Statutory Construction, section 107. Cooley on Constitutional Limitations, 188.) But no case

stated as authority for the text is decisive of the question under consideration. We are therefore left almost entirely to the language of the constitution, and recognized rules of construing the same.

It has been repeatedly held that the constitution of a state is a limitation upon the power of the general assembly, and not a grant; that the general assembly, as representative of the people of the state, has full and complete power to enact any law which its judgment dictates unless prohibited by the constitution of the state, or the constitution of the United States. Unless, then, the language of the section above quoted, by a fair interpretation or necessary implication, prohibits the legislature from providing that the laws passed at this extra session shall take effect more than ninety days after the adjournment, it has such powers.

The rules for construing statutes are applicable to considering a constitution. The supreme court of Pennsylvania said it is not to be presumed that those who draft the laws have a perfect knowledge of the use of language or grammar. This is well recognized, and courts have considered "will" to mean "shall," "shall" to mean "will," "may" as "shall," etc. The true object is to get at the real intention of the legislature, or those adopting the constitution.

A casual perusal of the second sentence of section 26 under consideration might lead to the idea that it was intended to make it obligatory that all laws passed at a special session shall take effect ninety days after the adjournment of the general assembly, and at no other time, but I do not think a careful analysis of the language necessarily leads to that conclusion. There is no direct prohibition or limitation on the power of the general assembly contained in the second sentence.

I will not enter into a discussion of the distinction between "shall" and "will," which has been taken up by philologists and grammarians, further than to say the grammars used about the time of the adoption of the constitution generally stated that shall or will was the sign of the future indicative. The use of the words, "shall take," as they occur in the second sentence, do not necessarily mean more than the future form of the verb, "take." In connection with what precedes and follows, it does not appear to be imperative. The supreme court of Illinois in *Wheeler v. Chicago*, 24 Ill., 105, says: "The word, 'shall,' may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction; but if any right to anyone depends upon giving the word an imperative construction, the presumption is that the word is used with reference to such right or benefit. But where no right or benefit to anyone depends upon the imperative use of the word, it may be held to be directory merely." No right is imperiled, no principle is involved which requires the giving of an imperative meaning to the words.

The last sentence of the section is: "If the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state." This does not explicitly say that by publication the laws of a special session shall take effect before the expiration of ninety days after the adjournment, yet the

evident intent is that it is left to the judgment of the legislature to determine whether or not they shall take effect immediately upon publication. Such has been the construction placed upon it by the previous extra sessions.

If the second sentence of the said section is to be considered as inflexibly imperative, then there is nothing in the last sentence to construe the language strictly which abrogates that rule. Laws may take effect by publication ninety days after the adjournment, and thus comply with the terms of both sentences

Applying certain rules of construction to the first sentence, a strong argument could be made to show that the naming of the 4th day of July as the time at which laws of a public nature shall take effect, would exclude any other day than the 4th of July. In fact, the Nebraska supreme court in an opinion paraphrases the following language of the Nebraska constitution: "No act shall take effect until three calendar months after the adjournment of the session at which it is passed," into, "all acts shall take effect upon the expiration of three calendar months after the adjournment of the legislature." No doubt, however, has seemed to have arisen in the mind of any general assembly as to its right and power to provide that laws passed at a regular session shall take effect any time in the future that it may designate.

There is suggested to my mind no reason, in the nature of things, why a special session should be limited in its power. No good reason can be given for a construction which would thus limit the power of a special session. The discussion in the constitutional convention upon the proposition to limit the power of an extra session to legislate on the subjects which are named in the governor's proclamation, shows that it was the intention of the convention that an extra session should have the same powers in all respects to legislate that were given to the regular session.

The supreme court of this state in the recent case of *White v. Green*, 70 N. W. R., 182, says: "It is well settled that in construing statutes, courts should not only consider the mischief of the old law and the remedy intended to meet it, but all parts of a statute relating to cognate matters should be considered as well, and that construction adopted which will give effect to and harmonize the provisions." The rule thus stated has received the sanction of courts everywhere. Let us, then, examine into the mischief to be remedied by the adoption of section 26.

Under the common law, the acts of parliament took effect on the first day of the session at which they were enacted.

The accepted doctrine, however, in America was that statutes took effect from and after their enactment by the legislature, some courts holding that they took effect on the same day at the same instant they were signed and approved by the governor; other courts excluded that day.

The constitution of this state, of 1846, provided: "No law of the general assembly, of a public nature shall take effect until the same shall be published and circulated in the several counties of the state by authority." If the general assembly shall deem any law of immediate importance, it may provide that the same shall take effect by publication in the newspapers of the state. This left the matter of the taking effect of the law too uncertain. Those subject to the law could not tell when the law would

take effect The discussion of this section in the constitutional convention of 1857 (see Vol I, Con. Debates, pages 530 and 551), shows that the sole thought of the convention was to provide a general rule by which time was given for the publication of the law, and its circulation among the people. It was proposed to make the laws take effect ninety days after the adjournment of the general assembly. Mr. James F. Wilson said, "I think, judging from the past history of the state, that that time would not be sufficient, The general assembly usually adjourns about the 1st of February, and yet we scarcely ever receive the laws in our county before May or June. It seems to me that ninety days would not be sufficient time, and we ought at least to say four months after the adjournment of the legislature." With that in mind. the committee of the whole inserted the 4th of July, and on the final action, an amendment was made on the floor without discussion, inserting the second sentence of section 26, making the language as it appears in said section.

I think no one familiar with the history of the wrongs done by having retroactive laws enacted, or laws taking effect before those subject to the law could possibly have knowledge thereof, and then reading the constitutional debate, can doubt for a moment that the sole object of the convention was to fix a time for the taking effect of laws not deemed of immediate importance, so as to give the people of the state a knowledge of the law before it affected their interests. There is no suggestion anywhere that it was intended to limit the power of the legislature to provide that a law should take effect at any time in the future beyond the date or period named.

There is in the constitution no suggestion that there shall be a difference between the power of a regular session and a special or extra session. As suggested above, the convention expressly refused to make a difference between the two in the matter of legislation. If this section is so construed as to make a distinction in the powers of a regular session and a special session, it is the only instance, and is out of harmony with the entire constitution.

In determining a constitutional question, it is right to consider the construction placed upon it by the different departments of the government and the previous legislatures. I have no doubt that the legislature which enacted the code of 1873 would come under the term, "special session." "A board or court, legislative body or tribunal may be said to hold a special session when it meets at an unusual time or between its appointed or ordinary times of convening." (Abbott's Law Dictionary, page 492.) A session is defined to be a sitting; sometimes used for the time during which a body of persons or a tribunal is organized competent for the transaction of business. In another connection, the time during which it is convened and actually engaged in business.

It has been held that when a legislative body disperses, the members going to their ordinary private business, that the session is closed. An adjourned session is not a regular session. It is a special session. An extra session convened by the governor is likewise a special session. The special session of 1873 adjourned February 20th. It provided that the code adopted should take effect on the 1st day of September, 1873,—more than six months after the adjournment of the general assembly. The validity of the code was never questioned on that account, and could not have been

successfully assailed. It is no uncommon thing for a special session to enact laws which become operative more than ninety days after the adjournment. Some such have been pending before this session of this general assembly. I have never heard of such laws being assailed on that account, and do not think they can be, as the evident purpose of the constitution is that laws not deemed of immediate importance shall not take effect until time has been given (at least ninety days), for their publication and circulation.

If any differ from the conclusion expressed that an adjourned session is a special session, I would suggest that the present session then, by the same reasoning, would not be embraced within the term, "special session;" so upon that theory, this extra session would not be affected or controlled by the constitutional provision made with reference to a special session.

Another consideration: a distinction is sometimes made by the courts between a law going into effect, and becoming operative. Laws which are duly enacted become the law of the land, but do not necessarily become operative upon the subjects until the happening of a future event. Our statute books are full of such laws. The case of *Hopkins v. Scott*, 38 Neb., 661, in discussing a similar constitutional question, says: "The act as an act did go into effect under the constitutional provision referred to. It became the law of the state from that time, but the class of persons to whom it applied only came into existence upon the expiration of the then current terms of office Until three months after the adjournment of the legislature, the act could not have taken effect, even though terms of treasurers might have expired during the interval. After the constitutional period for the act to take effect had expired, it became the law, and as fast as the terms of treasurers expired, became operative. It was the law from that time, although it may have been without practical effect for want of subject matter to act upon."

So an act passed by this legislature repealing all statutes of a general nature embraced within the new code when the new code shall take effect and fixing the time by the happening of some event or the lapse of a stated time when the new code shall become operative, becomes a completed statute when duly enacted and approved, at the expiration of ninety days after the adjournment. It becomes the law and lacks nothing to put it in force upon the arrival of the time that it is to become operative. The provisions of the law must not necessarily be carried out the moment the law goes into effect or becomes the law, but the provisions of the law become operative at the time and in the manner that the law provides.

There is no doubt in my mind that the extra session of the Twenty-sixth General Assembly can, by legislative act, determine the time in which the code now before the general assembly shall become operative, and that such date may be fixed more than ninety days after the adjournment of the general assembly.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CLAIM AGAINST COUNTY—Surgical operation—Liability of county under facts stated.

DES MOINES, Iowa, April 1, 1897.

George A. McIntyre, Esq., County Attorney, Shell Rock, Iowa:

DEAR SIR—Your favor of the 31st ult at hand, asking my opinion upon the question whether the county is liable for a bill rendered by C. J. Dittmar, supervisor of the town of Freeport, Ill., for hospital dues and surgeon's fees for services rendered to J. M. Miles, who has a settlement in your county. If I understand the facts correctly, the board of supervisors made arrangements to have a surgical operation performed upon said Miles, at the expense of the county, in a hospital at Chicago. Miles declined to have the operation performed there and started to return home, and was again attacked with his ailment at Freeport, where the proper authorities sent him to the hospital and the operation was performed. He has now returned to Butler county, and has recovered from his ailment, appendicitis.

Under section 2155 of McClain's code, the board of supervisors are authorized to grant specific relief, and it appears from their action that they thought the case of Mr. Miles one which justified such relief. Having sent him to the hospital at Chicago at the expense of the county, there is no question but that the county would have been liable for the contract price of the services rendered Mr. Miles by the hospital in Chicago.

I infer from your statement of the facts that the services rendered by the hospital and surgeon at Freeport were rendered without direct employment by the authorities of Butler county.

While the statute makes the county of a pauper's settlement liable for the aid and support furnished by some other county of the state, yet I find nothing in the law which authorizes the recovery from a county by any county or city of another state, and, under the facts stated, I doubt very much whether the authorities at Freeport could recover in an action at law from Butler county, because of the absence of a contract price or statutory liability under which the services were rendered. In order to recover of a county, there must be either a contract or a statute making the county liable, both of which seem to be wanting in this case.

This is a technical view to take of it, however. The facts stated show that the board of supervisors was willing to pay for the operation, believing it to be best for the county to have the same performed. The operation was performed, and successfully performed, by parties who were not employed by the county to do the same, but humanity probably demanded it should be done at the time without waiting to get the authority of the county to perform the operation at the county's expense. As a matter of right and justice, the county ought to pay what the services were reasonably worth. I do not think the public expects or demands of its officers that just claims against the county or state should be defeated by any technical rules of law.

If the bill is no more than the county agreed to pay the hospital in Chicago, there can be no reasonable objection to paying it, and, under the circumstances, I think the board would be justified in paying the reasonable value of the services rendered, not to exceed, however, the price contracted to be paid to the hospital in Chicago.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COUNTY JAIL—Erection of when cost will be more than $5,000—Vote of electors necessary—May use surplus of county fund.

DES MOINES, Iowa, April 6, 1897.

W. M. Jackson, Esq., County Attorney, Bedford, Iowa:

DEAR SIR—Your favor of the 5th inst. at hand, in which you ask my opinion upon the following question:

Your county, having a surplus of $24,000 in the county fund, and being in need of a new jail. the board of supervisors desire to know if they submit a proposition to the taxpayers for authority to build a jail that would cost $10,000, if they have a right to take this amount out of the surplus of the county fund, without levying any additional tax for the purpose of building the jail.

Under the provisions of section 402 of McClain's code, general authority is given to the board of supervisors to build and keep in repair the necessary buildings for the use of the county, subject, however, to the limitation in paragraph 24 of said section, which provides: "They shall not order the erection of a court house, jail, poor house, or other county building or bridge, when the probable cost would exceed $5,000, until the proposition has been submitted to the legal voters of the county and voted for by a majority of all voting," etc.

The provisions of section 1270 of McClain's code authorize the levy of a tax for ordinary county revenue. They are also authorized to levy taxes for particular purposes, as, for instance, the bridge tax, insane hospital tax, soldiers' relief, etc. The use of these special taxes, as a rule, is limited to the purposes for which they are levied. By said section the county may, by vote, authorize the levy of a special tax for county purposes.

The buildings, repairs and expenses of the county are to be paid out of the ordinary county revenue if it is sufficient. If, however, bonds are required to be issued to pay for such improvements, or a special levy for such special purposes is made, the same must be voted upon by the people, as required by sections 430 to 441 inclusive.

An examination of these different sections shows that paragraph 24 of section 402 of McClain's code is a limitation on the power of the board of supervisors to use the county fund for building purposes in excess of $5,000, and their action in regard to expending more than $5,000, or levying a tax for the purpose of building, or issuing bonds, must first be authorized by a vote of the people. Whatever the people authorize, then, in regard to the use of the county fund on hand, or the levy of a special tax for the purpose of erecting buildings, can be fully carried out by the board of supervisors within the limit prescribed by section 433 of McClain's code, as amended by chapter 32, acts of the Twenty-third General Assembly.

I find nothing whatever in the law which prohibits the use of the county fund for the erection of a jail costing $10,000, or any other sum, if the people, by vote, authorize a jail to be erected. In fact, it seems appropriate that it should be paid from the ordinary county fund, and the county is to be congratulated that it can do so without increasing the burdens of taxation. The proposition, however, should be plainly stated, so that the electors may fully understand the same, and the board unquestionably has authority to carry out the directions of the people given at the polls.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

LIABILITY OF SURETIES ON MULCT SALOON-KEEPERS BOND—Liability for tax due the county—Liability for tax due the city—As to liability for fines, query—Suit should be brought upon the bond by the injured party.

DES MOINES, Iowa, April 6, 1897.

C. W. Crim, Esq., County Attorney, Estherville, Iowa:

DEAR SIR—Your favor of the 24th ult. at hand, in which you request my opinion upon the following propositions of law:

First.—"Are the bondsmen, provided for in section 17, chapter 62, acts of the Twenty-fifth General Assembly, liable for the tax of $600 provided by the statute?"

In regard to this I will say that the case of *Marshall County v. Knoll, et al.*, decided February 1, 1897, reported in 69 N. W. R., 1146, determines this question in the affirmative.

Second.—"Are said bondsmen liable for the additional municipal tax therein provided for? If so, at whose suit?"

Section 24 of chapter 62 provides that cities and towns shall have power to levy and collect additional taxes, etc. Taxes levied in pursuance of such authority are just as obligatory upon the vendor of intoxicating liquors to pay as other taxes, and the same reasoning which leads to the conclusion reached in the case of *Marshall County v. Knoll*, applies to the additional municipal tax, and upon the authority of that case, I am of the opinion that the bondsmen are liable for the additional municipal tax. Section 3757 of McClain's code authorizes a suit to be brought on such bond "in the name of any person intended to be thus secured who has sustained an injury in consequence of the breach thereof." In case the city or town is the party injured by a breach of the bond, viz.: failing to pay the tax, then such city or town would be the proper party to bring the suit.

Third.—"Are said bondsmen liable for the penal judgment rendered because of a failure to comply with the mulct statute?"

The bond is conditioned upon the faithful performance of all the provisions of this act, and for the payment of any and all damages which may result from the sale of intoxicating liquors on the premises occupied by the obligor. A failure of any of the conditions would justify a judgment upon the bond for the amount thereof, it being in the nature of a penal bond. The fact of a conviction for violating the provisions of the law would justify a suit to forfeit the entire bond and recovery of penalty therein named. I do not think that judgment in a criminal case imposing a fine could be rendered against the sureties on the bond in that action, but to make them liable, an action would have to be maintained upon the bond.

Whether, in such action, sureties would be liable for the amount of the fines recovered is a question of considerable doubt in my mind. The reasoning of the court in *Marshall County v. Knoll*, does not necessarily lead to that conclusion, and if it were an original proposition I would incline to the contrary view. The same end can be obtained practically by bringing an action upon the bond against the surety, alleging the breach thereof which led to the conviction, and demanding a forfeiture on such bond.

You will notice there is a difference in the provisions of section 17 of chapter 62, and the provisions of section 2419 of McClain's code. If the act

upon which the criminal prosecution was based is in violation of said chapter 62, then the sureties on the bond cannot be made liable by a suit upon the bond.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COUNTY ATTORNEY—It is not his duty to bring suit on the bond of an officer of the state militia.

DES MOINES, Iowa, April 6, 1897.

J. M. Wilson, Esq., County Attorney, Centerville, Iowa:

DEAR SIR—Your favor of 24th ult. came duly to hand, in which you state:

"The captain of our militia company gave a bond to the state of Iowa with sureties thereon for the proper application and disbursement of all funds coming into his hands as such officer. He left the state about a year ago and failed and still refuses to account for the moneys and property that came into his hands." You ask: "Is it the duty of the county attorney to bring a suit on this bond, given for the benefit of the state by the militia officer and are such sureties liable on said bond where the officer fails or refuses to turn over said property to his successor in office?"

The provision of law in regard to the giving of a bond is contained in section 24, chapter 74, acts of the Eighteenth General Assembly, which provides: "When any arms or ammunitions are delivered to any commander, he shall execute and deliver to the adjutant-general, a bond payable to the state of Iowa, in sufficient amount and with sufficient securities, to be approved by the governor, conditioned upon the proper use of such arms and ammunitions and return of the same when requested by proper authorities, in good order, wear, use and unavoidable loss and damage excepted." This provision is the only one that I am aware of authorizing the giving of a bond.

It will be noticed that it is not security for funds of the company which may come into the hands of the officer that such bond is given. The company is made an organization,—not exactly a corporation but a voluntary organization,—which may, under section 16 of said act, make by-laws for its own government. It may elect its own financial agents or officers, and the internal affairs of each company are managed according to such by-laws as may be adopted. They may have a treasurer to care for and disburse the funds collected by the company.

In regard to the security of such funds, which the company may raise, the statute does not provide that a bond shall be given to the state. Section 26 of said act makes it embezzlement for an officer to mis-appropriate money drawn from the state treasury, but the bond which the law authorizes does not stand as security for such money. The company might, by by-laws, require bonds of those who handle the company's funds, and I am uncertain, from the statement of your letter, whether such bond is not the one that you refer to.

I will say, therefore, that if the bond is such a one as is required by section 24 of chapter 74, acts of the Eighteenth General Assembly, the governor of the state as commander-in-chief, would be the proper party to

order a suit to be brought thereon for a violation of its terms. If, however, the bond is one given in accordance with the by-laws of the company, this being a matter wholly within the control of the company itself, I do not think it would be the duty of the county attorney to bring suit thereon.

Yours truly,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICERS—CLERK OF THE DISTRICT COURT—COMPENSATION.

DES MOINES, Iowa, April 7, 1897.

W. L. Smith, Esq., County Attorney, Humboldt, Iowa:

DEAR SIR—Your favor of the 6th inst. at hand, enclosing a resolution of the board of supervisors fixing the salary of the clerk of the district court at $1,100 for the year 1896, and stating that the clerk for six years received the fees provided for in section 2560 of McClain's code, in addition to the salary. You state, also, that your population is less than 12,000, and the limit of the salary of the clerk is $1,300, and you ask whether the clerk is entitled to the fees provided for in section 2560 of McClain's code, or whether the county is bound because he has been paid this in other years.

In regard to this I will say that section 5033 of McClain's code provides a scale of fees that the clerk of the district court may charge. Section 2560 also authorizes him to charge fees. Section 5036, however, places a limit upon his compensation which, in counties like yours having a population in excess of 10,000 but not exceeding 20,000, is $1,300. By the last section, however, the board of supervisors is authorized to allow him an additional compensation up to the limit in case his fees are less than the limit fixed in said section.

I do not think the resolution of the board fixing his salary at $1,100 can have the effect of depriving him of the fees he is authorized to collect and receive for himself to an amount equal to the sum named in such section, viz., $1,300. The effect of the resolution of the board is to require the county to pay the clerk enough with the fees which he has received to amount to $1,100

It would be absurd to say that he can receive the $1,100 and the fees too, or any part thereof. The county has practically guaranteed to him that the fees will amount to $1,100. If this sum has been paid to him out of the county treasury, then all the fees in equity belong to the county. If, under this supposition, he can, in addition to the $1,100 received from the county, retain the fees arising under section 2560 of McClain's code, why can he not retain all the fees the law authorizes him to charge?

I think if the fees of the office amounted to less than $1,100, and he has received from the county enough to make it up to $1,100, he is entitled to nothing more. If the fees have amounted to more than $1,100, so that he has been paid nothing out of the county treasury, he is entitled to the aggregate amount received up to $1,300. I make no distinction between the fees arising under section 2560 of McClain's code and the other fees; so

far as this question is concerned, they all must be considered in ascertaining the total amount of compensation of the clerk.

The fact that the board of supervisors has allowed such fees to be retained by the former clerk, or even by the present clerk, would not bind the county to continue the course. (See *Palo Alto Co. v. Burlingame*, 71 Iowa, 211.) Yours respectfully,

MILTON REMLEY,
Attorney-General.

IOWA LAKE BEDS—The beds of meandered lakes belong to the state and neither the board of supervisors nor the local health officer has any authority to drain them.

DES MOINES, Iowa, April 7, 1897.

Hon. Geo. E. Delavan, Fish Commissioner, Estherville, Iowa:

DEAR SIR—Your favor of the 5th inst. at hand, in which you enclose a letter of John A. Kyle of Lake Mills, and ask my opinion upon these questions:

"Can the county board of supervisors condemn and ditch a government lake? Must the government do that? Has the local health officer anything to do with it?"

I will briefly state my views upon these questions together. If a lake that has been meandered by the government surveyors, and all the land sold with reference to the plats made by the government surveyors, then the government of the United States has no further interest in such lake, and the same belongs to the state government as a part of the public waters of the state The board of supervisors has been given no control whatsoever over the public waters, and would become trespasser if it drained the same. There is no authority given to the board of supervisors to condemn the lake. There is nothing in the law anywhere to indicate that the supervisors have any authority whatsoever in the matter to which you refer.

The government of the United States would have no authority to enter upon the public waters of the state and drain the same. I cannot conceive how a local health officer would be authorized to do any such a thing as to drain a lake. There is not a syllable in any statute that I can find that would justify any such construction.

Referring to the letter of Mr. Kyle, which I return to you, I will say that if any parties, whether they be those acting for the board of supervisors or any local health officer, attempt to dig a ditch so as to drain off the water of the lake, which his letter shows to be full at the present time, if local parties are interested in enjoining them or preventing the destruction of the lake, and will bring an injunction suit to restrain them, I will give them such assistance as I am able to do in the way of furnishing briefs or citing authorities. Yours respectfully,

MILTON REMLEY,
Attorney- General.

CLAIM FOR EXPENSES INCURRED IN RETURNING A FUGITIVE FROM JUSTICE—One must show that the conditions imposed by the requisition have been fulfilled in order to recover from the state.

DES MOINES, Iowa, April 7, 1897.

Hon. F. M. Drake, Governor of Iowa:

DEAR SIR—In regard to the claim of C. C. Samson for fees and expenses as agent of the state on requisition for the arrest and return of Lester Stevens, a fugitive from justice, which has been referred to me, I will say that the requisition which made his appointment, stated the terms under which he was entitled to compensation, which in no case should exceed the sum of $75; that the requisition provided that the state would be "at no expense on account thereof unless the accused is returned to the state, indicted (if not already), and tried."

The condition has not been complied with. Mr. Samson understood the provision, or is presumed to have done so, and has no legal claim for his expenses thereunder. It may be that he was not at fault for the escape of the prisoner, but the purpose of such a condition is a wise one It encourages extraordinary diligence in securing the return of the person accused. The circumstances may make it a hardship upon him to bear the loss, but it is to be presumed he took the risk. The enforcement of any rule may occasion hardships, but if the rule is a wise and wholesome one, it should be administered, notwithstanding the hardship.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF SUPERVISORS—The removal of a member from one township to one in which another member of the board resides does not create a vacancy.

DES MOINES, Iowa, April 13, 1897.

Ivar Boe, Esq., County Attorney, Northwood, Iowa:

DEAR SIR—Your favor of the 9th inst. came duly to hand, in which you ask my opinion upon a question which may be stated as follows:

Whether or not the removal of a member of the board of supervisors from the township in which he resided when he was elected into a township which is the place of residence of another member of the board, has the effect to cause a vacancy in the office You say that your county has three supervisors, and since the change of residence of one, two members now live in Kensett township, and the other one in Northwood.

Section 390 of McClain's code provides: "At the general election in each year, there shall be at least one supervisor elected in each county, who shall not be a resident of the same township with either of the members holding over, and who shall continue in office three years."

If the supervisor in question, at the time he was elected, resided in a township where there were no holdover members of the board, his election was valid and cannot be questioned on account of residence. Having been duly elected and qualified for the office, his term of office continues for three years, unless there are provisions of law which make the office vacant because of his removal.

The office of supervisor is a county office. Its functions are to be exercised throughout the entire county. In no sense is it a township office, nor are its functions to be exercised within the township alone. Paragraph 5 of section 1253 of McClain's code provides that every civil office shall be vacant upon the incumbent "ceasing to be a resident of the state, district, county or township in which the duties of his office are to be exercised, or for which he may have been elected." This is the only provision of law bearing upon a vacancy because of a removal. You will notice, however, that this does not fit the case stated in your letter. The supervisor in question has not removed from the county. Being a county officer, the duties of his office are to be exercised co-extensively with the county. He is the representative of every elector of the county as much as of the township in which he resided when elected. He was not elected for a township, but for the county. This paragraph does not make his removal from one township to another forfeit his right to the office, and there being no other statute upon this subject, I do not think there can be said to be a vacancy.

While section 390 was wisely enacted to cause the members of the board to be selected from different townships in different parts of the county, yet there is nothing to indicate that the legislature deemed the matter of sufficient importance to provide that a removal from one township to another should cause a vacancy. Cases of such removals are not so very common, and the evils, if any, of having two members of the board reside in one township are more imaginary than real. At any rate, the legislature did not provide that the removal of a supervisor should cause a vacancy in the office to which he was elected.

I note what you say in regard to a doubt arising as to the legality of the transactions of the board with the member in question acting on the board. As long as he is actually exercising the functions of the office, he is a *de facto* officer, and, as between the member and the public, his acts would have the same force and effect as an officer *de jure*.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSURANCE—A COMPANY NAMED HELD NOT TO BE EXEMPT FROM COMPLYING WITH THE INSURANCE LAW.

DES MOINES, Iowa, April 13, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—Your favor of the 12th inst. at hand, in which you state that the corporation known as the Hawkeye Clerks' association is doing an accident insurance business in this state. * * * It has been transacting the business of accident insurance for some two years or more. It has not complied with the general insurance laws of the state, claiming exemption therefrom under section 21, of chapter 65, acts of the Twenty-first General Assembly. You enclose seven communications from as many different persons, residents of Marshalltown, all of whom state they either are or have been members of the Hawkeye Clerks' association, of Des Moines, Iowa, and that they were not clerks at the time of their application, nor did they

state to the agent who took the applications that they were clerks. You further state that it seems from this evidence that the Hawkeye Clerks' association is not confining its business to persons of one occupation, and ask my opinion as to whether or not, upon the evidence submitted, you should require the Hawkeye Clerks' association to comply with chapter 65, laws of the Twenty-first General Assembly.

Upon the facts stated, I have grave doubts whether the Hawkeye Clerks' association ever came within the classes of associations which are exempted by section 21, chapter 65, laws of the Twenty-first General Assembly. By such section only two classes of associations or societies are exempt: first, secret benevolent societies; second, associations organized *solely for benevolent purposes*, and composed solely of persons of one occupation, profession or religious denomination.

It will be noticed that it is essential, in order to claim the exemption, that the organization be for benevolent purposes, and it matters not that an association may be composed solely of persons of one occupation. If it is not organized for benevolent purposes, it is not entitled to claim the exemption. If it is organized for insurance purposes, or the profits of the organizers, it does not come within the classes which are exempt from compliance with the law.

But be this as it may, the seven communications submitted to me show very conclusively that said association is not confining its membership to persons of one occupation (that is, assuming the statements communicated to you to be true), and, in my judgment, the company should be made to comply with the law the same as any other insurance company.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

RIGHT OF NONRESIDENT ALIENS TO INHERIT—2. TO WHAT THE WIDOW OF A DECEASED IS ENTITLED.

DES MOINES, Iowa, April 14, 1897.

Hon. F. M. Drake, Governor of Iowa:

DEAR SIR—In reply to your request for a statement of the law of this state with reference to the descent of the property of Peter Christian Anderson, a citizen of Denmark, who died in this state, leaving herein his widow and five minor children who live with her, and leaving also three children by his first wife in Denmark, for the minister of Denmark, who asks:

"What, in the state of Iowa, are the rules to be observed in the division in question?"

I will say that under the laws of this state there is no restriction on resident aliens acquiring real estate. The real estate of one dying intestate descends as follows: one-third in fee simple goes to the widow; the rest of the property is divided in equal shares between his children, or the descendants of any who may be dead, subject to the debts of the deceased, but the widow's share cannot be sold for the debts of the deceased.

The Danish minister also asks:

"What amount should, under the laws of Iowa, be assigned to the widow in virtue of the widow's award?"

There is first set off to the widow all personal property which, in law, is exempt from execution, in her own right. This property, in general terms, consists of the household goods to the value of $300, two cows and their calves, a team of horses or mules, farming implements, five hogs and all pigs under six months old, five stands of bees, etc., and if the deceased was a mechanic, the tools with which he earned his living. Food and provisions for the family and exempt animals for six months are also set off to the widow. In addition to this, the court will allow a sum of money from the estate to support the widow and children for twelve months. The amount of this is determined by the court, taking into consideration the station, rank and condition of the intestate, the value of his estate, and also the amount which is set off to the widow under the exemption above named. After the payment of all debts and expenses of administration the rest of the personal estate is distributed to the widow and children of the deceased in the same proportion as the rest of the estate is divided. All property, real and personal, set off to the widow, is absolutely her own, and the amount does not depend upon whether she has charge of the education of the minor children or not.

It is, however, the duty of the mother to support and educate her children, but if the minor children have property of their own, the court will appoint a guardian for the care of such property. If the mother has not means sufficient for the support and education of the children without embarrassing her estate, the court will order a guardian to pay such sum as to it may be deemed proper.

The rights of the children of Mr. Anderson who reside in Denmark and have never been citizens of the United States or residents of Iowa, depend upon the time at which Mr. Anderson died. From July 4, 1888, to July 4, 1896, a law was in force which prohibited non-resident aliens from acquiring real estate by descent. They could acquire real estate by purchase, which includes devise, and hold the same for ten years, during which time they must sell or become residents of this state; otherwise it will escheat to the state. A law enacted in 1896, being chapter 104, acts of the Twenty-sixth General Assembly, repeals the former law and permits non-resident aliens to inherit from aliens or naturalized citizens any real estate, and they may hold the same for twenty years, during which time they must sell to *bona fide* purchasers for value, or become residents of the state. Their right to an equal share with resident children in the personal property has not been affected by our statute.

I suppose this statement of the law is sufficiently full for the purposes of the minister of Denmark. Some minor matters have been omitted, but the general rules are as above stated.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COMPENSATION OF PUBLIC OFFICERS.—1. Insane commissioners who act as physicians.—2. Sheriff who serves process from a justice's court.—3. Constable who is also deputy sheriff.

DES MOINES, Iowa, April 15, 1897.

John Menzies, Esq., County Attorney, Emmetsburg, Iowa:

DEAR SIR—Your favor of the 14th inst. at hand, in which you ask my opinion upon the following questions:

"Is the physician who is a member of the board of commissioners of insanity, when appointed as the examining physician to make an examination of a person alleged to be insane, as required by section 2194 of McClain's code, entitled to receive compensation as such examining physician, and also as commissioner, or is he limited to the sum of $3 per day, allowed him as commissioner?"

Section 2194 of McClain's code requires that the board "shall appoint some regular practicing physician of the county to visit such person and make a personal examination of the truth of the information and the actual condition of such person, and forthwith to report thereon. Such physician may or may not be one of their number," etc.

The duty of this examining physician is very different from his duty as commissioner. While he is engaged in making this examination and his report thereon, he is not engaged in any duty as commissioner. Section 5102 of McClain's code allows to each commissioner compensation at the rate of $3 per day each for all the time actually employed in the duties of the office. It further provides, "The examining physician shall be entitled to the same compensation."

If it were the duty of the physician who is a member of the board of commissioners to make such examination, or if he became by law *ex officio* examining physician, or if the two offices were incompatible there might be reason for saying that he should receive compensation at the rate of $3 a day for the time actually spent in discharging all of the duties, or the duties of the commissioner and examining physician. But I do not so read the statute. They are two offices; they are not incompatible.

Under the statute, a commissioner of insanity may be made the examining physician The duties are different, and the statute attaches to each office the compensation stated. In arriving at the amount of the compensation to which the physician is entitled, the time spent in performing the duties as examining physician cannot be added to the time spent as a commissioner, and he be allowed a per diem as commissioner for the time spent as examining physician, and again be allowed as examining physician for the same time. But where he is allowed $3 per day for the same time which the other commissioners who attend the meetings of the board are allowed, and he has performed the duties as examining physician at a time when the other commissioners were not engaged, I see no reason why he should not be permitted to draw the compensation fixed by the statute, viz.: $3 per day.

To illustrate: if the commissioners of insanity are in session one day, the physician would be entitled to receive one day's compensation as commissioner. If he is appointed examining physician and makes such examination and reports thereon, he is entitled to compensation for such examination and report at the rate of $3 per day independently of what he may receive for performing the duties of commissioner.

Second.—You ask: "Where the sheriff or his deputy arrests tramps or intoxicated persons on a warrant issued by a justice of the peace, and takes them before the justice, is he entitled to the sum of $2 for serving the warrant, or is he limited to the fees allowed constables for doing the same work, viz.: 75 cents for serving a warrant?"

The sheriff is a peace officer. It is his duty to serve all warrants and execute all writs placed in his hands. He cannot refuse to serve a warrant or a writ that is placed in his hands for service. While the constable is recognized as the ministerial officer of the justice court, and all warrants emanating from the court should properly be placed in the hands of a constable, yet if they are placed in the hands of the sheriff, the sheriff cannot refuse to serve the same.

The law fixing the compensation of a sheriff makes no distinction as to the amount of his fee for serving the same between those issued by a justice and those issued from the district court. I am inclined to the view that a sheriff is entitled to the fees allowed by law to him as sheriff for serving a warrant, whether it is issued by a justice of the peace or by the district court.

Of course, for the arrest of tramps, his compensation is limited by the fees fixed by the board of supervisors, in case it has been done under the provisions of chapter 43, acts of the Twenty-third General Assembly.

Third.—"Where the deputy sheriff, who is also constable, arrests tramps or intoxicated persons on a warrant issued by a justice of the peace, and returns the warrant as deputy sheriff, can he collect $2 for serving the warrant, or, being constable, is he not bound to do the work for constables' fees?"

If the warrant is placed in the hands of the sheriff for service, and the sheriff serves it by his deputy, I think the sheriff would be entitled to his fees as sheriff. But in a case where the warrant is placed in the hands of the constable who is elected as the ministerial officer of a justice court, he is required to serve the same as such constable, and cannot properly return the warrant in the name of the sheriff by him as deputy, and collect a larger fee.

For the arrest of tramps, however, I would call your attention to section 6 of chapter 43, acts of the Twenty-third General Assembly.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSURANCE—Cancellation of policy in mutual company—Short rates—Duty of auditor as to insurance policies.

DES MOINES, Iowa, April 15, 1897.

Hon. C. G. McCarthy, Auditor of State:

SIR—Your favor of the 7th inst. at hand, enclosing a policy of the Anchor Mutual Fire Insurance company to T. W. Hancock; also the correspondence relating to the said policy, and in view of chapter 39, acts of the Seventeenth General Assembly, which, among other things, provides that the certificate of authority to do business in this state shall not be

renewed "whenever the form of policy contract issued or proposed to be issued by any such company, association or corporation, does not provide for the cancellation of the same at the request of the insured upon equitable terms." You ask for my opinion whether or not the policy herein referred to and submitted by you provides for the cancellation of the same upon equitable terms within the meaning of the statutes of this state, and if not, then what is your duty as auditor of state as to revoking the authority of the company to do business within this state.

The representatives of the company asked to be heard upon the question presented, and I heard a presentation of all the questions involved by the attorney of the company, and also by the attorney of another mutual company, and have given due consideration to all the arguments and authorities produced. Let me say that the correspondence left it a matter of doubt whether the policy to Mr. Hancock had ever been accepted by him, and it was questionable whether it should be treated as a policy surrendered for cancellation at the request of the assured. The secretary of the company stated that they would ask the return of the policy, and would surrender up the premium note without demanding short rates, or any other rates.

The company in question is a mutual company, organized under the provisions of chapter 4, title 9, of the code of 1873. The only provision in the policy for cancellation by the assured is section 5, which provides: "This insurance may be canceled, in whole or in part, at any time, upon the request of the insured, in which case the company shall retain only the customary short rates for the time the policy has been in force." In an opinion given you January 11, 1896, I expressed the view that mutual insurance companies were not authorized by statute to require what is known as the payment of short rates upon the cancellation of the policy at the request of the insured.

The earnestness with which this view is combatted by the representatives of the mutual insurance companies has led me to make a patient re-examination of the entire subject, and I am unable to arrive at any other conclusion than that stated to you in my former opinion.

The contention resolves itself into one question: whether chapter 210 of the acts of the Eighteenth General Assembly repeals the provisions of sections 1138 and 1139 of the code, relating to the cancellation of premium notes given by insurers in a mutual company after the organization thereof. Section 1138 distinctly says: "But any note which may have been deposited with any mutual company subsequent to its organization in addition to the cash premiums on insurance effected with such company, may, at the expiration of the time of such insurance, or upon the cancellation by the company of the policy, be relinquished and given up to the maker thereof, or his legal representatives, upon his paying his proportion of losses and expenses which may have accrued thereon during such terms; * * * but any person insured in any mutual company * * * may at any time return his policy for cancellation, and upon the payment of the amount due at such time upon his premium note, shall be discharged from further liability thereon." The next section conveys the same idea. The whole plan of mutual insurance companies is that each policy holder becomes a member of the company. He may be required to pay in cash

enough to pay the expense of procuring the insurance, and possibly to add something to the fund which stands in lieu of capital in a stock company; but on the premium note he can only be assessed by the board of directors for his proportional share of losses and expenses incurred during the time his policy is in force

This is unquestionably the law unless chapter 210 repeals the same. The said chapter does not purport to repeal any part of said sections. It does not purport to add any additional burden to the policy holders in mutual companies. The only purpose and object is to secure policy holders from unjust forfeitures of policies. The notice required by section 2 must state the amount due on the assessment, if the premium note has been given. I see nothing in the entire act which, by implication, repeals the provisions of the sections above referred to

Mutual companies being organized under the provisions of chapter 4, title 9, any policy which fixes more onerous terms of cancellation by the assured than the terms fixed by the statute cannot be said to provide for the cancellation upon equitable terms. Under section 1 of chapter 39, acts of the Seventeenth General Assembly, it is the auditor's duty to see that the form of policy issued does provide for the cancellation of the same at the request of the assured upon equitable terms. That is, the terms of the cancellation of the policy stated therein shall be such that the auditor recognizes and approves of as equitable; but where the statute, as in the case of mutual fire insurance companies, provides the terms, no more onerous terms can be recognized as equitable.

It has been said that this rule places the mutual companies at a disadvantage when put in competition with stock companies. If this were true, it would not change the rules for interpreting the statute, but I think it more imaginary than real. Under section 1138 of the code, the directors or trustees of any company have the right to determine the amount of the note to be given in addition to the cash premium by any person insured in the company. By the articles of incorporation or by-laws, enough cash premium may be required to pay the expense of soliciting the insurance and any incidental expenses connected therewith, or even in excess thereof, and then the premium note shall be assessed only for actual losses and expenses pro rata. This saves the company harmless, and gives to the insured indemnity at actual cost. No stock company can long exist which gives indemnity below actual cost.

I do not think the provision for the cancellation of the policy by the insured in the policy submitted to me, complies with the provision of chapter 39, acts of the Seventeenth General Assembly, and it seems plainly to be your duty under the statute to require a different clause in lieu of paragraph 5 of the policy, or else revoke the certificate to do business in the state. I am informed, however, that no cash premiums have been required of any policy holders, and acting upon a different view of the law, the policies have been written in substantially this form.

It is difficult to say what should be done with outstanding policies under the circumstances, but clearly, no new policies should be issued in this form.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

MUTUAL LIFE INSURANCE—Articles of incorporation of the Woodmen of World examined and held to provide for a representative form of government.

DES MOINES, Iowa, April 17, 1897.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Yours at hand, submitting to me the articles of incorporation and the constitution and laws of the sovereign camp of the Woodmen of the World, and calling my attention to the provisions of article 6 of the articles of incorporation, and section 11 of the constitution, and asking my opinion whether said order has a representative form of government such as is required by section 1, chapter 21, laws of the Twenty-sixth General Assembly.

Article 6 of the articles of incorporation provides:

"The officers shall be elected to serve four years, except that of the sovereign consul, whose term shall be as provided in the sovereign constitution and law."

Section 11 of the constitution is as follows:

"The term of office of all officers of the sovereign camp shall be four years, and until their successors are elected and qualified, excepting the first sovereign commander, the originator of "woodcraft," who shall hold his office until resignation or removal by a three-fourths vote of all the sovereign executive council."

But the question as to the representative form of government of this order arises because of the fact that the election of the first sovereign commander took place at the institution of the order, and he holds his position for life, unless removed as provided in section 11 of the constitution, and the further fact that throughout the entire plan of organization there appears to be given to the sovereign commander extraordinary powers—so great that he might seem to have autocratic powers—while the means provided for the removal of the sovereign commander because of an abuse of his power are inadequate, and render it practically impossible to secure his removal. This view of the case naturally raises the question which you submit to me.

Government is the aggregate of authorities which rules a society. While the expression, "representative form of government," is apparently well understood in a republic like ours, where the functions of government are exercised by officers elected by the people, yet it is difficult to find a definition of a representative form of government, either in the law books or lexicons. It can well be defined, however, as a form of government which requires those who administer the government to be selected by the members of the society governed.

If the form of government prescribed by the constitution and laws be in fact representative in its character, the form of government is not changed by the fact that one selected according to the prescribed rules has autocratic powers, or may be, to all intents and purposes, a dictator, or may usurp powers not warranted by the law. The question we have to do with is, what is the form of government? Is it representative? Not how, in its practical workings, it is administered.

I find, by article 5 of the articles of incorporation:

"The affairs of the corporation shall be conducted by an executive council composed of a board of directors of not less than seven nor more than thirteen, all of whom shall be members of the same camp or camps, and shall consist of the elective officers of the sovereign camp, which are as follows:" giving the names of the several officers, "with the sovereign physician, who shall be appointed by the sovereign commander and be confirmed by the executive council."

The scheme of the organization is, local camps wherever organized, and a head camp, which is composed of delegates elected by the local camps. The chief officer of the head camp is head consul; he is elected by the head convention. The head convention elects delegates to the sovereign camp. The sovereign camp meets biennially and elects the sovereign officers, who hold office for a term of four years, except the first sovereign commander, who holds practically during life. The constitution also provides that the sovereign camp shall enact laws for its own government, and for conducting the business of the order generally; shall have sole authority to levy the assessments upon the members of the order, and shall elect the executive council. The only feature in the whole scheme that appears to be not representative consists in the fact that the sovereign commander, as elected, holds the position during life or good behavior.

This is not sufficient, in my judgment, to justify the conclusion that the order has not a representative form of government. If at the foundation of the government of the United States, the constitution had provided that the first president should be George Washington, as the father of his country, and because of his distinguished service, should hold the office of president for life, and after that, the president be elected for four years, I do not think that fact would have determined the character of the government to be not representative.

It may be said that the members of the organization have not elected a sovereign commander or had any voice in it, because he was designated to such office in the articles of incorporation when they were formulated. The order, when formed, elected him, and the fact that many have come into the order since who have not had an opportunity to vote for him, or vote for the representatives that elected him, does not change the rule This is pre-eminently true because of the fact that a method is provided for removing him. The sovereign camp, which represents the membership, selects the sovereign council, and the sovereign council, by three-fourths vote, may remove him. If he has not been removed, it is because of the acquiescence of the membership of the order.

Again, the articles of incorporation, which must control, provide that they may be amended by a two-thirds vote of the sovereign camp. It is in the power of the representatives of the people to change the article which gives the commander a life lease of office.

I do not think that the representative character of a form of government is determined by the length of time which the chief executive, or president or commander may hold office. It is representative if the voice of the members of the society, through its representatives, is potent in the affairs of the government.

Applying every test which I can think of to the articles of incorporation and the system of government of the Woodmen of the World, my conclusion is that it is a representative form of government. I cannot, however, shut my eyes to several features of the system which make it easy for the chief executive of the order to perpetuate himself in office, and the difficulties of removing him in case he should abuse his power, and having vast power given him by the form of government prescribed, the case with which the chief executive *might* practically become the government. These features ought, I think, for the good of the order, to be removed, and a representative form of government organized which would be so plainly representative in its form that no doubt could arise upon the subject.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF EQUALIZATION—May adjourn from time to time.

DES MOINES, Iowa, April 19, 1897.

S. B. Reed, Esq., County Attorney, Waterloo, Iowa:

DEAR SIR—Your favor of the 16th inst. at hand, asking my opinion as to the proper construction to be placed upon the language in section 1310 of McClain's code, which provides: "Said board (the board of equalization) shall meet for that purpose in the office of the township or city clerk on the first Monday of April of each year, and continue from day to day until completed." You ask whether they must meet every twenty-four hours in order to come within the meaning of the words, "continue from day to day."

I think that the language used is directory. It prescribes a rule for their action, which should, as far as possible, be complied with in all particulars. It is almost universally held that a statute requiring anything to be done within a given time is directory. I know of no exceptions when it relates to the assessment and levy of taxes. Whenever the time within which it is to be done does not pertain to the essence of the thing to be done, it is held to be directory. This is in harmony with a number of decisions of our own supreme court.

Hill v. Wolfe, 28 Iowa, 577;
Easton v. Savery, 44 Iowa, 654.

In *Parish v. Ellwell*, 46 Iowa, 162, it is said: "It is a general rule of law that statutes as to the mode of procedure of public officers relating to time and manner, where there are no negative words restricting the action and nothing showing a different intent, are directory" This was approved in *Jordan v. Circuit Court*, 69 Iowa, 177.

A number of cases are collated in 23 Am. and Eng. Enc. of Law, 558.

The work of the board of equalization depends upon the completion of the work of the assessor. Circumstances frequently arise which make it impossible for the work to be done commencing on the first Monday of April, and continuing from day to day. It would be a senseless formality to require the board of equalization to meet every day and adjourn if it were

known by them that the work of the assessor would not be ready for them until a week or ten days afterward, and I do not think it would render their acts illegal to adjourn to a given time and complete the work when the assessor was ready to lay his assessment before them.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

MULCT LAW—Where consent has once been given by the voters of the county but subsequently revoked as to one township, that township can only gain consent anew by filing a new petition signed by the required number of the voters of the entire county.

DES MOINES, Iowa, April 19, 1897.

W. T. Chantland, Esq., County Attorney, Ft. Dodge, Iowa:

DEAR SIR—Your favor came duly to hand, but I was unable to reply thereto sooner because of the press of other matters. You make the following statement of facts, upon which you desire my opinion:

"This county is operating under the mulct law forbidding saloons to run. The year after the petition of consent was filed, a remonstrance was filed from Gowrie township. Now the people of Gowrie wish to permit saloons to be operated. What steps are necessary?"

As gathered from some statements in your letter, I assume that the remonstrance referred to is called in section 19 of chapter 16, acts of the Twenty fifth General Assembly, a petition, and the real inquiry is whether or not a written statement of consent shall be filed with the county auditor, signed by 65 per cent of all the legal voters who voted at the last preceding general election residing in such county, and outside the corporate limits of cities having a population of 5,000 and over.

The statute is not plain upon the manner of procedure when once proper statements of consent are filed and the same are revoked, as may be done under section 19 of the act.

In towns having less than 5,000 inhabitants, the provisions of section 18 must be complied with, and it is said, "the following additional condition must be complied with." This indicates clearly that in such towns having less than 5,000 inhabitants, all of the conditions set out in section 17 must be complied with, as well as the conditions set out in section 18 of the act.

Paragraph 1 of section 17 provides: "The person appearing to pay the tax shall file with the county auditor a certified copy of a resolution regularly adopted by the city council, consenting to such sales, and a written statement of consent of all the resident freeholders owning property within fifty feet of the premises wherein the business is carried on." The written statement of consent referred to in section 18 of the act, takes the place of the written statement of consent referred to in the first sentence of section 17 of the act. This leaves it indefinite as to when the written statement of consent of a city having over 5,000 inhabitants, or of the voters of the county for cities of less than 5,000, shall be filed.

But a written statement of consent, signed by 65 per cent of the legal voters of the county, does not have the effect to permit intoxicating liquors

to be sold in an incorporated town situated in a township in which less than a majority of the voters of the township, including the incorporated town, have signed the written statement of consent; nor shall it be considered as a bar in any incorporated town in which the majority of the voters did not sign such statement of consent. If, then, the majority of the voters of Gowrie, or the majority of the voters in the township in which Gowrie is situated, did not sign the statement of consent, a general statement signed by the voters of the county would not be effective to bar proceedings in case a saloon were started in the town of Gowrie.

If a majority of the voters of the town of Gowrie and township in which Gowrie is situated, did not sign such general statement of consent, and it was afterwards withdrawn in the manner provided for in section 19 of the act, the situation would be substantially the same as if the majority of the voters of said town and township had, in the first place, declined to sign the general statement of consent of the voters of the county, except it would indicate that a change of sentiment had turned against the saloon in said town or township.

Now I understand parties wish to take advantage of a statement of consent signed a year or more ago throughout the county at large, except as to Gowrie, and the township in which it is situated, and supplement the same by a new statement of consent signed within the town of Gowrie and the township in which it is situated.

I have grave doubts as to whether this can be done. The law contemplates that all statements of consent which are used as a bar to prosecutions shall be signed within thirty days prior to the filing of the statement of consent. (Section 20 of the act.) The former statement of consent, signed by the voters generally of the county, has been annulled and rendered wholly ineffective, so far as the town of Gowrie is concerned, by the action taken since the same was filed. I doubt very much whether it is permissible to now withdraw in effect the petition to revoke the consent, and patch up the old statement of consent which was rendered inoperative by filing a new statement of consent signed by persons within the town of Gowrie only, or the township in which it is situated. Your letter states: "It seems a very harsh rule, it is true, but I can see no other way out of it from the wording of the law as it stands." I agree with your statement and conclusion. It is possible a court might hold otherwise, but it is evident that one, to relieve himself from liability under the general statutes prohibiting intoxicating liquors, must perform all the conditions necessary to bring him within the exception, and make the bar operative in his favor. A general statement of consent, signed by 65 per cent of the voters of the county at the last election preceding the filing of the same, does not have the effect of permitting intoxicating liquors to be sold everywhere in the county. The exceptions are stated in section 18 of the act. Gowrie, because of what you call a remonstrance, is one of the places within the exceptions. It may be presumed that the change of sentiment against the saloon shown by the "remonstrance" from Gowrie, extended to other parts of the county. The voters who voted at the last general election throughout the county may have altogether a different view of the propriety of permitting the sale of intoxicating liquors in the county, or in Gowrie, from that held by the voters of two years ago. If a new statement of consent were signed

by a majority of the voters voting at the general election of 1896, in Gowrie and the township in which it is situated only, and this be treated as a part of the general statement of consent of the voters of the county, then this condition of affairs would exist. One part of the general statement of consent would be based upon the poll books of the election of 1896, and another part based upon the poll books of a previous election. The law does not contemplate such a condition of affairs. I do not think it can be lawfully done. Hence, I agree with you that the only way is to begin anew as if no statements of consent had ever been filed.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CLAIMS AGAINST THE STATE—Statute of limitations. What a claim for returning a fugitive from justice should show.

DES MOINES, Iowa, April 20, 1897.

Hon. G. L. Dobson, Secretary Executive Council:

DEAR SIR—Yours of the 13th inst. at hand, submitting to me in behalf of the executive council, three claims of William Desmond, of Clinton county, for expenses as agent of the state in returning fugitives from justice from other states, in the sums of $263.25, $262.50 and $111.50 respectively, two of them arising in February, 1891, and one in May, 1891. You ask my opinion as to whether the said claims are barred by the statute of limitations.

Section 4171 of McClain's code as amended by chapter 65, acts of the Seventeenth General Assembly, provides: "The accounts of the agents appointed for that purpose must be audited by the auditor of state and paid out of the state treasury." Section 4184 of the code of 1873, provides: "When, in the opinion of the governor, expenses incurred in the arrest of fugitives from justice should be paid by the state, such expenses shall be made out by items in detail and sworn to, and approved by him and at least two other members of the executive council, and when so approved, shall be audited and paid out of the general revenue of the state."

To audit means to settle or to adjust an account. The question arises, by whom shall it be audited, and wherein does the auditing differ from the approval by the governor and two other members of the executive council. These sections are somewhat difficult to harmonize, but I find nothing in section 4184 which dispenses with the duty imposed upon the auditor of state to audit the expenses.

Right in this connection, I notice the claims submitted to me do not contain statement of the expenses made out in detail and sworn to. It is very doubtful whether, taking sections 4171 and 4184 together, it was ever contemplated that the state should pay anything more than actual expenses. Section 4171 says: "The expenses to be allowed agents for returning fugitives from justice shall be the fees paid the officers of the state upon whose governor the requisition is made; and the agent shall not receive exceeding 10 cents per mile each way for all necessary travel of himself," etc. If the

claim, after approval by the governor and two other members of the executive council, shall be audited by the auditor, the next inquiry is, what is the auditor's duty with reference thereto?

Paragraph 5, of section 66, makes it the auditor's duty to settle all claims against the treasury, etc. Section 69 of the code says: "Every claim against the state shall be presented to the auditor for settlement within two years after it accrues, and if thereafter presented, the same shall not be audited. The provisions of section 4184, that claims of this character approved by the governor and two members of the executive council, shall be audited, does not necessarily repeal or come in conflict with section 69, and the provisions of section 69 would prevent the auditor from allowing the claim because the same was not presented within two years after it accrued.

I do not think the governor and two members of the executive council could suspend the operation of section 69 in a proper case. In regard to these claims submitted to me, however, there is no such a statement of the expenses in detail sworn to as would justify any action by the executive council.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—Where property fails to sell at tax sale for the amount of the taxes due, what may be done?

DES MOINES, Iowa, May 4, 1897.

J. M. Wilson, Esq., County Attorney, Centerville, Iowa:

DEAR SIR—Your favor of the 1st inst. at hand, in which you make a statement of the condition of certain town lots in the town of Mystic, on which the taxes have not been paid for some time, and you say that the treasurer has offered them for sale for the unpaid taxes and no bidders have appeared, and although the treasurer repeatedly tried to sell the same, he has been unable to do so, and you ask whether the board of supervisors can make a compromise to secure the payment of some portion of the tax in lieu of the whole amount, and convey to a land or town improvement company a valid title, subject only to the rights of the original owners to redeem upon the payment of the whole amount due.

In regard to this, I know of no provision which would authorize the board of supervisors making any compromise, strictly speaking. When property has been offered for sale for two or more years without a bidder, then it may be sold for less than the amount due thereon. It may be put up and sold to the highest bidder under the provisions of section 1361 of McClain's code. The board of supervisors is also authorized, under section 1327, when taxes have been unpaid for four years or more, to remit the interest and penalty upon the payment of the original amount of such tax.

Whatever is done in the way of receiving less than the full amount due thereon, must be done in accordance with the provisions of one of these two sections named.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COUNTY ATTORNEY- Duty to give advice and counsel to local board of health, and prosecute persons for violating the rules and orders of the board.

DES MOINES, Iowa, May 7, 1897.

B. B. Foster, Esq., County Attorney, Manson, Iowa:

DEAR SIR—Your favor of the 4th inst. at hand. I also received one from G. A. Cafferty, which I enclose to you with copy of my reply. You ask:

"Is or is not the county attorney required, as such, to advise and counsel various local boards of health in their respective counties, and is he required to attend to cases arising and growing out of the violations of the health laws and rules and regulations of the state and local boards of health?"

In regard to this, I will say that section 269 requires county attorneys to give opinions and advice to the board of supervisors and other civil officers of their respective counties. Local boards of health are civil officers, and as such are entitled to the counsel and advice of the county attorney.

Section 2559 makes it the duty of police officers, sheriffs, constables and all other officers of the state to enforce such rules and regulations so far as the efficiency and success of the board may depend upon their official co-operation.

Chapter 59 of the acts of the Twenty-fourth General Assembly makes it a criminal offense for any person to violate any such rules and regulations; this includes disobedience to the quarantine lawfully established.

Sections 268 and 271 of McClain's code make it the duty of the county attorney to attend and prosecute cases before a justice of the peace.

The proceedings, under chapter 59 of the acts of the Twenty-fourth General Assembly, to impose a fine should be brought by information, it being a criminal action.

I am of the opinion that it is the county attorney's duty to give advice and counsel to the local boards of health, and to prosecute persons who violate the rules of the boards of health and refuse to obey the order of quarantine.

Yours truly,

MILTON REMLEY,
Attorney-General.

WHO ARE PEDDLERS—Constitutionality of statute.

DES MOINES, Iowa, May 17, 1897.

Miles W. Newby, Esq., County Attorney, Sac City, Iowa:

DEAR SIR—Your favor of the 15th inst. at hand, asking my opinion upon the question, whether merchants who run wagons into the country, exchanging goods of different kinds for produce or money, are "peddlers" and required, under section 906 of the code, to pay a license.

I think it extremely doubtful whether such merchants could properly be called peddlers; they hardly come within the definition of the term, "peddlers." In addition to this: I have no question about section 906, as it stands at the present time, being unconstitutional. It discriminates between merchandise manufactured out of the state and within the state,

and comes clearly within the inhibition frequently announced by the supreme court of the United States. While our supreme court has not passed upon the question directly, yet in *City of Marshalltown v. Blum*, 58 Iowa, 184, it announced the principle. I have advised prosecutions brought under said section to be dismissed, or rather approved of their dismissal after the same had been done. I do not think the payment of such license could be enforced against your merchants.

Yours truly,

MILTON REMLEY,
Attorney-General.

SCHOOL—SUB-DIRECTOR OF A DISTRICT TOWNSHIP—Where the district fails to elect, the board of directors of the district township appoint.

DES MOINES, Iowa, May 18, 1897.

W. L. Smith, Esq., County Attorney, Humboldt, Iowa:

DEAR SIR—Your favor of recent date at hand in which you state the following facts:

One Miles had been, for several years, elected as a sub-director of a district township, and hence a member of the board of directors of said township; his term expired on the third Monday of March A. D., 1897. There was a failure to elect his successor at the meeting on the first Monday of March; Miles took the oath of office as a hold-over—in other words, qualified anew—and claims to hold his office by virtue thereof. At the meeting of the board of directors of the district township the board appointed one Haney to the office of sub-director over said district, who took the oath of office and entered upon the discharge of the duties.

You ask, which one, Miles or Haney is entitled to the office?

Section 784 of the code of 1873 provides: "Every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless the statute under which he is elected or appointed expressly declares the contrary."

The law, however, under which the sub-director was elected, is amended by chapter 19 of the acts of the Twenty-fourth General Assembly, providing that in case of failure to qualify or the district fails to elect, the board shall fill the office by appointment. This amendment of the law in relation to the office of sub-director expressly declares that the incumbent of the office of sub-director shall not hold over until his successor is elected and qualified. If the incumbent could hold over by qualifying anew in case the district failed to elect, the board would not have the power to fill the office by appointment, but chapter 19 of the acts of the Twenty-fourth General Assembly expressly provides that if the district fails to elect the board shall fill the office by appointment. This being the later expression of the legislative will, prevails. Any previous statute which conflicts therewith must be considered as repealed or amended. The board having been expressly given the power to fill the office under said chapter and having done so the conclusion is irresistible that Haney is the legal incumbent of the office. It matters not that the law prior to the enactment of chapter 19 of the acts of the Twenty-fourth General Assembly may have been different, we are bound by the law as it is at the present time.

In my opinion, the board was authorized, because of the failure of the district to elect a sub-director, to fill the office by appointment.

You ask also, whether, under the provisions of sections 1791, 3966 and 3967 of the code of 1873, Miles could be indicted or could be convicted of a misdemeanor?

If Miles, in good faith, believed that he was entitled to hold the office, I do not think he could be convicted. Nothing in your statement of facts indicates to my mind that he acted otherwise than in good faith. If he believed that he was entitled to hold the office and he could readily think so if he overlooked chapter 19 of the acts of the Twenty-fourth General Assembly, I do not think he could be made criminally liable for an error in construing the statute. His act must be wilful to make it a criminal misdemeanor.

Yours truly,

MILTON REMLEY,
Attorney-General.

CRIMINAL LAW—INDICTMENT FOR KEEPING A NUISANCE—DUPLICITY.

DES MOINES, Iowa, May 21, 1897.

D. W. Telford, Esq., County Attorney, Mason City, Iowa:

DEAR SIR—Your favor of the 19th inst. at hand, in which you ask my opinion as to whether a certain indictment for keeping a nuisance is bad for duplicity. The charging part is as follows:

"Did unlawfully establish, keep, use, maintain and continue a certain building or place in the city of Mason City, Cerro Gordo county, state of Iowa, for the purpose and with the intention of unlawfully, keeping, selling and giving away in said building or place aforesaid in said county and state, intoxicating liquors to-wit: whisky, beer, gin, brandy and other intoxicating liquors to the grand jury unknown, and did then and there at said building or place in said county and state unlawfully keep, sell and give away the said intoxicating liquors contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state of Iowa."

The indictment is under section 1543 of the code of 1873 as amended. The language of the statute is: "Whoever shall erect or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections shall be deemed to keep a nuisance."

The sections referred to prohibit the manufacture of intoxicating liquors; the selling of intoxicating liquors without a permit; the selling of any mixture of intoxicating liquors, and the keeping with intent to sell.

It has been frequently held that an indictment charging the use of any building, erection or place for any or all of the purposes above stated, was not bad for duplicity.

State v. Bauman, 20 Iowa, 497;
State v. Becker, 20 Iowa, 438.

In *State v. Kreig*, 13 Iowa, 462, it was held that the description of the place of a nuisance in this language was sufficient: "A certain building and place." See *State v. Freeman*, 27 Iowa, 333.

In *State v. Walch*, 74 Iowa, 610, the court held that a description of the building was not necessary, the charge in that case being: "that the defendant did use a certain building known as a saloon, for the purpose of selling therein," etc., adding that a more particular description would be necessary in case the state wished to procure an order to abate.

In section 1543, as amended, it is declared a nuisance to *use* any building, erection or place. The indictment in question uses the language of the statute in describing the building or place except there is left out the word, "erection," in the indictment.

The use of the disjunctive-conjunction, "or," negatives the idea that two places were used; and, if, as held by the supreme court, the use of the copulative conjunction, "and," as in *State v. Freeman*, and *State v. Kreig*, above cited, does not render the indictment bad for duplicity, certainly there is greater reason for saying an indictment charging the use of a "building or place" is not bad for duplicity.

State v. Finney, 68 N. W. R., 568, while not directly in point, is very nearly so, the principle as stated derived therefrom should control in this case. Certainly the defendant in this case could understand the exact nature of the charge against him; he was deprived of no substantial right by being tried upon such an indictment.

Yours truly,

MILTON REMLEY,
Attorney-General.

NOTE.—The above indictment was afterwards held good in *State v. Dixon*, decided by the supreme court April 6, 1898.

INSURANCE—Iowa's "retaliatory law," enforcing comity between the states.

IOWA CITY, Iowa, June 3, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—Your favor of the 2d inst. at hand, in which you ask my opinion upon:

"Whether or not, because of the decision expressed in the letter of Insurance Commissioner Dearth, of Minnesota, dated March 15, 1897, as follows: 'I consider it my duty to refuse admission to this state to the Bankers' Life association, of Iowa, whose application is now on file; and also all other associations or societies, organized under the laws of Iowa governing this class of societies, which may in the future make application for admission to Minnesota,' I could, under the retaliatory laws of this state, on April 1, 1897, issue to similar associations from Minnesota certificates of authority to transact their appropriate business in this state?

"Also, whether or not, because of the explanation contained in Commissioner Dearth's letter of May 31st, of his letter of March 15th, to the effect that it was not the intention of that decision, expressed in the letter of March 31st, that the decision expressed in his letter of May 15th should apply to the associations at that time having certificates of authority to transact

business in Minnesota for the current year, but it was only to apply to similar associations from Iowa that should in the future — that is, after March 15, 1897 — apply for admission to Minnesota to transact insurance business, I should now license the associations from Minnesota which were as of April 1, 1897, refused a certificate of authority to transact business in this state for the current year, and refuse a license to all similar associations from Minnesota that in the future apply for admission to transact their appropriate business in this state?"

You also enclose me copies of the letters of Commissioner Dearth referred to.

In the letter of Commissioner Dearth of March 15, 1897, are found other passages equally as strong as the one you quote, and if the language is to be understood in its ordinary acceptation, it announces to you the ruling of the insurance department of Minnesota to admit no more insurance companies organized under the laws of Iowa governing this class of societies to do business in the state of Minnesota.

In section 13, chapter 65, acts of the Twenty-first General Assembly, we find the following language: "Upon complying with the provisions of this section, and upon payment of $25, the auditor shall issue to such foreign corporations or associations so complying, a certificate of authority to do business in this state, provided the same right is extended by the state in which said corporation is organized to similar corporations or associations organized in this state."

This proviso is, in effect, a limitation on the power of the auditor to issue such certificate to any similar corporation or association organized in another state, which does not extend the same privilege to corporations or associations organized under the laws of this state. Therefore, when Minnesota, either by statute or by the ruling of a proper officer of the state, denies to insurance companies organized in this state the right to do business in the state of Minnesota, the auditor is without power to issue a certificate authorizing similar companies organized in Minnesota to do business in this state.

The provision of the statute above quoted does not leave it to the discretion of the auditor as to what companies from another state shall be permitted to do business in this state when the law as enforced by the appropriate department of another state excludes Iowa companies from such state.

I notice from the correspondence that the Bankers' Life has for some time been excluded from doing business in the state of Minnesota, and it is proposed by Commissioner Dearth to permit the Iowa companies, which have already received certificates to do business in Minnesota, to continue such business if you, as auditor of Iowa, will permit certain companies from Minnesota to do business in the state of Iowa. I do not so understand the law. The terms in the language quoted, "similar corporations or associations," are general. It means all of that class, not one or two or three which may be picked out by the auditor or commissioner of insurance of the two states. I am sure the idea never entered into the legislative mind that under the provisions of this statute the auditor of this state and the insurance commissioner of Minnesota might agree upon what companies organized in their respective states might do business in the territory of the other.

Having received official notice from the commissioner of insurance of Minnesota that thereafter the Bankers' Life of Iowa, and all other associations and societies organized under the laws of Iowa governing this class of societies, would be refused admission to do business in the state of Minnesota, I am well satisfied that you, after such notification, were without authority to issue certificates of authority to transact business in this state to any similar associations organized under the laws of Minnesota.

In regard to your second inquiry as to what is your duty, in view of the explanation given of the order of March 15th, contained in Commissioner Dearth's letter of May 31st, I do not know that I need to say anything further. His explanation amounts to a proposition that if certificates are issued to the three Minnesota companies applying therefor to do business in this state, then the certificates heretofore granted by the commissioner of Minnesota to the Iowa companies will not be revoked, but all other Iowa companies which have not yet obtained certificates will not be permitted to do business in the state of Minnesota.

I am very clear upon this proposition that the auditor of Iowa is given no authority under the law to discriminate between Iowa companies. If any company organized under the laws of this state is unjustly refused admission into the state of Minnesota, then the power of the auditor of Iowa to grant certificates to do business in this state to any and all Minnesota companies is entirely suspended. What is called the "retaliatory law" of Iowa is made to enforce comity due between sister states, and if a sister state refuses to admit one Iowa company to do business in such state then it is the duty of the auditor of Iowa to refuse to permit any and all similar organizations organized under the laws of such state to do business in the state of Iowa. The comity due from one state to the other should be full and complete or else none at all.

In my opinion, whenever the authorities of Minnesota refuse to authorize a company organized under the laws of this state to do business in the state of Minnesota, then you have no authority, as auditor, to issue certificates authorizing any company of Minnesota of the same class and order to do business in this state. It would be a monstrous law that would permit the officers in charge of the insurance departments of two states to get together and designate two or three companies from each state which should be authorized to do business in the other state while all other companies of the same class and kind were excluded. Such a law would be subject to abuse, and would open the door to oppression and favoritism which wise legislation never places in the hands of any of the officers of the law. The state of Iowa is just as much bound by considerations of honor and the dignity of the state to protect one of the companies organized under the laws of the state as it is to protect a dozen, hence the limitation on the power of the auditor contained in the language quoted above from section 13 of chapter 65 of the acts of the Twenty-first General Assembly.

I am of the opinion that so long as the laws of Minnesota or the proper officers claiming to act under such laws refuse to grant certificates permitting any Iowa company to do business in the state of Minnesota, that you, as auditor, have no authority to grant certificates to do business in this state to any similar organizations or societies from Minnesota.

Yours truly,

MILTON REMLEY,
Attorney-General.

COUNTY ATTORNEYS—COMPENSATION.

IOWA CITY, Iowa, June 4, 1897.

A. W. Enoch, Esq., County Attorney, Ottumwa, Iowa:

DEAR SIR—Your favor of the 2d inst. at hand, in which you ask my opinion upon two questions, as follows:

First.—"Is a county attorney entitled to compensation for the collection of mulct tax due the state and county on a mulct tax bond when the same is placed in his hands by the county treasurer for collection; that is to say, would a county attorney be legally entitled to a reasonable amount allowed by the board of supervisors on such a claim filed?

Second.—"Is a county attorney entitled to reasonable compensation in the collection of a tax claim collected by him in another state where he sends the same for collection, and would it be legal if the board of supervisors allowed him say 10 per cent."

In regard to this I will say that the county attorney is entitled to no compensation for performing the duties of his office except such as are provided by law. If, then, the services referred to in your two questions are required under the law to be rendered by you by virtue of your office, then you would not be entitled to extra compensation therefor, unless there is some provision of the statute authorizing the payment of such extra compensation.

Section 2 of chapter 73, acts of the Twenty-first General Assembly (section 268 of McClain's code) defines the duties of the county attorney. It is his duty to appear for the state or county in all cases and proceedings in courts in his county to which the state or county is a party; also in all cases in the supreme court to which the county is a party. It is also his duty to collect and pay over to the person or officer entitled thereto, all money due the state or county, so far as he is able to collect the same.

If it becomes necessary to bring an action on a mulct tax bond, to recover the tax, I think it would come within the class of duties referred to in said section.

In regard to the ordinary taxes, however, which are due the state or county, they, under other sections of the code, are to be collected by the county treasurer, and I would make a distinction between the ordinary tax which must be collected by the treasurer, and a claim which must be collected by suit upon a bond. I doubt very much whether services rendered in collecting the ordinary taxes which involve no suit in the county where the county attorney resides, are a part of the duties of the county attorney. The county treasurer could not turn over the tax list to the county attorney and say that it was his duty under the section above quoted to collect the same because of the general language of said section, and he shall collect and pay over to the person entitled thereto, the money due the state or county. There might possibly be cases where a bond might be given to secure part of the ordinary taxes. If suit should be brought in the county upon such bond, I would not question that it is the county attorney's duty to bring such action to recover even the amount of ordinary taxes in such a case.

Under the 11th section of chapter 73, above referred to (McClain's code, section 277), we find that in addition to the salary of the county attorney, he is entitled to receive for the collection of all fines collected and school fund

mortgages foreclosed, the same fees as are now allowed to attorneys for suits on written instruments, etc. School fund mortgages usually provide for the payment of attorney's fees. This provision entitles the county attorney to receive such fees, or a like amount from the county treasury in case no fees can be taxed, in addition to his salary. He is also allowed, for the collection of fines, a similar sum. This is for the purpose of making an additional incentive for the collection of all fines.

The collection of a mulct tax upon a bond is not either a school fund mortgage nor is it a fine, and does not seem to come within the class of services for which the county attorney is entitled to extra compensation, and I think your first inquiry should be answered in the negative.

It goes without saying that if the county attorney is not legally entitled to extra compensation, that the board of supervisors is not authorized to pay the same.

In regard to the second inquiry, I do not know just how a tax claim may be collected in another state. If it is a claim for ordinary taxes, and if peculiar circumstances require you to go to another state in order to secure the same, involving labor not strictly within the line of your duty, I can see no reasonable objection to the board of supervisors allowing a fair compensation. The treasurer might as well have employed another attorney: *i. e.*, he is under no obligation to place the matter in your hands, and you were under no legal obligation to attend to it, and if these things are true, as I assume they are from the statement, then it would appear to me just and right for the supervisors to allow what the services were reasonably worth.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

REGISTERED PHARMACIST—Permit to buy and sell intoxicating liquors—Forfeits same by becoming citizen of another state.

IOWA CITY, Iowa, June 8, 1897.

Geo. A. McIntyre, Esq., County Attorney, Shell Rock, Iowa:

DEAR SIR—Your favor of the 5th inst. at hand, in which you ask my opinion upon the following question:

"A registered pharmacist holding a permit to buy and sell intoxicating liquors, sells out his business, removes from the state and is absent from the state three or four years. He comes back into the state and locates in the same town and commences to sell liquors, claiming he is protected by his old permit. During his absence from the state he became a citizen of another state. Does the loss of citizenship in Iowa forfeit his permit?"

Section 4, chapter 35, laws of the Twenty-third General Assembly, requires the applicant for a permit to state in his petition therefor to the court, ' The applicant's name, the place of residence, in what business he is then engaged, in what business he has been engaged for two years previous to filing the petition, the place, particularly describing it, where the business of buying and selling the liquor is to be conducted, that he is a citizen of the United States and of the state of Iowa, that he is a registered

pharmacist, and now is and for the last six months has been lawfully conducting a pharmacy in the town or township where he proposes to sell intoxicating liquors under the permit applied for," etc.

These statements in the petition may be said to show the qualifications of the applicant to obtain such permit. Section 7 of said chapter states: "The permits granted under this act shall be deemed trusts reposed in the recipients thereof, and may be revoked upon sufficient showing by the order of the court or judge thereof." The remainder of the section provides a method of revoking such permits.

The revocation of a permit is only necessary when the recipient of the permit is unwilling to surrender the same, and a revocation becomes unnecesary when the holder voluntarily surrenders the permit.

If the holder of a permit does any act which in law amounts to a surrender of the permit, it must thereafter be treated as void. It appears plain to me that if the holder of such permit does any act which changes his situation or condition so that he is not qualified within the terms of section 4 of said chapter to hold such permit, he must be deemed to have surrendered the same. For instance, if he ceases to be a citizen of the United States or of the state of Iowa, the trust reposed in him while he was a citizen is in effect surrendered and rescinded by the holder of such permit. The trust reposed by the state in him ceases from the time that he removes from the state, and he, by his own act, has rescinded the trust.

I think any act of the permit holder which disqualifies him from receiving the permit, disqualifies him from holding the same and renders the said permit void. The permit terminates by operation of law at the time the holder thereof, by his own act, renders himself incapable of holding the same.

I do not think the party referred to can, upon his return to the state, legally engage in the selling of intoxicating liquors without obtaining a new permit in the manner required by law.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

THE IOWA TRANS-MISSISSIPPI AND INTERNATIONAL EXPOSITION COMMISSION—Is not authorized to appoint one of its members as secretary and pay him a salary—The commissioners are entitled to their necessary cash expenses while engaged in discharging their duties.

IOWA CITY, Iowa, June 9, 1897.

Hon. Geo. L. Dobson, Secretary of State and Ex-officio Secretary of the Executive Council:

DEAR SIR—Your favor of the 7th inst. at hand, in which you submit, on behalf of the executive council, for my opinion, two questions involving the construction of sections 1 and 2 of chapter 149 of the acts of the Twenty-sixth General Assembly, making an appropriation for the Iowa exhibit at the Trans-Mississippi and International exposition to be held in Omaha in the year 1898. These questions may be summarized as follows:

First.—"Is the said commission authorized to appoint one of its members as secretary and pay him a salary for his services as secretary?

Second.—"The statute provides the commission herein created shall serve without compensation; are the commissioners entitled to receive their necessary expenses while engaged in the discharge of their duties?"

The purpose of the said act is stated in the preamble, and the appropriation is made to the end "that the agricultural, mineral, mechanical, industrial and educational, and every resource and advantage of the state of Iowa shall be creditably represented in such exposition." The commission as appointed consists of one member from each congressional district, and this commission "shall have full power to devise and execute plans for the said exhibit herein contemplated, and take charge of the same and dispose of the appropriations. It may appoint such officers as it, in its judgment, may deem necessary for the carrying out of the purposes of this act," etc. The act authorizes the commission to choose one of its members to act as treasurer.

While the act is silent upon the appointment of any member of the commission to any office created, this silence does not argue that the legislature intended the commission should have power to appoint its own members to the offices which it created. It must be presumed that the legislature had in mind the principles of law which obtain everywhere relating to such matters. It is a rule of universal acceptance that agents, public or private, can have no dealings with themselves in matters in which a personal interest adverse to the interest of the principal does, or might, enter.

It is stated in *People v. Township Board of Overyssel*, 11 Mich., 222: "All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own. And, a greater necessity exists than in private life for removing from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed are stronger, and the risk of detection and exposure is less. A judge cannot hear and decide his own case, or one in which he is personally interested. He may decide it conscientiously and in accordance with law. But that is not enough. The law will not permit him to reap a personal advantage from an official act performed in favor of himself."

Justice Christiancy, in the same case, says: "As individuals, in taking the contract, they must naturally (and while human nature remains unchanged, we may almost say, necessarily) seek to adopt the plan, and to make the terms most conducive to their own interests. The public were entitled to their best judgment, unbiased by their private interests, and by accepting the office they became bound to exercise such judgment, and to use their best exertions for the public good, regardless of their own. They had no right, while they continued in office, to place themselves in a position where their own interests would be hostile to those of the public."

The law will not allow an agent or a trustee to place himself in such an attitude toward his principal *cestui que trust* as to have his interest conflict with his duty. Greenhood Public Policy, 302.

A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal and diligence, and primarily for the benefit of the public. It is also the duty of a public officer having an appointing power to make the best available appointment, and, in such a case, the

right of appointment is not in any sense the property of the officer possessing the appointing power. It is the policy of the law to secure the utmost freedom from personal interest or undue influences in the selection of public officers, whether elective or appointive. *Hornung v. State*, 19 N. E. Rep., 151; 116 Ind., 458.

In *The City of Ft. Wayne v. Rosenthal*, 75 Ind., 156, it was held that the statute prohibiting a public officer, having appointing power, from appointing himself to office, is but declaratory of the common law. Therefore, where the common law is in force the prohibition is in force in the absence of a statute.

The principles stated above are well recognized by many other cases than those referred to; among them, see *State v. Hoyt*, 2 Arlington, 246; *Com. v. Doughlas*, 1 Binney, 77; *State v. Taylor*, 12 Ohio, 136; *Atlantic N. C. R. Co. v. Coles*, 69 N. C , 57. Dillon, Greenhood, Story and Cooley announce the same doctrine.

The commissioners appointed under this statute are to serve without compensation. They are the agents of the state. They have full and complete control over the arrangement of the exhibit. They are trustees for the expenditure of the money to the best possible advantage. They are authorized to appoint others under them. Their appointment should be made out of consideration of the public service, and it would be clearly against public policy and the law well recognized, for them to appoint one of their members as secretary and fix the compensation for such services If they can appoint one of their number secretary at a salary, they have like power to create an office for each of the other commissioners, with a salary attached, and thus the whole appropriation could be spent in paying salaries to themselves. Of course they would not do so, but it illustrates the evil the law I have stated intends to prevent.

In regard to the second question: the commission, having entire control of the expenditure of the money, is authorized to do such things as will effectuate the end and object of the statute. The prohibition against their receiving compensation does not prohibit them from paying the necessary cash expenses incurred in the discharge of their respective duties. Such expenses can in no sense be considered compensation. They inure in no way to the personal advantage of the members. We cannot presume that the legislature intended that they should not only serve the state without pay, but also pay from their private funds and entail upon themselves a personal expense for travel, hotel bills, etc., which must necessarily be incurred in discharging the duties and trusts imposed upon them. I see no reason why they should not be allowed their reasonable necessary expenses incurred in the discharge of their respective duties.

Yours truly,

MILTON REMLEY,
Attorney-General.

FEES—What a justice of the peace is entitled to for making out a long transcript.

DES MOINES, Iowa, June 10, 1897.

A. B. Lovejoy, Esq., County Attorney, Osage, Iowa:

DEAR SIR—Your favor of the 7th inst. at hand, in which you call my attention to sections 5080 and 5096 of McClain's code, and ask my opinion as to whether a justice of the peace who has a prolonged transcript to prepare in a case appealed from his court, is entitle to receive for making out such transcript at the rate of 10 cents per hundred words, or whether he is limited to the amount named in section 5080 of McClain's code.

In regard to this I will say it is well recognized that an officer is entitled to no greater compensation than that provided by law. It is made a misdemeanor for him to take more. (Section 5120, McClain's code.) The provision of section 5096 of McClain's code, allowing 10 cents for every hundred words of the transcript, is, by the terms of said section, applicable only to cases where no other fees have been fixed therefor. The fee, however, for making out a transcript by a justice is otherwise fixed in section 5080 of McClain's code. The fee there fixed is 50 cents, and this, in my judgment, is all that he is entitled to receive.

It may be grossly inadequate in a case such as you refer to, and undoubtedly is, but in many cases it more than pays the justice for the labor actually spent in making it out. Such transcripts are unusual; at any rate, the legislature has thought that 50 cents for the average of the transcripts was a suitable provision for the compensation of the justice.

The law being so written, it cannot be changed by construction to cover exceptional cases. Yours truly,

MILTON REMLEY,
Attorney-General.

SCHOOLS—Division of assets and liabilities between two boards where two school districts have been formed from one.

DES MOINES, Iowa, June 14, 1897.

Hon. Henry Sabin, Superintendent of Public Instruction, Des Moines, Iowa:

DEAR SIR—Your favor came duly to hand, requesting my opinion upon the following question:

"When two boards have made a division of assets and liabilities, under section 1715 of the code, will a person claiming the settlement to be inequitable and insufficient as to the amount agreed upon, have the right to appeal to the county superintendent from such agreement; that is, from such joint action of the boards taken as provided in section 1715, will an appeal lie?"

The section in question provides the respective boards shall make an equitable division of the then existing assets and liabilities between the old and the new districts; it also provides that in case of the failure to agree, the matter may be decided by arbitrators chosen by the parties in interest.

It has been held by our supreme court that under this section the boards of directors become special tribunals for the determination of the respective rights of the parties.

It is said in *Dist. Twp. of Viola v. Dist. Twp. of Audubon*, 45 Iowa, 104: "A special tribunal having been created by statute, clothed with power to make a division of assets between the old and new organizations, the jurisdiction of such tribunal was exclusive during its existence. * * * It is eminently just that the division should be made by the local tribunal appointed by law. It must be an equitable division in view of all the circumstances shown, and what is equitable is for such tribunal to determine." And it is held that the tribunal thus constituted has exclusive jurisdiction.

It will be noticed that in case the respective boards cannot agree, arbitrators chosen constitute the tribunal for the determination of the question which the boards were unable to agree upon.

It is held in *Dist. Twp of Little Sioux v. Ind. Dist. of Little Sioux*, 60 Iowa, 141, that the district court has jurisdiction to render a judgment upon the award of the arbitrators thus chosen.

In *Dist Twp. of Algona v. Dist. Twp. of Lott's Creek*, 54 Iowa, 286, it is said in the opinion: "Section 1829 of the code applies only to the case of a person aggrieved by a decision or order of the district board of directors; it has no reference to an appeal from an award of arbitrators."

The action of the special tribunal, consisting of the several boards of directors, is not the action or order of a board of directors, but an order of a special court for the determination of the rights of the several new districts with reference to the assets and liabilities of the old district of which they formed a part. The statute does not give an appeal from such tribunal.

There is something said in the case of *Ind. Dist. of Lowell v. Ind. Dist. of Duser*, 45 Iowa, 391, which is misleading. The decision in that case involved the construction of section 1820 of the code as it then existed. Under the provisions of said section 1820, upon the division of the district township into independent districts, the old board was authorized to make an equitable division of the assets and liabilities between the new independent districts. In that case the division of such assets and liabilities was made by the old board of directors, and in the argument by the court it is said that an appeal would lie from such action of the board of directors. But whether an appeal would lie from the action of the special tribunal created by section 1715, was not involved in that case.

It is doubtful whether the language of the court which is used to support the contention that an appeal does lie, was necessary to the decision of the case, or is merely dictum. But be this as it may, I will say that section 1820 was repealed by the Sixteenth General Assembly, chapter 155, and the section enacted in lieu thereof does not relate to a case of the kind contemplated in section 1715.

Another difficulty arises, even if a right of appeal had been given from the special tribunal created by section 1715. The parties in interest are the respective independent districts concerned. The board of directors of such districts represent fully all the interests of such districts. The independent district would be the party to appeal if the right of appeal were given. A private citizen may not assume control of the business of the independent district and arrogate to himself the right to conduct litigation for the said district. If there can be an aggrieved party having the right to appeal, it is the independent district and not a private citizen. The

respective boards represent all of the interests of their districts. They are vested by law with certain duties. They could not abdicate any of their powers and functions of their office in favor of a private citizen, nor could he assume them.

My conclusion is that a right of appeal does not exist, and a person claiming the settlement to be inequitable has no right of appeal to the county superintendent. If the independent districts cannot agree, then arbitrators must be chosen, and the action of the arbitrators, in case it is fraudulent, unjust or oppressive, or based upon errors of law, may be controlled or set aside by the courts of equity. See *Dist. Twp. of Algona v. Dist. Twp. of Lott's Creek*, 54 Iowa, 286, above cited.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

SCHOOL FUND—Loss from loans made by a county—Who must bear the loss.

DES MOINES, Iowa, June 15, 1897.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Your favor came duly to hand, enclosing a letter from Mr. J. W. Hallam, county attorney of Woodbury county, and you ask my opinion upon the question presented by Mr. Hallam. Mr. Hallam also wrote to me and requested my opinion upon the same point. The question asked is as follows:

"Among the loans in favor of the permanent school fund made on real estate in this county, are three or four secured upon land which was, at the time the loans were made, rich and valuable land, and apparently in no danger whatever from injury from the Missouri river, but the channel of the river at that particular place has, within the last year or two, changed its location by a mile or two, and has swallowed up all of the land in question.

"Will you kindly let us know if, in your opinion, Woodbury county can take advantage of section 3016 of McClain's code in regard to the loss above referred to, and thereby save the county from a heavy loss?"

In regard to this, permit me to say that chapter 148 of the laws of the Ninth General Assembly made radical changes in the management of the permanent school fund, and made the counties liable for the losses upon loans of such funds made in such county after the passage of the act. Section 3016 of McClain's code is section 1 of the act in question as it was amended by chapter 68 of the Fourteenth General Assembly. The Fourteenth General Assembly, however, enacted the law that now appears as sections 3042 and 3043 of McClain's code. Ten years intervened between the enactment of section 3016 and sections 3042 and 3043. Chapter 148 of the Ninth General Assembly made the county liable for all losses upon the loan of such fund to the county, but it also provided a means by which it may discharge itself of liability in certain cases. These several sections were re-enacted into the code of 1873, and except in regard to the rate of interest that may be charged, have been unchanged since that time.

The liability of counties for losses upon loans of the permanent school fund has attached to all loans made since the enactment of chapter 148, laws of 1862.

The county may discharge itself from liability for losses upon such loans made prior to January 1, 1874, by showing that the loss was not incurred by reason of any default of its officers, or by taking insufficient or imperfect securities. The language of the section authorizing the county to discharge itself from liability is as follows: "But any county may discharge itself from liability in any case wherein its liability is not made absolute by sections 1881 and 1882 of this chapter." (McClain's code, 3042, 3043.) The county, then, by express language of the statute, might discharge itself from liability in any case where sections 1881 and 1882 have not made the county absolutely liable.

The absolute liability of the county for losses upon loans referred to in sections 1881 and 1882 (McClain's code, 3042, 3043), is upon the loans made after January 1, 1874. These sections provide that if there is any loss made in the foreclosure, it shall be borne by the county, and if there are any gains realized upon the foreclosure and sale of the mortgaged property, they shall inure to the benefit of the county.

The county also received for its own use, the interest upon school fund loans in excess of 8 per cent, 10 per cent being the interest paid by the borrower. Subsequent legislation requires the school fund to be loaned at 6 per cent, 1 per cent of which goes to the county fund.

In other words, the counties are liable, by these acts, upon all loans made subsequent to January 1, 1874, absolutely, for all losses to the permanent school fund. They guarantee all loans made by them, and are charged with interest accruing on such loans at the rate of 5 per cent. The counties receive only 1 per cent at the present time, formerly 2 per cent, as a consideration for their guaranty.

The question whether or not Woodbury county is entitled to discharge itself from liability for the losses referred to in Mr. Hallam's letter, depends upon the time when such loans were made. If the losses are upon loans made prior to 1874, the county would be authorized to make a showing and be discharged from liability in a proper case. If, however, the losses have occurred on loans made since January 1, 1874, the loss must, in my opinion, be borne by the county. Yours respectfully,

MILTON REMLEY,
Attorney-General.

ACCIDENT INSURANCE—Indemnity to be paid when accident does not cause death—Such companies are authorized by the Iowa law.

DES MOINES, Iowa, June 15, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—Your favor of the 9th inst. at hand, asking my opinion as to whether or not, under chapter 65, laws of 1886, there can be operated an insurance association which provides only weekly benefits for disability resulting from accident to the member, such disability benefits to be paid as a weekly indemnity—it being the intent and purpose of the association to provide no indemnity in the event of the death of a member as the result of an accident?

Section 1 of the act referred to expressly recognizes the right to organize such associations for the purpose of insuring the lives of individuals, or of furnishing benefits to the widows, heirs, representatives and legatees of deceased members, or of paying endowments or accident indemnity. It is lawful, under this section, to organize an association for any one of the purposes named.

So again, in section 20 of the act, the right to organize a company to furnish indemnity in case of disability resulting from accident, is recognized. I find no intimation anywhere in the chapter that indemnity for disability because of accident may not be the business of a company, without also furnishing indemnity in case of death. Any doubt upon this question must have arisen because of the following clause in section 4: "And they (meaning 'each association'), must have actual applications upon at least 250 individual lives for at least $1,000 each." "Lives" is the plural of "life." "Life" is derived from the old Anglo-Saxon word which means "body." One of the definitions given of life is: "the person." It is equivalent to saying there must be 250 applications for policies, or the application of 250 persons.

We would not be warranted, because of the use of the word, "lives," in the said clause, to say that no insurance company could be organized to furnish indemnity against disability resulting from accident unless it had 250 applications for indemnity against the death of the applicants. It would be a strained construction of the statute so to hold, and would be giving to the word, "lives," a meaning not warranted by usage.

In my opinion, the statute contemplates that mutual benefit associations may be organized to provide benefits for disabilities resulting from accident, and are not required, as a condition of so organizing, to furnish indemnity resulting from death. Yours truly,

MILTON REMLEY,
Attorney-General.

INSURANCE—A company organized to insure against the loss of bicycles by theft is an insurance company and should comply with the insurance laws.

DES MOINES, Iowa, June 15, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—Yours of the 9th inst. at hand, in which you enclose some circulars of a bicycle protective company, in which you ask my opinion as to:

"Whether or not, a corporation that provides for the registration of bicycles and that provides, in the event of the bicycle being stolen, to provide the member an exact duplicate of the stolen bicycle, to remain in his or her possession until the stolen bicycle is restored in as good condition as when stolen, and if not restored within twenty days from date of proofs of loss, said new duplicate to become the property of such member, is, within the meaning of the insurance laws of this state, an insurance company. If such a corporation should pay to the member the value of the bicycle

stolen, instead of replacing it with an exact duplicate, would that method of transacting the business make of the corporation an insurance company, amenable to the insurance laws of this state?"

Insurance is defined to be a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. (May on Insurance, 1.) Phillips on Insurance defines it to be a contract whereby, for a stipulated consideration, one party undertakes to indemnify another party against certain risks.

Again, insurance in its most general sense, is a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect of a specified subject by specified peril.

In my opinion, it matters not how the indemnity is furnished; whether it be paid in money, or by making good the loss by furnishing a new article. The contract which you enclose is, in my judgment, a contract of insurance, and the company whose business it is to furnish such indemnity is an insurance company and is amenable to the laws of the state of Iowa The fact that it has not the word, "insurance," in its name, nor in its contract of indemnity does not change the effect of the contract. There is no provision of our statute authorizing that class of insurance to be done within the state. Section 1132 of the code of 1873 provides the five kinds of insurance that are authorized. The insurance of bicycles against theft is not one of the kinds of insurance named. The fifth paragraph of said section authorizes companies to "insure horses, cattle and other live stock against loss or damage by accident or theft, or any unknown or contingent event whatever," but nowhere does it provide that other property may be insured against theft.

I think it very plain that the company in question should be required to comply with the laws of the state before it is permitted to do business in the state.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—Where personal property should be assessed.

DES MOINES, Iowa, June 15, 1897.

Geo. C. Olmstead, Esq., County Attorney, Webster City, Iowa:

DEAR SIR—Your favor of the 12th inst. duly at hand. You state the following case:

A man who resides in Jewell Junction, an incorporated town in Lyon township, is the owner of a farm in Ellsworth township and another in Lincoln township. He has cattle on each of those farms; also cattle in Jewell Junction, Lyon township, where he resides. The assessor in each of those townships assessed the cattle in his township to him. The assessor at Jewell Junction assessed all the cattle in the three townships as though all the cattle were in Lyon township. You ask: "Is it right for him to have the cattle assessed in the township where they are, or should they all be assessed in the township where he resides, that being Jewell Junction, and necessitate his paying corporation tax on his cattle, some of which are not in the township where Jewell Junction is located?"

When a person is doing business in more than one county, the property and credits existing in any one of the counties shall be listed and taxed in that county. (Section 1279 of McClain's code.) It is recognized that where business is done in a particular place, the property connected with such business is properly taxed at the place of business, irrespective of the residence of the owner. If the farms were in different counties there would be no controversy, but that section 1279 of McClain's code applied, and the cattle on each farm would be properly assessed in the county where the cattle were situated.

The statute does not, in express terms, say in what township it shall be assessed, yet I think section 1302 of McClain's code furnishes a basis for determining where the property shall be assessed. The assessor is required to assess the property in his township. This has been construed in *Rhyno v. Madison County*, 43 Iowa, 632, to mean, not necessarily all the property in his township on the 1st day of January, but all the property properly assessable in his township. If the owner of the three farms resided in another county, there can be no question but that the property connected with his business carried on at each of his farms, should be assessed in the township where the same is situated (*Dean v. Solon*, 68 N. W. R., 182.)

A business being carried on in connection with each farm, there is no doubt in my mind that the property connected with such business is properly assessable in the township, and the fact that the owner resides in some other township within the same county does not, in my judgment, change the rule.

In *Rhyno v. Madison County, supra*, the court says a farmer owning a stock of merchandise in the city ought not to escape city taxation because he lives in the country; and on the other hand, a merchant owning a farm ought not to pay city taxes upon his implements of husbandry.

If the cattle in question were sent from Jewell Junction to the other townships for a temporary purpose, of course a different rule should be applied, but if they are kept on farms in other townships in connection with the business of operating the said farms, then I am of the opinion that they should be assessed in the townships where the farms are situated respectively, and that the assessor of Jewell Junction was not authorized to assess the cattle situated on farms in other townships and permanently kept there in connection with the business carried on in said townships, as if the same were in the town of Jewell Junction where the owner resides.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

MULCT TAX — When returned — Application to rebate — When made and heard.

DES MOINES, Iowa, June 15, 1897.

D. W. Telford, Esq., County Attorney, Mason City, Iowa:

DEAR SIR—Your favor of the 10th inst. at hand, in which you ask my opinion upon the following questions:

First.—"Under section 4 of chapter 62, Twenty-fifth General Assembly,

does the meeting of the board following the listing mean the April or June meeting, where the assessor makes returns in March as to the list of places and names of persons to be assessed?"

Section 4 says: "At the meeting of the board of supervisors *next* following the listing as aforesaid, application may be made to rebate," etc. Certainly, the April meeting of the board of supervisors is the meeting next following the listing, when the listing is done in March.

Second.—"Does the eight days mentioned in said section mean prior to the first day of the meeting of the board, or should the board fix a date for hearing all cases, and then would the party have a right to have the time so fixed that they would have eight days to file the petition and serve notice on the county attorney, prior to the hearing of the same? And if the party filed the petition but failed to serve notice on the county attorney, could they then have a hearing, or would the board be required to pay any attention to same unless said notice was served on the county attorney as stated in the said section?"

The section in question does not say how the time set for the consideration of the case is to be fixed, but the application to rebate the tax must be on file at least eight days before it is set for hearing, and the notice on the county attorney must be served eight days before such hearing.

The purpose of this evidently is that those interested in securing the levying of such tax may have an opportunity to learn of the application made to rebate the same, and to appear at the time of considering the application with evidence to show that it should not be rebated. I think it would be proper for the applicant to file his application and serve a notice upon the county attorney, stating the date on which it would be called up for hearing before the board of supervisors. It is not, in my judgment, necessary that the date fixed in such notice should be the first day of the session of the board. Naming a date eight days after the service of the notice and filing of the application is sufficient. If the board cannot hear it on the date named, of course it can postpone further hearing until such time as it may be heard.

A party having failed to file a petition eight days before the date set for hearing, or having failed to serve notice on the county attorney, he could not claim as a right to have the application heard, and the board of supervisors would not be authorized to consider the case without such requirements having been complied with. The community is entitled, under the law, to at least eight days to prepare for the hearing or consideration of the application, so that it may secure the attendance of witnesses to show that the assessment of such property is valid and should not be rebated I do not think the board is authorized to consider the matter in the absence of such notice, or the filing of the petition eight days before it is heard. Nor are they authorized to consider an application filed after the term or session next following the listing of the property.

It may be, in some cases where the owner of leased property did not know of the assessment or the sale of intoxicating liquors on his premises, that justice and equity would demand that he be permitted to file an application after the session next following the assessment; and I would not like to say that in exceptional cases there ought not to be relief granted after the next session following the assessment. But the rule as laid down by the statute is otherwise. Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—Right to tax—Interest of a nonresident member of a banking institution engaged in the banking business in this state.

DES MOINES, Iowa, June 15, 1897.

O. C. Meredith, Esq., County Attorney, Newton, Iowa:

DEAR SIR—Your favor of the 10th inst. at hand. You state in substance:

The firm of Burton & Cassell, a firm consisting of J. B. Burton, of Jasper county, Iowa, and J. W. Cassell, of Ohio, have been doing a private banking business in this county for a number of years. The business has been done in the firm name and J. B. Burton has managed and conducted the business. Their capital is $80,000. Cassell is an equal partner in the firm, and has never been a resident of this state. You ask my opinion as to whether the interest of Cassell is subject to taxation here.

While the general rule is that moneys and credits should be assessed at the place of residence of the owner, and they cannot be assessed in a state which has not jurisdiction of the property nor the owner (*Reamy v. Board of Equalization, Burlington*, 80 Iowa, 470), yet it is universally recognized that a state has power to provide that tangible personal property shall be assessed wherever it may be in the state, whether the owner is a resident of the state or not. (Cooley on Taxation, page 373)

The capital of a firm belongs to the firm, and is properly assessed for taxation at the place where the business is carried on. (Section 806 of the code of 1873; Cooley on Taxation, section 374.) Under the law of this state there can be no question of the right to assess all the property used in business carried on within the state, although the owner of such business may reside in another state. (Code of 1873, sections 804, 805, 806.)

These statutes are in harmony with the statutes of other states, and the decisions of the federal courts. I do not think it would be contended for a moment that our statutes are in conflict with any provision of the federal constitution, or any law of congress.

I notice the petition filed before the board of supervisors, which you inclose me, states that Cassell has listed his interest in the firm in the business in your county, and paid taxes upon his share of the capital at the place where he resides in the state of Ohio. If this is true, he should apply for relief from such unjust assessment in the state of Ohio. His capital invested in the firm business in your county is within the jurisdiction of the state of Iowa, receives protection from its laws, and upon no principle of law or ethics that I can conceive of, can it be justly claimed it should escape bearing its proportionate share of the public burdens.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

SHERIFF—Compensation.

DES MOINES, Iowa, June 15, 1897.

C. G. Saunders, Esq., County Attorney, Council Bluffs, Iowa:

DEAR SIR—Your favor came duly to hand. Circumstances prevented an earlier reply. You state:

The sheriff of your county has filed a claim with the board of supervisors for $400, claiming that he has the right to receive that in addition to compensation allowed him by chapter 75, acts of the Twenty-fifth General

Assembly. You ask whether the sheriff of a county like this has a lawful claim against the county for the $400 that was formerly allowed him under section 5062 of McClain's code, in addition to the $3,000 of salary fixed by chapter 75 of the Twenty-fifth General Assembly.

In the first place, section 5062 of McClain's code did not fix the sheriff's salary at $400. The board of supervisors was authorized to make it not less than $200 nor more than $400. The last clause of section 2 of said chapter 75 is as follows: "The fees retained by the sheriff under the provisions of this act shall be in full compensation for all services." Section 4 provides: "All acts or parts of acts in conflict or inconsistent with this act are hereby repealed."

If, therefore, section 5062 of McClain's code undertook to give a sum in excess of the limit fixed by section 2 of said chapter 75, it would be repealed by section 4 of the said act. I see no process of reasoning that would authorize the board of supervisors to allow the sheriff a compensation in excess of the limit thus fixed in section 2 of said chapter 75.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF HEALTH—Authority to appoint from its membership delegates to attend health associations held outside of the state and to pay the expenses of such delegates.

IOWA CITY, Iowa, July 5, 1897.

Dr. J. F. Kennedy, Secretary State Board of Health, Des Moines, Iowa:

DEAR SIR—Your favor of the 22d ult. duly at hand, in which you ask my opinion upon the following question:

"Whether or not, under the law, the state board of health has authority to appoint from its membership delegates to attend health associations held outside of the state, and pay the expenses of such attendants from the appropriation made to the board in section 12, chapter 151, acts of the Eighteenth General Assembly?"

The section in question appropriates $5,000 per annum, or so much thereof as may be necessary to pay the salary of the secretary, meet the contingent expenses of the office of secretary, and the expenses of the board, and all costs of printing. These purposes for which the money may be expended are a limitation on the power of the board. They cannot use the appropriation for other purposes than those named.

The expenses of sending a delegate to health associations outside of the state, if a proper charge against the state, would come under the clause, "and the expenses of the board." The expenses of the board are such cash expenses as arise in the discharge of the duties of their offices. The statement of their duties is very general. Section 2 provides: "The board shall have general supervision of the interests of the health and life of the citizens of the state; they shall have authority to make such rules and regulations and such sanitary investigations as they may, from time to time, deem necessary for the preservation or improvement of the public health."

The statute nowhere attempts to lay down a detailed statement of all the

acts, or any act, which shall be done by the board in the discharge of its duties. The statute wisely leaves the manner of the discharge of the duties to the board itself.

The question upon which you ask my opinion is more a question of fact than a question of law. I cannot say, as a question of law, that it is not a part of the duties of the board to send delegates to an association outside of the state. For instance, in case a new epidemic were invading the country which was infectious and dangerous, if a convention of the health officers of the different states were called, for instance, in the city of New York, where a general investigation was had into the nature of the disease and the best means of protecting the citizens against it, and the united efforts of all the health boards in the United States was needed to stay its spreading and ravages, I can readily see that the board would be remiss in its duty did it fail to send representatives there.

The improvement of methods of sanitation has been very marked in the later years, and great progress has been made in the science of sanitation, and if, in the judgment of the board, new discoveries are presented at such associations and new methods and measures are discussed, affecting the health of the people of the state, in such manner that the board, by adopting such measures, may better secure the general health of the people of this state, I am not prepared to say that the board would be unjustified in sending such delegates at the expense of the state.

On the other hand, it would not be right nor best to have a mere junketing trip or pleasure excursion for the members of the board, carried on at the expense of the state, nor is it a part of the duties of the state to pay for the education of the members of the board so as to fit them to discharge the duties of their offices. While such associations are educational in their purposes, yet I can readily see that the scope of the discussion, and the presentation of papers and the interchange of ideas gained by the observation and experience of the different boards of health, may have such an effect as to amply repay the state for the expense incurred.

I reiterate that it is impossible for me to determine the question as a question of law It is one that must be determined by the good judgment of the members of the board, and if the board determines the discharge of their duty to the people of the state requires gaining the light and knowledge which may be obtained by having representatives at such associations, then it would appear to be a part of the proper, legitimate expenses of the board.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

IOWA SCHOOL FOR THE DEAF—Upon what basis, under the act of the special session of the legislature, funds for the current and ordinary expenses of the school should be drawn from the state treasury.

IOWA CITY, Iowa, July 6, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—In response to your request for my opinion in regard to the proper construction of section 5 of the acts of the special session of the Twenty-sixth General Assembly, entitled, "An act to revise, amend and codify

the statutes in relation to the school for the deaf," approved April 6th, 1897, with especial reference to the manner of ascertaining the average attendance of pupils during each quarter. I will say that the doubt arises because of the uncertainty in the meaning to be given to the word, 'quarter."

The section is as follows: "For the purpose of meeting the current and ordinary expenses of the institution, including furniture, books, school apparatus and compensation of employes, except officers and teachers, there is hereby appropriated the sum of $35 per quarter for each pupil in said institution, based upon the average number of pupils in attendance during each quarter; but where the quarter occurs in vacation, then the average number of pupils in attendance during the last preceding quarter."

Some have construed the word, "quarter," as used above to be equivalent to the term or the session of the school. Others contend it means the quarter of the year. If the first is the correct meaning, then the average would be found by dividing the aggregate daily attendance by the number of days in the school term, as is done in regard to our common schools to find the average attendance, and if the latter is correct then the average attendance should be found by dividing the aggregate number of days of the attendance of pupils by the number of days in the quarter of the year.

I am reminded that the word, "quarter," is seldom used in connection with schools. One of the definitions of the specific use of the word, "quarter," is, "a term of study in a seminary, college, etc., properly the fourth part of a year, but often longer or shorter than this period." If it were not for the last sentence above quoted in the statute, I could readily believe that the quarter was intended to mean the term of school The statute says: "But where the quarter occurs in vacation, then upon the average number of pupils in attendance during the last preceding quarter."

To speak of a quarter of school occurring during vacation is a solecism, There is no school in vacation, and a quarter of school cannot occur in vacation. We could not consistently give to the word, "quarter," one meaning in the first sentence of the section, and another meaning in the second sentence of the section. To say that the word, "quarter," means in the first sentence the term of school, and in the second sentence the quarter of the year, would be without precedent.

We are thus forced to the conclusion that the word, "quarter," in both sentences refers to the quarter of the year, or to the term of school. In the latter case, however, there can be no quarter occurring in vacation, and the last sentence above quoted becomes nugatory. We should, however, give the construction that will sustain every part of the statute. Every part will be sustained by giving to the word, "quarter," the meaning of one-fourth of a year. This appears to me to be the proper construction.

Hence, the average upon which payment should be made by the state should be found by adding together the number of days that the pupils were in attendance at the institution during the quarter of the year ending June 30th, and divide the aggregate by the number of days in the quarter of the year and the quotient will be the average attendance during the quarter.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CRIMINAL LAW—REQUISITION—EMBEZZLEMENT—Facts stated show the commission of the crime within this state.

IOWA CITY, Iowa, July 12, 1897.

Hon. W. H. Fleming, Private Secretary, Des Moines, Iowa:

DEAR SIR—Your favor of the 10th inst. at hand, enclosing the application for requisition of William Taggart, who is charged with embezzlement, and ask:

"Do the papers show that the crime has been committed within the state of Iowa?"

I think they do. The sale of the hogs as his own in Chicago and escaping with the proceeds would clearly indicate that such was his intention at the time he took charge of the hogs for the owner at Quimby, Cherokee county. The act of receiving them with such intention was one of the acts which constituted the conversion. It being done in the state of Iowa, the crime was commenced in the state, and this would give the state courts jurisdiction for the punishment of the crime.

I am also of the opinion that the defendant is liable for the violation of the laws of this state. The case is not unlike a man hiring a livery team, ostensibly to drive to some point within the state, and really driving to some point without the state and selling the team and escaping. The subsequent act simply explained the motive and intention at the time that he hired the team, and the larceny is as complete within this state as if he had stolen the same in the night-time.

Answering your other question, I beg to say that having committed a crime within this state, although it became a completed crime in another state, and he having fled to Montana and not returned to his home, admitting such was the case, he would be a fugitive from justice. One does not have to start from his own home and go direct to the place in which he is found in order to be a fugitive from justice. If he commits a crime in the state and goes in hiding in any other state, keeping away from his own home because of the commission of the crime, he is, in my judgment, a fugitive from justice

I return you the application for the requisition.

Yours truly,

MILTON REMLEY,
Attorney-General

BOARD OF SUPERVISORS—Has no power to transfer money from the board of health fund to the road fund.

IOWA CITY, Iowa, July 12, 1897.

J. M. Wilson, Esq., County Attorney, Centerville, Iowa:

DEAR SIR—Your favor of the 10th inst. at hand, requesting my opinion upon the following question:

"Have the township trustees the right and power to transfer money raised for board of health purposes to the road fund in the same township? Are there any steps whereby, in the absence for the necessity for the use of board of health funds, they might use it for the improvement of the roads of the different districts?"

In reply I beg to say that I know of no provision of law which authorizes the funds raised for such purposes to be diverted to the road fund. The law limits the amount of tax that may be levied for the road fund, and it certainly is not permissible to do indirectly what the law does not authorize directly. Townships would have no authority to levy a 6 or 8 mill tax for road purposes. It would be no less a violation of the law to levy a 4 mill tax for road purposes and 4 mills for the expenses of the board of health, and then, after the collection of the money, to transfer it to the road fund.

No one can tell just when funds will be needed to pay the expenses which may be incurred by the board of health. The law does not contemplate that a very large fund shall be accumulated; hence, no provision was made for the transfer of any surplus to other funds.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

FOREIGN INSURANCE COMPANIES—The auditor of state may refuse license under certain circumstances.

IOWA CITY, Iowa, July 13, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—Your favor of the 8th inst. came duly to hand. You make the following statement:

"The Bankers Life association of St. Paul, Minn, a mutual insurance company, has made application to this department for admission to transact its appropriate business in this state. Upon examination of its articles of incorporation, I find that there is no provision therein for representation, at any of the meetings to be held by said company, by its members by proxy, but that in order to participate in the business of any meeting, the members must be present and vote in person. This company has heretofore made applications to my predecessor, Auditor Lyons, as well as myself, for admission to do business in this state, but it has been refused such admission for the reason already cited—that it denies to its members the right to vote by proxy.

"I desire your official opinion as to my authority, under the provisions of section 13, chapter 65, laws of 1886, to refuse admission to said insurance company to do business in this state so long as its plan of business denies to its members representation by proxy."

I assume that the Bankers Life association of St. Paul is a mutual benefit association, such as would come under the definitions of section 1 of chapter 65, acts of the Twenty-first General Assembly. The act is entitled, "An act to regulate the organization and operation of mutual benefit associations."

It is to be regretted that the act in question was not more specific in several particulars. It is a familiar rule in the construction of statutes that three things are to be considered: the old law, the mischief and the remedy. It has been the policy of all wise legislation to place wise safeguards around life insurance, and to a greater or less degree subject the

business of life insurance to state control. Prior to the enactment of chapter 65 of the Twenty-first General Assembly, there was in this state practically no state control over co-operative mutual assessment corporations or associations, and I think it very evident that chapter 65 was for the purpose of placing a certain amount of state supervision over the organization and operation of such associations to the end that the citizens of the state may be protected against unsafe and unreliable companies in which the earnings of men are invested to secure a benefit to their families after their death.

The intent and purpose of the statute evidently was that the supervisory control of the auditor should be ample to prevent unreliable and unsafe companies doing business in the state. Our supreme court has stated: "One of the cardinal rules for the construction of statutes is to search out the intent of the legislature, and to adopt the sense which will be in harmony with the statute as a whole." (*Crabel, Administrator, v. Wapello Coal Company*, 68 Iowa, 751.) Any construction of a statute which would render it nugatory and defeat the intent of the legislature, is in no case justifiable if it is susceptible of a construction which will carry out the intention of the legislature.

To illustrate the idea, take section 2 of the act, which provides: "The articles of incorporation of such organization shall show the plan of business; and shall be submitted to the auditor of state and the attorney-general, and if such articles are found to comply with the provisions of this act, they shall be approved." Yet, in no place in the act is there a single provision as to what the articles of incorporation shall or shall not contain, or how such an association shall be organized, save and except the prohibition in section 3, that it shall not take the name of any other organization, or so closely resembling the same as to mislead the public as to its identity.

If, then, the auditor and the attorney-general, are by that provision required to approve, *pro forma*, or as a ministerial act, the articles of incorporation of an association whose name is unobjectionable, then it is useless to require the plan to be submitted for the approval of such officers, and the whole purpose of the act is defeated.

Now, applying these principles to section 13 of the act, concerning which you specially inquire, it provides: "Any foreign corporation or association organized under the laws of any other state to carry on the business of insuring the lives of individuals * * * upon the mutual assessment plan, may be licensed by the auditor to do business in this state by complying with the following conditions." Then is specified:

First.—"Said corporation shall file with the auditor of state a copy of its charter or articles of incorporation.

Second.—"It shall file a copy of its by-laws, blank application and policy or certificate of membership.

Third.—"It shall file a sworn statement signed and verified by its president and secretary, containing the name and location of said corporation; its principal place of business; the name of its president and secretary and other principal officers; the number of certificates or policies in force; the aggregate amount insured thereby; the amount paid to beneficiaries in the event of death or accident; the amount collected of each member on each assessment; the purposes for which such assessments are made, and the

authority under which they are made; the amount paid on the last death loss, and the date thereof; the amount of cash assets owned by the company, and how invested.

Fourth.—"Also, any information which the auditor may require." It is then provided: "All such statements and papers thus filed shall show that death or surrender value of all the certificates of insurance or accident indemnity is in the main provided for by assessments upon, or contributions by, surviving members of such corporation or association, and shall show to the satisfaction of the said auditor that said corporation or association is legally organized and honestly managed, and that the ordinary assessment upon its members, or other regular contributions to its mortuary fund, is sufficient to pay its maximum certificate to the limit named therein."

It will be noticed that the section says the corporation "may be licensed by the auditor." "May" is generally used in a permissive sense, implying a discretion. I am aware it is often used as imposing a duty, or in a mandatory sense. More generally, however, it signifies a discretion. It is evident, however, that before the auditor would be justified in licensing the company to do business in the state, he must be satisfied that the company is legally organized and honestly managed. An association may be legally organized according to the laws of the state, and no question may be raised as to the honesty of the management, but the plan of the business may be such that it produces the very results that the statute was enacted to prevent. If the duty of the auditor were limited to examining into the question of whether the corporation was legally organized in another state, or whether the management was honest, it would fall far short of carrying out the intention of the legislature in its enactment.

I cannot concur with those who think the auditor's power is thus limited. It is evident to my mind that the legislature intended to give him a discretion; hence, it requires to be furnished all information which he may desire to arrive at a conclusion whether the corporation applying should be admitted to do business in this state. Much of the information required to be given throws no light upon the two questions, viz., the legal organization and the honest management of the company, but looks to the further question, whether the members will probably receive the benefits expected when they become members. In my judgment, he is authorized to scrutinize not only the question whether it was legally organized, or whether the officers honestly conduct the business according to the rules provided by the organization, but also the plan of organization and the practical operation of the plan; the practical results obtained by the membership, and if, in the exercise of a sound discretion, the auditor sees that the plan would work an injustice or inequity to the members, or the result of the plan of business or management would work a hardship or an injustice upon the very persons the law was intended to protect, then it is his duty to refuse a license to such organization.

As to whether depriving the members of the right to vote by proxy leads to such a result, I will say it is largely a question of fact or a conclusion of fact based upon observation or experience. There is nothing in our statute relating to the question of whether members of a corporation may vote by proxy. It is said that the right to thus vote by proxy is not a common law right. Some courts have denied the right to vote by proxy unless the

statute or the articles of incorporation authorize it. Most of the states and territories by statute recognize the right to vote by proxy, some denying to corporations the power to limit such right. In this state, so far as my knowledge extends, the practice of voting by proxy is universal, although the statute is silent upon it. The law of Minnesota (Gen. Stat., 450, Sec. 160), authorizes corporations, by their by-laws, to determine "the mode of voting by proxy." Those courts which have held the right to vote by proxy did not exist by common law, have followed the English cases where corporations were of a *quasi* public character. There is, to my mind, no analogy between the voting at meetings of private corporations and exercising the elective franchise or any political functions, which of course cannot be delegated. One's interest in a private corporation is a financial interest. The stock or rights therein are his property. There is no reason in the nature of things why one may not appoint any agent he may see fit to look after his interests and carry out his wishes in the management of a corporation in which he has a pecuniary interest. I see no good reason why a member in such an association should be restricted in his right to employ an agent or proxy to represent his interests. Public policy does not demand the denial of that right.

Chapter 65 relates only to mutual assessment benefit associations. If articles of incorporation were presented which were mutual in name, but the rights of the members to participate in the management by voting were so hedged about as to practically deprive them of the right to vote and make it, to all intents and purposes, a close corporation, I have no question but that it would be the auditor's duty to refuse to license it. If the denial of voting by proxy, in the judgment of the auditor, tends in any substantial degree to that result, it is a matter that he should not overlook.

In my opinion, if in the sound discretion, exercised not arbitrarily but for the good of insurants in Iowa, he is convinced that the denial of the right to vote by proxy is prejudicial to the interests of the members of said association in Iowa, and may lead to results working an injustice or detriment to the members, then the auditor has authority to refuse to license said company.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INTOXICATING LIQUORS—MULCT LAW—Consent to resident freeholders, who to give consent—How long same continues—How it may be revoked.

IOWA CITY, Iowa, July 15, 1897.

C. W. Crim, Esq., County Attorney, Estherville, Iowa:

DEAR SIR—Your favor at hand, in which you ask my opinion upon the following questions in division 1 of section 17, chapter 62, acts of the Twenty-fifth General Assembly, viz :

First.—"How long does a consent given by a resident freeholder within fifty feet continue in force?

Second.—"In what way may that consent be revoked or rescinded?

Third.—"Does a change in ownership operate as a termination of such consent?

Fourth.—"Who is the freeholder 'owning property within fifty feet' in a case where the legal title is in one person, and another is the owner by contract?"

Chapter 62 nowhere provides the manner in which the consent of property owners may be terminated, nor how long it shall continue in force. Section 19 of the act provides how the consent of the voters of the county, city or town may be recalled, but there is an absence of any provision as to the manner in which the consent of property owners within fifty feet of the premises may be recalled.

I am told that Judge Holmes, of the Polk county district court, has held that under the language of division 1, which reads: "The person appearing to pay the tax shall file with the county auditor a certified copy of a resolution regularly adopted by the city council consenting to such sales, and the written statement of consent from all resident freeholders owning property within fifty feet of the premises where the business is carried on," it is incumbent upon the saloon-keeper to file a certified copy of the resolution of the city council once a year; that when he appears to pay the tax, he must present the certified copy of the resolution of the city council.

If this position is correct, it would be incumbent upon him also to present a written statement of consent of the resident freeholders owning property within fifty feet, and further, he should file a copy of such resolution and such statement of consent every time he appears to pay the tax, which is every quarter. I am not clear in my own mind that this is the correct position. There is force in it, however.

I think without question, however, that intoxicating liquors cannot legally be sold against the consent of the property holders. To make the sale legal, there must be a continuing consent, and although the statute does not say how the consent, when once given, may be withdrawn, it is very evident, from the nature of things, it may be withdrawn. In the absence of any provision of the statute, it occurs to me that a written statement of the withdrawal of such consent and objecting to the sale of intoxicating liquors by the property holders, filed with the county auditor, with notice of such withdrawal to the saloon-keeper, would be sufficient. If this be not true, it is evident the construction of the statute suggested must be adopted, for it is very evident the legislature never intended that a saloon should run against the objections of residents owning property within fifty feet.

If one has paid his tax for a quarter in advance, it would seem no more than just and right that he should be permitted to continue the business until the expiration of the quarter, notwithstanding the consent may be withdrawn in the meantime, or there may be a change in the owners of property within fifty feet. Where property changes hands, the consent of the new owner must be obtained, and the consent of the former owner will not avail a saloon-keeper.

In regard to your fourth question, permit me to say, that in contemplation of this statute the owner of the property is the one who has the right of possession, the beneficial interest, together with the right to procure the legal title. In the case you put, the one holding by contract a bond for a deed, for instance, must be considered the owner.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSANE PATIENTS - Cared for by the counties—The superintendent of a hospital for the insane should surrender patients to the counties upon the order of the insane commissioners of such counties.

IOWA CITY, Iowa, July 16, 1897.

Hon. T. E. Clark, Treasurer of Clarinda Hospital, Clarinda, Iowa:

MY DEAR SIR—Your favor of the 14th inst. at hand, asking my opinion upon the following question:

"The different counties of the district are making requisitions upon the superintendent for patients to be taken out of the Clarinda hospital to the respective poor houses. Ought he to surrender patients to the counties ordered, unless the order for the patient from the insane commissioners shows that the order is made upon the request of the relatives or friends?"

Some time ago I received an inquiry from Dr. Hoyt, the superintendent, along the same line, and I had it out on my desk to answer when your favor was received. His inquiries may be summarized into two questions:

First.—Have the commissioners of insanity the power to remove patients to the poor houses purely on economical grounds, when the patients are retained in the hospital and are, in the opinion of the medical officers of the hospital, unfit for poor house care?

Second.—Have the commissioners of insanity power to decide what patients are incurable and harmless, or does this rest with the superintendent of the hospital?

I shall endeavor to answer, as best I can, these inquiries together.

I think it evident that the insane hospitals of the state are intended as places for the treatment of those who have mental diseases which may yield to proper medical treatment. They are not intended as asylums for the confinement of incurable insane. I need not call attention to the sections of the statutes which clearly lead to this conclusion.

While the state furnishes buildings for the hospitals, appoints the officers and physicians and attendants to treat and take care of the patients received, the respective counties pay the expenses of the care and treatment of the patients sent from the county, and the local board, known as the commissioners of insanity, determines what patients shall be sent to the hospital for treatment. The officers of the hospitals are bound to receive all patients sent by the commissioners of insanity from the counties, if there is room in the hospital to so receive them. When a patient is cured he must be discharged. (McClain's code, section 2223.) When a patient is incurable, and it becomes necessary to make room for recent and more hopeful cases, the incurables must be discharged. If, for want of room, all who apply cannot be received, a discrimination is permitted to be made in favor of certain classes. (McClain's code, section 2221.) The county authorities then determine what patients shall be sent from the county to the hospital for the insane. The counties pay the bills, and the hospital authorities have no discretion about receiving all patients sent, if there is room, and no discretion about keeping them there, if there is room, unless they are cured, but when cured the patients must be released.

The commissioners of insanity of a county have been constituted a special tribunal having cognizance of all applications for admission to the hospital, or for the safe keeping of insane persons within their respective

counties. (Section 2192.) This tribunal determines whether the applicant is a fit subject for custody and treatment in the hospital. (Sections 2193, 2194, 2195.) If it should be found that a person is insane and not a fit subject for custody and treatment in a hospital, and he cannot, with safety, be allowed to go at liberty, other provisions must be made by the board of commissioners of insanity for the custody of such insane persons so as to best secure his safety and comfort, and best protect the persons and property of others. (Sections 2202 to 2205, inclusive.)

Section 2208 authorizes the commissioners of insanity of any county, when cause no longer exists for the care within the county of any insane patient, to order the immediate discharge of such person. Section 2207 authorizes, in the case named, the commissioners of insanity to order the discharge from the hospital of one not cured.

Taking all the statute together, with reference to the powers and jurisdiction of the commissioners of insanity, I am inclined to the opinion that, subject to certain limitations within the statute, the commissioners of insanity is the board or tribunal which has control of the insane that must be cared for at the expense of the county, and it is within its sound discretion to determine what patients are fit subjects for treatment in the hospital and should be sent there, and what patients should be cared for by the county elsewhere; and, further, that the order made by the proper commissioners of insanity for the discharge of a patient from the hospital must be respected by the hospital authorities.

I do not think the general jurisdiction and power conferred upon the commissioners of insanity by section 2192, and other sections, is necessarily limited by the following clause in section 2207, viz: "On the application of the relatives or friends of any patient in the hospital who is not cured, and who cannot safely go at large," etc. Suppose one were sent from the county to the hospital at the county's expense who was incurable, and could not safely be at large, and had no immediate friends or relatives, could the county be required, against the best judgment of the commissioners of insanity, to support such patient in the hospital until his death? I think not. I think the purpose of the first clause of said section is to make it obligatory upon the commissioners to thus order the discharge of a patient, and make provision for his care outside of the hospital when required by the relatives and immediate friends. In other words, it authorizes relatives and immediate friends of the patient to invoke the exercise of the power which is given to the commissioners of insanity. Friends may wish to provide greater comforts for an insane person who is not cured and still must be restrained, and if the commissioners of insanity are satisfied that such provisions have been made for the proper care of the person within the county, they may order a discharge. This is the purpose of section 2207, but it in no way detracts from the general jurisdiction given for the safe keeping of insane persons within their respective counties by section 2192.

I doubt very much whether the authorities of the hospital can refuse to honor an order made by the proper commissioners of insanity for the discharge or release from the hospital of an insane patient. The responsibility of determining what patients from each county shall be treated and cared for at each hospital, rests upon the commissioners of insanity. The hospital

must care for those sent to the hospital so long as they are insane and there is room to receive them. The counties must pay the expenses. The commissioners of insanity have a specific line of duty to perform, being responsible to their constituents. The authorities of a hospital have another line of duty to perform. These do not conflict with each other.

I am not unmindful that abuses may arise and mistakes occur, because of poor judgment, as suggested by Dr. Hoyt, but the same may be said of all matters depending upon fallible human judgment. In response to a suggestion of Dr. Hoyt, I will further add that the board of supervisors has no authority in law to direct the commissioners of insanity in the discharge of their duties. The board of supervisors is required, in certain cases, to provide for the comfort and care of insane persons under the direction of the commissioners of insanity, but in the exercise of the proper functions of the commissioners of insanity they are sole judges as to what shall be done. I think you will agree with me that the local tribunal which has a knowledge of the estate of an insane patient, or if he have no estate, of the ability of his relatives who are responsible for the keeping of a pauper, and having intimate knowledge of the facilities of the county for taking care of the insane, also the financial condition of the county, is better able to do justice, both to the insane patient and the people of the county, who must bear the expense of keeping him in the hospital so long as he is there.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

SCHOOLS—Fences—Who should maintain.

IOWA CITY, Iowa, July 17, 1897.

J. M. Wilson, County Attorney, Centerville, Iowa:

DEAR SIR—Your favor came duly to hand, in which you desire my opinion upon the question whether the law in regard to partition fences is applicable to school districts and the owners of lots adjacent to schoolhouse lots.

In regard to this I will say that section 1489 of the code of 1873 appears to be of general application, and there is to my knowledge no statute or decision which will make an exception in favor of persons owning land adjacent to school property. While this is true, I doubt very much whether it was ever in the mind of the legislature that the owners of land adjacent to schoolhouse lots should be compelled to erect part of the partition fence. School districts, as a rule, desire the lot fenced to keep stock away from the building, and they wish the fence to be uniform all around. Generally the land has been donated for schoolhouse purposes, and so far as I know, the school districts, when they want a fence, have built the entire fence. I do not think I ever heard the question raised before.

There is no obligation on the part of a person to put up a particular kind of a fence. Any obstruction, barrier, trench, wall, which, in the judgment of the fence viewers, will prevent the passage of live stock, is a lawful fence. The average school district would not wish the schoolhouse yard to be enclosed partly by a neat, substantial fence of its own building, and partly by a brush fence or a ditch, or any grotesque structure the adjacent land

owner might see fit to erect. The provisions of section 2839 require the removal by the board of directors before a given time of any barbed wire fence enclosing in whole or in part any public school grounds within the district. It also makes it the duty of any person owning or controlling any barbed wire fence within ten feet of any public school grounds to remove the same.

The first clause, relating to the duty of the school directors, seems to have something of the idea that the directors would control the entire fence enclosing the school grounds. If any part of the fence enclosing the school grounds belonged to the adjacent land owner, the board of directors could not be required to trespass by removing the same. I think it is a recognition of the universal custom of the state for the school districts to fence their school grounds when needed, but it is not enough to justify the conclusion that the exception was intended to be made in this respect to the general law relating to partition fences.

I am inclined to think in practice there has been an exception during the entire history of the state, and possibly because of such practice or custom, it was not thought worth while for the legislature to make an exception in the law in regard to partition fences.

I am inclined to think that the owner of adjacent lots could be compelled by the school district to maintain one-half of the partition fence under the same circumstances in which he could be compelled if it were an individual instead of a school district, but I doubt very much the expediency of the district compelling them so to do.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COSTS—Which of two counties liable therefor upon a given state of facts.

IOWA CITY, Iowa, July 17, 1897.

W. L. Smith, Esq., County Attorney, Humboldt, Iowa:

DEAR SIR—Your favor of the 3d inst. at hand, inclosing a stipulation between yourself and G. C Olmstead, county attorney of Hamilton county, in regard to the claim of Humboldt county against Hamilton county for costs occasioned by the arrest, in Humboldt, of one Ed Welch, from which it appears the crime of seduction was committed by Welch in Hamilton county. The young lady, who became pregnant, moved to Humboldt county. Information was filed there before a justice of the peace, the defendant was arrested in Dubuque, and on the preliminary examination before the Humboldt justice it was discovered, for the first time, that the crime was committed in Hamilton county. By due process the person was sent to Hamilton county where he was taken charge of by the officers, was indicted and sentenced to the penitentiary. The question is whether, under section 3841 of the code, Hamilton county is liable for the costs incurred before the justice in Humboldt county.

Section 3841 was originally enacted in chapter 66 of the Ninth General Assembly. The first section of said chapter required the costs in such cases to be paid in the first instance out of the county treasury where the

writ, precept, or process is made returnable. Officers cannot, in such case, demand fees in advance. The county is made by statute liable for all costs in criminal cases in the county where the costs accrue. The law makes it the duty of a committing magistrate, when it is ascertained that the crime has been committed in another county, to send the prisoner to such county.

Section 3841 requires the county where the crime was committed to reimburse the county paying the costs. I think that section was intended and applies to the case stated in your stipulation, and that Hamilton county should pay to Humboldt county all legal costs arising in such a case. Hamilton county received the benefit of the bringing of the prisoner from Dubuque. Some other items of costs were no greater because incurred in Humboldt county.

If it had been found on the trial that no crime had been committed, a different rule might apply. There is no question in this case about the good faith of the officers of Humboldt county, and I can see no good reason why, inasmuch as Hamilton county, having accepted the prisoner, received the benefit of what was done in Humboldt county, and having convicted him, it can now refuse to pay all legal costs incurred by Humboldt county.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

Duties and compensation of public officers — Regents of the state university.

IOWA CITY, Iowa, August 3, 1897.

Hon. Thos. D. Healy, Chairman of Investigating Committee, Ft. Dodge, Iowa:

DEAR SIR—On my return to my office yesterday morning, I found your favor of the 23d ult. awaiting me, in which you desire my opinion upon the question whether section 2624 of McClain's code is entirely repealed by section 5104, or, more particularly, whether under existing laws, a regent may collect compensation from the state for expenses and mileage for a trip made by him outside of the state and for business connected with the university, he being authorized to do so by the board of regents in a regular meeting.

Chapter 92 of the Seventeenth General Assembly, section 3, repeals all acts or parts of acts inconsistent therewith. I can find nothing remaining in section 2624, after striking out all that is inconsistent with chapter 92 of the Seventeenth General Assembly. In regard to the question whether a regent is entitled to compensation at $4 per day and expenses incurred while making a trip outside of the state on business connected with the university, there is more room for doubt. Your inquiry is in regard to expenses and mileage. I do not think he is entitled to mileage in any event, and nothing more than actual expenses.

The language of section 5104 is that they should 'receive as compensation $4 per day for each and every day actually employed in the discharge of their duties, and the actual and necessary expenses incurred while so engaged." The term, "their duties," evidently refers to their duties as regents. It may be said generally that in the duties of the board of regents

to govern the university and manage and control its affairs, the regents act as a unit, as a board. It may be and probably is proper for the board of regents to send some one to inspect articles to be purchased or needed by the institution, or to obtain information as to the best methods of making needed repairs, and it is not improper to send a member of the board to obtain the information needed. But I do not like to say that a person thus sent was discharging his duty as a regent. Some person other than a regent could be employed to make any inspection or examination and obtain information needed by the board. He obtains information and data which the board of regents may act upon when they are called upon to discharge their duties as regents. Such trips, I believe, are always undertaken for the purpose of obtaining information to enable the regents to act intelligently upon any matter before them. While it is undoubtedly incumbent upon one holding the office of regent to obtain information and knowledge necessary to enable him to discharge the duties of regent intelligently, yet obtaining such information and knowledge is not discharging the duties of regent.

There is to my mind clearly a distinction to be made between the duties of a regent and the duties of one appointed, who may be a member of the board, or not, to go elsewhere and obtain information upon which the regents may act. Section 5104 of McClain's code provides for the compensation and expenses of the regents while actually employed in the discharge of their duties, but does not provide for the payment of agents or employes appointed by the board of regents.

I am of the opinion that if a regent is appointed as such agent to make a trip of the kind indicated in your inquiry, he is not entitled to receive compensation and expenses under the provisions of section 5104 Undoubtedly, if it is necessary in the judgment of the board of regents to have a person sent on such a trip, such person should be paid such reasonable sum as the regents may determine, out of any funds in the control of the regents belonging to the university; but I do not think they are entitled to draw upon the state treasury therefor under the provisions of this section.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

TAXATION—ASSESSMENT OF BANK STOCK—Where assessed to the wrong party the auditor should correct the assessment.

IOWA CITY, Iowa, August 4, 1897.

M. W. Herrick, Esq., County Attorney, Monticello, Iowa:

DEAR SIR—Your favor of the 30th ult. at hand, in which you make the following statement of facts:

For several years the Anamosa National bank has been assessed as a bank; no assessment has been made against the individual stockholders for the stock owned by them. Until the present year the tax has always been paid by the bank. About the 8th of January last some of the stockholders transferred their stock to other parties. The bank as now constituted has

paid a portion of the tax of 1896, viz., the portion thereof assessed against the stock of those who did not sell their stock, and refuses to pay the balance. On this statement of facts you ask:

First.—"Was the assessment against the bank illegal?

Second.—"If illegal, may the county auditor now assess the individual stockholders for the stock owned by them on January 1, 1896, for the year 1896, under the provisions of section 1322 of McClain's code?

Third.—"May the auditor assess the individual stockholders on the stock owned by them January 1, 1897, for the year 1897?"

I think all three of your inquiries should be answered in the affirmative. There is no question that the assessor had no authority to assess the capital stock of the bank to the bank itself. It should be assessed to the individual stockholders. (Section 1279, McClain's code; *National Bank v. Hoffman*, 93 Iowa, 119.)

An assessment under such circumstances of the National bank of Oskaloosa was held to be void. This case has been approved by subsequent decisions.

The theory of our law is that all property not exempt from taxation should be assessed. If the assessor fails to make an assessment of property subject to taxation, and the auditor knows thereof, he is required to make such assessment. (Section 1322 of McClain's code). It is likewise the treasurer's duty to assess any real property subject to taxation which may have been omitted by the assessor. He may make such assessment within two years after the tax list shall have been delivered to him for collection, and not afterward. There is no express limitation of time in which the auditor may make an assessment or correction of an assessment, nor is he limited to correcting errors in regard to real estate.

The tax levied for the year 1896 is payable in 1897. The sale for delinquent taxes does not occur until December, 1897. Section 1322 of McClain's code contemplates that the auditor may correct errors, which includes making an assessment of property omitted, even after the tax books have passed into the treasurer's hands, and I am clearly of the opinion that at any time before the time fixed for the sale of property for delinquent taxes, the auditor has authority to make such corrections as he sees necessary to carry out the policy of the law.

No injustice or wrong is done to those who owned stock in the Anamosa National bank on the 1st of January, 1896, and also the 1st of January, 1897, by changing the assessment of stock from the bank itself to the stockholders. By so doing, they are required to pay no more than their just burden of taxation.

It cannot be disputed that there was an error in the assessment. The stock was assessed, but assessed in the wrong name. To correct this error is clearly within the power of the auditor, given by section 1322, and has been sustained by the supreme court in *Parker v. Van Steenburg*, 68 Iowa, 174: *Fuller v. Butler*, 72 Iowa, 729; *Ridley v. Doughty*, 77 Iowa, 226.

The case last cited, holds it was his *duty* so to do.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

SWISS TREATY—INSURANCE COMPANIES—The Iowa insurance law—A corporation is not a citizen within the meaning of the treaty.

IOWA CITY, Iowa, August 17, 1897.

Hon. Francis M. Drake, Governor of Iowa, Des Moines, Iowa:

DEAR SIR—Your favor of the 12th inst. at hand, in which you enclose a copy of the letter of Hon. John Sherman, secretary of state of the United States, calling attention to section 31 of the chapter relating to insurance adopted by the extra session of the general assembly of Iowa as a part of the new code, and also calling attention to the following provision of the "Convention of Friendship and Commerce and Extradition" concluded November 25, 1850, between the United States and the Swiss Confederation, viz.: "No higher impost, under whatever name, shall be exacted from the citizens of one of the two countries, residing or established in the other, than shall be levied upon citizens of the country in which they reside, nor any contribution whatsoever, to which the latter shall not be liable." You ask my opinion as to whether the section of the Iowa law above referred to can rightly be considered as being in any manner in conflict with the treaty.

The provision of the statute complained of by the minister of the Swiss Confederation is in substance this: Insurance companies organized under the laws of this state, at the time of making the annual statement as required by law, shall pay into the state treasury as taxes, 1 per cent of the gross amount received as premiums on business done in this state. Companies incorporated under the laws of any other state of the American union are required to pay 2½ per cent of the gross premiums thus received, and companies incorporated under the laws of any other state or nation than the United States, are required to pay 3½ per cent.

In my judgment, the contention of the minister of Switzerland is not well founded. It is indisputable that laws, treaties and contracts must be interpreted in the light of the conditions existing at the time the same were enacted or entered into. It was well recognized that in the system of government of the United States, as well as that of Switzerland, the states of the United States had exclusive jurisdiction in regard to certain matters and things which had not been granted to the United States government. The same is true of the cantons of the Swiss Confederation.

This fact is recognized in the first article of the treaty, in which the following language is found: "The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries where such admission and treatment shall not conflict with the constitutional or legal provisions, as well federal as state and cantonal, of the contracting parties." Thus it is seen that neither of the contracting parties undertook to abridge or barter away any constitutional or legal rights of the several states of which each of the contracting parties was composed.

Corporations are merely creatures of the law. They are not persons, and have no rights whatsoever except such as a state gives to them. Within the jurisdiction of a state that creates such artificial persons, they have the right and power that the law of the state gives them, and no more. Outside of the jurisdiction of the state that creates them, they cannot demand for themselves a recognition of their artificial personality.

I think it will be undisputed that each state in the American union has a constitutional right to determine for itself whether corporations organized in another state shall be recognized as having a legal entity. Corporations incorporated under the laws of one state are recognized in another because of comity or reciprocal arrangements between the states. But this recognition cannot be demanded as a matter of right. The power to exclude any foreign corporation from doing business in the state of Iowa, includes also the power to make conditions under which business may be transacted.

The Iowa statute referred to requiring the payment of a certain percentage of the gross premiums received by insurance companies, simply states one of the conditions under which insurance corporations organized under the laws of another state of the American union or foreign country, may be permitted to do business in Iowa. The treaty expressly providing that it shall not conflict with the constitutional or legal powers, as well federal as state and cantonal, of the contracting parties, no rights of the citizens of the Swiss Confederation are affected by the act of the Iowa legislature aforesaid.

Another consideration is, to my mind, equally as conclusive. The treaty in question deals only with citizens of each of the contracting parties. Whatever rights may be conferred upon the citizens of either of the parties in the country of the other, such rights are not conferred on corporations, for by no proper use of the term can corporations be called citizens. Chief Justice Marshall, in *Bank v. DeVeaux, et al.*, 5 Cranch, 51, said: "That invisible, intangible and artificial being, that mere legal entity, a corporation aggregate, is not a citizen, and consequently cannot sue or be sued in the courts of the United States unless the rights of the parties in this respect can be exercised in their corporate name," the court holding in that case that the capacity of a corporation aggregate to sue in those courts depends upon the citizenship of its members.

It is true that the decision of the court in regard to the incapacity of a corporation to sue in the courts of the United States was afterwards overruled. It is said in *Louisville Railroad Company v. Letson*, 2 How., 497–558: "A corporation created by and doing business in a particular state, *is to be deemed, to all intents and purposes, as a citizen*, although an artificial person, an inhabitant of the same state for the purposes of its corporation, capable of being treated as a citizen of that state as much as a natural person. Like a citizen, it may make contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially the manner in which it can sue and be sued, it is substantially within the meaning of the law, a citizen of the state which created it and where its business is done, for all purposes of suing and being sued."

This doctrine has been followed ever since by the federal courts, as well as the states, *i. e.*, that the corporation, for the purposes of giving the courts jurisdiction and determining the venue, is to be deemed and considered as a citizen of the state in which it is incorporated. This is very different from holding that it is a citizen for all purposes. It is entitled to no civil rights, or political rights. Numerous courts have held, and it seems to be a settled principle of constitutional law, that it is not a citizen within the meaning of that clause of the federal constitution of the United States which declares that citizens of each state shall be entitled to all the privileges and

immunities of the citizens of the several states. I think it evident, from an examination of all the provisions of the treaty, that wherever the word, "citizens," occurs therein, it refers solely to natural persons who may have "families," who may "come and go and sojourn," and may "perform personal military service," and may be the "bearers of passports," and may "dispose of their property by sale, testament or donation," and may have "heirs," "inherit property," and in short, do all things that a natural person may do. But an "artificial being, invisible, intangible, and existing only in contemplation of law," does not come within the terms or the purview of the treaty in question.

If the treaty in question would bear the interpretation which the honorable minister of the Swiss Confederation seems to have placed upon it, a serious question might arise whether the treaty-making power had authority to make it. It must be self evident that the constitution gives to the president and the senate no power whatever to make a treaty which would override the constitution of the United States, or subvert, abridge or destroy the powers retained by the states respectively. The whole subject matter of the organization of corporations, the manner of dealing with the same, the terms imposed as conditions of doing business or acquiring property within the state, is, under our form of government, left exclusively to the states. While federal courts will protect vested rights, yet, so far as I know, they have never assumed to interfere with the state regulation of corporations when vested rights are not involved.

I am of the opinion that no treaty rights of Swiss insurance companies are abridged or affected by the statute of Iowa above referred to; that a corporation being unable to demand as a matter of right permission to do business in a state other than that which created it, must comply with the terms and conditions under which such permission, if any, has been granted.

Very respectfully,

MILTON REMLEY,
Attorney-General.

CRIMINAL LAW—OBTAINING PROPERTY UNDER FALSE PRETENSES—Facts stated show the commission of that crime.

IOWA CITY, Iowa, August 19, 1897.

W. L. Smith, Esq., County Attorney, Humboldt, Iowa:

DEAR SIR—Yours of the 17th inst. at hand, in which you make the following statement of facts:

B, a life insurance agent, solicited S to apply for a life insurance policy. He represented to S that he had authority from the company to take a note for two and a half years' premium on the policy to be issued, and procured S to execute his note therefor to himself as payee, saying that he would endorse the note and send it to the company. He said, further, that he had full power to collect the premium for any length of time, and that the company would take said note for two and a half years' premium. As a matter of fact, B had no such authority to collect any more than one year's premium on the policy. The company refused to be bound by what B had agreed. B sold the note two days after he got it, and paid the insurance company only the premium for one year.

You ask: "What crime, if any, has been committed?"

I think the crime is obtaining property under false pretenses, and is a violation of section 5439 of McClain's code. He pretended that the insurance company had given him authority to receive premiums for any length of time. This is a fact. False pretense cannot be predicated upon an opinion, but the authority of the agent must be based upon what was said or done by his principal. If nothing were said by the principal which would justify such a statement, then such a statement, being a statement of fact, and being false, would be such pretense as to make B amenable to law.

Yours truly,

MILTON REMLEY,
Attorney-General.

THE PROPERTY OF THE STATE IS NOT SUBJECT TO TAXATION.

IOWA CITY, Iowa, August 28, 1897.

Hon. A. E. Shipley, Clerk Executive Council, Des Moines, Iowa:

DEAR SIR—Your favor of the 27th inst. at hand, enclosing the claim of Mrs. E. R. Bristow for $5.70, upon which the executive council desire my opinion:

It appears from the petition that the state owns block 27 in Stewart's addition to the city of Des Moines; that a sidewalk around said block was repaired by the city of Des Moines, and a special assessment was made to pay the expense of said repairs, and that the property was sold at tax sale and purchased by E. R. Claflin, the certificate of sale being now owned by E. R. Bristow.

The real estate belonging to the state is not subject to taxation, either general or special. It is a clear case of improper sale. In case of improper sale for taxes, the statute provides how it may be refunded. The claim of Mrs. Bristow is a proper one to be taken up by the city council, or the county treasurer, and then have the same charged to the city. Without determining how she may collect the claim, I am clear that it is not a legitimate claim against the state, and should not be allowed.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

STATE BOARD OF HEALTH—How its rules and regulations are to be enforced.

IOWA CITY, Iowa, September 6, 1897.

Dr. J. F. Kennedy, Secretary State Board of Health, Des Moines, Iowa:

DEAR SIR—Yours at hand in regard to the proper construction of section 2572 of the code of 1897, which reads as follows: "The local boards of health shall obey and enforce the rules and regulations of the state board; and peace and police officers within their respective jurisdictions, when called upon to do so by the local board, shall execute the orders of such board." You ask: "Does the word, 'such,' in the last line, refer to the state or the local board?"

I think, considering the grammatical construction of the sentence, that that the words, "such board," in the last line, refer to the state board. Taking the different parts of chapter 16, title 12, it occurs to me that it was the intent of the legislature to require the state board to operate through the local boards. The state board has authority to make "rules and regulations as it, from time to time, may find necessary for the preservation and improvement of the public health, which, when made, shall be enforced by the local boards of health and peace officers of the state" The local boards can determine when these rules and regulations are violated by anyone within their jurisdiction, and shall order the peace officers to enforce the rules and regulations made by the state board. There are sections giving to the local board authority to enforce their own orders made with reference to the abatement of nuisances and removing or destroying the source of filth, or cause of sickness. Section 2573 prescribes a penalty against one who "knowingly fails, neglects or refuses to comply with or obey any order, rule or regulation of the state or local board of health, or any part of this chapter after notice thereof has been given as herein provided." The local board, however, gives the notice, and it occurs to me that the machinery of the law to enfore the rules and regulations made by the state board, must be set in motion by the local boards. The state board makes general rules and regulations. The local boards are required to enforce these rules and regulations whenever occasion requires it, within their jurisdiction.

It may be said that this view robs the state board of some of its power. I think not. In case of the failure of the local boards to do their duty, they can be dealt with according to law on complaint of the state board. The law presumes the local boards will do their duty, and in case of wilful failure they are made amenable to the law.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

THE USE OF AN APPROPRIATION BY A PUBLIC OFFICER—May use discretion as to when the same shall be expended.

IOWA CITY, Iowa, September 6, 1897.

Hon. Henry Sabin, Superintendent Public Instruction, Des Moines, Iowa:

DEAR SIR—Your favor of the 30th ult. came duly to hand, in which you ask my opinion upon the following question:

"In joint resolution number 9 by the general assembly at its extra session, fixing amounts for help in the several offices, the following is stated with regard to the superintendent of public instruction: 'He may also expend for extra necessary clerical assistance not to exceed $500 per annum.'

"In order that I may act advisedly with reference to the preparation of the biennial report, and particularly as regards the collection and compilation of the large amount of statistical information customarily included, I desire your official opinion whether there is anything in the entire resolution to prevent securing the benefit of the use of the amount named for necessary extra assistance during the usual months when such necessary help is most needed, especially when in his judgment it is imperatively

demanded to enable such officer promptly and efficiently to perform the duties of his office as required of him by his official oath."

In regard to this I will say that section 3, chapter 126 of the Twenty-sixth General Assembly, made an appropriation to the superintendent of public instruction for clerical help, $1,500, for the two years ending March 31, 1898. This statute has not, to my knowledge, been repealed. The repealing clause of prior laws, being section 49 of the new code, does not "affect acts appropriating money when the same has not been fully paid out." Joint resolution number 9, to which you refer, was adopted by the two houses of the general assembly in harmony with the provisions of section 181 and section 182 of the code of 1897, but these sections do not take effect until October 1st, and at the time joint resolution number 9 was adopted, there was no law in force authorizing the general assembly, by joint resolution, to fix the number or limit the compensation of clerks and employes in the different departments of the state.

I have no doubt that the joint resolution cannot at any time be considered as repealing existing statutes. Joint resolutions are not signed by the governor, and do not, in all respects, have the force and effect of law I think it well, however, to accept the limitations on the expenditures under the appropriations made by chapter 126 of the Twenty-sixth General Assembly, as an expression of the legislative will. While possibly not legally binding upon you, with the force and effect of law, yet it should be respected and obeyed if it is possible to do so without violating some statutory duty.

It is not to be presumed that the extra clerical assistance needed would be needed uniformly throughout the entire year. Some months of the year, or some months of the biennial period, there may be a demand for a great deal of extra clerical help, as at the time of making out your report, and other months, none may be required, and in my judgment, you are authorized to use as much of the $500 as the good of the service requires.

It is a matter within the discretion of the superintendent when it shall be used. Where there is a change in the incumbents of the office during the biennial period, in expending this allowance for extra help, due regard should be made to the probable wants of the successor. But the law fixes no limit, and the whole matter as to the time of procuring extra help and the compensation, is left by the legislature to the wise discretion of the superintendent.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

STATE BOARD OF HEALTH—It is not necessary that the board re-enact its rules and regulations upon the new code becoming operative.

IOWA CITY, Iowa, September 6, 1897.

Dr. J. F. Kennedy, Secretary State Board of Health, Des Moines, Iowa:

DEAR SIR—Your favor at hand requesting my opinion as to whether or not it will be necessary for the state board of health to meet in October and re-enact rules and regulations made by the board under the statutes heretofore existing; in other words, are such rules and regulations rendered

nugatory by the operation of the new code, which repeals all prior statutes, provided such rules and regulations are not in conflict with the new code?

In my judgment, it is not necessary. The reservations in the repealing of the prior statutes are sufficient to protect acts done under the prior statutes. The new code contains practically the same language with reference to the authority of the board to make rules and regulations, and the adoption of the new code would only render nugatory such rules and regulations as would be in conflict with the new code.

If there are no new rules and regulations which are in conflict with the new code, they need not be changed.

Yours truly,

MILTON REMLEY,
Attorney-General.

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1. **DRAWING PETIT JURY**—Is not made the duty of either the auditor or clerk to keep a formal record of the drawing of the jury.—2. **TAXATION**—All assessments made after the taking effect of the new code must be under its provisions.

IOWA CITY, Iowa, September 6, 1897.

Julius Lischer, Esq., County Attorney, Davenport, Iowa:

DEAR SIR—Your favor of the 3d inst. at hand, in which you ask my opinion upon: "Who is the proper officer to keep a record of the drawing of the petit jury, the clerk or the auditor?"

In regard to this I will say that the law does not in express terms require a record of the drawing to be kept. A list of the names furnished by the judges of the elections, to be put upon the jury list, is required to be recorded by the county auditor, (section 6, chapter 61, laws of the Twenty-sixth General Assembly). The auditor and the clerk of the district court shall prepare from such list separate ballots containing the names and places of residence of all persons returned. These ballots of the grand jurors, petit jurors and talesmen are put in separate boxes, plainly marked and sealed and deposited with the clerk of the district court, (section 7).

Under section 11, the auditor, clerk of the district court and recorder shall meet and proceed to draw the grand and petit jurors. As their names are drawn, the statute says, "the names shall be read aloud and taken down," and this continues until the required number is drawn, and the box sealed up again and returned to the clerk. The statute does not require a formal record to be made as to the manner of drawing the grand jury, and I do not know that any formal record is required. The clerk takes the names of those who are drawn and issues his precept or summons therefor, which the sheriff serves. I think the general custom heretofore has been for the auditor to make a memorandum, upon a jury-book or election-book, of the drawing of the jurors, and the expression in section 11, "the books shall be returned to the clerk of the district court," indicates that something of that kind was in the mind of the one who drafted the act.

I doubt very much whether any special record is required, but it would certainly not be amiss for the auditor to keep a record of the time and place

of meeting, and what was done, and the list of persons drawn as jurors. It is evident, however, that the clerk must keep a list of the persons who served as jurors, for he is required to furnish such list to the auditor, (section 6).

Drawing a jury is not necessarily a part of the court record, but the clerk should keep a list of those who actually serve, so as to furnish the same to the auditor. In the absence of a statute requiring it, I am unable to say that it is the duty of either the clerk or the auditor to make a formal record of the acts done by the three officers who draw the jury.

You ask, further, whether the assessment of the county is to be made under the old or the new law for the year 1898. The new law comes in force October 1st, and all assessments made after that must be made in conformity with the new law. Yours respectfully,

MILTON REMLEY,
Attorney-General.

SOLDIERS' HOME—Upon what basis funds for the support of the inmates of the home should be drawn from the state treasury.

IOWA CITY, Iowa, September 9, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—Your favor of the 31st ult. came duly to hand, in which you request my opinion as to the proper construction or interpretation of section 2, chapter 121, laws of the Twenty-second General Assembly, (section 2801 of McClain's code), as to the support of inmates in the soldiers' home at Marshalltown, Iowa, with more particular reference to what is meant by, "the average number for the preceding quarter."

I understand that there are two methods of computing the average number for the preceding quarter, one based upon the total enrollment for the quarter. The aggregate enrollment for the three months is divided by the number of months, the quotient being the average number. The other method is to find the aggregate daily attendance during the quarter, which sum is divided by the number of days in the quarter, the quotient being the average daily attendance. The difference between these methods of computing is quite important, as the requisitions made on the two different plans for August show that $1,360 is drawn from the state treasury more by adopting the former plan than by adopting the latter plan.

Because of the importance of the question to the home, I have examined it very carefully, and will state the conclusions I have reached. The entire section is: "For the general support of the inmates of said home, there is hereby appropriated the sum of $10 per month, or so much thereof as may be necessary to each inmate of said home, to be estimated by the average number for the preceding quarter."

"Average" is an adjective which means "medial; containing a mean proportion." The average is found by dividing the aggregate amount of each of the periods by the number of periods: as, for instance, the average daily attendance at a school is found by adding together the number of days that each scholar attended school during the term, and dividing by the number of days in the term.

The uncertainty as to the meaning of the statute in question arises because there is no period of time fixed which we can use as a divisor in finding the average number. The statute does not say that the requisition shall be based upon the average daily attendance at the home during the preceding quarter. If it so stated, it would be plain. We are compelled to look, then, to the other parts of the section to ascertain its meaning. We find that only "each inmate in said home" is to be taken into consideration. An inmate is one who lodges or dwells in the house or home. One enrolled and not actually dwelling or lodging in the home, is not necessarily an inmate. If, by misuse of language, we could apply the term, "inmate," to one who was absent for a number of months, yet the words, "in said home" would require only those actually in the home to be considered.

When leave of absence is given, or a furlough, as it is called, for a stated time, and the inmate goes away possibly for a month or two, I hardly think the use of the language would permit him to be called an inmate in said home during the time that he is absent. A child is a member of his father's family, but he is not an inmate of the home when he is off attending school, although he remains a member of the family.

While I cannot escape from the conviction above stated, I do not undertake to say that the roll should be called every day, and the daily attendance noted and the average daily attendance ascertained. There is nothing in the statute that warrants the conclusion that the legislature so intended. I can see many reasons why such a rule should not be adopted. Clothing is furnished to the inmates of the home. A certain allowance is made per month for spending money. Their place is kept open for them in case they are absent for a day or two. The expense of providing cooks, reading material, and the care of the wards and grounds is not perceptibly diminished by reason of the absence of a few, or even of a dozen, members.

The determination of when one ceases to be an inmate of the home depends upon the facts of each case, but in every case there is a point where it can be said, that although the name of the inmate may be carried on the rolls as entitled to a place in the home, he ceases to be an inmate in said home. The sum of $10 per month to each inmate of said home is not appropriated absolutely, but only so much thereof as may be necessary. The amount that may be necessary for the support of said home is left to the wise discretion and good business management of the commissioners and those in charge thereof. It is contemplated that they will only draw from the state treasury the amount that in their judgment is necessary for the support of the home, not to exceed the amount named in said section. The same good judgment should be exercised in determining when one ceases to be an inmate of said home. The moment one steps outside of the home he does not cease to be an inmate, even if he should be absent from a meal, or several meals, or possibly for several days, his place being kept open for him, and all the expenses of the table and conducting the home being essentially the same as if he were there, and the home being under moral obligations, at least, to send for him if he were sick or misfortune should happen him, and extend its fostering care over him. But it is very different from the case where a leave of absence is granted for a month or two, and the home being under no obligations or responsibility for him while he is absent.

I am aware that in cases of furlough the soldier wears the clothes furnished by the home, and in many instances undoubtedly receives the monthly cash allowance that, under the rule, is given for personal expenses, and it may be considered a hardship to the home, under such circumstances, to deprive it of the right to draw for the support of such furloughed soldier. But to give the construction to the language of the statute which would permit hundreds of persons to be carried on the roll as inmates of the home who are absent month after month, and under no control or discipline of the home, would not only do violence to the language of the statute, but would open the door to abuses of a serious nature.

When, therefore, the absence from the home is of such a nature and for such a time that the management of the home is released from the responsibility of his care, or for attendance in time of sickness, and is under no obligation, morally or otherwise, to send for him and bring him back to the home in case of misfortune, especially where it is understood to be for a fixed time, I do not think he could be considered an inmate of the home. The facts and circumstances connected with each case are different from others, and I have no doubt that the management of the home would be able to conscientiously determine when one ceases to be an inmate of said home, and that no fiction will be indulged in to carry on the roll, as inmates, the names of those who are absent for any length of time from the home, during which time the home has no control over them, and has no responsibility for their support. Yours respectfully,

MILTON REMLEY,
Attorney-General.

STATE OIL INSPECTOR—Abolishment of office—Effect upon the term of the incumbent.

IOWA CITY, Iowa, September 11, 1897.

Hon. Luther A. Brewer, State Oil Inspector, Cedar Rapids, Iowa:

DEAR SIR—Your favor at hand in which, at the request of the governor, you ask my official opinion as to whether the new law touching the inspection of oils, affects the tenure of your office?

Chapter 11, of title 12 of the code of 1897 is a codification and revision of all prior law relating to the inspection of petroleum products. The subject of the inspection of petroleum products being revised in the code, all law not embraced therein is repealed by section 49 of said code. All provisions, then, of chapter 185, laws of the Twentieth General Assembly, and acts amendatory thereto, not embraced in the new code, are repealed. The new code takes effect October 1st.

Without quoting the language of the statute, I will say the provision for the appointment of a state oil inspector is omitted from the new law. The provision, also, for the appointment of deputies for the state oil inspector, is omitted from the new code, and hence repealed. In lieu of these provisions, "the governor shall appoint such number of inspectors of the products of petroleum as may be determined by the state board of health, not to exceed fourteen in number. Each inspector shall be a resident of the state

and not interested either directly or indirectly, in the manufacture or sale of products of petroleum. His term of office shall begin on the first day of July of each even-numbered year."

There is no express statute abolishing the office of state oil inspector. The state oil inspector was appointed for the term of two years, commencing April 1, 1896; his deputies were also appointed and required to furnish their own implements with which to test the oil. The duties which they perform are continued under the new code. Provision is made for the appointment of inspectors to discharge these duties at a future date, viz., after the termination of the present term of office of the state oil inspector. If the abolishing of the office takes effect on the first of October next, it is very evident that no person is authorized to perform the duties which the statute provides shall be performed. It is well recognized that the office of a subordinate or deputy ceases by the abolishment of the superior office. (19 Am. and Eng. Enc. of Law, 562; *State v. Board of Public Lands*, 7 Neb., 42.) The power of a deputy, therefore, ceases upon the suspension of his principal from office. (*McCue v. Circuit Court*, 51 Iowa, 60-66.) The deputies act for the principal officer. All agencies are terminated by the death of the principal. It would be absurd to contend that the office of a deputy continues to exist while the office of the principal who appointed the deputy has no existence.

If, then, the statute be construed as abolishing the office of state oil inspector on the 1st of October, all of his deputies likewise cease to hold office. But there is no provision of the statute for the appointment of anyone to perform the duties contemplated by chapter 11 until inspectors are appointed by the governor to take office on the 1st of July next, unless the office being created and being unfilled would constitute a vacancy which might be filled by the governor immediately. If we examine section 1266 of the new code, it being substantially the same as section 781 of the code of 1873, the facts involved do not come within the provisions of law which determine a vacancy. An office which has never been filled, and the law does not contemplate that it shall be filled until a future date, cannot be said to be vacant.

I do not think, under existing statutes, the governor would be authorized to appoint inspectors as provided for in section 2503 of the new code, to enter upon the duties of the office prior to July 1, 1898. If then, the legisture intended, by repealing the law authorizing the appointment of a state oil inspector, to abolish the office of one already appointed, we would have this state of affairs: the law prohibits the use of oil not inspected, prohibits the sale of any product of petroleum which has not been inspected and duly branded, but has provided no one to inspect it. I cannot for one moment imagine that the legislature intended any such a thing. Without an inspector, petroleum products cannot be legally inspected. Without an inspection under the law, there can be no legal sale or use of the products of petroleum. Certainly it was not intended by the legislature to prohibit the sale and use of the products of petroleum in the state from October to July.

It will be noticed that the change in the statute, although it becomes a law on the 1st of October, relates to future appointments, and does not expressly, or necessarily by implication, abolish the office which was filled

under existing laws. The necessity for inspection of oil continuing, it is evident to my mind that the legislature did not intend to abolish the office at the instant the law goes into effect. But having provided that the duties now performed by the state oil inspector and his deputies shall be performed by inspectors who will take their office on the 1st of July next, I think it evident that the intent of the legislature, as expressed by the several acts, was that the present incumbent of the office of oil inspector shall by himself and his deputies perform the duties which the statute requires until such time as they are relieved therefrom by persons appointed under the new law.

If this be not true then all oil inspection stops until new appointees can legally take their office July 1, 1898. Considering all the provisions togther, I am of the opinion that you are authorized to exercise the functions of your office during the remainder of your term, or until such time as the persons to be appointed can perform the duties which the statute requires with reference to petroleum products.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CRIMINAL LAW—When the presence of a defendant charged with a felony, at the rendition of a verdict, is waived.

IOWA CITY, Iowa, September 18, 1897.

J. M. Wilson, Esq., County Attorney, Centerville, Iowa:

DEAR SIR—Your favor of the 10th inst. at hand, in which you make the following statement of facts:

One Clark was indicted for larceny of property of the value of $28.50. Pending the trial, he was out on bail. He attended the trial, including the argument of the counsel and instructions of the court, and about the time the jury retired to consider their verdict, he absconded. The jury were out over night, and returned a verdict the next morning. The defendant could not be found after diligent search, and the judge received the verdict in the afteroon of the same day, and polled the jury. The verdict was: "Guilty as charged in the indictment." You ask whether the defendant, if found and brought into court during this term, can be legally sentenced. You say, also, that his bond has been forfeited.

Section 4461 of the code of 1873, provides: "If the indictment be for a felony, the defendant must be present at the renditioa of the verdict" I find no decision of our own court which fairly meets the question that you propound. This section is made for the protection of the defendant, so that if a juror, upon seeing him at the time of the rendition of the verdict should have any doubts about the correctness of the verdict, he might change his mind at the last moment and dissent from the verdict upon the jury being polled. The statute being for the benefit of the defendant, I cannot think that our supreme court would hold that by his wrongful act in wilfully absenting himself and hiding he could claim there was a mis-trial or that the verdict could not be received. In other words, I think he hould be considered as having waived his statutory right to be present, by

his act. I would so construe the statute. If the defendant is arrested and brought into court, I am satisfied it would be the duty of the court to pass sentence upon him under the verdict which has been recorded in this case.

This course commends itself to reason, and I think it is the only course that should be pursued. If he were detained without any fault on his part, through any accident or misfortune or sickness, I doubt whether the verdict received in his absence could be sustained; but not so where he wilfully and intentionally absents himself.

At any rate, I have so much confidence in the soundness of this position that if he is arrested and the court imposes a sentence, I am willing to defend the action of the court in the supreme court, and think it can be successfully sustained. Yours truly,

MILTON REMLEY,
Attorney-General.

COMPENSATION OF PUBLIC OFFICERS—Sheriff—Fees for commitment and discharge of prisoners from jail.

IOWA CITY, Iowa, September 18, 1897.

Henry Michel, Esq., County Attorney, Dubuque, Iowa:

DEAR SIR—Yours of the 15th inst. at hand, in which you ask my opinion as to whether, under chapter 75, acts of the Twenty-fifth General Assembly, and section 5054 of McClain's code, the sheriff is entitled to receive fees for commitment and discharge from the jail, in addition to the $3,000 referred to in said chapter 75.

Section 2 of chapter 75 provides that in counties having a population of not less than 45,000, "the fees received by them (the sheriffs) and their deputies, in excess of $3,000 per annum, shall be paid into the county treasury." I can conceive of no reason why the fees allowed to be charged by section 5054 should be retained by the sheriff any more than the fees allowed to be charged by any other section or statute. I suppose the thought is that these fees go to the jailer, but it is made the duty of the sheriff to safely keep the prisoners entrusted to him, and to receive them. The jailer only acts for the sheriff, and receives no fees by virtue of his appointment as a sheriff's assistant to take charge of the jail. The jailer, as a jailer, is entitled to collect no fees. Any fees received must be received by virtue of the law authorizing the sheriff to charge the same.

I have no doubt in regard to the correctness of the proposition that the fees authorized by this section must be accounted for and paid into the county treasury, if the fees collected by the sheriff are in excess of $3,000. If the aggregate fees of the sheriff were less than $3,000 the sheriff would be authorized to receive the fees for commitment and discharge of a prisoner from the county. Yours truly,

MILTON REMLEY,
Attorney-General.

WHO ARE ITINERANT VENDORS OF DRUGS, ETC.

IOWA CITY, Iowa, September 21, 1897.

W. M. Jackson, Esq., County Attorney, Bedford, Iowa:

DEAR SIR—Your favor came duly to hand, asking my opinion upon the following statement of facts:

"Rev. J. C. Lewis of this place, a reputable citizen, has the agency in this and other states for what is known as Dr. Judd's electric belt. It is a belt which, as we understand it and as he represents it, is not of itself a medical appliance, but is simply the positive and negative poles of an electric battery with proper connection, which, immerged in an acid and applied to the human body, will generate an electric current and pass it through the human body.

"Mr. Lewis' method of conducting his business is that he simply procures suitable agents who go from house to house seeking private and personal interviews with prospective customers. No advertising of any sort is done, and the only representations made at all are made by the agent direct and privately to the customer. No attempt is made by the agents to address a crowd or call the attention of the crowd to the belt. No advertisements are inserted in newspapers and no hand bills are scattered. The only printing made use of in any way is a circular, or rather a series of rules for the use of the belt, which is delivered to the customer along with the belt, and one of these circulars I inclose herewith for your perusal."

The section involved is: "Any itinerant vendor of any drug, nostrum, ointment or appliance of any kind, intended for the treatment of diseases or injuries, who shall, by writing or printing or any other method, publicly profess to treat or cure diseases or injury or deformity by any drug, nostrum, manipulation or other expedient, shall pay a license of $100 per annum, to be paid to the treasurer of the commission of pharmacy," etc.

To make it necessary for one to pay this license, he must be an itinerant vendor. Whether Mr. Lewis himself goes from place to place, making sales and publicly professing to cure, is a question of fact. From the statement of facts, the agents he appoints are the persons that become the itinerant vendors. I suppose your inquiry, however, relates not to Mr. Lewis personally so much as to his agents.

The suggestion made, that in order to publicly profess to cure or treat diseases, one must make public address to a crowd, or call attention of the crowd to the belt, I think is of no force. One having printed circulars of the appliance, giving directions how to use it so as to cure ailments or diseases, giving these directions or circulars to any one of the public, or many of the public, to whomsoever he thinks may purchase, is publicly professing to cure. A lawyer or a doctor holds himself out to the public as competent to discharge business intrusted to him, without publicly advertising or addressing a crowd explaining his proficiency

The circulars which you enclose, if given to possible purchasers of the appliance, contain statements of the ailments that can be cured by the electric belt, testimonials, etc., and come within the prohibitions of the statute, "by writing or printing or other method, publicly profess to cure or treat diseases or injury," etc. A physician holds himself out to the public as able to cure or treat diseases, etc., although his conversation with his patrons may be private conversation. Going from house to house selling

the electric belt constitutes the one so going an itinerant vendor, and if by printing or verbal representation, such a one professes to treat or cure diseases by means of the appliance, he is, in my judgment, first required to procure a license. The circular enclosed says the belt cures hernia, rheumatism, heart disease and twenty-six other diseases. It prescribes the way in which the belt is to be used in order to work these cures, and by following the rules, the public is told that cures will be effected.

I have examined the cases to which you refer me, and also others, and think they sustain the views which I have herein expressed.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC OFFICE—VACANCY—ASSESSOR—CHANGE OF DISTRICT—When one ceases to be a resident of the district wherein his duties are to be performed, his office becomes vacant.

IOWA CITY, Iowa, September 21, 1897.

A. N. Wood, Esq., County Attorney, Grundy Center, Iowa:

DEAR SIR—Your favor of the 18th inst. at hand, in which you say:

"At the annual election of 1896, one B. Bolt was elected township assessor for and within Colfax township, Grundy county. Since that time, a part of said townsip has been incorporated into the incorporated town of Holland, and the said B. Bolt has been elected assessor within and for the incorporated town of Holland, and resides within the incorporated town of Holland." You ask: "Can this man Bolt still act as assessor for that portion of Colfax township not included within the incorporated limits of Holland, and, if not, should the township elect an assessor this fall?"

Chapter 110, acts of the Nineteenth General Assembly, provides: "There shall be elected in each township, a part of which is included within the incorporated limits of any incorporated city or town, by the qualified voters of such township residing without the corporate limits of such city or town, one assessor, in the same manner as provided by law for the election of township assessors, and at the regular municipal election of each incorporated city or town in the year 1882, and biennially thereafter, * * * there shall be elected by the qualified voters of such city or town one or more assessors for such city or town."

This makes it plain that each city or town shall elect an assessor, and that the township outside of the city or town shall also elect another assessor. The general provisions of law require an elective officer to be a resident of the township or district in which the duties of his office are to be exercised. Section 1253 of McClain's code provides: "Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office: * * * *Fifth.*—His ceasing to be a resident of the state, district, county or township in which the duties of his office are to be exercised, or for which he may have been elected."

The duties of the assessor of the township outside of the corporate limits of Holland are to be performed by an assessor who is to be elected by the

voters residing in said district. Mr. Bolt has ceased to be a resident of the assessor district of the township of Colfax outside of the corporate limits of the town of Holland. It matters not in what manner he ceases to be a resident — whether by a removal or a change of the district; it is evident he has ceased to be a resident of the assessor district outside of the corporate limits of Holland.

There becomes, then, under the section last referred to, a vacancy in that office, and I think it would be proper to fill the vacancy at the next general election, as provided by law.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

ROAD TAX—How and for what expended.

IOWA CITY, Iowa, September 21, 1897.

W. L. Livingston, Esq., County Attorney, Corydon, Iowa:

DEAR SIR—Your favor came to hand some days ago, in which you refer to section 1, chapter 200 of the acts of the Twentieth General Assembly, and ask my opinion as to whether the fund therein provided shall be used for work (labor) done under the direction of the board of supervisors; also, whether the board of supervisors has the right to return the proportionate amount of this fund to the various townships.

In reply I will say that I have serious doubts as to the constitutionality of the entire act. If it is unconstitutional, the board of supervisors has no right to do anything under the act, but I do not determine the question of the constitutionality of the act.

On the assumption that it is constitutional, I will say that the language of the statute is: "This county road fund shall be paid out only on the order of the board of supervisors for work done on the highways of the county in such places as the board shall determine." This negatives the idea that the fund can be apportioned to the townships and paid to the trustees for working the highway. The language is: "Shall be paid out only * * * for work done on the highways of the county." "Work" does not necessarily mean labor alone. The second definition given by Webster is: "The matter on which one is at work; that upon which one spends labor; material for working upon; subject of exertion; the thing occupying one."

Work on the highway evidently means, improvement of the highway for the purpose of making it in a good condition for travel. Considering the object to be obtained by providing the county road fund is the improvement of the road in places where the township fund is insufficient, and the improvement of the road necessitates culverts or stone, or timbers, or material with which to make a good road, I would not like to say that the use of the word, "work," in the statute necessarily limits the board of supervisors to paying for labor alone. In my opinion, they are authorized to do whatever is necessary to be done to improve the condition of the road, which is the work entrusted by this statute to the board.

I do not think, however, that any money should be expended from this fund for purposes for which the bridge fund can be expended. There is no thought on the part of the legislature to permit this fund to be as an addition to the bridge fund.

I would call your attention, however, to chapter 42, laws of the Twenty-sixth General Assembly. If the fund to which you refer were collected prior to the 1st of January, 1896, it seems that under the provisions of this act, the board of supervisors could do pretty much as they pleased with it.

Yours truly,

MILTON REMLEY,
Attorney-General.

INTOXICATING LIQUORS — SEIZURE CASES — PROCEDURE — Whether or not a change of venue may be had.

DES MOINES, Iowa, September 28, 1897.

F. E. Gates, Esq , County Attorney, Adair, Iowa:

DEAR SIR—Your favor of the 27th inst. at hand, asking my opinion as to whether or not the claimant of intoxicating liquor, in seizure cases brought under the statute (McClain's code, sections 2401 to 2404 inclusive) is entitled to a change of venue as in criminal cases.

This question is one involving considerable doubt. The statute nowhere expressly provides that a change of venue may be granted. In section 2403, it says: "At the time and place described in said notice, the person named in said information, or any other person claiming an interest in said liquor and vessels, or any part thereof, may appear and show cause why the same should not be forfeited. If any person shall so appear, he shall become a party defendant in said case, and said justice shall make a record thereof. Whether any person shall so appear or not, *said justice shall*, at the prescribed time, proceed to the trial of said case. * * * The proceedings in the trial of such case may be the same substantially as in cases of misdemeanor triable before justices."

Those who contend that the right to a change of venue exists, do so because of the language last above quoted: "The proceedings in the trial of such case may be substantially the same as in the trial of cases in cases of misdemeanor triable before justices." I do not think it was intended that a change of venue should be granted. The language above quoted does not militate against this idea. The *proceedings in such trial before* the justice shall be conducted in the manner of trials in misdemeanor cases. A change of venue, if taken at all, must be taken before the trial begins. The provision that the manner of conducting the trial after the trial is entered upon, may be the same substantially as in misdemeanor cases triable before justices, is not broad enough to include the procedure before the trial is entered upon. This is a statutory proceedings, and must conform to the statute. Nothing can be engrafted into the statute by analogy.

Every right is reserved to the party by taking an appeal. It is not an arbitrary exercise of power. It is usual to permit a jury to be called in the justice court, but whether that be done or not, the right of appeal being preserved to the claimant of liquors, and a right to a trial by jury in the

district court, clearly preserved to the defendant every constitutional right. I do not think the statute can be considered to authorize a change of venue.

I am aware that different district courts have held differently upon this question, but I am unable to give full force and effect to all the language of the statute by any other construction than that above stated. The new code makes no change in this provision.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

ELECTION OF TOWNSHIP OFFICERS WHERE A CITY EMBRACES ALL OR A PART OF THE TOWNSHIP.

DES MOINES, Iowa, October 6, 1897.

Wm. Wilbraham, Esq., County Attorney, Cresco, Iowa:

DEAR SIR—Your favor of the 27th ult. came to hand, in which you make the following statement, upon which you ask my opinion:

"Last year at the time for holding the township caucus, the city and township held together. Since then there has been a division, making four precincts, three in the city and one in the township. At the election all the voters of the township, including the city, voted for township officers. This fall each precinct has held its own caucus, and the question is as to whether the township ticket should be included in the general ticket, or whether there should be a separate ticket for township officers, to be voted for by those living in the outside precinct, and deposited in a separate ballot box the same as is done in voting for township assessor. Also, should the voters of the city precincts have any voice in choosing township officers?"

The determinatieon of this question depends upon whether the city has been organized into a township by itself. If the board of supervisors has not changed the township limits so as to make the city a separate township, as the board is authorized to do under section 552 of the code, then all the voters in the city have a right to vote for the township officers, except assessor. If the township limits have been changed, then a different ballot should be prepared for the township outside of the city, on which all of the candidates' names for the township offices are placed, including that of assessor.

The division of the township into election precincts, under the power given by section 1090 of the code, does not change the right of every voter in the township to vote for township officers, but inasmuch as an incorporated town elects its own assessor, and that part of the township outside of the incorporated town elects its own assessor, the voters inside of the limits of the town or city have no right to vote for the assessor which is elected by the electors outside of the city.

Not knowing whether or not the boundaries of the township have been changed, I am unable to answer more specifically, but the rules stated above should be applied to the facts of your case.

Yours truly,

MILTON REMLEY,
Attorney-General.

GENERAL ELECTIONS — CARD OF INSTRUCTIONS—The card of instructions prepared by the attorney-general and sent out by the secretary of state is the card of instructions that should be printed and distributed by the county auditor.

DES MOINES, Iowa, October 16, 1897.

Hon. G. L. Dobson, Secretary of State:

DEAR SIR—You have asked my opinion or construction of sections 1111 and 1112 of the code, with reference to the instructions to voters, in response to an inquiry from T. A. Cunningham, auditor of Webster county.

Not knowing the exact point that he has in mind, I hardly know what to say. The card of instructions is required to be prepared by the attorney-general, which I have done. The instructions are sent out by the secretary of state to the county auditors, which I understand has been done.

Section 1111 requires the county auditor to have the card of instructions printed in large, clear type. He should print the card of instructions that has been sent out from your office, and furnish the same to the judges of the election, who are required by section 1112 to post the same as provided in said section. The county auditor simply furnishes the card of instructions as required by law, which has been sent out from your office.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

OBEYING SUBPŒNA—RAILROAD COMMISSIONER—May refuse to attend when same will interfere with the hearing of a case which is set for hearing before the board of railroad commissioners.

DES MOINES, Iowa, October 20, 1897.

Hon. E. A. Dawson, Railroad Commissioner, Des Moines, Iowa:

DEAR SIR—Your favor of yesterday at hand, in which you ask my opinion upon the following question:

"Where a date has been fixed by the board of railroad commissioners for a hearing provided for by statute and notice thereof has been duly given, and subsequent to the fixing of such date and the giving of such notice one of the commissioners is served with a subpœna to attend the trial of a case in one of the district courts of the state of Iowa and the presence of such commissioner is necessary in order to make a quorum of the board, what is the duty of the commissioner so served with the subpœna, to obey the subpœna or to attend to his official duties?"

In regard to this I will say that while subdivision 4 of section 4460 makes the disobedience of any subpœna issued by it (the court) and duly served, a contempt, yet it must be construed with section 4664. This latter section provides: "For a failure to obey a valid subpœna *without a sufficient cause or excuse*, or for refusal to testify after appearance, the delinquent is guilty of a contempt of court and subject to be proceeded against by attachment." Hence, disobedience with a sufficient cause or excuse is not contempt, and cannot be punished as such.

It is evident to my mind that a railroad commissioner disobeying a subpœna because of the facts stated in your inquiry has a sufficient excuse therefor, and should not be adjudged guilty of contempt. The statute does not in direct terms exempt any one from the duty to obey a subpœna but persons holding a public office, when the duties of the office require their attendance at their office; I do not think courts have a right to demand their attendance elsewhere.

Of course, it is incumbent upon a state officer to arrange the public business so that he may attend a court where his presence is necessary, so far as he can consistently do so, but where a case has been set for hearing and parties are to appear, before the subpœna was served, the court wishing the attendance of the commissioner should assign the trial so as not to conflict with such immediate duties.

There should exist, and my observation has been that there does exist, a spirit of courtesy and comity between the different branches of the state government which obviates all complications. You should send as soon as possible to the court an explanation of the condition of affairs, and of your inability to attend court on the day named in the subpœna.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COMPENSATION OF PUBLIC SERVANTS—Janitors.

DES MOINES, Iowa, October 27, 1897.

Hon. A. E. Shipley, Clerk Executive Council, Des Moines, Iowa:

DEAR SIR—In reply to your inquiry as to whether the executive council has authority to pay the janitors, or whether there is any appropriation therefor, I would respectfully say in my judgment section 149 of the code authorizes the payment of the janitors or employes of the custodian upon complying with the terms therein stated. "The executive council shall approve the report of the custodian and the auditor, upon such approval, shall issue a warrant." This is a sufficient appropriation to authorize the payment of said employes.

Section 5 of chapter 126 of the laws of the Twenty-sixth General Assembly, makes an appropriation for the payment of office janitors and mail carriers. This section has not been repealed by the adoption of the new code, and payment of office janitors and mail carriers may be made out of the fund thereby appropriated, not to exceed, however, the amount of said appropriation.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

POWER OF THE LEGISLATURE TO REDUCE SALARIES OF CERTAIN PUBLIC OFFICERS—Railroad Commissioners.

DES MOINES Iowa, November 4, 1897.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Your favor duly at hand, in which you ask my official opinion as to wnether or not the change made by section 2121 of the code in the amount of salary of the railroad commissioners, reducing it from $3,000

to $2,200 annually, took effect on the 1st of October, at the time the code went into effect, and whether they are only entitled to draw a salary at the rate of $2,200 per year from said date, or are they entitled to draw under the old law, which was in effect at the time of their election and the assumption of the duties of the office, at the rate of $3,000 per annum.

There is no constitutional provision prohibiting the legislature from increasing or diminishing the salary of any public officer except that of the judges of the supreme court and district courts. It is said in *Bryan v. Cattell*, 15 Iowa, 538: "That it is competent for the legislature to abolish an office, increase or decrease the duties devolving upon the incumbent, add to or take from his salary when not inhibited by the constitution, we entertain no doubt." See, also, *Iowa City v. Foster*, 10 Iowa, 189.

It is well settled that an office is not regarded as held under a grant or a contract within the general constitutional provisions protecting contracts. The compensation belongs to the officer as an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office.

These principles are abundantly sustained by the decisions of the supreme courts of many states and of the United States, and there can be no question that it is within the power of the legislature to reduce the salary of the railroad commissioners, and that such commissioners can only receive compensation fixed by the law in force at the time their services are rendered. (Throop on Public Officers, sections 19, 20; Cooley on Const. Limitation, 334, 5th Ed.) Yours respectfully,

MILTON REMLEY,
Attorney-General.

COLLEGE FOR THE BLIND—CONSTRUCTION OF PROVISIONS OF THE NEW CODE—1. Appropriations for support and special improvements, when drawn—2. Compensation of trustees, when drawn—3. When the term of office of the trustees expire—4. The taking effect of the provision relating to the eligibility of one to fill the office of treasurer created a vacancy in that office.

DES MOINES, Iowa, November 5, 1897.

Hon. C. G McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—Your favor duly at hand, asking my opinion upon the following points with reference to the requisitions of the treasurer and trustees of the college for the blind, you stating that heretofore the board has been composed of six members, and they have made requisition for per diem and expenses for a period from July 6, 1897, to October 7, 1897, both days inclusive. Your questions are:

First.—"Under section 2614, construed in connection with section 2718, can a warrant be issued them at this time? and does section 2614, above mentioned, apply both to appropriations made for support and special improvements?"

The evident intention of section 2614 is that all requisitions upon the state treasurer for appropriations for the support of any state institution

shall be presented on or after the middle of the current quarter. Section 2718 provides that the appropriations shall not exceed $40 a quarter for each resident pupil. The requisitions being presented on February 15th, May 15th, August 15th and November 15th, those dates may be considered the times at which the resident pupils are to be counted for the purpose of making requisitions.

You will notice that section 2718 does not provide for the average number of pupils in the college for the blind, as is provided with reference to some other state institutions. Section 2614, however, does not require that the requisition shall be presented on the days named therein, but may be presented after the days named therein. The requisition having been presented for the quarter ending September 30th, I am of the opinion that you are authorized to issue a warrant therefor (provided the same be correct in other respects), and that a requisition for the support for the current quarter cannot be presented until November 15th, or thereafter.

I think section 2614 refers to both appropriations for the support and special appropriations, "except appropriations already made for the erection of buildings now in course of construction, or under contract, as provided by law."

Second.—"Can a warrant be issued at this time, under section 2617, construed in connection with section 2614, for such per diem and expenses of its board of trustees, covering the whole period of their services, as above cited; and, if not for the whole period, can it be issued for any portion thereof?"

In regard to this, section 2614 does not seem to relate to the compensation of regents or trustees, but relates alone to appropriations made directly to the institution itself. I see nothing in the law that prevents the payment of the per diem and expenses of the regents at such times and whenever proper bills are presented to the auditor therefor.

Third.—"The board of trustees of that institution is now composed of six members. Does paragraph 3 of section 2609, construed in connection with section 2611, terminate the office of any trustee? and, if so, what particular one?"

Construing the two sections above named together with section 2714, I am of the opinion that no trustee is legislated out of office. Section 2611 expressly provides that if the term of any regent or trustee now holding office, expires prior to the 1st day of May in the even-numbered years, he shall hold until that time, so that the next general assembly will elect but two trustees instead of three. Then the board will be organized under the provisions of the new law with five trustees, but the six now holding office continue in office until the 1st day of May, 1898.

Fourth.—"The treasurer of said institution is now a member of the board of trustees, and a resident of Jackson county. By reason of section 2714, is he removed from office? and if so, when? and have I the right to issue warrants payable to his order at this time?"

At the time the treasurer was elected, the law authorized one of the trustees to be so elected. Section 2714 being now the law, makes the offices of trustee and treasurer incompatible offices. It is a rule of law well recognized that the same person cannot hold incompatible offices. The new section, in addition to this, requires that the treasurer shall be a resident

of Benton county. The functions of the office are to be exercised in Benton county. While the residence of the treasurer is not changed, yet the district or county within which the functions of the office are to be exercised has been limited, and changed by the new law, and the treasurer has ceased to be a resident of the county in which the duties of his office are to be exercised. This, under the provisions of section 1266 of the code, creates a vacancy in the office.

For both of the reasons above stated, I am of the opinion that the trustees should elect a new treasurer who is not a member of the board and who is a resident of Benton county. The vacancy having arisen by operation of law, and the former treasurer being no longer treasurer, I do not think you would be justified in issuing a warrant payable to his order. But note the last clause of section 2718 provides, "All warrants shall be issued in the name of the college."

Every change of law creates more or less friction in launching the new law or applying it to existing circumstances, but it is best for all state institutions to adapt themselves to the new order of things as soon as possible.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CLAIMS AGAINST THE STATE—Bills for supplies furnished prior to the taking effect of the new code—No appropriation out of which to pay for the same.

DES MOINES, Iowa, November 5, 1897.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Your favor duly at hand, in which you enclose two bills aggregating $976.60 for sundry supplies for the supply department, the same having been furnished prior to October 1, 1897. These bills, as stated by you, have been audited and allowed by the executive council. You add: "I am unable to find in the code of Iowa, which went into effect October 1st, any provision authorizing the auditor of state to issue warrants on any particular fund in payment of the above bills. I desire your official opinion as to on what fund or in what manner I may legally draw warrants in payment of such bills. In view of the fact that these bills were contracted when section 120 of the code of 1873 was in force and effect, would it be proper at this time to issue a warrant under said section 120, which was in effect repealed by the adoption of the new code?"

Section 120, as construed by the supreme court, authorizes the executive council to audit the bills "for such other necessary and lawful expenses as are not otherwise provided for," and the payment therefor by warrants drawn upon the state treasurer. This provision has been repealed, and the general power to appropriate money to pay the necessary expenses has not, by the new code, been given to the executive council. Sections 165, 166 and 167 provide the manner in which supplies for the supply department shall be purchased; section 167 provides that the executive council shall audit the bills "and order a warrant drawn upon the state treasury for the amount due, payable out of the sum appropriated by the general assembly for that purpose, and *not otherwise.*"

If there is no appropriation by the general assembly for that purpose, then it is evident the executive council has no authority to order the warrants paid. Because of the general power heretofore granted to the executive council to pay all current expenses of the different departments of the state, no appropriation has been made for a number of years for the incidental and necessary expenses in furnishing supplies to the different departments of the state government. No general appropriation for such purposes was made by the Twenty-sixth General Assembly either at the regular or at the special session. The special session, by the adoption of the new code, deprived the executive council of the power of paying such bills, except out of the sum appropriated for that purpose, and then unfortunately did not make an appropriation to cover such necessary expenses and bills against the state.

The fact that such bills were contracted before the new code took effect would not change the rule of law. The executive council is simply an agent of the state. The law under which it acts is the authority for it to act. It is competent for the principal, or the state, to withdraw the authority from the agent or officer of the state, and having withdrawn the authority theretofore given to the executive council, the executive council would not be warranted in making payment of bills although contracted when they had the authority to make the payment therefor.

The bills are just claims, I am satisfied, against the state, but by an oversight no appropriation was made to pay the same. The constitution provides: "No money shall be drawn from the state treasury but in consequence of appropriations made by law." Section 120 was construed by the supreme court to mean an appropriation of money to pay necessary and lawful expenses not otherwise provided for, but that having been repealed, any payment of the bills referred to by the executive council the same as if section 120 had not been repealed, would be, in my judgment, a violation of this constitutional provision.

However just the bills may be, the holders thereof will be compelled to wait until the legislature makes an appropriation to pay the same.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

SOLDIERS' ORPHANS' HOME—Changed by new code to simply an orphans' home and home for indigent children—Counties liable for support of all inmates—From what fund the counties may pay the same—Repeal of prior statutes.

DES MOINES, Iowa, November 6, 1897.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Your favor at hand, in which you refer to chapter 6, title 13 of the code of 1897, relating to the orphans' home and home for destitute children, and ask my opinion as to whether, "each county shall be liable to the state for all sums paid by the home in support, not only of the indigent children who may have been sent from the county, but also of the orphans of soldiers who may have had a residence therein."

It will be noticed that there is omitted from the new code the word, "soldiers," from the name. It is now "the orphans' home and home for destitute children." The orphans of soldiers are given preference in regard to admission into the home; otherwise there is no distinction in the entire statute.

Under the former law, the state paid for the support of the soldiers' orphans, and each county paid for the support of the children it sent to the home. The code having obliterated this distinction and provided in section 2692 that "each county shall be liable for all sums paid by the home in support of its children, which shall be charged to the county and collected when and as a part of the taxes due the state and paid by it at the same time state taxes are paid," it is evident that the legislature intended that each county should pay to the state for all the children it has in the home, whether they be soldiers' orphans, other orphans or indigent children. I do not think any other construction can be given to the section.

Second.—You ask: "Is the 'county orphan fund' provided for by section 2687 of the code, intended simply to pay for the support of destitute children, or is it also intended to provide for the support, in the soldiers' orphans' home, of soldiers' orphans?"

I have called attention to the fact that the orphans' home at Davenport is no longer distinctively a soldiers' orphans' home. The orphans' fund referred to in section 2687 is for the maintenance and education of destitute orphans, and the fund thus raised shall be called the county orphans' fund, and shall be expended in such sums and manner as the exigencies of each case may require. It is certainly competent for the board of supervisors to pay the state for the support of orphans in the orphans' home and home for destitute children out of this fund. They are given a large discretion, and may appoint someone to care for an orphan and pay therefor out of this fund.

Third.—You further ask: "Does the enactment of chapter 6, title 13, of the code, repeal chapter 97, laws of 1892, which chapter annually appropriates $500 for the payment of a charge made by the Davenport Water company for water consumed at the soldiers' orphans' home?"

Chapter 97 of the laws of the Twenty-fourth General Assembly, referred to, is a public and special act enacted for the purpose of aiding in the support and maintenance of the soldiers' orphans' home and home for indigent children at Davenport. The subject of the soldiers' orphans' home and home for indigent children and appropriations for its support have been thoroughly revised and codified in chapter 6, title 13, of the code. Section 49 of the code provides: "All public and special acts, the subjects whereof are herein revised, or which are repugnant hereto, are repealed."

The subject to which chapter 97 of the Twenty-fourth General Assembly belongs is certainly revised in the code, and I cannot escape the conclusion that said chapter 97 is repealed by the adoption of the code.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

NOTE.—Since this opinion was given the Twenty-seventh General Assembly has amended chapter 6, title 13, of the code, so that the institution is once more the soldiers' orphans' home.

STATE OIL INSPECTOR—COMPENSATION—Is entitled to salary until the termination of his term of office.

IOWA CITY, Iowa, November 10, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—Your favor of the 9th inst. at hand, in which you refer to an opinion given by me to the governor with reference to the office of oil inspector, in which the conclusion reached by me was that Mr. Brewer's term of office as oil inspector continued until July 1, 1898. You state that you are unable to find any provision in the new code fixing the salary of the state oil inspector, and ask:

"Am I authorized, by law, to draw a warrant to Luther A. Brewer at the end of each month for $166.66 on account of salary as such oil inspector, until such time as his office shall terminate in accordance with your opinion to the governor, and if so, under what chapter, or section, or provision of the laws of this state, am I authorized to draw such warrant?"

Prior to the taking effect of the new code, there was no question in regard to the right of Mr. Brewer to hold the office of state oil inspector, and to draw the salary attached thereto by law, viz , $2,000 a year. If the conclusions reached in my opinion to the governor were correct (and I see no reason for changing my views), then the office of state oil inspector was not affected by the provisions of the new code until the governor is authorized, by law, to appoint oil inspectors in lieu of those now filling the offices of oil inspectors and deputies.

While the code took effect on the 1st day of October, yet some of its provisions did not become operative until a later date. In a number of instances it is provided that certain acts shall be done by certain officers at some date in the future, and the order of things before the taking effect of the law continues until such time as the act may be done. To illustrate: section 144 provides: "Nothing in this act shall be construed to in any manner affect the compensation of the present state binder and printer during the unexpired term," and chapter 5, of which the section forms a part, is the law in force and effect at this time, and the general repealing clause of section 49 repeals all former law relating to the compensation of the state binder and printer. Such acts must be construed together.

The provisions of the old law with reference to the state oil inspector and his salary, continue in force until his successor is appointed. Section 1 of chapter 126, of the acts of the Twenty-sixth General Assembly, makes an appropriation for the payment of such salary, and it is your authority for drawing a warrant to pay the same. In my judgment you are authorized thereby to draw a warrant in favor of Mr. Brewer at the end of each month for $166.66, on account of salary as oil inspector, until the termination of his term of office as above stated.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

COUNTY AGRICULTURAL SOCIETIES -**What constitutes membership—What societies entitled to draw money from the state treasury.**

IOWA CITY, Iowa, November 16, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—A compliance with your request for my official opinion in regard to the proper construction of section 1661 of the code, has been delayed because of the press of other duties. You ask my construction and interpretation of the following clause therein:

"And raised during the year any sum of money for actual membership, it shall be entitled to an equal sum, not exceeding $200, from the state treasury," etc. What kind of report should be required from these societies? and what constitutes actual membership and the payment of sums of money for said membership? Would money received from admission fees, gate receipts, etc., by the society, be classified and reported under the heading, "for actual membership," and can money be drawn from the state treasury under this section to an equal amount, up to $200, for the receipts of societies from admission and gate receipts?

The language of the statute is not as explicit and plain as it could well be made. The section in question is a part of chapter 3, title 9. Title 9 treats of corporations. I think it fair to assume that county agricultural societies referred to in said section are such societies as are incorporated under the laws of the state with a permanent membership, associated together for the purpose of diffusing knowledge beneficial to those engaged in agricultural pursuits, encouraging investigation and experiments in growing different kinds of agricultural products, the improvement of stock, the development of agricultural implements, and in every way to foster and develop the agricultural interests of the county.

While the statute does not define an agricultural society, yet the history of the organization of agricultural societies for more than 100 years, the purpose of their organization and the work undertaken by them have attached to the term, "agricultural society," a distinct and well defined meaning. Such societies are authorized to own land, enter into leases, erect buildings, receive aid from the counties, contract debts, which clearly indicates the legislative intent that such societies should have a corporate existence. The beneficial results from the work of such societies in their early history, justified the state in making an appropriation to aid in such work.

Every corporation must have incorporators or members who sustain and manage the business of the corporation. The use of the words, "actual membership," in the statute evidently means a *bona fide* membership, and not a transient membership or a fictitious membership, but refers evidently to persons who, in good faith, for the purpose of keeping up a permanent organization, have become members of the corporation known as the agricultural society from a desire to advance the agricultural interests of its members and the community, and who are willing to devote a certain amount of time and a certain amount of money from their own purses to the advancement of these interests.

Persons who buy what is sometimes called a membership ticket, in order to obtain cheap rates into the fair, and never attend any meetings of the society or have any interest therein, and assume no responsibility for its

management, cannot be said to be *bona fide* members or actual members. I have before me the constitution and by-laws of a so-called agricultural society, in which every person buying a dollar's worth of tickets, and every exhibitor, is called a member, and their rights and duties end at the close of the fair which is held. Such membership, in my judgment, is not actual membership. The society, in such a case, composed of such membership, is not in a true sense an agricultural society at all, but simply a fair association. Fairs and exhibitions are only one of the means for carrying on the legitimate purposes of an agricultural society, and when the fair is made the end and only object of the society, it cannot fairly be called an agricultural society.

It is very evident to my mind that admission fees, gate receipts and entry fees cannot be considered as a part of the sum received for actual membership. The statute does not say the amount received *from* actual members, but the language is, "*for actual membership.*" The annual dues of the members, which are paid into the treasury of the society in order to maintain their membership, irrespective of whether the members actually attend the fair or not, is, to my mind, what is meant by the expression, "money for actual membership."

You ask what kind of a report should be required from these societies. Section 1659 provides: "It shall make a report of the condition of agriculture in the county to the board of directors of the state agricultural society." With this report you, as auditor, have nothing to do, except to receive the certificate of the secretary of the state agricultural society that such a report has been made. The basis for your issuing a warrant is the certificate of the secretary of the state agricultural society that such a report has been made, and the "filing of an affidavit of the president, secretary and treasurer showing that such sum was raised for the legitimate purposes of the society during the current year." The affidavit should state more than the conclusion of the affiants that the money was received for actual membership and for the legitimate purposes of the society. The facts should be stated from which the auditor could draw the conclusion which must be reached to entitle them to the money.

No particular form of affidavit is required by statute, but it should be full enough to satisfy the state auditor of the fact that the sum of money named was paid in to the society as annual dues or contributions from the members for the legitimate purposes of the society, and not merely as admission fees to the fairs.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

STATE LIBRARIAN—Entitled to draw supplies from the supply department for use in the office of state librarian.

DES MOINES, Iowa, November 19, 1897.

Hon. A. E. Shipley, Clerk Executive Council, Des Moines, Iowa:

DEAR SIR—Your favor of the 18th inst. at hand, in which, by the direction of the executive council, you ask my opinion as to whether, under section 168 of the code of 1897, the state librarian is entitled to draw supplies from the supply department for use in the office of state librarian.

The following language is used in section 168: "The executive council shall supply to the governor, secretary, auditor, treasurer, judges of the supreme court and clerk thereof, attorney-general, supreme court reporter, superintendent of public instruction, railroad commissioners, adjutant-general, the dairy commissioners, the historical department, mine inspectors, labor commissioners, the horticultural department, and other officers entitled by law thereto, * * * with all such articles required for the public use and necessary to enable them to perform the duties imposed upon them by law."

The state libriarian is not named among the list of officers entitled to receive supplies. Chapter 17 of title 13 provides for the appointment of a librarian, and defines generally the duties of such librarian. The appropriation made by section 2867 is to be expended in the purchase of new books, or in binding or rebinding books already on hand, and for no other purpose.

The duties imposed upon the librarian are such as to require stationery, blanks, postage, etc. Such articles are necessary to enable the librarian to perform the duties imposed upon her by law. There seems to be no specific provision for the supplying of such necessary articles unless it is contained in said section.

There is no intimation anywhere in the statute that the librarian should furnish such things at her own expense. It is the duty of the state to furnish the same. I have no doubt that it is the duty of the state to furnish such things as are necessary to enable the librarian to discharge the duties imposed by law, and that it was the intent of the legislature that the librarian should be so furnished.

In my judgment, the l brarian is included among "the other officers entitled by law thereto."

Yours respectfully,

MILTON REMLEY,
Attorney-General.

STATE BOARD OF HEALTH—SECRETARY'S OFFICE—Out of what appropriation the furnishings of the office to be paid.

DES MOINES, Iowa, November 22, 1897.

Hon. A. E. Shipley, Secretary Executive Council:

DEAR SIR—Your favor of the 20th inst. at hand, enclosing a request of the executive council for my opinion upon a question stated as follows:

"The code, section 2564, provides that the cu todian of the capitol building shall provide suitable rooms in the building for the state board of health, and the secretary of the board.

"Section 2575 appropriates $5,000 annually for the payment of the salary of the secretary, expenses of the board, contingent expenses of the secretary's office, etc.

"The question arises as to what are to be deemed 'suitable rooms,' under section 2564; whether or not it implies furniture, fixtures, etc., necessary to the work and efficiency of the board, or was it the intent of the legislature that such fittings should be as expenses of the board?"

In section 2564, we find the following language: "It (the board) shall meet semi-annually in May and November, and at such other times as it may decide upon, such meetings to be held at the seat of government, suitable rooms therefor to be provided by the custodian of the capitol." This is the only provision in regard to the suitable rooms for the state board of health, and it will be noticed that it makes no provision whatsoever for the office of the secretary of the state board of health, except that he shall have an office in the capitol. The "suitable rooms" referred to are rooms for the semi-annual or special meetings of the board. Such meetings are not required to be held in the office of the secretary. The furnishing of an office for the secretary may be provided by the board, of such kind as it may be determined.

I do not question that the term, "suitable rooms," carries with it the idea that the rooms should be furnished with suitable chairs, tables, lights, etc., to enable the board to have a convenient and suitable place to hold its meetings.

Section 2575 providing for the contingent expenses of the secretary's office, all such expenses should be paid out of the appropriation thereby made. I cannot imagine that the legislature intended to make two provisions for the contingent expenses of the office of secretary of the state board of health. Having made provision in section 2575 which the legislature thought to be ample, I do not think that any inference can be drawn from any language of section 2564 that it is the duty of the custodian or other officer of the state than the board to do more than provide a room for the secretary's office in the capitol; furnishing the same, keeping the furniture in repair, and everything that would come within the definition of "contingent expenses of the secretary's office," should properly be paid out of the sum appropriated by section 2575.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

SOLDIERS' HOME—Upon what basis, under the provision of the new code, appropriations for support of members should be drawn from the state treasury—Who is a member in the sense used in the statute.

DES MOINES, Iowa, November 22, 1897.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Your favor at hand in which you request my official opinion "as to the proper construction of section 2608 of the code, providing for the general support of the soldiers' home and the manner of drawing funds from the treasury in payment of said support,—more particularly the proper construction, or interpretation of the word, 'member,' whether that word allows the board of trustees of said home to draw a greater amount per quarter than if it were based upon the word, 'inmate,' as found in chapter 121, laws of the Twenty-second General Assembly, 2801 of McClain's code.

"I find in the requisition for support for the month of September, which was filed October 29th, the number of inmates in said home for July is 447;

August, 448; September, 440, making the average number of inmates for that quarter, 445, which requisition was honored at $10 per inmate for the month of September. Another requisition was presented by the trustees of said institution on or about November 4th, giving the number of *members* in said home in August, as 614; September, 614; and, I think for the month of October, 614, or this is approximately correct, making an average of about 614 for the quarter. You will note, by comparison, that the number of inmates reported for the months of August and September differ materially from the number of members reported for said months, making a difference of some $1,600 more on account of members than on account of inmates for one month.

"I desire to know if there is any authority in section 2608 which would justify the change in the basis of computation for the expense of support of that institution for that time because of the difference between the word, 'member,' in the code, and the word, 'inmate,' which was used in chapter 121, laws of the Twenty-second General Assembly."

The appropriation for the support of the soldiers' home was made by section 2, chapter 121, acts of the Twenty-second General Assembly, in the following words: "For the general support of the inmates of said home, there is hereby appropriated the sum of $10 per month, or so much thereof as may be necessary, to each inmate in said home, to be estimated by the average number for the preceding quarter." The language of section 2608 of the code is as follows: "For the general support of said home, there is hereby appropriated the sum of $10 per month for each member, or so much thereof as may be necessary, to be estimated by the average number for the preceding quarter."

The change of the phraseology suggests an intention to give a different meaning. At first blush, it seems that the term, "member," is more comprehensive than the word, "inmate," as for instance, "member of a family," "member of a class" It may be argued that the legislature intended to include within the term, "member of the home," persons not included within the term, "inmate of said home." The change, however, may be explained on other grounds. To the popular mind, the term, "inmate," carries with it something of the idea of enforced occupancy, as the inmate of an asylum, a hospital, a prison or reformatory, while the use of the word, "member," while meaning to all intents and purposes exactly the same as applied to a home, has nothing in it that is offensive to the sensitiveness of anyone.

A member is defined to be "a part of a whole." A member of a family, in a broad sense, is one of numerous descendants from one person. Persons having a common ancestor may be said to belong to the same family. But when the term is used with reference to the support of a family, it refers to one who sits at a common board, sheltered by a common roof with others, supported, protected and controlled by the head of the family.

Hence, the meaning of the term, "member," must be ascertained from the connection in which it is used, and the intent of the legislature in using the same. A comparison with the provisions of law making monthly appropriations for the support of other state institutions, and the use of the language employed, makes it clear to my mind that the legislature did not intend to make any appropriations for constructive members of the soldiers'

home. It intended to provide only for those who are supported at the home, and for no others. The amount of money to be drawn from the state treasury is to be determined by the number of persons who are actually supported by the home. To carry on the roll of membership a large number of absentees, or persons not actually at the home and receiving support therefrom, and making such roll the basis of the requisition upon the state treasury, would be placing a construction upon the statute which is not warranted by any rules of construction of which I have knowledge.

On September 9th last, I gave you my views as to the construction to be placed upon the old statute. The views there expressed are, I think, equally applicable to section 2608 of the code. I do not think the legislature intended to enlarge the appropriation or change the basis by which a greater amount should be drawn from the state treasury. Hence, in my opinion, the word, "member," used in said section 2608 was intended by the legislature to mean the same as "inmate in said home" as used in section 2 of chapter 121 of the laws of the Twenty-second General Assembly.

I am reminded that the construction placed upon said chapter in the opinion of September 9th, reduces the amount which may be drawn for the support of the home far below the actual imperative necessities of the home. While I have every confidence in the integrity, capacity and conscientious devotion to duty of the managers of the home, and personally regret exceedingly that the support provided is insufficient to meet the imperative demands of the home, yet that is a matter in regard to which a plea must be made to the legislature. I can do no otherwise than construe the law as I believe the legislature intended.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

STATE BANKS—Directors; number and qualifications—When the provisions of the new code should be complied with.

DES MOINES, Iowa, November 23, 1897.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Your favor came duly to hand, in which you request my opinion in regard to the construction of section 1866 of the code, governing the election, number and qualifications of the directors of state banks, in which you ask:

First—"Are state banks whose stock, previous to the enactment of the code, was held by two or three persons, compelled by section 1866 to increase the number of their stockholders, in order that they may elect five directors, or can these banks go on and do business with the same management as before?"

The only theory upon which it is contended that banks are not required to comply with the law passed after their organization, is that the granting of a charter by the state is a contract between the state and the corporation, and the state may not constitutionally impair the obligation of a contract. All the cases which follow the Dartmouth college case make the exception

that if the state has reserved the right to repeal, alter or amend the charter of a corporation, the exercise of this power does not impair the obligation of the contract.

Without undertaking to discuss the question whether the doctrines of the Dartmouth college case are applicable to the case under discussion, I will call attention to section 1090 of the code of 1873, being section 1619 of the code of 1897, in which it is provided: "Corporations shall at all times be subject to legislative control, and may at any time be altered, abridged or set aside by law," etc. This reserves to the state the right to control all corporations thereafter organized, and brings the question clearly within the exception above referred to.

Without, however, such express reservation of power to the general assembly, the legislature would still have power to make any reasonable regulation in the interest of the safety and security of the public, notwithstanding it may render the use of the franchise more burdensome or less lucrative.

Rodemacher v. Mil. & St. P. Ry., 41 Ia , 297, and cases cited;
Chicago Life Ins. Co. v. Needler, Auditor, etc., 113 U. S , 574.

I have no doubt that banks must comply with the provisions of said section 1866, or else go out of business.

You ask, second: "Are directors who are elected as such previous to the taking effect of the section in question, but who do not own in their own right the requisite number of shares of stock, legally entitled to hold their offices until the next annual election of directors without increasing their holdings of stock in compliance with the law, granting that they cannot be re-elected without doing so? Does not the requirement of the section, that each director take an oath, become operative at once, or can the directors refuse to take this oath until after the next annual election?"

The code took effect on the first day of October. Corporations are creatures of the law, and have no rights except such as the legislature gives them. They cannot be conducted only in the manner which the legislature prescribes. I know of no good reason for saying that the law shall not operate upon banks until some future date after the law takes effect. Banks have no vested right to conduct their business in a certain manner, but the same may be conducted by persons pointed out by statute having the qualifications which the statute provides, and in the manner the statute directs or they cannot do business at all.

It must be presumed that section 1866 was enacted for the purpose of giving greater security to the public doing business with the banks. There are no exceptions in the statute which authorize the banks to be conducted until the next annual election the same as if the statute had not been enacted. I think, without doubt, that if a bank wishes to continue business under the new law, it must at once make its organization and manner of business conform to the law. This includes electing additional directors, possessing the necessary qualifications and taking the oath which the statute directs.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INDIAN LANDS—Leases should be signed by the governor.

DES MOINES, Iowa, December 13, 1897.

Hon. F. M. Drake, Governor of Iowa:

DEAR SIR—Your favor of the 11th inst. at hand, submitting to me two leases which you, as governor and trustee of the land of the Sac and Fox Indians of Tama county, are requested to sign leasing certain tracts to Henry F. Pagel and Minnie C. Pagel, and a certain other tract to Emil Meves and Carrie H. Meves, requesting my views as to the proper course to be pursued.

You, as holder of the legal title in trust for the Indians, are authorized to sign the leases. These leases appear to have received the approval of Mr. Rebok, the resident United States Indian agent, and one of them, of Hon. G. B. Pray, special Indian agent, Mr. Rebok stating that the land is well rented at a rental of $260 per annum more than the amount for which it has previously rented.

I, of course, know nothing about the value of the rental of this land. There can be no question about your right or your duty to sign the leases if they are fair and for the best interests of the beneficiaries. I assume that the land is, as Mr. Rebok says, well rented, and unless you have some further information leading to a contrary conclusion, the proper course seems to be to sign the leases.

The Meves lease is drawn to terminate January 1, 1903. A separate paper is presented for you to sign extending the time from the 1st of January, 1903 to the 28th of February, 1903. I do not see why the change was not made in the lease itself, but with the addition that I have made to the separate paper, there can be no harm resulting from signing it. Its only effect is to extend the time from January 1, 1903, to the 28th of February, 1903.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CORPORATIONS—Must be residents of the state where incorporated.

DES MOINES, Iowa, December 17, 1897.

Hon. G. L. Dobson, Secretary of State, Des Moines, Iowa:

DEAR SIR—You request my opinion upon the questions presented by the letter of Mr. L. W. Reynolds, which you submit to me. It is stated therein that it is desired to organize a company under the Iowa law to transact business in other states, with the principal office in New York city, and a branch office in Chicago. The organizers of the company are nearly all Iowa men. "As this company will not transact business in Iowa, it is necessary to state in the articles of incorporation where the principal place of business shall be, it being organized to do business outside of the state of Iowa; also, where must the publication of the notice of incorporation be made, provided for in section 1613 of the code?"

In regard to this I will say, that section 1612 is entirely a new section. It provides: "If the corporation transacts business in this state, the articles shall fix its place of business, which must be in the state, and in

charge of an agent of the corporation, at which it shall keep its stock and transfer books and hold its meetings." This is the only section from which any inference can be drawn that a corporation may be organized under the laws of this state to do business elsewhere, with its principal place of business outside of the state.

A corporation being solely a creature of the law of a state, must, I think, have its domicile, its residence, within the state that creates it. A corporation organized under the laws of one state has no legal right to do business in another state, except as the comity of such other state permits. I think it goes without saying that the state of Iowa has no authority to create an artificial person to do business in another state when it is not authorized to do business in Iowa.

In *St. Louis v. The Ferry Co.*, 78 U. S., 423, it is said: "In the jurisprudence of the United States, a corporation is regarded as in effect a citizen of the state which creates it. It has no faculty to emigrate. It can exercise its franchise extra territorially only so far as may be permitted by the policy or comity of other sovereignties. * * * It is in the eye of the law a citizen of that state, and from the inherent law of its nature, could not migrate or become a citizen elsewhere."

Again, in the same report, in *Insurance Co. v. Francis*, it is said: "A corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and cannot be elsewhere. Unlike a natural person, it cannot change its domicile at will, and although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there."

In *Hill v. Beach*, 1 Beas., 31, it is held that a corporation organized under the laws of the state of New York to do business exclusively in the state of New Jersey, is no corporation, and a fraud upon the laws of New York.

In *Landgrant R. & T. Co. v. The Commissioners, etc.*, 6 Kan., 343, it is said: "A corporation, in order to have any legal existence, must have a home and domicile and place of business within the boundary of the state which creates it. It may send agents into other states to do business, but it cannot migrate in a body; beyond the jurisdiction of the laws which bind and hold it together, it dissolves into its original elements and the persons who compose it become only individuals." It is said that such a corporation is no corporation.

In the case of *State ex rel. Attorney-General v. L. S. & W. Ry. Co.*, 45 Wis, 579, it is held, in the absence of any statutory regulation upon the subject, that it is the duty of a corporation to keep its place of business, records and residence of its officers so located as to render it accessible to all members, and to the exercise of the visitorial powers of the state by which it is created, and a forfeiture may be adjudged for violating this common law obligation.

The statutes of this state require, in some cases, the attorney-general, and in other cases it is the duty of the county attorney, on the request of the governor, to bring action either in *quo warranto* or equity, to wind up the affairs of a corporation and dissolve the same because of its doing or omitting acts which amount to a forfeiture of its rights and privileges as a corporation, or exercising powers not conferred by law. If a corporation,

organized under the laws of this state, had no office in the state, and no actual residence in the state, how could it be amenable to the laws of this state, or how could the state exercise any visitorial powers over such corporation. If the inference sought to be drawn from the language of section 1612 had been made a positive enactment, authorizing corporations to be organized not to do business in the state of Iowa, but to do business elsewhere, with no place of business in the state, in view of the general preponderance of authorities, I would be of the opinion that such enactment would be of no effect. I cannot think the legislature intended, by said section, to authorize a corporation to be organized without a home and abiding place within the state so as to make it in fact a citizen of the state.

I am, therefore, of the opinion that every corporation organized under the laws of the state, must have a place of business in the state which becomes its place of residence in which meetings of the stockholders are held, and the secretary's books and the stock books are kept. Having such an office in the state does not prevent it from operating its business in another state, if the laws of such state permit, but the business required by law to perpetuate its corporate existence must be done within the state.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

SCHOOL DISTRICTS—What are rural independent districts—How the change in the number of school directors should be effected.

DES MOINES, Iowa, December 18, 1897.

Hon. Henry Sabin, Superintendent Public Instruction, Des Moines, Iowa:

DEAR SIR—Your favor at hand, asking my opinion upon the following question:

"Is it the intention of the present law that independent districts formed under the provision of the former section, 1800, from villages, towns or cities, with contiguous territory taken from district townships are all of them to remain and exist as independent school districts, or does the law intend that only such districts so formed as may include an incorporated town or city shall remain as independent school districts, and that all such districts not containing an incorporated town or city shall fall into the rank of the rural independent school districts?"

Section 2744 of the code of 1897 gives a new nomenclature to school corporations. First, what were formerly called district townships are now to be known as school townships; second, independent school districts take the name of the city or incorporated town forming the district, or a part thereof, unless two or more districts are included in the same city or town, then an appropriate name or number is given to each; third, rural independent school districts of the township, (naming it).

Sections 2752 and 2754 preserve this classification in the determination of the number of directors that shall be chosen, except that districts including all or part of a city of the first class, or city under a special charter, shall have seven members of the board of directors, but in section 2754 it is provided that in all other independent city or incorporated town districts,

the board shall consist of five members. Section 2794 contains the provision for the organization of independent school districts of cities or towns, and were it not for the clause therein, "a village of over 100 residents," there would be no doubt in regard to the intention of the statute. This clause originated in chapter 139 of the laws of the Eighteenth General Assembly.

Let me say, however, that the title in the printed law (chapter 139 of the laws of the Eighteenth General Assembly), viz , "formation of independent school districts," and the words in parentheses, "Amendatory of sect'on 1800 of the code," and the statement on the margin, are no part of the original bill or enrolled bill. It is, therefore, a serious question whether chapter 139 did in fact amend section 1800, and it is a matter of extreme doubt whether it would legally be considered a substitute for said section 1800. I would have little doubt that it did not amend section 1800 were it not for chapter 38 of the laws of the Twenty-fifth General Assembly.

I call attention to this because if said chapter 139 could not properly be considered as a part of the code, and as repealing section 1800 of the code of 1873, then there was no authority for independent districts consisting of villages and contiguous territory electing six directors. But be that as it may, independent districts consisting of villages and contiguous territory have been since organized and have a recognized existence.

It is very evident to my mind that independent districts consisting of villages and contiguous territory do not come in the same class of independent districts as the independent districts of cities and incorporated towns. To what class, then, do they belong? The present code is entirely silent upon that question. Such independent districts, however, must belong to one of the classes of independent districts recognized by the statute. Section 2797 of the code provides for the organization of rural independent districts primarily contemplating the division of a school township into independent districts. This fact, however, does not negative the idea that a rural district may be formed of a village or village and contiguous territory in the manner provided by section 2794. In fact, it seems appropriate that a village of over 100 inhabitants should not be required to secure the request of one-third of the legal voters of each sub-district of the school township, required by section 2797, as a condition precedent to organizing an independent district.

Section 2795 provides that if a proposition to establish an independent district carries, then notice shall be given for the election of directors, two to serve until the next annual meeting, two until the second, and one until the third annual meeting thereafter. This section contains no exception of independent districts formed from villages in the manner provided in the preceding section, and its provisions must be harmonized if possible with the other sections to which I have referred. It cannot be harmonized with sections 2744 and 2754, except by concluding that the legislature intended it to apply only to those independent districts which were formed of cities and incorporated towns.

My conclusion, from a careful examination of all the sections bearing upon the question, is that independent districts consisting of unincorporated towns or villages, or unincorporated towns and villages and contiguous territory, must be treated and considered as rural districts.

Second, you say: "If you hold that independent school districts now are only those districts organized under the former section 1800 that include an incorporated city or town, and that all others are by the present law reduced to rural independent school districts, then we desire to know how the voters of such a district containing an unincorporated town of more than 100 inhabitants, now having a board of six shall readjust itself to the new conditions, which require for all rural independent school districts without exception a board of three members."

Because of the facts stated above, I doubt very much whether any such independent district was ever entitled to have a board of six directors. Certain it is, however, that section 1800 of the code of 1873, and chapter 139 of the Eighteenth General Assembly, were repealed by the code of 1897. Section 2754 provides that in rural independent districts the board shall consist of three members, one of whom shall be chosen on the second Monday of March, 1898, and one each year thereafter. The law under which the six directors claim to have been elected having been repealed, and a board of three directors taking their places, the term of office of the six directors would terminate certainly as soon as the district is authorized to select new directors so as to conform to the new law.

The language above quoted from section 2754, evidently contemplates cases where there are but three directors, and contemplates that they should hold for the term for which they were elected and until their successors are elected, but where the number of the members of the board is reduced, it would clearly be the duty of the district to conform to the new law at its first meeting thereafter by the election of three directors in March, 1898, one for one year, one for two, and one for three years.

It might be contended that the code taking effect the 1st of October, all of the directors were thereby legislated out of office. It is unnecessary to discuss that theory because the directors are *de facto* officers so far as the public is concerned. There being no provision to elect *de jure* officers before the March meeting, 1898, I have little doubt but that their acts would be valid.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

NOTE.—Since this opinion was given the Twenty-seventh General Assembly has materially changed sections 2744 and 2754 of the code of 1897.

APPROPRIATIONS—Failure to draw before the new code took effect, the auditor of state has no authority to issue warrants for the same.

DES MOINES, Iowa, December 21, 1897.

Hon. C. G. McCarthy, Auditor of State, Des Moines, Iowa:

DEAR SIR—You request my opinion as to whether you, as auditor, are authorized to draw warrants to pay the undrawn portion of the annual appropriations allowed to certain institutions which, under the law, might have been drawn prior to October 1st, but were not, said law making the appropriation having been repealed by the taking effect of the code, special

attention being called to chapter 67 of the laws of 1878, making an annual appropriation of $1,000 to the Iowa agricultural college, chapter 78 of the laws of the Nineteenth General Assembly, and chapter 126 of the laws of the Twenty-second General Assembly. Each of these chapters provided for the appropriation of a given amount, the first payment to become payable on the 1st day of May following the taking effect of the act, and the same sum annually thereafter.

In regard to this I will say that the failure to draw from the state treasury the amount which the law authorized before the law was repealed, does not continue the law in force until such money shall be drawn. The auditor must have authority of law for every warrant that he draws. These chapters making an annual appropriation having been repealed, have no vitality whatsoever, and afford no authority for the auditor drawing any warrant whatsoever thereunder.

The question is not what the institutions might have drawn had they called for their warrants, nor what power the auditor had prior to the time the repeal of the law took effect. The question is, what power has he now? A statute which has been repealed, and is of no effect, will not justify the auditor in drawing any warrant. When a statute is repealed, the auditor's authority thereunder is at an end; he can do nothing further.

It is very clear to my mind that you have no authority to draw any warrant in any case similar to that which your inquiry presents.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CLAIMS AGAINST THE STATE—FUGITIVE FROM JUSTICE—Expenses of an agent of the state in returning a fugitive from justice may be paid without a special appropriation being made to pay expenses of that character.

DES MOINES, Iowa, December 21, 1897.

Hon. Wm. H. Fleming, Private Secretary:

DEAR SIR—Your favor of the 20th inst., enclosing bill of C. J. Dunn for expenses as agent of the state to return James E. Hall, a fugitive from justice, arrested in Arkansas. You ask whether such expenses can be paid under the provisions of section 5169 and section 5181 of the code, or will it be necessary to have the general assembly make an appropriation for such payment?

Section 5169 provides: "The accounts of the agent appointed for that purpose must be audited by the auditor of state and paid out of the state treasury." Section 5181 provides: "When, in the opinion of the governor, expenses incurred in the arrest of fugitives from justice should be paid by the state, the claim therefor shall be itemized and sworn to and approved by him and at least two other members of the executive council, and when so approved, be audited and paid out of the general revenue of the state."

The language of these two sections, "be audited and paid out of the state treasury," and "be audited and paid out of the general revenue of the state," are equivalent to making an appropriation of any money in the state

treasury derived from general revenue not otherwise appropriated for the payment of the claims thus audited. Either of the two sections is an appropriation.

I do not think any further appropriation is required by the legislature to secure the payment of claims of this character when they are properly proven and audited in the manner required by law. I have not examined into the merits of the claim which you enclosed, as it was not involved in the inquiry, and hence express no opinion as to the merits of the claim or the amount that should be allowed.

I return the papers you enclosed.

Yours truly,

MILTON REMLEY,
Attorney-General.

CLAIMS AGAINST THE STATE—FUGITIVES FROM JUSTICE—Payment of the expenses of an agent where the fugitive is not returned, including an amount expended for attorney fees in an endeavor to hold the prisoner after his capture, may be made under certain circumstances.

DES MOINES, Iowa, December 23, 1897.

Hon. W. H. Fleming, Private Secretary:

DEAR SIR—Your favor of the 22d inst. at hand, asking my construction of sections 5169 and 5181 of the code, with especial reference to whether a bill of expense of the agent for the state for the return of a fugitive can be allowed when the fugitive has not been returned. It appears that proceedings were brought in the United States district court of Arkansas, and also in the state court, by which the fugitive was released. The agent of the state was compelled to employ counsel in such proceedings. You say the governor would like to know whether he has authority, under the provisions of said section, to pay for the attorneys employed in the state of Arkansas.

It is not easy to harmonize the provisions of sections 5169 and 5181. The history of the legislation upon this subject shows that section 4171 of the code of 1873, (section 4518 of the Revision), provided that the accounts of the agents appointed for that purpose must be audited by the auditor of state and paid out of the state treasury. Chapter 39 of the laws of the Twelfth General Assembly, provided that the governor might, as a condition of making the appointment of an agent of the state and the issue of a requisition, provide that it should be executed without expense to the state. Section 2 of the chapter is substantially the same as section 5181 of the code. These two sections, then, as well as section 4518 of the revision, passed into the code of 1873 practically unchanged. Chapter 65, laws of the Seventeenth General Assembly, amended section 4171 of the code of 1873, and as thus amended, it has gone into the code of 1897 substantially in the same form.

Now, we have two sections which authorize the payment of the expenses of the agent of the state in a different manner and with different limitations. Under section 5169 the auditor must examine and audit the expense

account of such agent, and he is prohibited from paying any expenses if the fugitive has not been tried, unless the governor is satisfied that the failure of trial has not occurred through any fault or neglect of the person interested in the prosecution. This limitation is placed upon the auditor in case the expenses are presented to him for auditing. It will be noticed also that the expenses which may be audited by the auditor are limited to the items named in the section, viz., the fees of the officers of the state upon whose governor the requisition is made, and the actual expenses of the agent, not exceeding 10 cents per mile, etc.

Section 5181, however, authorizes the payment of expenses incurred in the arrest of fugitives from justice in another way, when, in the opinion of the governor, they "should be paid by the state." What does "should be paid by the state" mean? If it means no more than when, under the letter of the law, the state is liable therefor, there was no need of using such language, or of retaining it as a separate section of the code. I am inclined to think it means more. When, as a matter of justice or equity, in the opinion of the governor, the expense of arresting the fugitive ought, in good conscience and in all fairness, to be paid by the state, notwithstanding a condition may have been imposed in the first place that the writ should be executed without expense to the state, or notwithstanding the claimant may not bring himself strictly within the rules required for the allowance of a claim by the auditor under section 5169, the governor may do what is right and just in the matter about allowing the claim, and, if his judgment is approved by two other members of the executive council, the claim must be paid.

It is beyond human wisdom to anticipate in advance every condition or contingency that may arise in the future, and to make wise provision for or against the same. It is the policy of the law to secure the arrest and punishment of criminals. The agent of the state, who is generally a sheriff, obtains no compensation, only actual expenses, under the law, and if, as in the case of Mr. Dunn under consideration, he was required to employ counsel in order to retain possession of the criminal arrested, and if he failed after having made in good faith every effort in his power to secure his man, I am not prepared to say that any reasonable expenses incurred in the execution of his trust and performance of his duty, including reasonable compensation to his attorneys, should not be paid under the provisions of section 5181. I think this section was originally enacted by the Twelfth General Assembly, and retained in the code for the purpose of giving the governor some latitude in the allowance of claims which were not authorized by section 5169. Yours truly,

MILTON REMLEY,
Attorney-General.

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