FOURTH BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA.

CHARLES W. MULLAN,
ATTORNEY-GENERAL

TRANSMITTED TO THE GOVERNOR, JANUARY, 1904.

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FOURTH BIENNIAL REPORT OF THE ATTORNEY-GENERAL OF IOWA.

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

TO THE HONORABLE ALBERT B. CUMMINS, Governor of Iowa:

In compliance with law I hereby submit to you a report of the business transacted by this office during the years 1902 and 1903.

Schedule A is a complete list of all appeals in criminal cases, submitted to the supreme court during the years 1902 and 1903, and also all rehearings asked during that period, and shows the final disposition of the cases.

Schedule B is a list of all criminal cases pending on the first day of January, 1904.

Schedule C is a list of civil cases which were pending in the state and federal courts at the time of my last report, and have since that time been disposed of.

Schedule D is a list of civil cases which have been commenced and disposed of in the state courts since my last report.

Schedule E is a list of civil cases which are now pending in the state and federal courts in which the state is a party.

Schedule F is the official written opinions given by this office during the years 1902 and 1903.

Schedule G contains a few of the many letters which were written in response to inquiries from county officers and others as to the construction and interpretation of statutes, and as to the law in cases which have arisen in the state. These letters are

not official in their character, and frequently contain a simple suggestion instead of the expression of an opinion. They relate to matters of public interest as to which uniform action is desirable in the state, and it is thought advisable to include the same in this report.

APPEALS IN CRIMINAL CASES.

There has been a considerable increase in the number of appeals in criminal cases which is perhaps due to the increase in population of the state. There are fifty-six appeals in criminal cases upon the docket of the supreme court for the January term, 1904, which is greater than has appeared upon any previous docket. The policy of requiring all criminal cases appealed to the supreme court to be submitted at the second term after the appeal is taken has been very satisfactory, and very little difficulty or delay has been experienced by this office in having cases promptly submitted.

In my last report I commented upon the unusual number of murder cases which had been tried during the two years previous. At that time I thought the number of murders committed in the state was exceptional, and that there would be a marked decrease during the next biennial period; instead of this being true, the number of murder cases has increased during the last two years, and thirty-three cases in which the defendants were charged with murder have been appealed to the supreme court. Nineteen of these have been determined by the court and fourteen are now pending.

Among the more important cases which have been tried during the last biennial period is the case of *State v. James H. Easton,* who was indicted under the fraudulent banking laws of the state for receiving a deposit at a time when he knew the bank to be insolvent. He was the president of a national bank and the question was raised as to whether the legislature of the state had the power to make it a criminal offense for an officer of a national bank to receive a deposit when he knew the bank to be insolvent. The supreme court of the state, following the case of the *State v. Fields,* held that such power existed in the

legislature. The case was taken upon writ of error to the supreme court of the United States, and that court, upon a full presentation of the case, held that it is not within the power of a state legislature to make the receiving of a deposit by the officers or agents of an insolvent national bank a criminal offense.

The decision in this case is far reaching in its effect, as a large number of states have enacted laws almost identical with the statute of Iowa, and in several of the states these laws have been held by the state courts to be constitutional. The decision of the supreme court of the United States overrules the state courts and relieves national banks, their officers and agents from the provisions of the statutes.

LAKE BED CASES.

In my last report I referred to the lake bed cases, and particularly to the case of *Rood v. Wallace* which was then pending in the supreme court of the United States. That case has since been dismissed upon the ground that no federal question was involved therein, and no decision was reached as to the title of the non-navigable lake beds in the state. That question is still, to some degree at least, an open one, and I hope it may be presented to the supreme court of the United States in a case where the decision of that court will be final, and the title to the meandered lake beds in the state determined.

COLLATERAL INHERITANCE TAX.

Since my last report many of the important questions arising in relation to the collection of the collateral inheritance tax have been decided by the courts. The law and the method of procedure are much better understood by the bench and bar, and the opposition which existed to the payment of this tax has almost wholly ceased to exist.

CORPORATIONS.

In my last report I recommended a law requiring all articles of incorporation and amendments thereto to be approved by the attorney-general before any permit was issued thereon, either by

the secretary of state or the auditor of state to the corporation to transact business.

The experience of the state officers during the last biennial period convinces me more firmly than ever of the necessity of such a law. The proportion of business transacted by corporations within the state is rapidly increasing.

Corporations are here to stay, and in my judgment it is desirable that they should. Under modern industrial conditions they provide the better means for carrying on the business of the country. They permit an aggregation of capital by which great enterprises can be undertaken and carried to a successful end. When conducted upon strict, modern business principles they reduce the cost of the industrial products to the consumers. They enable men to embark in desirable industrial enterprises without risking their entire fortunes upon the success of the enterprise.

Much has been said within the last few years as to the evils of the great corporations of the country; but when we stop to consider that it would have been impossible to build and operate any of the great lines of railway to which the development of the west is more indebted than to any other cause, without a corporate association of capital, and that the farmers of the west would be paying twice what they now pay for every article of machinery which is used upon the farm, if corporations did not exist and such machinery was built under the old methods, every thinking person must admit that legitimate corporations, by which the output is increased and the cost lessened, have been and will be of great benefit to the people. The difficulty has been, and now exists, that these artificial beings are not properly regulated by statute.

The filing of the articles of incorporation with the secretary of state, if the previous steps required by law have been complied with, creates a contract between the state and the corporation. The present law does not give to the secretary of state or to any other officer direct authority to refuse to file articles of incorporation which are presented to him, or to refuse to issue a permit to transact business thereunder, except as to arti-

cles of incorporation of insurance companies, which must be approved by the attorney-general and the auditor of state.

This is clearly a defect in the law, and the result is that many corporations of doubtful legitimacy are organized under the name of bond and investment companies, co-operative and home building associations, and other names of like character, which claim the right to carry on their business in the state without restriction or supervision.

The corporation laws of the state should be so amended as to require that all articles of incorporation should be submitted to the attorney-general for his approval, and give to the secretary of state or other proper officer supervisory powers over such associations.

No corporation should be permitted to issue its shares of stock beyond a reasonable capitalization; nor should bonds be permitted to be issued upon its property beyond the reasonable value thereof; and such other regulations should be made by the legislature as will prevent over capitalization and over bonding, and secure to the stockholders, at least as far as is possible, a reasonable return for their investment. When these things have been accomplished, the stigma which now attaches to corporations generally will disappear and the people will recognize their value as the means by which the great industries of the country are carried on.

MONEYS RECEIVED.

The only money received by me during the last biennial period is the sum of $53.65, which was the unexpended balance of the amount required to be deposited with the clerk of the United States supreme court for costs in *Rood v. Wallace.* This sum was received by me January 20, 1903, and on the same day paid over to the state treasurer.

NEEDS OF THE OFFICE.

In my last report I urged the necessity of the purchase of a set of the Reports of the Supreme Court of the United States for the attorney-general's office. Since that time, with the consent of the executive council, I purchased a set of the United States Supreme Court Reports of the Banks Law Publishing

Company, for $318.40, including all of the reports to the 191st. This purchase was made upon the condition that the legislature should make an appropriation to pay for these reports. They were delivered at once under the purchase, and have been in my office since that time, and I have no doubt that the appropriation will be made.

The principal need of the office at the present time is adequate rooms within which to transact the business. An assistant and two stenographers are now required during the entire time. This necessitates the operation of two typewriters in the office in which the assistant is compelled to prepare his briefs and arguments in criminal cases. There should be at least a suite of four rooms for the accommodation and dispatch of the business of the office; one in which typewriters may be operated without interfering with the other work of the office, a library, a room for the assistant, and a private office for the attorney-general.

The work of the office has increased so largely in volume that it cannot be carried on with system and expedition in the two small rooms occupied by the attorney-general. It is certainly to be hoped that some arrangement and assignment of the rooms in the state house may be made which will give to this office at least reasonable accommodations for transacting its business.

In conclusion I desire to express my appreciation of the courtesy extended to me by you and the other officers of the state, and to say that our relations have been of the most pleasant character during my term of office.

I also desire to acknowledge the faithful and valuable services of my assistant, Mr. Lawrence De Graff, and the other members of my office force. Their work is deserving of high commendation, and if the work of this office is entitled to any credit it is largely due to the efficient manner in which they have discharged their duties.

Respectfully submitted,

CHAS W. MULLAN,

Attorney-General of Iowa.

SCHEDULE "A."

The following is a list of criminal cases submitted to the Supreme Court, and also rehearings asked during the years 1902 and 1903, and the final disposition of the cases:

Title of Case.	County.	Decisions.	Offense.
State v. Am. Ex. Co. and R. M. Coffin, appellants	Tama	Reversed October 30,1902	Keeping intoxicating liquors with intent to sell contrary to law.
State v. W. W. Ames, appellant	Dubuque	Reversed April 8,1903	Embezzlement.
State v. Walter Anderson, appellant	Wapello	Reversed April 8,1903	Rape.
State v. Adams Express Co., appellant	Madison	Affirmed May 29,1903	Nuisance.
State v. Elza Booker, appellant	Wapello	Affirmed May 23,1902	Rape.
State v. Ellsworth Berger and Wm. Phillips, appellants	Mahaska	Affirmed May 24,1902	Robbery.
State v. Chas. Boyd, appellant	Van Buren	Affirmed May 26,1902	Seduction.
State v. A. J. Boyd, Jr., appellant	Jefferson	Affirmed May 28,1902	Liquor nuisance.
State v. J. E. Brady, appellant	Polk	Reversed October 7,1902	Burglary.
State v. Oliver Brundidge, appellant	Black Hawk	Reversed October 17,1902	Breaking and entering.
State v. H. C. Bedison, appellant	Page	Affirmed October 30,1902	Shipment and having in possession intoxicating liquors.
State v. E. A. "Tip" Blaine, appellant	Polk	Affirmed December 17,1902	Larceny.
State v. C. C. Beird, appellant	Lee	Reversed December 17,1902	Murder.
State v. James Babbitt, appellant	Polk	Affirmed February 11,1903	Embezzlement.
State v. Ida Bell, appellant	Woodbury	Affirmed February 12,1903	Larceny.
State v. Edward Burns, appellant	O'Brien	Affirmed April 8,1903	Seduction.
State v. Ike Brafford, appellant	Polk	Affirmed October 7,1903	Robbery,
State v. Thomas Bebb, appellant	Muscatine	Affirmed October 7,1903	Rape.
State v. J. E. Brady, appellant	Polk	Reversed on rehearing October 27,1903	Burglary.
State v. Ed. Berger, appellant	Cerro Gordo	Reversed October 29,1903	Breaking and entering.
State v. John W. Booth, appellant	Howard	Affirmed October 31,1903	Perjury.

SCHEDULE "A."—CONTINUED.

Title of Case.	County.	Decisions.	Offense.
State v. Joseph Balluff, appellant	Johnson	Affirmed October 31, 1903	Assault with intent to commit rape.
State v G. A. Burns, appellant	Cass	Affirmed October 31, 1903	Larceny.
State v. Frank Comer, appellant	Cass	Affirmed June 2, 1902	Rape.
State v M. C. Connor, appellant	Hancock	Affirmed December 17, 1902	Larceny from the person.
State v. M. O. Clemons, appellant	Hardin	Dismissed April 8, 1903	Murder.
State v. Thomas Cather, appellant	Marshall	Reversed October 6, 1903	Assault with intent to commit murder.
State v. S. E Carter, appellant	Boone	Affirmed October 7, 1903	Larceny.
State v. J. W. Crofford, appellant	Decatur	Reversed October 19, 1903	Murder, second degree.
State v. W. H. Coleman, appellant	Polk	Affirmed October 31, 1903	Adultery.
State v. M. O. Clemons, petitioner	Hardin	Petition for rehearing overruled October 31, 1903	Murder.
State v. Patt Dunn, appellant	Marshall	Affirmed April 9, 1902	Murder.
State v. Edward Dennis, appellant	Page	Affirmed April 8, 1903	Murder.
State v. D. D. Donahue, appellant	Jones	Reversed April 11, 1903	Nuisance
State v. Harry E. Fields, appellant	Black Hawk	Reversed December 18, 1902	Killing quail in violation of law.
State v. John Gray, appellant	Marshall	Affirmed April 9, 1902	Murder.
State v. John Garrety, appellant	Audubon	Affirmed April 12, 1902	Larceny.
State v. J. A. Gregory, appellant	Pottawattamie	Affirmed June 2, 1902	Larceny.
State v. Albert Gathman, appellant	Pottawattamie	Affirmed October 30, 1902	Seduction.
State v. Glucose Sugar Refining Company, appellant	Tama	Affirmed October 11, 1902	Nuisance.
State v. John Hogan, appellant	Winneshiek	Reversed January 30, 1902	Burglary.
State v. Margaret Hossack, appellant	Warren	Reversed April 9, 1902	Murder.
State v. M. R. Hammer, appellant	Jasper.	Affirmed April 10, 1902	Assault with intent to commit murder.
State v. Pat Hanaphy, appellant	Jefferson	Reversed May 15, 1902	Illegal sale of liquors.
State v. Fred Height, appellant	Linn	Reversed October 23, 1902	Rape.
State v. A. M. Hunter, appellant	Ringgold	Reversed December 20, 1902	Murder.
State v. Jerome W. Hoot, appellant	Black Hawk	Affirmed May 26, 1903	Assault with intent to commit murder.
State v. M. J. Higgins, appellant	Pottawattamie	Affirmed May 29, 1903	Adultery.
State v. J. C. Hasty, appellant	Keokuk	Affirmed October 23, 1903	Adultery.

State v. H. C. Irwin, appellant	Madison	Reversed	October 7, 1902	Using and keeping a place for the purpose of prostitution and lewdness.
State v. Wesley Irwin, appellant	Page	Affirmed	October 7, 1903	Murder.
State v. Martin Jay, appellant	Boone	Reversed	April 10, 1902	Larceny.
State v. G. C. Jamison and W. C. Crone, appellants	Franklin	Reversed	May 26, 1902	Using false weights.
State v. Zenas W. John, appellant	Muscatine	Affirmed	January 22, 1903	Perjury.
State v. Sarah Kuhn, appellant	Keokuk	Affirmed	May 28, 1902	Murder
State v. Kunhi, appellant	Scott	Reversed	February 4, 1903	Rape.
State v. S. C. Kirby, appellant	Greene	Reversed	April 9, 1903	Violation of quarantine regulations.
State v. Hayden King, appellant	Polk	Affirmed	October 6, 1903	Larceny.
State v. Levi Loar, appellant	Van Buren	Affirmed	May 2, 1902	Procuring a miscarriage.
State v. L. K. Linhoff, appellant	Cerro Gordo	Reversed	October 30, 1903	Murder.
State v. Belle Luenze, appellant	Clayton	Affirmed	October 31, 1903	Adultery.
State v. Henry Mongoven, appellant	Wapello	Affirmed	May 26, 1902	Assault with intent to commit murder.
State v. Wm. McFarland, W. W. Welday, and A. Holand, appellants	Polk	Dismissed	October 28, 1902	Violation of official duties.
State v. Ben McKnight, appellant	Woodbury	Affirmed	January 21, 1903	Murder.
State v. C. E. Osborn, appellant	Polk	Affirmed	April 12, 1902	Robbery.
State v. Jack Phillips, appellant	Wapello	Affirmed	April 10, 1902	Murder.
State v. Fred Perry, appellant	Woodbury	Affirmed	October 7, 1902	Perjury.
State v. Henry J. Prins, appellant	Sioux	Affirmed	October 9, 1902	Forgery.
State v. B. F. Parker, appellant	Polk	Affirmed	October 29, 1902	Liquor nuisance.
State v. Chas. Pasnau, appellant	Wapello	Reversed	December 17, 1902	Assault with intent to commit murder.
State v. Albert G. Phillips and Lewis Brooks, appellants	Buena Vista	Reversed	December 20, 1902	Murder.
State v. Jack Phillips, appellant	Wapello	Reversed on rehearing	April 8, 1903	Murder.
State v. David Roscum, appellant	Des Moines	Reversed	January 30, 1903	Malicious mischief and trespass.
State v. George Steffens, appellant	Scott	Affirmed	April 9, 1902	Rape.
State v. Joseph Shunka, Jr., appellant	Benton	Affirmed	April 9, 1902	Assault with intent to commit murder.
State v. Wm. Schaedler, appellant	Johnson	Affirmed	April 12, 1902	Adultery.
State v. Samuel Stall, David Soderstrom and Wm. Mullen, appellants	Lucas.	Dismissed	May 26, 1902	Robbery.
State v. Hubbell O. Soper, appellant	Washington	Affirmed	October 7, 1902	Conspiracy.
State v. George W. Snider, appellant	Jefferson	Affirmed	October 8, 1902	Assault with intent to commit rape.
State v. Warren Snyder, appellant	Madison	Affirmed	October 8, 1902	Burglary.

SCHEDULE "A."—CONTINUED.

Title of Case.	County.	Decisions.	Offense.
State v. Thomas J. Strupper, appellant ..	Fremont	Affirmed October 17,1902	Bigamy.
State v. J. W. Sale, appellant.....	Page	Affirmed December 19,1902	Murder.
State v. A. L. Stevens and W. H. Mott, appellants.....	Cerro Gordo .	Affirmed April 8,1903 (Petition for rehearing overruled October 12,1903)	Using and maintaining a building with intent to unlawfully keep and sell intoxicating liquors.
State v. George Swift, appellant	Pottawattamie	Affirmed April 9,1903	Breaking and entering.
State v. J. W. Sale, appellant	Page	Affirmed with modification May 26,1903	Murder.
State v. Claus Stolly, appellant.....	Cass	Affirmed October 6,1903	Seduction.
State v. L. P. Scroggs, appellant.....	Shelby.....	Affirmed October 7,1903	Assault with intent to commit rape.
State v. Thomas Sheridan, appellant.....	Lyon	Reversed October 9,1902	Malicious mischief.
State v. J. C. Smith, appellant	Linn	Reversed October 17,1903	Nuisance.
State v. Marion Trusty, appellant.... ..	Winnebago...	Reversed December 17,1902	Rape.
State v. S. G. Thiele, appellant	Montgomery .	Reversed April 8,1903	Murder.
State v. Mark Vance, appellant	Wapello.....	Reversed April 8,1903	Lewdness.
State v. Isaac Wheeler, appellant	Boone	Reversed April 9,1902	Rape.
State v. J. L. Wright, appellant	Jasper	Affirmed October 7,1902	Soliciting orders for intoxicating liquors
State v. Mox Wackernagle, appellant....	Taylor	Reversed October 8,1902	Larceny.
State v. George Wright, appellant.....	Muscatine. ..	Affirmed October 16,1902	Murder.
State v. H. Williams, appellant	Hancock	Affirmed December 17,1902	Larceny from the person.
State v. Orris Wolf, appellant.....	Poweshiek ...	Reversed December 19,1902	Rape.
State v. Earnest Willey, appellant.....	Polk	Affirmed February 12,1903	Larceny.
State v. John Williams, appellant.....	Polk.....	Reversed April 9,1903	Breaking and entering a store building.

SCHEDULE "B."

The following is a list of criminal cases pending in the Supreme Court of Iowa on January 1, 1904:

Title of case.	Appealed from	Offense.
State v. Atkins, Bert et al.	Polk	Assault with intent to commit robbery.
State v. Anderson, Walter	Wapello	Rape.
State v. Barr, William	Delaware	False pretenses.
State v. Bebb, Thomas (Rehearing)	Muscatine	Rape.
State v. Birkby, John	Fremont	Larceny.
State v. Burns, James	Polk	Murder.
State v. Brown, Henry	Warren	Seduction.
State v. Busse, Louis	Bremer	Murder.
State v. Carpenter, Charles	Mahaska	Rape.
State v. Clemenson, William	Hancock	Conspiracy to commit adultery.
State v. Cobb, Major and certain intoxicating liquors	Monroe	Liquor nuisance.
State v. Coleman, W. H. (Rehearing)	Polk	Adultery.
State v. Crowell, Albert et al.	Lee	Larceny.
State v. Dale, J J	Woodbury	Larceny.
State v. Davidson, Edward	Wapello	Assault with intent to commit rape.
State v. Dominisse, Chas. et al.	Shelby	Liquor nuisance.
State v. Dover, Boyd	Monroe	Rape.
State v. DeGroate, Harry C	Dallas	Assault with intent to commit murder.
State v. Duffy, Frank	Fayette	Robbery.
State v. Egbert, Ed	Monroe	Rape.
State v. Evans, Plum	Monroe	Assault with intent to commit murder.
State v. Evenson, Ed	Worth	Assault with intent to inflict great bodily injury.
State v. Foster, Lucy	Kossuth	Assault with intent to commit murder.
State v. Gallaugher, Sarah Ellen	Johnson	Perjury.
State v. Gathman, Albert (Rehearing)	Pottawattamie	Seduction.
State v. Goldsberry, Joe	Appanoose	Liquor nuisance.
State v. Greenland, F. A.	Decatur	Larceny.

SCHEDULE "B."—CONTINUED.

Title of Case.	Appealed from	Offense.
State v. Hampton, Samuel	Appanoose	Nuisance.
State v. Halden, A. W	Appanoose	Liquor nuisance.
State v. Harris, W. W	Appanoose	Liquor nuisance.
State v. Hasty, J. C. (Rehearing)	Keokuk	Adultery.
State v. Heath, G. H	Boone	Practicing medicine without a license.
State v. Hewitt, Eugene	Cerro Gordo	Nuisance.
State v. Hohl, George	Warren	Liquor nuisance.
State v. Hohl, Fred	Warren	Liquor nuisance.
State v. Hortman, Harry	Cherokee	Murder.
State v. Hromadko, Frank J	Linn	Forcible defilement.
State v. John, Zenas W. (Rehearing)	Muscatine	Perjury.
State v. Jones, Marion	Mahaska	Assault with intent to commit murder.
State v. King, Hayden (Rehearing)	Polk	Larceny.
State v. Krueger, Sophia	Howard	Murder.
State v. Leibe, Oliver	Delaware	Rape.
State v. Leighton, Roy	Washington	Assault with intent to commit murder.
State v. Leuhrsman, B. H	Benton	Assault with intent to inflict great bodily injury.
State v. Loser, Leon et al	Pottawattamie	Conspiracy.
State v. Lucas, William	Page	Murder.
State v. McKay, C. B	Monona	Rape.
State v. Mahoney, L. D	Polk	Breaking and entering.
State v. Miller, H. G.	Cerro Gordo	Assault with intent to commit rape.
State v. Motto, Henry	Mahaska	Robbery.
State v. Norris, Levi S	Jones	Rape.
State v. Panor, Sam	Polk	Liquor nuisance.
State v. Peterson, Zeb et al	Decatur	Robbery.
State v. Poe, Claude J. et al	Union	Robbery.
State v. Pray, Richard	Decatur	Arson.
State v. Price, George H.	Ringgold	Incest.
State v. Raphael, Joseph et al	Black Hawk	Robbery.

State v. Rea, B. D.	Emmet	Practicing medicine as an itinerant physician.
State v. Reagan, Woodson	Appanoose	Murder.
State v. Richards, W. A	Warren	Burglary.
State v. Rivers, F. S.	Dallas	Forgery.
State v. Roan, Sam	Polk	Murder.
State v. Robinson, Thomas C	Howard	Murder.
State v. Robirds, Fred et al	Page	Conspiracy.
State v. Sanders, John W.	Cass	Conspiracy.
State v. Sandiland, Andy	Pottawattamie	Breaking and entering.
State v. Scroggs, L. P. (Rehearing)	Shelby	Rape.
State v. Smith, Hervey	Wapello	Seduction.
State v. Smith, Thomas	Monroe	Murder.
State v. Smith, Lewis	Pottawattamie	Murder.
State v. Starchirch, George	Appanoose	Liquor nuisance.
State v. Thompson, Wilifred	Johnson	Assault with intent to commit murder.
State v. Trusty, Marion	Winnebago	Rape.
State v. Tyler, Chester	Jasper	Murder.
State v. Wagner, Harry	Van Buren	Desertion of wife.
State v. Walker, John	Polk	Murder.
State v. Wasson, C. G.	Linn	Robbery.
State v. Williams, Richard	Mahaska	Murder.
State v. Wilson, Josephine	Mahaska	Keeping house of ill fame.
State v. White, Jack	Boone	Gambling
State v. Worthen, Owen	Benton	Burglary.

SCHEDULE "C."

Of the cases which were pending in the state and federal courts at the time of my last report, the following have been disposed of:

Manchester Fire Insurance Company et al. v. Herriott, Treasurer of State, et al.

Appeal from the judgment of the United States circuit court for the Northern district of Iowa to the supreme court of the United States. Dismissed by appellants.

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

Writ of error from the supreme court of the United States to the supreme court of the state of Iowa. The cases were fully argued and submitted in the supreme court of the United States at the October term, 1902, and were decided adversely to the claim of the state.

Scottish Union & National Insurance Company of Edinburgh, Scotland, and London, England, v. Herriott, State Treasurer, et al.

Writ of error from the supreme court of the United States to the supreme court of the state of Iowa. Dismissed by plaintiffs in error.

John Herriott, Treasurer of State, v. L. F. Potter, Administrator of the Estate of John Lawson, Deceased, et al.

Appeal from Pottawattamie district court to the supreme court of Iowa. The case was argued and submitted at the October, 1901, term and decided at the January, 1902, term of the supreme court of Iowa, the claim of the state being fully sustained.

State of Iowa on relation of Milton Remley, Attorney-General, v. The Iowa Mutual Building & Loan Association, et al.

This was an action in equity for a receiver to wind up the affairs of the association. Its affairs have been closed and the report of the receiver approved.

State of Iowa v. Sioux County.

An action at law to recover amount claimed to be due the state from Sioux county for the maintenance of an insane patient at the hospital at Independence, Iowa. The action was tried in the district court of Plymouth county and was determined adversely to the claim of the state. No appeal was taken from such judgment, as in the opinion of the attorney-general the judgment of the district court was correct.

State of Iowa v. Jas. H. Easton.

Writ of error from the supreme court of the United States to the supreme court of Iowa. The cause was fully argued and submitted at the October term, 1902, of the supreme court of the United States. On February 2, 1903, the cause was decided adversely to the claim of the state, the court holding that the Iowa statute under which the defendant was indicted is not applicable to officers of national banks conducting business under act of congress. The opinion is reported in 188 U. S., at page 220.

State of Iowa v. W. M. McFarland.

This was an action brought upon the bond of W. M. McFarland as secretary of state to recover money unlawfully paid by him to employes in his office. The case was tried at the March term, 1899, of the district court of Polk county, Iowa, and a judgment of $1,219 damages and $362.25 costs rendered in favor of the state and against the defendant McFarland and his bondsmen. From this judgment the state and McFarland both appealed. At the October term, 1902, the appeal of the defendant was dismissed for want of prosecution and that of the state by request of the attorney-general. A procedendo was thereupon issued to the district court of Polk county, and efforts

are now being made to collect the judgment from McFarland's bondsmen.

P. Farrington v. State of Iowa.

This was an action at law in the district court of Cedar county brought against the state by the plaintiff to recover $175,000 damages for alleged false imprisonment. The case was dismissed by the district court without trial.

State of Iowa on relation of Attorney-General v. W. A. Smith.

This was an action brought upon the relation of the attorney-general, Hon. Milton Remley, to restrain W. A. Smith from draining a lake in Pottawattamie county. The action was brought by the local authorities, the consent of the attorney-general being given thereto. Afterward a thorough investigation was made by Hon. W. H. Killpack, county attorney of Pottawattamie county, and the facts developed by such investigation showed that the action could not be successfully prosecuted to a termination. The case was therefore dismissed.

John Herriott, Treasurer of State, v. Jennie E. Day.

The decision of the supreme court in the case of *Ferry v. Campbell* is conclusive upon the questions involved in this case. The court held in *Ferry v. Campbell* that real estate descending to a collateral heir was not liable to pay the collateral inheritance tax where the title passed prior to the amendment made by the Twenty-seventh General Assembly to the collateral inheritance tax law, and the announcement of that decision rendered it unnecessary to further prosecute the case of *Herriott v. Day*. The judgment in the case was therefore set aside and an order made in the district court declaring the land not subject to collateral inheritance tax.

SCHEDULE "D."

The following is a list of civil cases which have been commenced and disposed of since my last report:

In the Matter of the Estate of Reuben S. Bennett, Deceased.

This was an application by Ruby J. Britt, sole heir of Reuben S. Bennett, deceased, asking an order of court to relieve the estate of the cost of the collateral inheritance tax appraisement, upon the ground that such appraisement was not authorized by law, as no part of the property went to a collateral heir. The court sustained the application and discharged the estate from the payment of such costs. This holding of the court was clearly correct and no appeal was taken therefrom.

Elizabeth Fitch v. G. S. Gilbertson, Treasurer of State.

This was an action begun in the district court of Woodbury county for the purpose of having certain property declared exempt from collateral inheritance tax. An answer was filed by the state and a demurrer thereto by the plaintiff. The demurrer was sustained and judgment entered thereon adverse to the state and no appeal was taken as in the opinion of the attorney-general the demurrer was rightly sustained.

State of Iowa v. Frank Sunderland.

This was an action in equity to have certain property in the town of Red Oak, Montgomery county, which had escheated to the state, sold under the order of the district court of that county. The property was sold under the order of the court and the sum received therefor paid into the state treasury and the action closed.

A. L. Stetson and others v. E. D. Dawson and others.

This was an action in equity to prevent certain lands within the corporate limits of Sioux City from being taken for railway

purposes under the right of eminent domain. An answer was filed on behalf of the railroad commissioners of the state, and afterward the case was settled as between the railway companies and the plaintiffs.

State of Iowa v. Chas. Danger.

This was an action begun by the state for the benefit of the State University to quiet title to certain lands in Winnebago county belonging to the university and which were occupied by the defendants. The case was tried in the Winnebago district court and a judgment entered therein in favor of the state and quieting the title of the lands in the State University. No appeal was taken and the cause is disposed of.

State of Iowa for the Use of the School Fund v. J. T. Cannon, et al.

After the government had selected the site for the new federal building in Des Moines, it was discovered that there was an unreleased school fund mortgage upon part of the land selected for such site. The mortgage was executed by T. J. Cannon on the 18th day of December, 1856, to James D. Eads, then superintendent of public instruction, and was for the sum of $6,318.87. Upon a careful investigation of all of the facts surrounding the execution of this mortgage and its existence, it was clearly apparent that it was one of the claims which had been settled as between the state of Iowa and the bondsmen of Eads by the commission appointed by the legislature for that purpose, and that the state could not enforce the payment of the mortgage as against the property upon which it appeared as a lien. It was, however, advisable that an attempt should be made to enforce the claim against the property, and if the court held that it was not enforcible that judgment should be entered against the state discharging the property from the apparent lien of the mortgage. An action was therefore begun by the state for the use of the school fund, asking a foreclosure of the mortgage and a sale of the property covered thereby. The action was tried in the district court of Polk county and a judgment rendered therein against the state canceling such mortgage and discharging the land from the lien thereof. No

appeal was taken from this decision as in the opinion of the attorney-general no other or different judgment could have been entered by the district court.

State Savings Bank v. State of Iowa et al.

This was an action by the plaintiff to foreclose a mortgage upon certain property in Pottawattamie county, upon which there was an apparent lien created by a bond running to the state of Iowa executed subsequently to the mortgage of the plaintiff. The facts were investigated by Hon. W. H. Killpack, county attorney of Pottawattamie county, and reported to the attorney-general, and no appearance was entered by the state in the action.

State Savings Bank v. Clara V. Albertson, State of Iowa, et al.

The facts in this case are precisely the same as those given in the preceding case.

State of Iowa ex rel Chas. W. Mullan, Attorney-General, v. H. N. Linebarger, Gurdian of W. S. Barton, Insane.

This was an action to recover the cost of maintenance of W. S. Barton from his guardian, H. N. Linebarger. A demurrer was filed to the application and sustained by the court.

SCHEDULE "E."

The following is a list of civil cases which are now pending:

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State v. Christopher T. Jones and H. Schofield, Polk county.
Wilson L. Ogden v. Leslie M. Shaw, Governor, Polk county.
Marshall Dental Manufacturing Company v. John Irving, Defendant, State, Intervenor, Greene county.
Iowa Telephone Company v. John Herriott *et al.*, Polk county.
American Home Investment Company v. W. B. Martin, Secretary of State, Polk county.
In the Matter of the Guardianship of Joseph Wesley, Insane, Johnson county.
State v. Meek Brothers Company *et al.*, Van Buren county.
Fidelity & Deposit Company v. Dennis E. Ryan, Frank Merriam, Auditor, Monona county.
Gilbert S. Gilberston, Treasurer, v. Geo. A. Oliver *et al.*, Monona county.
B. A. Stockdale v. G. S. Gilbertson, Treasurer, Polk county.
Iowa Loan & Trust Company v. Geo. Godfrey and State of Iowa, Polk county.
E. H. O'Connor v. Northwestern Life & Savings Company, B. F. Carroll *et al.*, Polk county.
In the Matter of John Thornton, Insane, Wm. C. Richardson, Guardian, St. Louis, Mo.
State of Iowa, *ex rel.* Chas. W. Mullan, v. John Callan, Administrator Estate of Edward Moran, Deceased, Dallas county.
State of Iowa, *ex rel.* Chas. W. Mullan, v. German Mutual Insurance Company, Polk county.
Mason City & Fort Dodge Railway Company v. A. F. Simpson ..*et al.*, Webster county.

Western Union Telegraph Company v. B. F. Carroll, Auditor, Polk county.

Chicago, Milwaukee & St. Paul Railway Company v. Wapello County, Wapello county.

State of Iowa v. Lafayette Young, Polk county.

State of Iowa v. Suel J. Spaulding, Polk county.

State of Iowa v. Ole Thompson, Hancock county.

In the Matter of the Estate of Robert R. Oswald, Butler county.

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Cedar Rapids & Marion City Railway Company v. Albert B. Cummins *et al.*

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FOURTH BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA.

CHARLES W. MULLAN,
ATTORNEY-GENERAL

TRANSMITTED TO THE GOVERNOR, JANUARY, 1904.

PRINTED BY ORDER OF THE GENERAL ASSEMBLY.

DES MOINES:
BERNARD MURPHY, STATE PRINTER.
1904

FOURTH BIENNIAL REPORT OF THE ATTORNEY-GENERAL OF IOWA.

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

TO THE HONORABLE ALBERT B. CUMMINS, Governor of Iowa:

In compliance with law I hereby submit to you a report of the business transacted by this office during the years 1902 and 1903.

Schedule A is a complete list of all appeals in criminal cases, submitted to the supreme court during the years 1902 and 1903, and also all rehearings asked during that period, and shows the final disposition of the cases.

Schedule B is a list of all criminal cases pending on the first day of January, 1904.

Schedule C is a list of civil cases which were pending in the state and federal courts at the time of my last report, and have since that time been disposed of.

Schedule D is a list of civil cases which have been commenced and disposed of in the state courts since my last report.

Schedule E is a list of civil cases which are now pending in the state and federal courts in which the state is a party.

Schedule F is the official written opinions given by this office during the years 1902 and 1903.

Schedule G contains a few of the many letters which were written in response to inquiries from county officers and others as to the construction and interpretation of statutes, and as to the law in cases which have arisen in the state. These letters are

not official in their character, and frequently contain a simple suggestion instead of the expression of an opinion. They relate to matters of public interest as to which uniform action is desirable in the state, and it is thought advisable to include the same in this report.

APPEALS IN CRIMINAL CASES.

There has been a considerable increase in the number of appeals in criminal cases which is perhaps due to the increase in population of the state. There are fifty-six appeals in criminal cases upon the docket of the supreme court for the January term, 1904, which is greater than has appeared upon any previous docket. The policy of requiring all criminal cases appealed to the supreme court to be submitted at the second term after the appeal is taken has been very satisfactory, and very little difficulty or delay has been experienced by this office in having cases promptly submitted.

In my last report I commented upon the unusual number of murder cases which had been tried during the two years previous. At that time I thought the number of murders committed in the state was exceptional, and that there would be a marked decrease during the next biennial period; instead of this being true, the number of murder cases has increased during the last two years, and thirty-three cases in which the defendants were charged with murder have been appealed to the supreme court. Nineteen of these have been determined by the court and fourteen are now pending.

Among the more important cases which have been tried during the last biennial period is the case of *State v. James H. Easton,* who was indicted under the fraudulent banking laws of the state for receiving a deposit at a time when he knew the bank to be insolvent. He was the president of a national bank and the question was raised as to whether the legislature of the state had the power to make it a criminal offense for an officer of a national bank to receive a deposit when he knew the bank to be insolvent. The supreme court of the state, following the case of the *State v. Fields,* held that such power existed in the

legislature. The case was taken upon writ of error to the supreme court of the United States, and that court, upon a full presentation of the case, held that it is not within the power of a state legislature to make the receiving of a deposit by the officers or agents of an insolvent national bank a criminal offense.

The decision in this case is far reaching in its effect, as a large number of states have enacted laws almost identical with the statute of Iowa, and in several of the states these laws have been held by the state courts to be constitutional. The decision of the supreme court of the United States overrules the state courts and relieves national banks, their officers and agents from the provisions of the statutes.

LAKE BED CASES.

In my last report I referred to the lake bed cases, and particularly to the case of *Rood v. Wallace* which was then pending in the supreme court of the United States. That case has since been dismissed upon the ground that no federal question was involved therein, and no decision was reached as to the title of the non-navigable lake beds in the state. That question is still, to some degree at least, an open one, and I hope it may be presented to the supreme court of the United States in a case where the decision of that court will be final, and the title to the meandered lake beds in the state determined.

COLLATERAL INHERITANCE TAX.

Since my last report many of the important questions arising in relation to the collection of the collateral inheritance tax have been decided by the courts. The law and the method of procedure are much better understood by the bench and bar, and the opposition which existed to the payment of this tax has almost wholly ceased to exist.

CORPORATIONS.

In my last report I recommended a law requiring all articles of incorporation and amendments thereto to be approved by the attorney-general before any permit was issued thereon, either by

the secretary of state or the auditor of state to the corporation to transact business.

The experience of the state officers during the last biennial period convinces me more firmly than ever of the necessity of such a law. The proportion of business transacted by corporations within the state is rapidly increasing.

Corporations are here to stay, and in my judgment it is desirable that they should. Under modern industrial conditions they provide the better means for carrying on the business of the country. They permit an aggregation of capital by which great enterprises can be undertaken and carried to a successful end. When conducted upon strict, modern business principles they reduce the cost of the industrial products to the consumers. They enable men to embark in desirable industrial enterprises without risking their entire fortunes upon the success of the enterprise.

Much has been said within the last few years as to the evils of the great corporations of the country; but when we stop to consider that it would have been impossible to build and operate any of the great lines of railway to which the development of the west is more indebted than to any other cause, without a corporate association of capital, and that the farmers of the west would be paying twice what they now pay for every article of machinery which is used upon the farm, if corporations did not exist and such machinery was built under the old methods, every thinking person must admit that legitimate corporations, by which the output is increased and the cost lessened, have been and will be of great benefit to the people. The difficulty has been, and now exists, that these artificial beings are not properly regulated by statute.

The filing of the articles of incorporation with the secretary of state, if the previous steps required by law have been complied with, creates a contract between the state and the corporation. The present law does not give to the secretary of state or to any other officer direct authority to refuse to file articles of incorporation which are presented to him, or to refuse to issue a permit to transact business thereunder, except as to arti-

cles of incorporation of insurance companies, which must be approved by the attorney-general and the auditor of state.

This is clearly a defect in the law, and the result is that many corporations of doubtful legitimacy are organized under the name of bond and investment companies, co-operative and home building associations, and other names of like character, which claim the right to carry on their business in the state without restriction or supervision.

The corporation laws of the state should be so amended as to require that all articles of incorporation should be submitted to the attorney-general for his approval, and give to the secretary of state or other proper officer supervisory powers over such associations.

No corporation should be permitted to issue its shares of stock beyond a reasonable capitalization; nor should bonds be permitted to be issued upon its property beyond the reasonable value thereof; and such other regulations should be made by the legislature as will prevent over capitalization and over bonding, and secure to the stockholders, at least as far as is possible, a reasonable return for their investment. When these things have been accomplished, the stigma which now attaches to corporations generally will disappear and the people will recognize their value as the means by which the great industries of the country are carried on.

MONEYS RECEIVED.

The only money received by me during the last biennial period is the sum of $53.65, which was the unexpended balance of the amount required to be deposited with the clerk of the United States supreme court for costs in *Rood v. Wallace.* This sum was received by me January 20, 1903, and on the same day paid over to the state treasurer.

NEEDS OF THE OFFICE.

In my last report I urged the necessity of the purchase of a set of the Reports of the Supreme Court of the United States for the attorney-general's office. Since that time, with the consent of the executive council, I purchased a set of the United States Supreme Court Reports of the Banks Law Publishing

Company, for $318.40, including all of the reports to the 191st. This purchase was made upon the condition that the legislature should make an appropriation to pay for these reports. They were delivered at once under the purchase, and have been in my office since that time, and I have no doubt that the appropriation will be made.

The principal need of the office at the present time is adequate rooms within which to transact the business. An assistant and two stenographers are now required during the entire time. This necessitates the operation of two typewriters in the office in which the assistant is compelled to prepare his briefs and arguments in criminal cases. There should be at least a suite of four rooms for the accommodation and dispatch of the business of the office; one in which typewriters may be operated without interfering with the other work of the office, a library, a room for the assistant, and a private office for the attorney-general.

The work of the office has increased so largely in volume that it cannot be carried on with system and expedition in the two small rooms occupied by the attorney-general. It is certainly to be hoped that some arrangement and assignment of the rooms in the state house may be made which will give to this office at least reasonable accommodations for transacting its business.

In conclusion I desire to express my appreciation of the courtesy extended to me by you and the other officers of the state, and to say that our relations have been of the most pleasant character during my term of office.

I also desire to acknowledge the faithful and valuable services of my assistant, Mr. Lawrence De Graff, and the other members of my office force. Their work is deserving of high commendation, and if the work of this office is entitled to any credit it is largely due to the efficient manner in which they have discharged their duties.

Respectfully submitted,

CHAS W. MULLAN,

Attorney-General of Iowa.

SCHEDULE F.

LEGAL SETTLEMENT—When once acquired continued until lost by acquiring a new one. A person who acquires a legal settlement in this state retains such settlement until he acquires one elsewhere, and this settlement is in the county wherein it is acquired, and such county is liable for his support, in case he is unable to maintain himself.

SIRS—I am in receipt of your communication of January 10th asking my opinion upon the following questions:

First. If a person unable to maintain himself, having a legal settlement in this state, moved to the state of Minnesota, with the intent of making that state his permanent place of residence, but before he acquires a legal settlement therein becomes insane and a public charge, does his legal settlement remain in this state for the purpose of maintenance at public cost until he shall have acquired one in the state of Minnesota?

Second. If, in the case supposed, the legal settlement of the person remains in this state, is the county in which his legal settlement remains, responsible for his support, or should the expense be borne by the state?

Section 2224 of the Code provides:

> "A legal settlement once acquired continues until lost by acquiring a new one."

This statute is declaratory of the general rule which prevails in this country and in England relating to the settlement of poor persons.

In *Payne v. Town of Dunham,* 29 Ill., 129, it is said:

> "There is one principle which seems to be universal in the construction and application of poor laws, both in

this country and in England, and that is, that a person having a legal settlement in one place, that settlement continues until he acquires a legal settlement in another place in the state."

In *Phillips v. Kingfield,* 19 Me., 375, it is said:

"There is a marked distinction between the place of residence or home and place of legal settlement. The latter cannot be changed without acquiring a new one."

The principle embodied in our statute and declared by the cases cited, has been substantially applied, in *Juniata County v. Overseers of Poor,* 107 Pa. St., 68, to cases arising where a person has left a state in which he had a legal settlement and become a public charge in another state before he had acquired a legal settlement therein. In that case it is said:

"The statute contemplates that a person may lose his settlement by acquiring a new one without the state as well as within. * * * It may be difficult, and often impossible, to remove a pauper from this state to his place of settlement in another. This provision may be nugatory as regards its enforcement, and yet material in ascertaining the intendment of the statute respecting persons coming into a district from another state. * * * The settlement of a person continues until he gains a new one. When he removes from this state and acquires a domicile and settlement in another, he has no settlement in Pennsylvania."

Under the principles of law enunciated in these cases, which simply carry out to its legitimate conclusion the rule of our statute, I am of the opinion that one who has a legal settlement in this state retains such settlement until he acquires one elsewhere, and that if he removes from the state he still retains such settlement until he acquires a legal settlement in the state to which he removes.

In the case submitted, where a person unable to maintain himself, having a legal settlement in this state, moved to the state of Minnesota with the intention of making that state his permanent place of residence, but before he acquired a legal settlement therein, became insane and a public charge, such person retains his legal settlement in this state for the purpose

of maintenance at public cost, until he acquires a legal settlement under the laws of the state of Minnesota.

In reaching this conclusion I take into consideration the fact that the laws of the state of Minnesota, fixing the time required for legal settlement in that state, are the same as ours. If a longer residence in the state of Minnesota was required to make a legal settlement therein than in the state of Iowa, it is possible a different conclusion might be reached; but that question is not involved in the case presented.

2d. Having reached the conclusion that a person under the circumstances stated, retains a legal settlement in this state, it seems to me clear that the county in which he retains such settlement, is liable for his support. If he retains a settlement here, it necessarily must be in the county where he resided before leaving the state, and his settlement being in such county, it is charged with his support, precisely as though he was a resident thereof. Had he remained in the county and become a public charge, no question would be raised as to the duty of the county to pay for his support. The fact that he left the county, and before obtaining a legal settlement elsewhere, became a public charge, does not in my opinion affect the liability of the county.

I am borne out in this conclusion by the case of *Sitterlee, Agent, v. Murray,* 63 How. Pr., 370, in which it is said:

> "He could not have gained a settlement in Palatine because he had not resided there a year. He had just previously resided in Minden over a year under all the circumstances that could establish his settlement there. If Funk had become sick and unable to provide for himself while residing in Minden at any time after the expiration of the first year's residence, then the town would have undoubtedly been liable for his support. What difference can it make that he removed into the town of Palatine and required assistance from that town as a poor person before residing there a year? I think none. It was Minden's misfortune as well as Funk's that he became sick and required help before residing in Palatine the period required by law to establish a legal settlement in the latter town."

The fact that he removed from the state instead of becoming a resident of another county within the state, does not relieve

the county in which he has a legal settlement from liability for his support, until he obtains a legal settlement elsewhere to which such liability can be shifted.

I therefore conclude that the legal settlement of the person referred to in your inquiry is in the state of Iowa, and in the county from which he removed when he went to Minnesota, and that such county is now liable for his support.

Respectfully submitted,

CHAS. W. MULLAN,

February 12, 1902. *Attorney-General.*

TO THE HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

MINE INSPECTOR—CERTIFICATE OF COMPETENCY—Such certificate issued by the board of examiners under section 2418 of the code continued during the life of the person to whom it is issued, or until the same has been revoked for cause shown.

SIRS—In compliance with your request for my opinion as to whether a mine inspector, holding a certificate of competency from your board and whose term of office is about to expire, and who is an applicant for re-appointment, must be required to take another examination and receive a certificate of competency before he is eligible to re-appointment, I have to say:

Section 2481 of the code provides that "the board shall issue to those examined and found to possess the requisite qualifications, certificates of competency for the position of mine inspector."

This section does not limit the time for which such certificate shall be issued, nor does chapter 9, of title XII, of the code, relating to mines and mining, and the amendments thereto, fix any limit of time for which such certificates shall be issued. Where the law is silent as to the length of time for which a certificate of competency or efficiency may be issued upon an examination, I think there can be no other inference than that it was

the intent of the legislature that such certificate should continue in force and effect during the life of the person to whom it is issued, or until it is revoked for cause shown.

I am therefore of the opinion that it was the intent of the legislature that the certificate of competency issued by your board under section 2481 of the code, should continue during the life of the person to whom it is issued, or until the same has been revoked for cause shown.

I am authorized to say that the attorney-general concurs with me in this opinion. Respectfully submitted,

CHAS. A. VAN VLECK,
Assistant Attorney General.

Des Moines, Iowa, February 21, 1902.

TO THE BOARD OF EXAMINERS OF MINE INSPECTORS.

ROAD TAX—Constitutionality of law which provides that railways shall pay the same. The classification and grouping of railways for the purpose of taxation is natural, reasonable, and not arbitrary or capricious. The above law is held not to be a local or special law within the meaning of section 30 of article 3 of the constitution, and is therefore constitutional and valid.

GENTLEMEN—Complying with the request of your chairman for an opinion as to the constitutionality of a law which provides that railways shall pay their road tax at a time other and different from that in which other persons are required to pay road tax assessed against their respective properties, I submit the following opinion:

Section 2 of article 8 of the constitution of the state provides:

> "The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals."

In *Central Iowa Railroad Company v. Board of Supervisors,* 67 Iowa, 199, it was held that no constitutional rights were infringed by providing a different method of assessing railroad

property than that provided for the assessing of property of the same nature belonging to other owners. In delivering the opinion of the court Mr. Justice Seevers said:

> "We think it is competent and not in conflict with any provision of the constitution of this state or of the United States, for the state to provide that any particular class of property belonging to all corporations of the same character and which possess the same rights and privileges, may be assessed in the same manner and by the same tribunal; and that the property of individuals and other corporations may be assessed by other officers at different times."

This decision has stood unquestioned, and the principles therein announced have been acted upon, by the legislature and courts of this state for more than fifteen years. This principle is in accord with the almost unbroken authority of the decisions of the courts of last resort of the different states.

In *Sawyer v. Dooley,* 32 Pac. Rep., 440, it is said:

> "For the purpose of taxation, real estate may be classified. Thus timber lands, arable lands, mineral lands, urban and rural, may be divided into distinct classes and subjected to different rates. In like manner other subjects, trades, occupations and professions may be classified, and not only things but persons may be so divided. * * * The right to classify railroad property as a separate class for purposes of taxation grows out of the inherent nature of the property and the discretion vested by the constitution of the state in the legislature, and necessarily involves the right on its part to devise and carry into effect a distinct scheme with different tribunals in proceeding to value it."

In *Warren v. Henley,* 31 Iowa, 39, Mr. Justice Beck clearly and tersely states the principle in these words:

> "The rule means that all individuals and all classes must contribute uniformly with like individuals and like classes to the burden of taxation. The manner of imposing this burden must of necessity be left to the discretion of the legislative branch of the government."

It is therefore competent for the legislature to classify all railway property within the state as a separate class for the pur-

pose of taxation, and in so doing it does not violate the provisions of section 2 of article 8 of the constitution of the state.

It has been suggested that the proposed law is in conflict with section 30 of article 3 of the state constitution, which provides:

> "The general assembly shall not pass local or special laws in the following cases:
>
> "For the assessment and collection of taxes for state, county or road purposes."

The inquiry at once arises: Is the proposed act of the legislature local or special? It is certainly not local in its nature as it extends to every part of the state, and that suggestion may be dismissed without further discussion. The question as to whether the act, if passed by the legislature, would be a special law presents a little more serious question, and one which deserves careful consideration.

It is said in Bouvier, 1032:

> "Special statutes relate to private interests and deal with the affairs of persons, places, classes, etc., which are not of a public character."

This may be said to be the distinguishing character between special and general statutes.

The definition of the word "general" as used in the constitutions of the various states, to distinguish statutes from those which are special, is given by Bouvier as follows:

> "When thus used, the term 'general' has a two-fold meaning. With reference to the subject-matter of the statute, it is synonymous with 'public' and opposed to 'private'; 37 Cal., 366; 14 Wis., 372; 46 Wis., 218; Dwarris Stat., 629; Sedgw. Stat. L. 30. But with reference to the extent of territory over which it is to operate, it is opposed to 'local', and means that the statute to which it applies operates throughout the whole of the territory subject to the legislative jurisdiction; 4 Co., 75-a; 1 Bla. Com., 85; 83 Ill., 585; 87 Tenn., 304; 10 Wis., 180. Further, when used in antithesis to 'special' it means relating to all of a class instead of to men only of that class; 70 Ill., 398; 26 Ind., 431; 22 Iowa, 391; 77 Pa., 348; 32 Pac. Rep., 440."

In *Hymes v. Aydelott,* 26 Ind., 434, it is said:

"The constitution prohibits the enactment of local or special laws, for laying out, opening and work on highways; article 4, section 2. It is insisted by the appellee that the act in controversy is a special law and therefore comes within the prohibition. The law is not special but general. True it relates to a particular class of cases, and applies to them alone as do a large number of legislative enactments, but that fact does not make it a special law. *Hingle v. State,* 24 Ind., 28."

In *People ex rel. v. Wright,* 70 Ill., 398, it is said:

"These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for, is affected by the laws. They are general and uniform in their operation upon all persons in like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation."

In *Van Ripper v. Parsons,* 40 N. J. L., 125, it is said:

"The law in all of its provisions is general, broad enough to reach every portion of the state and abating legislative commissions for the regulation of municipal affairs, wherever they existed. Such commissions are distinguished from other sorts of municipal governments, by characteristics sufficiently marked and important, to make them clearly a class by themselves, and, upon the whole of this class, this law operates equally, by force of terms which are restricted to no locality. A law so framed is not a special or local law, but a general law, without regard to the consideration that, within the state, there happens to be but one individual of the class, or one place where it produces effects."

In *Sawyer v. Dooley, supra,* it is said:

"The whole matter is left to the discretion of the legislative power and there is nothing to forbid the classification of property for purposes of taxation, and the valuation of different classes by different methods. The rule of equity in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar cicrcumstances. There is no objection, therefore, to the discrimination made as

between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained."

The principles enunciated by these cases have been frequently recognized by the courts of our own state.

Porter v. Thompson, 22 Iowa, 391;
Warren v. Henley, 31 Iowa, 31;
U. S. Ex. Co. v. Ellison, 28 Iowa, 370;
Mo. Val. B. Co. v. Harrison Co., 74 Iowa, 283.

In *State v. Garbroski,* 111 Iowa, 499, the rule of classification is tersely stated by Mr. Justice Ladd as follows:

"Legislation to be constitutional and valid must possess each of two indispensable qualities: First, it must be so formed as to extend to and embrace equally all persons who are or may be in like situation or circumstances; and, secondly, the classification must be natural and reasonable and not arbitrary or capricious." Citing a large number of authorities in support of the principle.

The classification and grouping of railways for the purpose of taxation is natural, reasonable and not arbitrary or capricious. The power of state legislatures to do this has been upheld by the courts of nearly every state in the Union. The proposed law extends to and embraces every railway corporation within the jurisdiction of the law-making power of the state. It operates equally and uniformly upon all persons and corporations falling within a particular class. Every person who is brought within the relations and circumstances provided for, is affected by the law.

I am therefore clearly of the opinion that it is not a local or special law within the meaning of section 30 of article 3 of the constitution, and that although it requires the payment of the road tax levied upon the valuation of railways within the state at a different time than the road tax levied upon the valuation of other property is required to be paid, it is constitutional and valid and will be upheld by the courts.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

Des Moines, Iowa, February 27, 1902.

TO THE SENATE COMMITTEE ON WAYS AND MEANS.

MINE INSPECTOR - CERTIFICATE OF COMPETENCY—Such certificate issued by the board of examiners under section 2481 of the code continues during the life of the person to whom it is issued, or until the same has been revoked for cause shown.

SIR—Complying with your request for an opinion as to whether a mine inspector, holding a certificate of competency from the board of examiners, who is an applicant for reappointment, is required to submit to another examination by the board, and to receive another certificate of competency from them to be eligible to reappointment, I submit the following:

Section 2478 of the code provides:

> "The governor shall appoint three mine inspectors from those receiving certificates of competency from the board of examiners hereinafter provided for, who shall hold their office for two years and until their successors shall be appointed and qualified, subject to removal for cause. * * *"

Section 2481 of the code provides:

> "The examination shall consist of written and oral questions in theoretical and practical mining and mine engineering, on the nature and property of noxious and poisonous gases found in mines, and on the different systems of working and ventilating coal mines. During the progress of the examination books, memoranda or notes shall not be allowed or used, and the board shall issue to those examined and found to possess the requisite qualifications, certificates of competency for the position of mine inspector."

The provisions of this section do not limit the time for which such certificates shall be issued, nor is there any provision in chapter 9 of title XII of the code limiting the life of such certificate. In the absence of any provision of law limiting the time for which such certificate may be issued, I am of the opinion that where it is issued to a person who has taken the examination required by law, it will continue in force and effect during the lifetime of such person, unless it is sooner revoked for cause. A careful reading of chapter 9 of title XII of the code and the amendments thereto bear out the conclusion that this was the intent of the legislature.

I am therefore of the opinion that any person holding such certificate of competency duly issued by the board of examiners, is eligible to the appointment of mine inspector under chapter 9 of title XII of the code, and if he has been previously appointed to such position and his term of office is about to expire, he is not required to take a re-examination as to his competency to make him eligible to the appointment.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

Des Moines, February 28, 1902.

TO THE HONORABLE ALBERT B. CUMMINS,
Governor of Iowa.

STATE BONDS—INTEREST THEREON—Interest thereon should be computed from the time the records of the state show they were delivered to its agents for negotiation.

SIR—Complying with your request of March 4th for a construction of chapter 16 of the Special Session of the Eighth General Assembly of the State of Iowa, approved May 28, 1861, as to when, according to the terms of said chapter, assuming that it was fully and faithfully complied with in the issuance of the bonds therein provided for, the bonds issued under the authority therein given began to bear interest, I submit the following opinion:

Section 1 of the act authorizes the state of Iowa to issue and sell the bonds of the state to an amount not exceeding the sum of eight hundred thousand dollars ($800,000) for the purpose of borrowing money to enable the state to repel invasion and defend itself in war. The bonds provided for in the act are to run twenty years from the date thereof, and to bear interest at the rate of seven per cent per annum, payable on the first days of January and July of each year.

Section 2 of the act provides:

"And said bonds shall be signed by the governor, countersigned by the auditor and treasurer, and attested by the great seal of the state of Iowa, but the seal of the state may be omitted from the coupons, which coupons shall be signed by the auditor of state, the necessary expense of which shall be paid out of the war defense fund. No bonds shall be signed or perfected prior to the time they are actually needed for negotiation, and then in such amounts only as may be requisite for the time being, and said bonds shall not be signed and perfected until the agents herein appointed are ready to receive them in person for sale and negotiation as provided in this act."

Section 5 of the act provides:

"The governor of the state, Charles Mason of Des Moines county, William Smyth of Linn county, James Barker of Lucas county, and C. W. Slagle of Jefferson county, are hereby appointed a board of commissioners who, or a majority of whom, shall cause to be issued and sold from time to time only so many of the bonds hereby authorized as in their judgment the wants and necessities of the state may require."

Section 6 provides:

"The treasurer of state and Maturin L. Fisher of Clayton county be and they are hereby declared to be agents of this state, with full power to negotiate said loan, to sell and transfer said bonds, and to do all things necessary in the premises."

Section 11 provides:

"If such a course is deemed advisable by the commissioners appointed in section 5 of this act, the agents may, on the written direction of said commissioners, or a majority of them, sell at private sale the said bonds, or any part thereof, in this state at their nominal par value, but in no instance for less, except as hereinafter provided. Any sale of the said bonds made in the city of New York must be made in the following manner, to wit: The said agents shall give at least twenty days notice by advertising in the *New York Daily Times*, *Daily New York Tribune*, *Daily New York Journal of Commerce*, or at least two of them, and *Daily Boston Atlas* and *Daily Boston Post*, or at least one of them, and the *Daily Chicago Tribune*, or other daily newspaper in Chicago, fixing the time

> and inviting sealed proposals for said loan, which shall be received and opened by them at the Metropolitan Bank in said city, where it shall be their duty to keep or have kept at all times before opening any bids, a copy of this act for public inspection, with such other documents relating thereto as may be necessary. * * *"

The provisions of section 2 above quoted give to the governor, auditor and treasurer of state the power to sign and perfect the bonds to be issued only as they were actually needed for negotiation. Under its provisions these officers were absolutely prohibited from signing and perfecting any of the bonds authorized by the act of the legislature, prior to the time that such bonds were needed for negotiation, and then in such amounts only as were required to meet the necessities of the state.

They were further prohibited from signing and perfecting any of said bonds until the agents were ready to receive them in person for sale and negotiation as provided in the act.

By the provisions of section 5 of the board of commissioners, who were to have the general supervision of the sale and negotiation of the bonds, were prohibited from causing any portion thereof to be issued or sold, except as they were required in their judgment to meet the wants and necessities of the state.

Section 11 prohibits the sale of any of said bonds, save those sold at private sale in the state of Iowa, except upon written sealed bids made therefor, received and opened at the Metropolitan Bank in the city of New York.

Construing the provisions of the act of the legislature of May 28, 1861, which authorizes the issuance and sale of what are known as the "war and defense bonds" of the state, I am clearly of the opinion that no bond could be signed, perfected and issued under said act, so that the same became an interest bearing obligation of the state, until such time as the commissioners determined that the wants and necessities of the state required the same to be perfected for negotiation, and then not until the agents of the state were ready to deliver them to the purchasers thereof.

The clear intent of the legislature was that no bonds should be signed or perfected, or become interest bearing obligations

of the state, until a contract, either by the acceptance of a sealed proposal or otherwise, was made by the agents of the state for the sale and delivery of the bonds. That is, when the agents of the state had made a contract, either to private parties within the state, or by the acceptance of a sealed proposal for the sale and delivery of said bonds, then, and then only, were the officers of the state permitted to sign and perfect such bonds, and make them interest bearing obligations.

It is equally clear that it was the duty of the officers of the state, when a contract for the sale of said bonds had been made by the agents, to perfect the amount of the bonds to be negotiated and sold under such contract, and to make them interest bearing obligations of the state in compliance with the provisions of chapter 16.

That the officers of the state did their duty under these provisions of the law, must be presumed.

It is therefore clear that no bond issued under the provisions of chapter 16 of the laws of the special session of the Eighth General Assembly, bore interest before it was delivered to the agents of the state to be negotiated under the contract of sale made by them; and it is equally certain that all of the bonds signed, perfected, issued and delivered under the provisions of said act, bore interest from the day on which they were delivered by the officers of the state to the agents, to be by them delivered to the purchaser thereof under the contract of sale previously made.

I am clear that no other construction can be put upon the act as to when the bonds issued thereunder began to bear interest. The intent of the legislature appears to me to be unmistakable.

In my opinion therefore interest should be computed upon these bonds from the time when the records of the state show they were delivered to its agents for negotiation.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

March 5, 1902.

TO THE HONORABLE ALBERT B. CUMMINS,

Governor of Iowa.

STATE BANK—RENEWAL OF ITS EXISTENCE—It is held that it is not necessary that the stock of a bank, organized prior to the enactment of section 1865 of the code, where the shares thereof are fifty dollars each, shall be recalled and new shares of one hundred dollars each issued to the stockholders.

SIR—Complying with your request of March 6th for an opinion as to whether a state bank, organized prior to the enactment of section 1865 of the code, which desires to renew its corporate existence, must recall its stock which was issued in shares of fifty dollars each and reissue such stock in shares of one hundred dollars each, I beg to submit the following:

Section 1618 provides:

> "Corporations for the construction of any work of internal improvement or for the transaction of business of life insurance, may form to endure fifty years; those for other purposes not to exceed twenty years; but in either case they may be renewed from time to time for the same or shorter periods, within three months before or after the time for the termination thereof, if a majority of the votes cast at any regular election or special election called for that purpose be in favor of such renewal, and if those wishing such renewal will purchase the stock of those opposed thereto at its real value."

The purpose of this statute is to permit corporations to renew and extend the time of their corporate existence, and to continue their business without interruption. When a corporation has extended and renewed the time of its corporate existence as contemplated in said section, it retains the same rights and powers which it originally had, unless the same have been added to or abridged by the legislature.

Section 1865 provides:

> "The capital stock of state banks hereafter organized shall be divided into shares of one hundred dollars each, issued or acquired only upon full payment of the sum represented by them."

The provisions of this section apply only to state banks organized after it became a law. Its enactment did not affect

banks organized and doing business under the previous statute. Banks organized under the laws of the state in force prior to the enactment of section 1865, which desire to renew and extend the time of their corporate existence, are not included within the provisions of said section.

The renewal and extension of the time of the existence of a bank under the provisions of section 1618 is not the organization of a corporation. Such corporation is already organized, in existence and transacting business under the authority which it derives from the state. Its renewal under section 1618 is the extension of the time during which such corporation, as previously organized, is authorized to transact business. Such extension does not fall within the provisions of section 1865, which relates to the organization of banks and not to extension of the time of corporate existence of banks organized prior to the enactment of that section.

Under the provisions of these statutes I am of the opinion that it is not necessary that the stock of a bank organized prior to the enactment of section 1865, where the shares thereof were fifty dollars each, shall be recalled and new shares of one hundred dollars each issued to the stockholders. I think no such proceeding was contemplated by the legislature and that it is not required by the provisions of the code.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney General.

March 15, 1902.

To HON. FRANK F. MERRIAM,

Auditor of State.

INSURANCE—UNIFORM POLICY KNOWN AS IOWA STANDARD POLICY—Constitutionality of the act of the legislature providing for Iowa standard fire policy. It is held that the proposed bill would be unconstitutional if enacted into a law, for the reason that a standard form of insurance policy, when so adopted, becomes a part of the law of the state, and this proposed act is an attempt by the legislature to delegate its law-making power to the auditor of state.

SIRS—Complying with your request for my opinion as to whether House file No. 356, being a bill to amend chapter four (4) of title IX (9) of the code, and providing for a uniform policy or contract of fire insurance, to be known as the Iowa Standard Policy, is constitutional, I submit the following:

The bill provides that the auditor of state shall prepare and file in his office a printed form of a contract or policy of fire insurance, with such provisions, agreements or conditions as may be endorsed thereon or added thereto, which shall conform to the laws of Iowa, and shall form a part of such contract or policy of insurance and be known as the Iowa Standard Policy.

The bill further provides that such form of policy shall, as nearly as applicable, conform to the type and form of the New York standard fire insurance policy, and that the auditor may call upon the attorney general for such assistance as to him may seem necessary in the preparation of such policy.

A standard form of insurance policy, when adopted by a legislature, becomes a part of the law of the state, and as such is a part of every contract of fire insurance entered into between fire insurance companies and individuals. The bill does not set out a form of policy which is sought to be made a law of the state. The power to formulate, determine and draft a standard form of policy is attempted to be delegated by the legislature to the auditor of state and the attorney general. The question at once arises, Can the legislature delegate this power to the auditor of state and the attorney-general?

Section 1 of article 2 of the constitution of the state provides:

> "The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives. * * *"

It is a well settled principle of law that where the legislative authority of a state is vested in a general assembly, which is the law-making power of the state, such authority cannot, by legislative enactment or otherwise, be delegated to any other body or to individuals.

In *State v. Weir,* 33 Iowa, 134, the supreme court of this state held that the legislature has no power to make the operation or repeal of a law dependent upon a vote of the people. And the principle that the legislature cannot delegate its powers has been several times recognized by the courts of this state.

In 1891 the legislature of the state of Pennsylvania enacted a law to provide for a uniform contract or policy of insurance, which provides that the insurance commissioner shall prepare and file in his office a printed form in blank of fire insurance policy, etc., to be known as the standard fire insurance policy, which shall be used by fire insurance companies doing business in the state. The question of the constitutionality of such a law arose in the case of *O'Neil v. American Fire Insurance Company,* which is reported in 30 Atlantic Reporter, at page 243. The supreme court of Pennsylvania in passing upon the question said:

> "The act of 1891 is a delegation of legislative authority, because: First. The act does not fix the terms and conditions of the policy, the use of which it commands. Second. It delegates the power to prescribe the form of the policy and the conditions and restrictions to be added to and made a part of it, to a single individual. Third. The appointee clothed with this power is not named, but is designated by his official title. He is the person who may happen to be insurance commissioner when the time comes to prepare the form for the standard policy for insurance against fire. Fourth. The appointee is not required to report his work to the body appointing him, but simply to file in his office the form of policy he has devised. It does not become part

> of the statute in fact, is not recorded in the statute book and no trace of it can be found among the records of either branch of the legislature."

In discussing the legality of this act the supreme court of that state says:

> "The effect of our cases is to settle firmly the rule that the law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and that nothing must be submitted to the judgment of the electors or other appointee of the legislature, except an option to become or not to become subject to its requirements and penalties. * * * Our conclusion is that the act of 1891 is void because clearly unconstitutional."

In the same year the legislature of the state of Wisconsin enacted a similar law empowering the insurance commissioner to adopt a printed form in blank of a policy of fire insurance, together with such conditions as may be endorsed thereon, which, as nearly as the same can be made applicable, shall conform to the type and form of policy adopted by the state of New York. The question of the constitutionality of such act arose in the case of *Dowling v. Lancashire Insurance Company,* which is reported in 65 Northwestern Reporter at page 738. After discussing the questions of law involved, the Wisconsin court says.

> "The result of all the cases on this subject is that a law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that in form and substance it is a law in all its details *in presenti,* but which may be left to take effect *in futuro,* if necessary, upon the ascertainment of any prescribed fact or event. * * * Conceding that the legislature might have adopted the New York form as an entirety by the use of general language, it is evident that the proposed form, to conform as near as can be to the form adopted in New York, involved a duty equivalent to that of revision, which it cannot be contended could be delegated, except subject to legislative approval. While the commissioner within the discretion intrusted to him might have approximated, in a great degree, to the policy which the legislature may have intended, the

> objection, in view of the consideration stated, that it has not received the legislative sanction, is necessarily fatal to it. * * * For these reasons, we hold that the provision authorizing the insurance commissioner to prepare, approve and adopt a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be endorsed thereon or added thereto, and form a part of such contract or policy, and that such form shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy, so called and known, is unconstitutional and void."

In 1889 the legislature of the state of Minnesota enacted a law which provided:

> "The insurance commissioner shall prepare and file in his office * * * a printed form, in blank, of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be endorsed thereon or added thereto, and form a part of such contract or policy, and such form, when so filed, shall be known and designated as the Minnesota standard policy."

The act further provided that such form shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy so called and known.

The question of the constitutionality of this act arose in *Anderson v. Manchester Fire Insurance Company,* which is reported in 63 Northwestern Reporter, at page 241. The supreme court of Minnesota, in passing upon the legality of the act, says:

> "He (the insurance commissioner) was to prepare and adopt a standard form, once for all, and when so adopted it was to remain irrevocable until changed by subsequent legislation. A clearer instance of an attempt to delegate legislative power could hardly be suggested. It is a principle not questioned that, except when authorized by the constitution, as in respect to municipalities, the legislature cannot delegate legislative power; cannot confer on any body or person the power to determine what shall be the law. The legislature alone must determine this. We are of the opinion that said chapter 217 is unconstitutional and void."

The bill under consideration is identical in many of its provisions with the acts passed by the Pennsylvania, Wisconsin and Minnesota legislatures, and the ground upon which those acts were held unconstitutional and void, applies with equal force to this bill. It is an attempt on the part of the legislature to delegate to the auditor of state the power to devise and determine what shall be a standard fire insurance policy in this state, and when the same has been prepared and filed by him, it is to become a part of the law of the state.

The bill does not attempt in general terms to adopt the New York standard fire insurance policy and make it a standard policy of this state, but specifically provides that the auditor of state shall prepare and file in his office a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be endorsed thereon or added thereto, which shall conform to the laws of Iowa, and form a part of such contract or policy of fire insurance, and such form, when so filed, shall be known and designated as the Iowa standard policy.

The bill further provides that the auditor of state shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy, so called and known.

As is said by the Minnesota court, a clearer case of an attempt by the legislature to delegate its law-making power, to an individual, can hardly be suggested; and I am clearly of the opinion that the proposed bill must by the courts of this state be held unconstitutional and void, if enacted into a law.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

Des Moines, Iowa, March 22, 1902.

TO MESSRS. WILSON, BLAKEMORE and CARDEN,
of the House Committee on Insurance.

SWAMP LAND GRANT—BILL NO. 8325 INTRODUCED IN CONGRESS—As none of the lake beds were ever erroneously sold by the government, or erroneously located by warrant or scrip, they cannot be affected in any way by the law, and the rights of the state therein will not be prejudiced by its passage.

SIR—Complying with your request for an opinion whether the bill introduced by Mr. Lacey in the house of representatives of the United States congress, No. 8325, entitled "A bill to finally adjust the swamp land grants, and for other purposes," in any wise affects meandered lake beds in the state of Iowa, I submit the following:

The bill in its terms provides that the proper officers of the interior and treasury departments shall finally adjust and settle the claims of any state against the United States for all lands which have been sold or located by warrant or scrip, which were included in any grant of swamp and overflowed lands.

It applies to no lands in any state except those which have been sold by the government, or located by warrant or scrip, and included in any grant of swamp and overflowed lands. No lands have ever been sold by the government, or located by warrant or scrip, which had not been previously surveyed by the general government. The lake beds of the state were meandered and excluded from the government survey. No part of the same has ever been sold or located by warrant or scrip, hence the bill does not and cannot apply to such lake beds.

The bill further provides:

> "In such settlement and adjustment such state shall, upon filing proper relinquishment and waiver to the land in place, or the surrender of swamp land indemnity scrip or certificates, where such scrip or certificates have been issued, in the manner to be prescribed by the secretary of the interior, be allowed, credited, and paid the purchase money actually received by the United States therefor, and not more, and in no case to exceed one dollar and twenty-five cents per acre, for all of such lands situated therein as have been erroneously sold, and indemnity in cash for all those erroneously located by warrant or scrip therein."

This clearly states the purpose of the bill, which is to pay the several states the value of the swamp lands which had been erroneously sold, or erroneously located by warrant or scrip, under the original government survey, at a price not exceeding one dollar and twenty-five cents per acre. As none of the lake beds were ever erroneously sold by the government, or erroneously located by warrant or scrip, they cannot be affected in any way by the bill, and the rights of the state therein will not be prejudiced by its passage.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

Des Moines, March 25, 1902.

To HON. E. W. BACHMAN.

SUPERINTENDENT OF PUBLIC INSTRUCTION—POWERS OF—Has authority to prescribe the conditions under which county superintendents shall issue certificates, and to prescribe the names and character of certificates—Has authority to specify the minimum age of applicants to whom certificates may be issued. It is not a compliance with the law to permit an applicant to write out an examination in the presence of the county superintendent of one county and forward the same to the county superintendent of another county for examination.

SIR—Complying with your request of April 21st as to the powers of the superintendent of public instruction conferred by statute, I submit the following opinion:

Section 2622 of the code provides:

> "He (the superintendent of public instruction) shall be charged with the general supervision of all the county superintendents and the common schools of the state."

Section 2735 provides:

> "He (the county superintendent) shall at all times comply with the direction of the superintendent of public instruction in all matters within that officer's jurisdiction, and serve as the organ of communication between him and school township, district or independent district authorities, and transmit to them or the teachers thereof, all blanks, circulars or other communications designed for them."

It was the intention of the legislature in enacting these statutes to give to the superintendent of public instruction the general supervision over all school matters in the state, and to make the county superintendent of schools in each county the means whereby the rulings and acts of the superintendent of public instruction are conveyed to or communicated to the persons within the county.

Under the power so conferred by the legislature, the superintendent of public instruction has authority to prescribe the conditions under which county superintendents shall issue certificates to applicants therefor, and to prescribe the names and character of the certificates to be issued by the county superintendents.

I think it is also within the power of the superintendent of public instruction to specify the minimum age of applicants to whom certificates may be issued by county superintendents.

It was clearly the intention of the legislature in framing the school law that every applicant for a certificate should appear in person before the county superintendent to whom application is made for a certificate, and submit to an examination by him and in his presence. It is not, in my opinion, a compliance with the law to permit an applicant to write out an examination in the presence of the county superintendent of one county, and forward the same to the county superintendent of another county for examination, with the request that a certificate be issued to the applicant if entitled thereto. There are many reasons which will readily suggest themselves why an applicant should appear in person before the county superintendent from whom a certificate to teach a public school is asked; and this

was contemplated by the legislature in prescribing the examinations to which applicants are required to submit before receiving a certificate to teach.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

April 28, 1902.

HON. R. C. BARRETT,
Superintendent of Public Instruction.

BANKS—CAPITAL STOCK THEREOF INVESTED IN GOVERNMENT BONDS—TAXATION—**It is held that state and savings banks and loan and trust companies cannot deduct the amount of their capital invested in government bonds from assessment made upon the shares of stock of such associations.**

SIR—I am in receipt of your favor of the 29th ult. enclosing a letter of Mr. S. B. Reed, county attorney of Black Hawk county, and requesting my opinion as to whether the amount of the capital stock of a bank which is invested in government bonds can be deducted from the assessable value of the shares of stock of such bank when the value of such shares is assessed to shareholders or to the bank.

Section 1322 of the code provides:

> "Shares of stock of national banks shall be assessed to the individual shareholders at the place where the bank is located. Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to the individual stockholders."

It is also provided in such section that the officers of national banks shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder, under the head of corporation stock, the total value of such shares. The section further provides the

manner and method by which the assessor shall arrive at the value of the shares so listed by him.

The question to be determined is whether the shareholders of the stock so listed and assessed can have the value of the amount of the capital stock of the bank, which is invested in government bonds, deducted from the value of the stock ascertained by the assessor in the manner provided in section 1322.

The question as to whether a national bank has the right to deduct the amount of its capital invested in government bonds from the value of its shares of stock when such shares are assessed to the stockholders, first arose in the case of *Van Allen v. Assessors,* 3 Wallace, 573. Mr. Justice Nelson in delivering the opinion of the court in that case, said:

> "The main and important question involved, and the one which has been argued at length and with eminent ability, is whether the state possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders whose capital is wholly invested in stock and bonds of the United States?
>
> "The court are of the opinion that this power is possessed by the state, and that it is due to the several cases which have been so fully and satisfactorily argued before us at this term, as well as to the public interest involved, that the question should be finally disposed of. * * *
>
> "The suggestion is, that it is a tax by the state upon the bonds of the government which constitute the capital of the bank, and which this court has therefore decided to be illegal. But this suggestion is scarcely well founded. * * * The tax is the condition for the new rights and privileges conferred upon these associations.
>
> "But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. * * *
>
> "The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in propor-

> tion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of congress has left subject to taxation by the states, under the limitations prescribed."

The principle thus enunciated by Mr. Justice Nelson has since been reaffirmed by the supreme court of the United States and followed by subsequent decisions.

In *First National Bank v. Farwell,* 10 Bissell, 270 (U. S. Circuit Court), it is said:

> "This is a bill filed by the plaintiff to restrain by injunction the collection of a tax by the defendant, for the reason, as alleged, that this provision of the statute has been violated by the assessment of the shares of stock of the plaintiff in this case. It is stated in the bill that no allowance was made by the assessors for the amount of capital and surplus invested in government bonds. This is answered, showing that such allowance need not be made, by the case of *Van Allen v. Assessors,* and the case of *People v. Commissioners,* 4 Wall., 244."

In *Exchange National Bank v. Miller,* 19 Fed. Rep., 379, it is said:

> "Unless the taxation on the shares in national banks is indirectly a tax on the property of the bank, there is no discrimination in favor of the individual banker, and the unincorporated bank. But in *Van Allen v. Assessors,* 3 Wall., 573, the supreme court of the United States decided that a tax on the shares is not a tax on the capital of the bank. They state as a familiar law that the corporation is the legal owner of all the property of the bank, real and personal, and that the interest of the shareholder is a distinct independent interest or property, held by the shareholder like any other property that may belong to him, and that it is this interest which the act of congress has left subject to taxation by the states. Chief Justice Chase for himself and associates, Justices Wayne and Swayne, in a dissenting opinion argued with great power that taxation on shares in national banks, without reference to the

amount of their capital invested in bonds of the United States, was actual, though indirect, taxation of the bonds, but the holding of the majority of the court was affirmed in *People v. Commissioners,* 4 Wall., 244, and has since remained as settled law. So that the dissenting opinion of the Chief Justice only strengthens the authority of *Van Allen v. Assessors.*"

Under these decisions it is clear that the stock of a national bank may be assessed to the holder thereof as provided by section 1322 of the code, and that neither the shareholder nor the bank is entitled to have the amount of the capital stock of the bank invested in government bonds deducted from the value of the shares so assessed. All that is required is that the shares of stock of a national bank so assessed to the shareholders shall not be assessed and taxed at a greater rate than is assessed upon other moneyed capital in the hands of individuals of such state; and that the tax so imposed under the laws of the state upon the shares of national bank associations shall not exceed the rate imposed upon the shares of banks organized under the authority of the state where such national bank is located.

Under the provisions of section 1322, the shares of state and savings banks and loan and trust companies must be assessed to the bank or company, and the questions arise:

First—Does the provision of the statute, under which the shares of state and savings banks are assessed in a different manner from those of national banking associations, discriminate against national banks and in favor of state and savings banks and loan and trust companies, in such manner that the shares of national banking associations are assessed and taxed at a rate exceeding that imposed upon the shares of state and savings banks and loan and trust companies, contrary to the provisions of the act of congress?

Second—Is the assessment of the shares of state and savings banks and loan and trust companies under the statute, an assessment of their capital stock which entitles them to deduct therefrom the amount invested in government bonds?

The provisions of the present statute, relating to the assessment of shares of state and savings banks and loan and trust companies, were enacted by the Twenty-third General Assembly

as section 1 of chapter 39 thereof. This statute came before the supreme court of the state for construction in *Primghar State Bank v. Rerick,* 96 Iowa, 238. It was there claimed that the act was invalid because in violation of the constitution of the state in that it made an unjust discrimination in the taxation of shares of banking associations. In that case Mr. Justice Robinson, writing the opinion of the court, said:

> "The fact that national banks and banks organized under the general incorporation laws of this state transact similar kinds of business does not show that they must be taxed according to the same plan. National banks are organized and exist by virtue of acts of congress. They are instruments of the general government, designed to aid it in the administration of a branch of the public service. * * * They are subject to regulations and limitations of power which have no application to state banks, and constitute a class of corporations which may be properly subjected to a plan of taxation different from that applied to state banks. The latter constitute another class, with distinct powers and privileges, and subject to different restrictions, and may properly be subject to a plan of taxation applicable only to that and similar classes. * * * In the case of *Hubbard v. Board,* 23 Iowa, 143, a distinction based upon *Van Allen v. Assessors,* 3 Wall., 573, between taxing the capital stock and the shares of the capital stock and the shares of a bank was recognized, but it cannot with any justice be said that inequality of taxation results from taxing the shares separately to their owner and taxing them collectively to the bank. The aggregate capital of an incorporated bank is virtually owned by its stockholders, and each share represents a definite part of the whole. Therefore, the aggregate of the taxes levied upon the separate shares would be the same as those levied upon the separate shares taken together, or upon the capital stock."

In *Davenport National Bank v. Board of Equalization,* 64 Iowa, 140, a similar question was presented to the supreme court of the state. Under the statute then in force the capital stock of state and savings banks was assessed directly to the bank, and the shares of stock of national banks were assessed to the shareholders. It was claimed by the Davenport National

Bank that this statute unjustly discriminated against the assessment of the stock of national banks and was in conflict with the act of congress permitting the same to be assessed by state authorities.

The point was there made that a state or savings bank might invest its capital in non-taxable government bonds, and deduct the amount so invested from the value of its capital stock subject to assessment, and that the statute directing the shares of stock of national banks to be assessed by the individual stockholders did not permit the capital of national banks invested in government bonds to be deducted from the assessed value of the stock; and for that reason the statute discriminated against the assessment of shares of national banks, and permitted an assessment thereof at a rate greater than that imposed upon the shares of state and savings banks.

The state court held that although state and savings banks might deduct the amount of their capital invested in government bonds from the assessable value of their property, such fact did not make such a discrimination between banks of that class and national banks as to render the law invalid. The case was taken from the state court to the United States court upon a writ of error, and the decision of the state court was sustained. 123 U. S., 84. Mr. Justice Miller, delivering the opinion of the court, said:

> "It has never been held by this court that the states should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is, that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits, the manner of assessing and collecting all taxes by the states is uncontrolled by the act of congress.

> "In the case before us the same rate per cent is assessed upon the capital of the savings banks as upon the shares of the national banks. It does not satisfactorily appear from anything found in this record that this tax upon the moneyed capital of the savings banks is not as great as that upon the shares of stock in the national banks. It is not necessary nor a probable inference from anything in this system of taxation that it should be so, and it is not shown by any actual facts in the record that it is so. If then neither the necessary, usual or probable effect of the system of assessment discriminates in favor of the savings banks against the national banks upon the face of the statute, nor any evidence given of the intention of the legislature to make such a discrimination, nor any proof that it works an actual and material discrimination, it is not a case for this court to hold the statute unconstitutional."

The statute which was upheld by the courts provided for the assessment of the capital stock of state and savings banks, and clearly gave them the right to deduct therefrom the amount invested in government bonds.

Under the present statute the capital stock of these institutions cannot be assessed. The assessment must be made upon the shares of the capital stock owned by the shareholders. If the method of assessment provided for by the former statute was not such a discrimination as to make the law invalid, it is clear that no such discrimination exists in the present statute.

It is true that in enacting the present statute the clause, "but not at a greater rate than is assessed on other moneyed capital in the hands of individuals," was omitted. Such omission cannot, however, in any wise affect the validity of the statute if the provisions thereof do not in fact discriminate in favor of state and savings banks and against the taxing of the shares of national banking associations. Neither the necessary, usual nor probable effect of the system of assessment under the present statute discriminates in favor of state and savings banks and against national banking associations, and no evidence of the intention of the legislature to make such a discrimination appears from the provisions of the statute.

The question, whether a statute discriminates in favor of state banks and against national banks, must be determined from

the provisions providing for the method of assessment; and a statute might be clearly invalid because of such discrimination and yet contain the clause incorporated in the former statute.

Under the present statute, the shares of all banking associations in the state are to be assessed at twenty-five per cent of their actual value. Upon such assessment the amount of the tax levied is laid equally on all. There can be no discrimination. Each equally bears its just proportion of the burden of taxation, and no more.

Under the authority of the cases cited and the principles of law enunciated thereby, I am clearly of the opinion that the present statute, which provides the manner of assessing the stock of national bank associations and state and savings banks and loan and trust companies, is valid, and that national banking associations are not entitled to deduct the amount of their capital invested in government bonds from the assessment of their shares of stock.

The question whether state and savings banks and loan and trust companies are entitled to deduct the amount of their capital invested in government bonds is not of so easy solution.

It can be urged with considerable force that the assessment of the shares of stock of these institutions to the banks and trust companies, is in fact an assessment of their capital stock, and that they have the right, therefore, to deduct from such assessment the amount invested in government bonds. I think, however, upon a careful consideration of the question the conclusion must be reached that the assessment of the shares of these institutions is not an assessment of their capital stock.

The capital stock is owned by the corporation; the shares are owned by the stockholders. Each exists as a class of distinct and independent property. The value of the shares depends upon the earning capacity of the corporation and may greatly exceed the amount of the capital stock. While the capital stock of a bank is an important element in the value of its shares, it is not the only element of such value. Under the charter of a corporation, the stockholder enjoys rights and privileges which are independent of the value of the capital stock of the bank, and a tax upon the shares is but a tax upon the enjoyment of

such new uses and privileges conferred by the charter of the association.

The corporation is the legal owner of all of the property of the bank, real and personal, and, within the powers conferred upon it by the charter, and for the purpose for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. The shares of stock are not the property of the corporation. They are owned by the shareholders. The interest of the shareholder entitles him to participate in the net profits earned by the bank, and upon its dissolution or termination, to his proportion of the property that may remain after the debts of the corporation are paid. This is a distinct, independent interest or property held by the share holder, and it is competent for the legislature to provide that a tax shall be levied upon such interest or property in lieu of any other tax upon the property owned by the corporation. *Van Allen v. Assessors, supra.*

In *Primghar State Bank v. Rerick, supra,* it is said:

> "But as the capital of a state bank is really owned by the stockholders, and is reduced by the amount paid for taxes. its value is reduced by a sum equal to that paid, and the shareholders do in effect pay the taxes."

This view is fully sustained in the recent case of *Cleveland Trust Company v. Lander,* reported in the advance sheets of the United States Supreme Court Reports, volume 9, 394. It is there said:

> " * * * * the contention is that the tax on the shares, being equivalent to a tax on the property of the Trust Company, there must be deducted from the value of the shares, that portion of the capital of the company invested in United States bonds.
>
> "The answer to the contention is obvious and may be brief. The contention destroys the separate individuality recognized, as we have seen, by this court of the Trust Company and its shareholders, and seeks to nullify one provision of the revised statutes of the United States, by another between which there is no want of harmony. And what the constitution of the state of Ohio, or what the statutes of the state require, as to taxation, must be left

> to be decided by the supreme court of the state; and whether that court has decided logically or illogically that a tax authorized by the laws of the United States on the shares of the company satisfies the constitution of the state as a tax on the corporation, is not open to our review or objection. The manner of taxation being legal under the statutes of the United States, its effect cannot be complained of in the federal tribunals."

The distinction made in the cases cited, between the capital stock of a bank and its shares of stock owned by its shareholders, appears to me to be logical and sound. They exist as independent and distinct properties. Each is subject to taxation as may be determined by the legislature of the state. The levying of a tax upon one is not the taxation of the other.

Upon a careful consideration of the question, I am therefore of the opinion that state and savings banks and loan and trust companies cannot deduct the amount of their capital invested in government bonds from an assessment made upon the shares of stock of such associations.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

May 1, 1902.
HON. F. F. MERRIAM,
Auditor of State.

INSURANCE COMPANIES—PLACE WHERE ACTION CAN BE COMMENCED UPON PROMISSORY NOTES—House File No. 78—Constitutionality of. It is held that the above bill is unconstitutional and invalid under the fourteenth amendment of the Constitution of the United States and section 1 of article 1 of the constitution of the state of Iowa, for the reason that it arbitrarily attempts a classification of corporations as to property owned and held by them which does not naturally exist, and is not framed so as to extend to and embrace equally all persons who are or may be in like situation, and abridges the right of such corporations to sell and transfer property legally held by them under the law of the state.

SIR—Complying with your request, I herewith submit a brief as to the constitutionality of House file No. 78, relating to the place where action can be commenced upon promissory notes made to insurance companies.

At the outset of this question two fundamental propositions are presented:

First—That corporations are persons within the provisions of the fourteenth amendment of the Constitution of the United States, and that the rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities, any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations.

A state has no more power to deny corporations equal protection of the law than it has to deny such protection to individual citizens.

Santa Clara Co. v. S. Pac. R. Co., 118 U. S., 394;
Pembina Mining Co. v. Pa., 125 U. S., 181;
Mo. Pac. R. Co. v. Mackey, 127 U. S., 205;
M. & St. L. R. Co. v. Beckwith, 129 U. S., 26;
Charlotte & Columbia R. Co. v. Gibbs, 142 U. S., 386;

Covington & Lexington T. Co. v. Sanford, 164 U. S., 578;
Gulf, Col. & Santa Fe R. Co. v. Ellis, 165 U. S., 150.

Second—All classification for legislative purposes must have some reasonable basis upon which to stand. It must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis.

The differences which will support class legislation must be such as in the nature of things to furnish a reasonable basis for separate laws and regulations.

Gulf, Col. & Santa Fe Ry. v. Ellis, 165 U. S., 155;
State v. Loomis, 115 Mo., 307;
Vanzant v. Waddel, 2 Yerger, 260;
Dibrell v. Morris' Heirs, 15 S. W., 87;
Bell's Gap Ry. Co. v. Pa., 134 U. S., 232;
Nichols v. Walter, 37 Minn., 262;
Johnson v. Ry. Co., 43 Minn., 222;
Sutton v. State, 96 Tenn., 696;
State v. Garbroski, 111 Iowa, 496.

In *Vanzant v. Waddel, supra,* it is said:

> "Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of community who make the law, by another."

In *Dibrell v. Morris' Heirs, supra,* it is said:

> "We conclude upon a review of the cases referred to above, that whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between citizens of this state, the basis of such classification must be natural and not arbitrary."

In *Bell's Gap Ry. Co. v. Pennsylvania,* it is said:

> "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or

the people of the state framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the principles of our government, might be obnoxious to the constitutional prohibition."

In *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis,* it is said:

"Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins,* 118 U. S., 356: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' "

In *State v. Hammer,* 42 N. J. Law, 439, it is said:

"The true principle requires something more than a designation by characteristics such as will serve to classify, for the characteristics which thus serve as a basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects and places excluded. The marks of distinction on which the classification is founded must be such, in the na-

> ture of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation."

In *Sutton v. State,* 96 Tenn., 696, the rule is tersely stated:

> "First, it must be so formed as to extend to and embrace equally all persons who are or may be in the like situation or circumstances; and, secondly, the classification must be natural and reasonable, and not arbitrary or capricious."

Many other extracts from the opinions of the highest courts in the country might be given holding the same doctrine, but it is not deemed necessary as the rule contended for has been adopted by our own supreme court in the case of *State v. Garbroski,* in which the entire question is ably discussed in the opinion of the court.

The bill under consideration provides that no action shall be brought by the receiver or assigns of any company, or any assignee or endorsee of such company, receiver or assignee, against a resident of this state, on any obligation or contract for payment of money due from the insured on contracts of insurance at a place other than in the county where the defendant resides.

By the provisions of this act one class of corporations is singled out and prohibited from transferring contracts which they may hold for the payment of money. It is a well known fact that corporations, organized for the purpose of insuring property and lives, in many cases accept from the person whom they insure, negotiable promissory notes for the premiums agreed to be paid by the insured. The obligation of the company to pay the loss of the insured, if any occurs, is a good consideration for the execution and delivery of such promissory obligations; and the making and delivery of such notes on the other hand is equally a good consideration for the obligation of the company to pay to the insured his loss, if any occurs. In the hands of the insurance company these are valid obligations, and a part of the property and assets of the company. If they contain a provision that action may be brought against the insured at the place where the home office of the company is located, such provision is a valid contract, binding upon the maker of the obligation, and in the practical carrying on of the

business of insurance increases the commercial value of the obligation.

If the bill under consideration should become a law, the insurance company holding notes which, by their terms, were payable at the home office of the company, would be absolutely prohibited from transferring or assigning the entire contract to any other person. That is, if it should be deemed necessary to the best interests of an insurance company to sell and transfer a part of its assets, consisting of such promissory notes, for the purpose of meeting its losses and liabilities, such contracts in the hands of an assignee of the company would, under the provisions of the bill, become a different contract than the same instrument was in the hands of the original holder.

The right to sell and transfer the property of insurance corporations is sought to be abridged by the provisions of the act. The contract as originally entered into between the insured and the insurer is attempted to be modified, altered, changed and abridged by the transfer of such contract by the original holder thereof.

The right to possess property, to sell and alienate the same, to make contracts in regard thereto, to enter into contracts for the payment of money, and to sell, assign and transfer the same, has always been held an indefeasible right, in the exercise of which every person is protected under the provisions of the constitution. . .

Jones v. Great Southern Hotel Co., 79 Fed. Rep., 481.

In *Stratton Claimants v. Morris*, 89 Tenn., 497, it is said:

> "When the constitution of this state was framed, the right to own, to hold, to enjoy, to alien, to devise and to transmit property by inheritance, was enjoyed to the fullness and perfection of absolute right, and one of the objects of the constitution was to protect and preserve this right. To take from property its chief element of value, and to deny the citizen the right to use and transfer it in any proper and legitimate method, is as much depriving him of his property as if the property itself was taken."

If the legislature had undertaken to prohibit insurance corporations, and persons for whom insurance contracts are made,

from providing that promissory notes given for insurance premiums should not be made payable at the home office of the insurance company, it might be well said that such act of the ligislature would be void, for the reason that it interfered with the liberty of contract. Such contracts are now lawfully executed between the insurer and the insured, and when so executed and delivered become the property of the insurer, and the right of the insurance company to enjoy, transfer, sell and dispose of such contracts, and confer upon its assignee the same rights with the insurance company held before the transfer, is in my judgment as much a part of the liberty of contract, guaranteed to every person under the constitution, as is the right to originally take such promissory notes.

The right to own property, to be protected in the right use thereof, and to enjoy, exchange, transfer or transmit it, can not be taken from the citizen by arbitrary enactment of the legislature.

> "To forbid an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to a community at large, would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness."
>
> Cooley on Constitutional Limitations, 6th ed., 484.
>
> "And those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived." *Ibid.*

No valid reason can be given why a promissory note, executed and delivered in consideration of a contract of insurance, should not stand upon the same footing, so far as the right of the holder to transfer the same is concerned, as a note given for any commodity or for any other valid consideration.

The act of the legislature attempts to create a distinction and classification between one class of corporations and other persons within the state, which does not exist naturally, or furnish a reasonable basis for separate laws and regulations. The classification is unnatural and arbitrary, as there exists no substantial distinction between promissory obligations and other prop-

erty held by an insurance company, and obligations and property held by other corporations within the state.

For the reason that the act thus arbitrarily attempts a classification of corporations as to property owned and held by them, which does not naturally exist, and is not framed so as to extend to and embrace equally all persons who are or may be in like situation, and abridges the right of such corporations to sell and transfer property legally held by them under the law of the state, the act is, in my opinion, invalid under the fourteenth amendment of the Constitution of the United States, and section 1 of article 1 of the constitution of the state of Iowa.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

May 7, 1902.

TO THE HONORABLE A. B. CUMMINS,
Governor of Iowa.

SHIPMENT OF GRAIN WITHIN THE STATE—A shipment of grain from one point within the state to another point within the state is not an interstate transaction, and the state board of railway commissioners has full power in the premises.

SIRS—I am in receipt of your favor of the 7th inst. asking my opinion as to whether a shipment of grain from a point in the state of Iowa on one line of railway, to Council Bluffs, another point within the state, there to be taken by the consignor and by him reshipped to some other point without the state of Iowa, falls within the interstate commerce, or whether it is the transportation of property by a common carrier wholly within the state, and therefore subject to the jurisdiction of the board of railroad commissioners of the state. In reply I submit the following opinion:

The case as stated by your secretary, and as I understand it, is this:

The A. A. Berry Seed Company of Clarinda, Iowa, have seed corn in the possession of their agent at Sloan, Iowa. They desire to ship this corn from Sloan, Iowa, to Council Bluffs, Iowa, over the Chicago & North-Western Railway, and have applied for cars for that purpose, which have been refused on the ground that the transportation from Sloan to Council Bluffs constitutes only a part of the carriage of the corn, as it is designed to be shipped to points beyond the state, the purpose of the Berry Seed Company being to bill the corn from Sloan to Council Bluffs, and there have the same delivered to them to be afterward reshipped by them to its destination over another line of railway.

I am clearly of the opinion that the contention of the Chicago & North-Western Railway can not be maintained. The case does not fall within the class which has been declared by the courts to be interstate commerce.

It is unquestionably true that where goods are delivered to a common carrier which only transports the same within the limits of a state, and then delivers them to another common carrier for transportation to a point beyond the state line, the transportation by the first carrier is interstate commerce, although it does not take the goods beyond the limits of the state. This was held in the leading case of *The Daniel Ball,* 10 Wall., 557, and the principle announced therein has since been closely adhered to by subsequent decisions; but in all the cases where such transportation wholly within the state has been held to be interstate commerce, the goods or property delivered to the carrier within the state was designed to be transported by the and delivered to another common carrier to be transported beyond the state, without again coming into the possession of the consignor before delivery to the consignee.

In the case under consideration the property is to be delivered to a common carrier at a point within the state, and by it conveyed to another point within the state, and there delivered to the consignor. When it is so delivered the consignor is at liberty to deliver it to another common carrier to be transported beyond the state, or to make such other disposition thereof as he may see fit. So far as the first common carrier is concerned,

its entire responsibility ceases when it delivers the goods to the consignor at the place of destination within the state; and so far as such carrier is concerned it is purely a transaction wholly within the state and does not come within the rules of interstate commerce.

No reason can be assigned why a common carrier should refuse to accept goods or property tendered to it for transportation between two points within the state, because the owner thereof to whom such property is to be delivered at the destination within the state, intends to reship the same over the line of some other common carrier to a point without the state. The transaction, so far as the original carrier is concerned, begins and ends within the state, and is therefore not only not within the rules of interstate commerce, but is within the rules and regulations of the state board of railroad commissioners.

If the A. A. Berry Seed Company wishes to ship its corn at Sloan to Council Bluffs for distribution to other points outside of the state, it has the absolute right to do so, and the North-Western Railway Company must furnish it cars and facilities for such shipment; and so far as that company is concerned, it is wholly immaterial what disposition the seed company makes of the property after it is delivered to them at Council Bluffs.

It is not an interstate transaction, and the state board of railway commissioners has full power in the premises.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

May 13, 1902.

TO THE STATE BOARD OF RAILROAD COMMISSIONERS.

BOARD OF CONTROL—TEACHERS EMPLOYED IN THE SCHOOL FOR DEAF AND DUMB—COMPENSATION OF—It is held that the state is liable for whatever damages the teachers may sustain by reason of its inability to furnish the facilities necessary to carry out contracts. Such damage cannot exceed the amount of the salary agreed to be paid, and it may be less than that amount.

SIRS—In compliance with your request of the 12th inst., asking my opinion as to whether the board of control should pay the teachers who were employed in the School for the Deaf at Council Bluffs for the entire period for which they contracted to teach, I submit the following opinion:

Since the receipt of your request I have received from Superintendent Rothert certified copies of the request of the superintendent of the school for an application by the teacher for a position therein, the application made by the teacher, and the acceptance thereof by the superintendent. Each of these contains a provision that if the application is accepted, the request, application and acceptance shall be construed to be a contract. Such provision is perhaps surplusage, as the application and acceptance clearly amount to a written contract between the agent of the state upon the one part, and the teacher upon the other, whereby the superintendent of the school acting for the state agrees to employ the teacher for the term named in the application and acceptance, and to pay the salary therein specified; and the teacher, upon the other part, agrees that she will teach in the institution, and perform the duties required as such teacher, for the term named in the contract in consideration of the payment of the salary specified, sickness, death or dismissal alone preventing.

Such a contract is not, in my opinion, prohibited by the provisions of sections 34 and 37 of chapter 118 of the acts of the Twenty-seventh General Assembly. It was not intended by the legislature in enacting these sections to prevent the state from entering into contracts with teachers in the public institutions, whereby they obligated themselves to teach therein for the

school year, and whereby the state upon its part became bound for their employment for such term. The contracts made between Superintendent Rothert and the teachers in the School for the Deaf are, therefore, valid contracts between the state and the teachers, and both parties are bound thereby.

By such contract the state is obligated to employ the teacher for the school year ending June 30, 1902, and the teacher is obligated to perform such duties as may be required of her as a teacher in the school during that period, at the salary fixed by the contract. Neither party can abandon or abrogate the contract without the consent of the other. It can only be terminated without the consent of the teacher when she is discharged for cause, after having an opportunity to meet any charges which are made.

Under the contract it is the duty of the state to furnish proper facilities for the work which the teacher is obligated to perform, and a failure to do so is a breach of the contract.

In the case under consideration the state furnished to the teachers employed in the school, the facilities for carrying out their contracts, and they were engaged in the performance of the work for which they were employed, until one of the buildings connected with the school was destroyed by fire, and the state by reason of the destruction thereof is now unable to carry out its contract.

The question presented is whether the destruction of the building by fire, and the inability on the part of the state to furnish to the teacher the facilities necessary to carry out the contract, releases the state from the obligation of its contract, and relieves it from liability for the salary agreed to be paid.

A question of this character arose in this state in 1877 when the Honorable John F. McJunkin was attorney-general, and was referred to him by the superintendent of public instruction. The question upon which he was called to express an opinion was whether a school district was liable for the salaries of teachers employed by it in a case where the schoolhouse was destroyed by fire, and it was impracticable for the district to procure rooms and furnish facilities for the carrying out of the contracts on the part of the teachers employed. The conclusion

of Mr. McJunkin upon this question was that the destruction of the schoolhouse, and the fact that it was impracticable for the district to procure rooms and facilities for carrying out the contracts with the teachers, did not relieve the district from its liability for payment of their salaries.

A similar case arose in Michigan where the public schools were closed on account of an epidemic of smallpox, and the teachers were unable to carry out their contracts for that reason. The district refused to pay the salaries of the teachers, and an action was brought by one of them to recover the amount claimed to be due under his contract. The trial court sustained the position of the district. An appeal was taken to the supreme court, the judgment of the court below was reversed, and the district was held to be liable for the payment of the teachers' salaries. In passing upon the liability of the district, the supreme court of Michigan said:

> "Beyond controversy, the closing of the schools was a wise and timely expedient, but the defense interposed can not rest on that. It must appear that observance of the contract by the district was caused to be impossible by act of God. It is not enough that great difficulties were encountered, or that there existed urgent and satisfactory reasons for stopping the schools. But this is all the evidence tended to show. The contract between the parties was positive and for lawful objects. On one side school buildings and pupils were to be furnished, and on the other personal service as a teacher. The plaintiff continued ready to perform, but the district refused to open its houses and allow the attendance of pupils, and it thereby prevented performance by the plaintiff. Admitting that the circumstances justified the officers, yet there is no rule of justice which will entitle the district to visit its own misfortune upon the plaintiff." *Dewey v. Alpena Sch. Dist.*, 43 Mich., 480.

As is suggested in the case from which the above quotation is taken, unless a teacher is discharged for cause, the state can only be excused from the performance of the contract upon its part by an act of God.

Does the destruction of the building by fire, which prevents the performance of the contract on the part of the state and the

teacher, fall within the legal definition of an act of God? Upon this question many cases might be cited, but I will content myself with simply saying that the destruction of a building by fire has never by any court, so far as I have been able to discover, been held to fall within that definition; and in a large number of cases it has been directly held that the destruction of a building by fire is not an act of God, which excuses the performance of a contract, and such is now the well settled law of this country.

Adams v. Nichols, 19 Pick., 275;
Booth v. Spuytenduyvil Rolling Mill Co., 60 N. Y., 487.

In *Trenton Public Schools v. Bennett*, 27 N. J. L., 513, it is said:

> "No rule of law is more firmly established by a long train of decisions than this: that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

To relieve the state from the obligation of its contract in the event of the destruction of a building by fire, a provision to that effect must have been incorporated in the contract. No such provision is contained in the contract, and the state assumed the risk that its buildings would not be destroyed, or if they were, that other facilities would be furnished by which its contract with the teachers could be carried out.

Under all the circumstances of the case under consideration, I am of the opinion that the state is liable for whatever damages the teachers may sustain by reason of its inability to furnish the facilities necessary to carry out the contract. Such damage can not exceed the amount of the salary agreed to be paid, and it may be less than that amount.

It is the duty of the teachers who are thus prevented from carrying out their contracts, to use reasonable diligence in obtaining employment of like character, which they are competent to perform, and if they can do so they must accept such em-

ployment, although at a less compensation than that fixed by their contracts with the state. In such case the measure of damages for which the state would be liable is the difference between what the teacher is paid in the new employment, and what she was to receive under the contract. If in the exercise of ordinary diligence the teacher is unable to obtain employment of like character, the measure of damages for which the state is liable is the amount of the salary fixed in the contracts.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

May 21, 1902.

TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

COLLATERAL INHERITANCE TAX—INTEREST THEREON—(1) It is held that the phrase "statutory fees" means the fees which an executor or administrator is entitled to charge as matter of right under the statute without the intervention of an order of court. Under this holding the extra compensation allowed an executor or administrator, beyond the statutory fee, is not a debt which can be deducted. (2) It is held that the levy of taxes against property creates a valid existing obligation against the owner thereof, but such obligation does not mature or become payable until the first day of January of each year. (3) It is held that interest must be collected from fifteen months after the death of the testator or intestate without regard to the fact that the time within which such tax could be paid had been extended by an order of court.

SIR—Complying with your request for an opinion upon the questions suggested in the letter of Deacon & Good in refer-

ence to the collateral inheritance tax upon the estate of Mary Leghorn, I submit the following opinion:

I. My predecessor, Mr. Remley, in an opinion given to your department, passed upon nearly all of the questions involved in the matter under consideration, and I am not disposed to overturn his decision, unless I am clearly convinced that he was mistaken as to the law governing the questions submitted.

Section 1 of chapter 51 of the acts of the Twenty-eighth General Assembly provides:

> "The term 'debts' in the eleventh line of section 1467 of the code shall include, in addition to debts owing by decedent at the time of his death, the local or state taxes due from the estate prior to his death, and a reasonable sum for funeral expenses, court costs, including the costs of appraisement made for the purpose of assessing the collateral inheritance tax, the statutory fees of executors, administrators, or trustees and no other sum."

It was held by Mr. Remley that the phrase "statutory fees" means the fees which an executor or administrator is entitled to charge as matter of right under the statute, without the intervention of an order of court.

While this is perhaps a strict construction of the statute, I shall adhere to the position taken by my predecessor until the question shall be determined by the courts. Under this holding the extra compensation allowed an executor or administrator beyond the statutory fee, is not a debt which can be deducted.

II. The section permits the deduction of local or state taxes due from the estate prior to the death of the decedent. In the case under consideration, Mrs. Leghorn died in November, 1900. The taxes for that year became due on the first Monday in January following. The tax assessed against the property of which she died seized and possessed, was not due at the time of her death. The legislature in using the phrase, "the local or state taxes due from the estate prior to his death," intended to confine the debts which may be deducted from the estate because of taxes assessed against it, to taxes which become due prior to the death of the decedent.

The machinery of the law by which taxes are assessed and collected requires that the state board of review shall, on or before the first Monday of August of each year, finish its review and adjustment, and the state auditor shall thereupon transmit to each county auditor a statement of the percentage to be added or deducted from the valuation of each kind or class of property in each county, and shall certify the rate of state tax fixed as required by law. The county auditor is required to transcribe the assessments of the several townships and complete the tax list, and deliver the same to the county treasurer on or before the thirty-first day of December, and such list is the authority of the treasurer for collecting the taxes assessed.

While it may be said that the tax assessed against the property may be owing from the owner of the property before the first day of January, the tax can not be said to become due until that time. It has long been understood by the officers and people of the state that taxes become due on the first day of January, and delinquent on the first day of March; and when the legislature provided that taxes which became due prior to the death of the decedent might be deducted as a debt from his estate in making the computation of the amount upon which the collateral inheritance tax should be charged, the word "due" was used in its ordinary, accepted sense with reference to taxes. The taxes of 1900 did not become due until after the death of Mrs. Leghorn, and do not fall within the class of debts which may be deducted from the amount of the estate, under the provisions of the act of the legislature.

A debt can not be said to be due as long as no obligation rests upon the person from whom it is owing to pay it. When it becomes due the obligation at once arises and is imposed upon the person who owes such debt to pay the same at the time it matures. The levy of taxes against property undoubtedly creates a valid existing obligation against the owner thereof, but such obligation does not mature or become payable until the first day of January of each year.

III. As to the question when interest shall be charged for the unpaid collateral inheritance tax, my predecessor, Mr. Rem-

ley, in an opinion given to your department, held that interest must be collected from fifteen months after the death of the testator or intestate, without regard to the fact that the time within which such tax could be paid had been extended by an order of court.

This is undoubtedly a strict construction of section 1475 of the code. The language of the statute is, "All taxes not paid within the time prescribed in this act shall draw interest at the rate of eight per centum per annum until paid." The time prescribed by the act is fifteen months after the death of the testator or intestate, and it may reasonably be said that any further extension of time granted by a court for the payment of the taxes, is not within the time prescribed by the act of the legislature, but an additional time which the court in its discretion has the power to grant.

This is the view taken by my predecessor, and I am disposed to adhere to it until the question is determined by the courts.

Under this construction of the statute, interest should be charged upon the collateral inheritance tax due from the estate of Mary Leghorn from fifteen months after her decease.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

May 23, 1902.

TO THE HONORABLE GILBERT S. GILBERTSON,
Treasurer of State.

PRINTING—It is held that there is no provision of statute which authorizes the payment of costs of printing briefs and abstracts in state cases out of any state fund where printing is done by order of a county attorney.

SIRS—Complying with your request for an opinion in writing as to whether the cost of briefs and abstracts in state cases, where the printing is done by order of county attorneys, is a matter for which the state is liable under the statutes, I submit the following opinion:

I find no provision of the statute which authorizes the payment of costs so incurred out of any state fund, and I am of the opinion that the cost of printing such briefs and abstracts, and the bills presented therefor, can not be audited by the executive council or paid from the state treasury, except upon an act of the legislature allowing the claim and providing funds from which the same may be paid.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

May 28, 1902.

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

GAME LAW—It is held that the water in a pond wholly within the lands of a private owner, is private water, and the fish within the same may be taken by the owner of the pond as he may see fit, without reference to the game and fish laws of the state.

SIR—I have carefully read the letters of Messrs. Gilchrist & Whipple relating to the question as to whether the pond upon the lands of Mr. Burke in Benton county, is private water within the meaning of section 2545 of the code, from which he is entitled to take fish without reference to the game laws of the state.

There has been no construction of this section by the courts of this state, nor have I been able to find any construction of a similar statute by other courts. The question must therefore be determined from the language of the statute itself, without the aid of judicial interpretation.

The statute provides:

> "Persons who raise or propagate fish upon their own premises, or who own premises upon which there are waters having no natural inlet or outlet through which such waters may become stocked or replenished with fish, are the

owners of the fish therein and may take them as they see fit, or permit the same to be done."

The letter of Mr. Gilchrist shows that the pond in question is wholly upon the land of Mr. Burke, and has no natural inlet or outlet in times of ordinary water. The land upon which the pond is situated overflows in times of extreme freshets, at which times the water flows into the pond from the river, and from the pond back to the river.

The question therefore arises upon the construction of the statute, whether the fact that at times of extreme freshets water flows from the public waters of the state into the pond and out of the same, constitutes a natural inlet or outlet as intended to be defined by the legislature.

It can hardly be said that the flowing of waters into the pond at times of extreme floods, or the flowing of the same at such times out of the pond, is a natural inlet or outlet.

It was the intention of the legislature to extend the protection of the fish and game laws to all inland waters which were connected with the public waters of the state by natural inlets or outlets at times of ordinary water. The reason for this provision of law is that fish which pass from the public waters of the state through such inlets or outlets into ponds shall be protected while in the waters of the pond to the same extent as they are in the public waters of the state.

Such reason does not exist in the case under consideration. Fish can not pass from the waters of the state into the pond in question by any natural inlet or outlet, and may only do so in times of extreme floods, which are not natural inlets or outlets within the meaning of section 2545.

I am therefore of the opinion that the water in question is private water, and the fish within the same may be taken by the owner of the pond as he may see fit, without reference to the game and fish laws of the state.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

June 4, 1902.

TO THE HON. GEO. A. LINCOLN,

State Game and Fish Warden, Cedar Rapids, Iowa.

BOARD OF CONTROL—UNEXPENDED BALANCE OF APPROPRIATION—It is held that no part of the money appropriated by section 2727 of the code can be used for the payment of the salaries of the officers and teachers of the school for the deaf, or for any other purpose after the first day of April, 1902.

SIRS—Complying with your request of May 21st for an opinion as to the right of the board of control to use the unexpended balance of the money appropriated by section 2727 of the code, for the payment of the salaries of officers and teachers of the School for the Deaf, I submit the following opinion:

House file No. 188, which was approved March 17th, and became a law on March 20, 1902, repeals section 2727 of the code and chapter 83 of the acts of the Twenty-seventh General Assembly, which provided for the appropriation of money to pay the salaries of the officers and teachers of the school for the Deaf. Section 2727 of the code provided that the money appropriated for such purpose should be drawn quarterly at the end of each quarter.

By the provisions of House file No. 188 the legislature has changed the method by which money is appropriated and drawn from the treasury for the purpose of paying the salaries of the officers and teachers of that school. This act appropriates out of any money in the state treasury not otherwise appropriated, or so much thereof as may be needed, twenty-two dollars per month for nine months of each year for each resident pupil actually supported in the school. The sum so appropriated is to be placed to the credit of the school on the certificate of the board of control of state institutions, which shall show the average number of pupils in the school for the preceding month, and shall be paid from the state treasury as provided by chapter 118 of the acts of the Twenty-seventh General Assembly.

The act further provides that the monthly allowance authorized thereby shall be computed from the first day of February, 1902, and that all expenses of the school incurred prior to the first day of April, 1902, shall be paid from the funds appropriated by section 2727 of the code, thus making a period

from the first day of February to the first day of April, 1902, during which the money appropriated by section 2727 of the code as amended, and that appropriated by House file No. 188, may be used by the board of control for the support and the payment of the salaries of officers and teachers of the School for the Deaf.

By this provision of the act of the Twenty-ninth General Assembly, the legislature has limited the period of time within which the money appropriated by section 2727 of the code can be used for the purpose of paying the expenses or the salaries of officers and teachers of the School for the Deaf. It may be used to pay all expenses of the school incurred prior to the first day of April, 1902, as the act so provides; but no provision is made for the use of any of the money appropriated by section 2727 of the code after the first day of April, 1902.

No construction can be given the language of the act of the Twenty-ninth General Assembly, in connection with the provisions of section 2727 of the code, which will permit the drawing of money from the state treasury under the act of the Twenty-ninth General Assembly and section 2727 of the code, for the same period of time, and for the same purposes, except as that authority is specifically given in the act itself.

When the legislature repealed section 2727 of the code, it clearly intended that the appropriation carried thereby should be repealed, and that no money should be drawn under such appropriation except as provided in section 2 of the act of the Twenty-ninth General Assembly. Any other construction of the provisions of the act of the Twenty-ninth General Assembly would have the effect of permitting double the amount of money to be drawn from the treasury, for the payment of the salaries of officers and teachers of the School for the Deaf, than that which was intended by the legislature to be appropriated for that purpose.

The fact that there remained an unexpended balance of the appropriation made by section 2727, which was credited to the institution upon the books of the state auditor and treasurer, does not change the conclusion reached. The legislature has, by the act of the Twenty-ninth General Assembly, made an

appropriation for the support of the school and the payment of the salaries of its officers and teachers, which takes the place of the entire appropriation under the provisions of section 2727, except during the period of time provided for in the act, and the credit given the institution upon the books of the auditor and treasurer can not change the effect of the act of the legislature.

I am therefore of the opinion that no part of the money appropriated by section 2727 of the code can be used for the payment of the salaries of the officers and teachers of the School for the Deaf, or for any other purpose, after the first day of April, 1902.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

June 9, 1902.

TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

BOARD OF HEALTH—It is held that the county is liable for the expense incurred in a quarantine of contagious diseases when the person, or those liable for his support, is unable to pay such expense.

SIR—Your request of the 23d inst. for an opinion as to whether the county is liable in the first instance for the expense incurred in providing nurses, needful assistance and supplies to a person infected with smallpox, where such person, or those liable for his support, is unable to pay the same, and where such person has been quarantined by a local board of health, has been referred to me.

Section 2570 of the code provides that when any person shall be infected, or shall have been recently infected, or sick with smallpox or other disease dangerous to the public health, whether a resident or otherwise, the board may make such provisions as are best calculated to preserve the inhabitants against dan-

ger therefrom by removing such person to a separate house, when it may be done without injury to his health, and provide nurses, needful assistance and supplies, which shall be charged to the person or those liable for his support, if able. If unable, it shall be done at the expense of the county.

Here the local board of health is given full power to make such provisions as are best calculated to preserve the health of the public, and is authorized to remove the person infected with such infectious disease and isolate him from other inhabitants, and is authorized to provide nurses, assistance and supplies for him while so isolated.

This section further provides that such person or those liable for his support, shall be liable for the expense incurred for such nurses, assistance and supplies, if he or those liable for his support are able to pay the same; but if unable to pay, the statute then specifically provides that this shall be done at the expense of the county.

In *City of Clinton v. County of Clinton*, 61 Iowa, 205, the question arose as to the liability of the county for expense incurred in providing for certain persons infected with smallpox while under quarantine by the local board of health. The court said:

> "If we are correct, then the sick person is properly chargeable with all the expenses which may properly be incurred under either section, including the expense of removal, if that is adopted, and the expense of isolation, if that is adopted; and we think the county is ultimately liable for the same if the sick person and those liable for his support are unable to pay."

In *Gill v. Appanoose County*, 68 Iowa, 20, this section was under consideration, and it was held in this language:

> "This provision will bear no other interpretation than that the county is liable for the care of the sick persons contemplated in the statute only in case they, or the persons liable for their support, are not able to make compensation therefor. It plainly provides that the county shall be liable only upon the conditions specified. Upon these conditions the county's liability depends, and it can not be established until it is shown that the facts exist which are contemplated by the statute."

I therefore conclude, and it is my opinion, that the county is liable for the expense incurred in a quarantine of this character when the person, or those liable for his support, is unable to pay such expense.

Respectfully submitted,
CHAS. A. VAN VLECK,
Assistant Attorney-General.

June 27, 1902.

DR. J. F. KENNEDY,
Secretary State Board of Health.

BUILDING AND LOAN ASSOCIATION—POWER OF EXECUTIVE COUNCIL TO REVOKE CERTIFICATE OF—**It is held that the fact that its officers have failed to comply with the law relating to the assessment of taxes is not, in the sense intended by the legislature, unjust or oppressive to the public, and is not a condition provided for in the law which gives to the executive council power or authority to revoke the certificate of such building and loan association.**

SIR—I am in receipt of your communication of the 27th inst. in which you state that you desire my opinion as to the following question:

Has the executive council power to revoke the certificate of authority of a building and loan association to transact business, because of the failure of such association to comply with the provisions of section 1326 of the code, which require the secretary or president thereof to make a verified statement to the county auditors, showing the name and postoffice address of the stockholders of the association, and the number of shares owned by each and the value thereof?

Complying with your request I submit the following opinion:

Section 11 of chapter 69 of the laws of the Twenty-eighth General Assembly provides:

> "The executive council shall have power, and it shall be its duty, to revoke any certificate of authority given to any building and loan or savings and loan association, whenever it appears to said council that said association is transacting business illegally, or is unjust and oppressive to its members or the public."

This section names three conditions upon which the executive council has the power to revoke the certificate of authority given any building and loan association:

First—Whenever it appears to the council that the association is transacting business illegally.

Second—Whenever it appears to the council that the association is unjust or oppressive to its members.

Third—Whenever it appears to the council that the association is unjust and oppressive to the public.

If the refusal of the association to comply with the provisions of section 1326 of the code, which require its secretary or president to make a verified statement to the county auditors where its stockholders reside, showing the name and postoffice address of such stockholders, with the number of shares owned by each and the actual value thereof, comes within either of the conditions provided for in section 11 of chapter 69 of the laws of the Twenty-eighth General Assembly, the council has power to revoke the certificate of the association. If such failure to comply with the provisions of section 1326 does not come within the conditions named in section 11, the executive council has no power to revoke the certificate of the association therefor.

It can not be said that a building and loan association is transacting business illegally because it fails to comply with the provisions of section 1326, which relate solely to the method of assessing the shares of stock of the association to the holders thereof as moneys and credits, and not to the manner of the transaction of the business of the association.

Neither can it be said that the failure of the officers of the association to comply with the provisions of section 1326 is unjust or oppressive to the members of the association.

While it possibly may be said that the failure of the officers of the association to certify a list of the stockholders to the county auditors, with the number of shares of stock owned by each and the value thereof for the purposes of taxation, is in one sense unjust to the public, I am clear that the phrase, "unjust and oppressive to the public," in section 11 of chapter 69 of the laws of the Twenty-eighth General Assembly, was not used in that sense by the legislature or so intended to be construed. The phrase as used in that section was intended to, and relates to the method and plan of business transacted by the association. That is, its plan and method of transacting business must be fair, just and not oppressive to those whom it seeks to induce to enter into business relations with it.

The fact that its officers have failed to comply with the law relating to the assessment of taxes, is not, in the sense intended by the legislature, unjust or oppressive to the public, and is not a condition provided for in section 11 of chapter 69 of the laws of the Twenty-eighth General Assembly which, in my opinion, gives to the executive council power or authority to revoke the certificate of such building and loan association.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

June 28, 1902.

TO THE HONORABLE A. B. CUMMINS,
Governor of Iowa.

WATERWORKS—BONDS ISSUED BY CITY THEREFOR—CONSTITUTIONAL LIMIT OF DEBT—It is held that it is upon the actual value, as it appears in the tax lists, that a five per cent indebtedness of municipal corporations can be legally created.

DEAR SIR—I am in receipt of your favor of the 2d inst. in which you ask whether the city of Lansing can issue and sell more bonds for the purpose of completing its system of water-

works, without holding a new election, where an election has been held authorizing the purchase and maintenance of waterworks and the issuance of bonds to pay therefor; and also the further question as to what is the limit of the indebtedness which a city can incur under the constitution of the state.

Before replying to either of these inquiries I desire to say that I can express no official opinion in relation thereto which will be binding upon any one or upon any court. My opinion here given is simply that of a lawyer and is entitled to such weight as courts or parties may see fit to give it.

From your letter I infer that the simple question: "Shall the city of Lansing, Iowa, purchase, establish and erect waterworks for said city, and issue its bonds in payment thereof," was submitted to a vote of the qualified electors of the city upon the notice required by statute, and that a majority of the electors voted in the affirmative upon such question. That thereafter the city council, under the authority thus granted by the electors of the city, issued $5,000 of the bonds of the city and purchased a system of waterworks theretofore constructed by private individuals or a corporation in the city of Lansing for the sum of $3,500, and that it now becomes necessary, in order to furnish the inhabitants of the city with a supply of water, to increase the capacity of the waterworks by constructing a reservoir or standpipe with pumping facilities.

Unless there is a restriction by the legislature, a city possesses the power under police authority, to preserve the health of its citizens, to furnish to them a supply of water; and the city council, as a rule, is the judge of the best mode adapted to accomplish this object. Our legislature has, however, restricted the power of the municipal corporation by providing that waterworks shall not be authorized, erected, established, purchased, leased, or sold, unless a majority of the legal voters voting thereon at an election where the question is submitted, shall vote in favor of the acquisition of waterworks by the municipal corporation. The voters of the city of Lansing have complied with the requirements of the statute and thereby removed

the restriction placed upon municipal corporations by the legislature.

When this restriction is removed by a vote of the electors, the city council, in whom is lodged the discretionary power, has the right to either purchase or erect and maintain a system of waterworks for the purpose of supplying the inhabitants of the city with water, and may issue bonds of the city therefor as may be required to accomplish the object, subject only to the constitutional limitation of the indebtedness of the city.

I am therefore of the opinion that under the election held in your city, authorizing the city of Lansing to purchase, establish and erect waterworks for said city, and issue its bonds in payment therefor, the city council has ample authority to issue bonds in such amount and at such times as may be required to carry out the purpose for which such bonds were authorized.

Answering your second inquiry as to what is the limit of indebtedness of a municipal corporation, I submit the following:

Section 3 of article 11 of the constitution of the state provides that "No * * * municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per centum of the value of the taxable property within such * * * corporation, to be ascertained by the last state and county tax lists previous to incurring such indebtedness."

The law in force at the time of the adoption of this section of the constitution of the state contemplated that all property not exempt from taxation within the state should be assessed at its actual cash value, although this was not done in actual practice.

The limit fixed by the constitution was intended to apply to the actual value of the property as shown by the tax lists, which were supposed to set forth such value. When the code of 1897 was adopted, the method of making assessments of taxable property was changed by a provision which requires the actual value of the property to be stated in the tax lists and fixes the taxable value thereof at twenty-five per cent of such actual cash value.

The fact that the legislature has provided that all taxable property within the state shall be taxed at twenty-five per cent

of its actual cash value, does not change the application of the provision of the constitution which was intended to apply to the actual value of the property and not to the value at which it is assessed under the present provisions of the law. It is upon the actual value, as it appears in the tax lists, that a five per cent indebtedness of municipal corporations can be legally created. I am, Yours very respectfully,

CHAS. W. MULLAN,
Attorney-General.

Des Moines, July 3, 1902.

TO MR. N. A. NELSON,
Lansing, Iowa.

DAYS OF GRACE—It is held that section 198 of the negotiable instruments law is for the purpose of extending the time within which a demand may be made to charge endorsers, and does not add days of grace to the instrument itself, which matures and becomes payable on the day fixed therein.

SIR—I am in receipt of your favor of the 17th inst., requesting my opinion as to whether the days of grace upon negotiable instruments are abolished by chapter 130 of the Laws of the Twenty-ninth General Assembly. In compliance therewith I submit the following opinion:

Section 85 of the act referred to provides:

> "Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday."

Sections 3050, 3051 and 3052 of the code, which provide that grace should be allowed upon negotiable bills and notes

payable within the state according to the principles of the law-merchant, and fixing the time during which demand should be made for charging an indorser, are repealed by section 197 of the act of the Twenty-ninth General Assembly.

By the provisions of chapter 130 of the laws of the Twenty-ninth General Assembly, all negotiable instruments become due and payable at the time fixed in such instruments without days of grace.

For the purpose of giving sufficient time within which to make a demand upon the maker of negotiable instruments, and a protest thereof for the purpose of charging indorsers, section 198 of the act provides that a demand on any one of the three days following the day of maturity of the instrument, except on Sunday or a holiday, shall be as effectual as though made on the day on which demand may be made under the provisions of the act—that is, on the day of the maturity of the instrument.

This provision, however, is clearly for the purpose of extending the time within which a demand may be made to charge indorsers, and does not add days of grace to the instrument itself, which matures and becomes payable on the day fixed therein.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

July 18, 1902.

TO HON. FRANK F. MERRIAM,
Auditor of State.

LOAN AND TRUST COMPANIES—EXAMINATION BY AUDITOR OF STATE—It is held that all loan and trust companies carrying on a banking business of any character should be subject to examination, regulation and control by the auditor of state precisely the same as state and savings banks.

SIR—I am in receipt of your favor of the 17th inst., submitting the following inquiry for my opinion:

Are loan and trust companies subject to the same examination, regulation and control by the auditor of state, under section 1889 of the code, as are savings banks under chapters 10, 11 and 12, title IX of the code?

Section 1889 provides:

> "No corporation shall be engaged in the banking business, receive deposits and transact the business generally done by banks, unless it is subject to and organized under the provisions of this title, or of the banking laws of the state heretofore existing; except that loan and trust companies may receive time deposits and issue drafts on their depositaries, but such companies shall be subject to examination, regulation and control by the state auditor like savings and state banks, and their stockholders shall be liable to the creditors of such companies as provided in section 1882 of this chapter for stockholders of savings and state banks."

The provisions of this section give to the auditor of state the same power of examination, regulation and control of all loan and trust companies within the state doing a banking business of any character whatever, which he has over state and savings banks organized under the laws of the state. The language of the statute could not well be made stronger. It was clearly the intent of the legislature that all loan and trust companies, carrying on a banking business of any character, should be subject to examination, regulation and control by the auditor of state precisely the same as state and savings banks.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

July 18, 1902.

To HON. FRANK F. MERRIAM, *Auditor of State.*

BOARD OF CONTROL—POWER TO GRANT THE RIGHT TO CONSTRUCT SEWER IN LAND OF STATE INSTITUTION—It is held that, as no such power or authority has been given or delegated by the state to the board of control, it cannot grant an easement of the character described in any of the lands belonging to the state. Such an easement can only be granted by the state through the legislature.

SIRS—I am in receipt of your favor of the 22d inst. requesting my opinion as to the power of the board of control to grant to a religious society the right to construct a sewer in land owned by the state and used in connection with the Soldiers' Home near Marshalltown.

In compliance with such request I submit the following opinion:

A grant of the right to enter upon the land of the state and to construct and maintain a sewer of the character described, would create an easement therein and make such land servient to the dominant right of the religious association to maintain its sewer therein.

The fact that the sewer is constructed beneath the surface of the soil does not alter the relations of the parties or the lands involved. The easement would be what is ordinarily known as an affirmative, non-apparent easement, and the land would be charged with the dominant estate as though such easement was upon the surface of the soil.

It is an elementary principle of law that no easement can be granted in real estate except by the owner thereof in possession, or by the trustees of an active trust who hold the legal title to the land.

The title and possession of the land occupied by the Soldiers' Home at Marshalltown is in the state. It therefore follows that the state alone has the right to grant an easement therein, unless such power has been delegated by the legislature; and that the board of control has no power or authority to grant an easement in lands belonging to the state, unless such power has been specifically given.

An examination of the statutes of the state, and particularly of chapter 118 of the laws of the Twenty-seventh General Assembly, by which the board of control was created, and of all subsequent acts amendatory thereto, fails to disclose any power or authority specially conferred upon the board of control to grant any easement in lands belonging to the state. As no such power or authority has been given or delegated by the state, to the board of control, it cannot, in my opinion, grant an easement of the character described in any of the lands belonging to the state. Such an easement can only be granted by the state through the legislature.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

July 22, 1902.

TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

BOARD OF MEDICAL EXAMINERS—POWER OF WITH RESPECT TO OSTEOPATHIC SCHOOLS LEGALLY INCORPORATED—**It is held that as to whether a school complies with the provisions of the statute in respect to its course of study must be determined by the board of medical examiners, and if it does not so comply the fact that it is recognized by the Iowa Osteopathic Association does not make it a school, the graduates of which are entitled to an examination.**

DEAR SIRS—I am in receipt of your favor of the 2d inst. requesting my opinion upon two questions.

> *First*—In section 1 of chapter 158 of the acts of the Twenty-ninth General Assembly, "Do the words 'and who are at the time of the passage of this act engaged in the practice of osteopathy in Iowa,' refer to April 8th, when the act was signed by the governor, or to July 4th, when it went into effect?"

Second—"Can the board question the standing of an osteopathic school 'legally incorporated' and recognized as of good standing by the Iowa Osteopathic Association without reference to the requirements of the statute itself which declares what studies shall be required for graduation?"

As to the first question I have to say that the words, "and who are at the time of the passage of this act engaged in the practice of osteopathy in Iowa", refers to the time of the taking effect of the law, viz: July 4th, and not to the time when it was signed by the governor.

This rule has been announced by the supreme court of our state in several cases:

Charlew & Blow v. Lamerson, 1 Iowa, 435;
Thatcher v. Holmes, 12 Iowa, 303-311;
City of Davenport v. D. & St. P. R. Co., 37 Iowa, 625;
13 Michigan, 318;
10 Michigan, 125;
Rogers v. Vass, 6 Iowa, 405.

In the case of *Charlew & Blow v. Lamerson* it is said:

"The words 'Prior to the passage' we think amount to the same thing as if the legislature had used the word 'heretofore', and either must relate to the time of taking effect, and not to the time of passage."

In *City of Davenport v. D. & St. P. R. Co.* it is said:

"The code of 1873 was enacted in April, but by its express terms it did not take effect until September 1, 1873, and the rule is universal that the statute only applies from the time it takes effect, and that the words 'heretofore', 'hereafter' and 'prior to the passage,' etc., when used in a statute, relate to the time of taking effect, and not to the time of the passage of the law."

Under the authority of these cases, and I think there is no exception to the rule, the words "at the time of the passage of this act", as used in chapter 158 of the acts of the Twenty-ninth General Assembly, relate to the time when the act becomes a

law, and not to the time when it is passed by the legislature and signed by the governor.

As to the second question asked I have to say that section 1 of the act requires two conditions to exist as to a school of osteopathy before it can be recognized by the Board of Medical Examiners as a school coming within the provisions of the statute:

(1) It must be a legally incorporated school of osteopathy, recognized as a school of good standing by the Iowa Association of Osteopathy.

(2) It must have a course of study which comprises a term of at least twenty months, or four terms of five months each, in actual attendance, and shall include instruction in anatomy, including dissection of a full lateral half of a cadaver, physiology, chemistry, histology, pathology, gynecology, obstetrics, and theory of osteopathy, and two full terms of practice of osteopathy.

As to whether a school complies with the provision of the statute in respect to its course of study, must be determined by the Board of Medical Examiners, and if it does not so comply, the fact that it is recognized by the Iowa Osteopathic Association does not make it a school, the graduates of which are entitled to an examination.

Respectfully submitted.

CHAS. W. MULLAN,
Attorney-General.

Des Moines, August 7, 1902.

TO THE STATE BOARD OF MEDICAL EXAMINERS.

BANKS—STATE AND SAVINGS—(1) It is held that neither state nor savings banks, organized and transacting business under the present laws of the state, are authorized to establish and maintain branches, either in the town or city where the bank is located or elsewhere. (2) Loan and trust companies—Authority to do banking business—It is held that these corporations have no authority to establish branches and transact their business at any other place or places than that fixed by their articles of incorporation.

SIR—I am in receipt of your favor of the 18th ult. requesting my opinion:

First—Whether state and savings banks, organized under the laws of Iowa, may establish and maintain branch banks, or branch departments in the same, or in different cities from that in which the corporation is authorized to transact business.

Second—Can loan and trust companies, organized under the laws of the state, and doing a banking business, so far as permitted under section 1889 of the code, establish and maintain branches in the same or different cities from that in which the corporation is located?

In July, 1892, my predecessor, the Honorable John Y. Stone, gave an opinion to the then auditor of state, holding that the law at that time did not permit the establishment or maintenance of branches of state or savings banks, organized under the laws of Iowa, in the cities or towns where such banks are located, or elsewhere.

I think the opinion delivered at that time correctly stated the law as it then existed, and a careful examination of the acts of the legislature since that time does not disclose any authority conferred upon state or savings banks to create, establish or maintain branches.

The authority of these banks to transact the business of banking is conferred by chapters 10 and 11 of the code, chapter 67 of the acts of the Twenty-eighth General Assembly, and chapters 76 and 167 of the acts of the Twenty-ninth General Assembly.

These statutes provide for the organization of state and savings banks, and for the control and regulation of their business. They have no power to transact the business of banking except as expressly or impliedly given by statute.

The legislature has not conferred upon them the power to establish, maintain or operate branches, either in the city or town where the bank is located or elsewhere, and such power, not having been conferred by the legislature, has been withheld, and cannot be exercised by state and savings banks organized under the laws of Iowa.

It was not contemplated by the legislature, in enacting the statute under which these banks are permitted to organize and carry on business, that they should have the power to establish, maintain and operate branches, either in the city where the bank is located or elsewhere, for the purpose of transacting a banking business.

All of the provisions of the law which relate to the reports to be furnished, by such banks, to the management thereof by their officers, and to the examination by the auditor of state, clearly contemplate that but one place of business should be established and conducted by the officers of such institutions.

I am, therefore, of the opinion that neither state nor savings banks, organized and transacting business under the present laws of the state, are authorized to establish and maintain branches either in the town or city where the bank is located or elsewhere.

Second—Section 1889 of the code provides:

> "No corporation shall engage in the banking business, receive deposits and transact the business generally done by banks, unless it is subject to and organized under the provision of this title, or of the banking laws of the state heretofore existing, except that loan and trust companies may receive time deposits and issue drafts on their depositaries, but such companies shall be subject to examination, regulation and control of the auditor, like savings and state banks, and their stockholders shall be liable to the creditors of such companies as provided in section 1882 of this chapter for stockholders in savings and state banks."

This provision of the statute authorizes loan and trust companies to transact a banking business to a limited extent, and at the same time places them under the control and regulation of the auditor of state, as are savings and state banks, and makes them subject to the same examination by him.

The effect of this provision of the statute is to put loan and trust companies, so far as their right to establish branches is concerned, upon the same footing as state and savings banks.

It was clearly not the intention of the legislature to permit loan and trust companies to establish branches and transact their business at any other place, or places, than that fixed by their articles of incorporation.

Such right is, in my opinion, denied alike to state and savings banks and loan and trust companies, organized under the laws of Iowa.

Respectfully submitted,
CHAS. W. MULLAN.
Attorney-General.

August 7, 1902.

To HON. FRANK F. MERRIAM,
Auditor of State.

PUBLIC SCHOOLS—COMPULSORY EDUCATION THEREIN—It is held that the word "inclusive" used in section 1 of chapter 128 of the acts of the Twenty-ninth General Assembly does not extend the period during which a child can be compelled to attend school beyond the time when he becomes fourteen years of age.

SIR—I am in receipt of your favor of August 9th requesting my official opinion as to the construction of section 1, chapter 128, of the acts of the Twenty-ninth General Assembly, relating to the compulsory education of children within the state.

The inquiry is stated as follows:

> "Does the statement, 'of seven (7) to fourteen (14) years inclusive' include the time only from the day a child is seven years of age to the day that he is fourteen years

of age, or does the word 'inclusive' extend the time to the day that a child is fifteen?"

The provision of section 1 of chapter 128 as to which the inquiry is made reads as follows:

> "Any person having control of any child of the age of seven (7) to fourteen (14) years inclusive, in proper physical and mental condition to attend school, shall cause such child to attend some public, private or parochial school where the common school branches of reading, writing, spelling, arithmetic, grammar, geography, physiology and United States history are taught." * * *

This provision requires a child in proper physical and mental condition to attend school from the time he becomes seven years of age until he reaches the age of fourteen years. The language of the section, "to fourteen (14) years" can not be construed to extend beyond the time when the child becomes fourteen years of age. The word "inclusive" following clearly applies to the time intervening bewteen the ages of seven and fourteen years. No other construction can, in my judgment, be fairly placed upon it.

The maximum age of a child who is compelled, under the provisions of the statute to attend school, is clearly fixed at fourteen years, and if any other interpretation should be given to the word "inclusive," it would at once become repugnant to the provision of the statute which fixes such maximum age. While if it is held to apply to the years between seven and fourteen, all of the provisions of the section are given the effect to which the language entitles them, and the whole section becomes harmonious.

I am therefore of the opinion that the word "inclusive", as used in the section, does not extend the period during which a child can be compelled to attend school beyond the time he becomes fourteen years of age.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

August 12, 1902.

TO THE HON. R. C. BARRETT,
Superintendent of Public Instruction.

JUDGES OF DISTRICT COURT—INCREASE OF SALARY—It is held that a district judge, appointed to fill the unexpired term of a judge who has resigned, can only receive the same compensation which his predecessor would have been entitled to receive had he continued in office.

SIR—I am in receipt of your favor of the 1st inst. requesting my opinion upon the question whether section 9 of article 5 of the constitution of the state prohibits a judge of the district court, appointed to fill a vacancy caused by the resignation of a judge elected prior to the passage of the act of the Twenty-ninth General Assembly, by which the salaries of judges of the district court are increased from $2,500 to $3,500 per annum, from receiving the compensation fixed by the act of the Twenty-ninth General Assembly amending section 253 of the code.

In the case stated, William S. Kenyon was elected judge of the district court of Iowa prior to the passage of the act of the Twenty-ninth General Assembly, and when the salary fixed by law was $2,500 per annum. He resigned his office, which resignation took effect July 15, 1902, and after the act of the Twenty-ninth General Assembly became a law. On July 16, 1902, George W. Dyer was appointed to fill the vacancy created by such resignation.

Th question now presented is whether Judge Dyer is entitled to compensation at the rate of $3,500 or $2,500 per annum.

Upon this question I submit the following opinion:

Section 5 of article 5 of the constitution of the state provides:

> "The district court shall consist of a single judge, who shall be elected by the qualified electors of the district in which he resides. The judge of the district court shall hold his office for the term of four years, and until his successor shall have been elected and qualified; and shall be ineligible to any other office, except that of judge of the supreme court, during the term for which he was elected."

By this provision of the constitution the term of office for which a judge of the district court is elected is fixed at four years.

Section 9 of article 5 provides that the compensation of a judge of the supreme or district court shall not be increased or diminished during the term for which he shall have been elected.

In the case under consideration, Judge Kenyon was elected for the term of four years. At the time of his election the compensation fixed by law was $2,500 per annum. It is clear that under the provision of the constitution referred to, his compensation could not be increased or diminished during the term which he was elected to fill. His resignation created a vacancy in the term for which he was elected. Judge Dyer was appointed to fill such vacancy. The term of office which he was appointed to fill is a part of the same term to which Judge Kenyon was elected. He stands precisely in the same position, so far as the term of office which he holds is concerned, as Judge Kenyon would have stood had he not resigned, with the single exception that under his appointment he only holds the term to which Judge Kenyon was elected until the next general election. He is filling the unexpired term to which Judge Kenyon was elected by the people as Judge Kenyon would have filled such term had he not resigned.

This being true, it is clear that he must be governed by the same constitutional provision which would have governed Judge Kenyon had he continued to fill the term of office for which he was elected, and which would have prevented him from having his compensation increased during such term.

I am therefore of the opinion that Judge Dyer can only receive the same compensation which Judge Kenyon would have been entitled to receive, had he continued in office; that is, at the rate of $2,500 per annum.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

August 13, 1902.

TO HON. FRANK F. MERRIAM,

Auditor of State.

STATE LIBRARY—TRUSTEES OF—BALANCE OF APPROPRIATION—It is held that the amount of the appropriation of the Twenty-eighth General Assembly unexpended upon March 31, 1902, is still available to the trustees of the library and should not be charged off or recovered into the treasury.

SIR—I am in receipt of your favor of the 11th inst. asking my opinion as to whether the trustees of the state library are entitled to draw the balance of the appropriation made by the Twenty-eighth General Assembly for classifying and cataloguing the library remaining unexpended March 31, 1902.

An examination of the act of the Twenty-eighth General Assembly by which the sum of two thousand dollars, or so much thereof as may be necessary, is appropriated for the completion of the work of classifying and cataloguing, according to the modern scientific methods, all books now in, or that may be hereafter added to, the state library, shows that the appropriation is not for the biennial period following the legislature by which the appropriation was made.

It is an appropriation of the sum of $2,000, or so much thereof as may be necessary, to complete the work of classifying and cataloguing the books in the library, and no time is fixed by the act when it shall be drawn or expended. The act provides that it shall be expended under the direction of the board of trustees, and as they are not limited as to the time when they shall expend the appropriation, it does not fall within the class of appropriations which are made for the biennial period.

The appropriation made by the Twenty-ninth General Assembly for the office of the state librarian is a biennial appropriation of $3,720 for the purposes stated in joint resolution No. 5, one item of which is: "One cataloguer at a salary of $1,000." This gives to the state librarian the sum of $1,000 with which to pay a regularly employed cataloguer, while the appropriation of the Twenty-eighth General Assembly still remains in the hands of the trustees and may be expended by

them in employing such additional assistants as the work may, in their judgment, require.

Under this view of the appropriations of the Twenty-eighth and Twenty-ninth General Assemblies, I am of the opinion that the amount of the appropriation of the Twenty-eighth General Assembly remaining unexpended upon March 31, 1902, is still available by the trustees of the library, and should not be charged off or recovered into the treasury.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

August 13, 1902.

TO HON. GILBERT S. GILBERTSON,
Treasurer of State.

SCHOOL DIRECTORS—SPECIAL MEETINGS OF—(1) It is held that a special meeting can be legally called by the president only upon notice, specifying the time and place, delivered to each member of the board in person. (2) It is held that written notices directed and mailed to members of the board would not be legal notice, even though a quorum be present at such special meeting called by the president of the board.

SIR—You ask our opinion upon the following questions:

First—For the legality of a special meeting called by the president, is it required that notice of the time and place of the meeting be delivered to each member of the board, or is such notice only necessary when a meeting is asked upon the written request of a majority of the board?

Second—In case verbal notices are served for a special meeting upon a part of the board, and written notices directed and mailed to others, and a quorum be present at such special meeting "called by the president," would the action of the board at such meeting be legal?

That part of section 2757 of the code applicable to meetings and special meetings of boards of directors reads as follows:

> "The board of directors shall meet on the third Monday in March and September, and may hold such special meetings as may be fixed by the board, or called by the president, or the secretary upon the written request of a majority of the board, upon notice specifying the time and place, delivered to each member in person, but attendance shall be waiver of notice."

Under this section special meetings of the board of directors may be fixed by one of three methods: *First,* the board, at one of its meetings, may fix a time and place for a special meeting; *second,* a special meeting may be called by the president of the board upon notice specifying the time and place delivered to each member in person; *third,* the secretary, upon the written request of a majority of the board, may call a special meeting by notice specifying the time and place, delivered to each member in person.

Nothing is said as to whether these notices must be in writing or not. A notice specifying the time and place can as well be delivered to each member in person orally as in writing. The statute is explicit that such notice must be delivered to each member in person. Therefore it can not be mailed to him through the postoffice.

I am therefore of the opinion that as to your first question the answer must be that a special meeting can be legally called by the president only upon notice, specifying the time and place, delivered to each member of the board in person.

As to your second question, I am of the opinion that written notices, directed and mailed to members of the board, would not be legal notice, even though a quorum be persent at such special meeting called by the president of the board.

Respectfully submitted,
CHAS. A. VAN VLECK,
Assistant Attorney-General.

September 3, 1902.

To HON. R. C. BARRETT,
Superintendent of Public Instruction.

CORPORATION—REORGANIZATION OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY—It is held that the acts of the Iowa corporation are not *ultra vires* nor opposed to the public policy of the state in a sense which will enable the state to arrest the transaction or maintain an action of *quo warranto* for the dissolution of the corporate franchise.

SIR—In response to your communication of the 30th ultimo, requesting my opinion as to whether the Chicago, Rock Island & Pacific Railroad Company, incorporated under the laws of the state on the 31st day of July, 1902, is a corporation organized for a lawful purpose, and whether the transaction described in your communication can be arrested at the instance of the state, I submit the following opinion:

The facts, as stated in your communication and gathered from other sources of information, are substantially as follows:

On the 21st day of July, 1902, William T. Rankin and others executed, in due form of law, and caused to be filed in the office of the recorder of Polk county, Iowa, and in the office of the secretary of state of the state of Iowa, articles of incorporation of the Chicago, Rock Island & Pacific Railroad Company, with its principal place of business in the city of Des Moines, Polk county, Iowa, and with the right to maintain offices in the cities of Chicago and New York, and in such other places as may be determined by the board of directors.

The authorized capital stock of the corporation is one hundred and twenty-five million dollars, divided into shares of one hundred dollars each.

Its corporate existence begins on the day on which its articles are filed in the office of the secretary of state, and continues for fifty years thereafter.

At or about the same time of the organization of the Chicago, Rock Island & Pacific Railroad Company in Iowa, another corporation was organized in New Jersey under the name of the Rock Island Company.

I have no knowledge as to who the incorporators of the Rock Island Company are, but assume, from the facts stated in your

communication, that they are the same persons who organized the Iowa company, or persons with like interest and purpose.

The authorized capital stock of the Rock Island Company is one hundred and fifty million dollars, and is divided into two classes, viz: ninety-six millions of common stock, and fifty-four millions of preferred stock.

Prior to the organization of these corporations, there had existed for many years in the state of Iowa, a corporation known as the Chicago, Rock Island & Pacific Railway Company, which was a consolidation organized under the laws of Illinois and Iowa. This company had constructed, purchased and leased lines of railway in Iowa and other states and territories, which it was then operating, of a total mileage between seven and eight thousand miles. It was the owner of the Chicago, Rock Island & Pacific Railway, and of the Burlington, Cedar Rapids & Northern Railway, which it had recently acquired, which together had a mileage of over five thousand miles.

Its capital stock, for which certificates had been issued, was seventy-five million dollars, and its bonded indebtedness about seventy million dollars. Its stock was at a premium of a little more than one hundred per cent; a share of one hundred dollars being worth about two hundred and three dollars in the market.

After the organization of the Iowa and New Jersey companies, an agreement was entered into between them by which the Iowa corporation should issue and deliver to the New Jersey corporation, certificates for the whole amount of its capital stock; and in consideration of such transfer of its capital stock, the New Jersey company should issue seventy-five millions of its common stock and fifty-two millions five hundred thousand of its preferred stock, and deliver the same to the shareholders of the Chicago, Rock Island & Pacific Railway Company as a part of the purchase price of the shares of that company held by them, the terms of the agreement being:

That the New Jersey company should deliver one hundred dollars of its common stock, and seventy dollars of its preferred stock, to the shareholders of the Chicago, Rock Island & Pacific Railway Company for each share of stock of one hundred

dollars held by the shareholders of that company; and, in addition thereto, the Iowa corporation should issue and deliver to each shareholder of the Rock Island Railway Company one hundred dollars, in four per cent. gold bonds, for each share of stock of that company so held.

Under the agreement, when executed, each shareholder of the Chicago, Rock Island & Pacific Railway Company would receive one hundred dollars in common stock and seventy dollars in preferred stock of the New Jersey corporation, and one hundred dollars, in four per cent. gold bonds, of the Iowa corporation, for each share of stock held by him. The stock of the Chicago, Rock Island & Pacific Railway Company, when thus transferred, is to become the property of the Chicago, Rock Island & Pacific Railroad Company, and to be deposited with the Central Trust Company of New York as security for the payment of the seventy-five millions of bonds issued by the Iowa company.

By this arrangement and transfer, the New Jersey corporation becomes the owner of the stock of the Iowa corporation, and the Iowa corporation becomes the owner of the stock of the Chicago, Rock Island & Pacific Railway Company, and the sole stockholder of that railway.

The first question upon which my opinion is requested is, whether the Chicago, Rock Island & Pacific Railroad Company is organized for a lawful purpose under the laws of the state.

Article 2 of the articles of incorporation of that company provides:

> "The general nature of the business to be transacted by the corporation is the construction or acquisition in any other manner, and the maintenance and operation of a line of railway and telegraph extending through the state of Iowa in and from the city of Davenport, Scott county, Iowa, to and in the city of Council Bluffs, Pottawattamie county, in said state; the purchase, lease, or acquisition in any other manner, and either directly or through ownership of the stocks and bonds or other obligations of the corporations owning and operating the same, of the railways, property and franchises of

the Chicago, Rock Island & Pacific Railway Company, and of any other lines of railway and railway property in the state of Iowa, and in any other states and territories of the United States, and the maintenance and operation of any other line of railway and railway property which the corporation may acquire; and the operation under lease and through contract of lines of railway and of railway property owned or operated by other railway corporations in the state of Iowa and in other states and territories of the United States. The corporation shall have power, while the owner of any stocks of other corporations, owning or operating lines of railway or railway property, as aforesaid, to exercise in respect thereto all the rights, powers and privileges of ownership, including the right to vote thereon; and shall have and by its board of directors may exercise all the powers now or hereafter conferred upon railway corporations by the laws of the state of Iowa, and of any other state or territory in which the corporation may transact its business, and of the United States."

Section 1607 of the code provides:

"Any number of persons may become incorporated for the transaction of any lawful business, but such incorporation confers no power or privileges not possessed by natural persons, except as hereinafter provided."

Subdivision 6 of section 1609 provides that corporations shall have power to make contracts, acquire and transfer property, possessing the same powers in such respects as natural persons.

Under our law the right of any number of persons to organize a corporation under chapter 1 of title IX of the code, for the purpose of constructing, purchasing and owning any railway or railways within the state of Iowa, or in other states or territories, subject, perhaps, to one condition, viz: that a corporation will not be permitted to purchase and consolidate competing lines of railway for the purpose of creating a monopoly and taking away from the citizens of the state the benefit of competition, cannot be questioned. Aside from this restriction, a corporation organized under the laws of the state may construct, purchase and operate any number of railways, either in the state of Iowa or elsewhere.

The charter of a corporation, by which its powers are measured, consists of the statutes under which it is formed, and its articles of incorporation required to be executed and filed by the incorporators. The article above quoted gives to the corporation the right to purchase the stock and bonds of other railway corporations.

Section 2047 of the code provides:

> "Any railway corporation, organized under the laws of the state, or operating a road therein, under the authority of the laws thereof, may acquire, own and hold either the whole or any part of the stock, bonds or other securities of any railroad company in this or any adjoining state."

Under its charter, the Iowa company clearly has the right to purchase, own and hold all of the stock of the Chicago, Rock Island & Pacific Railway Company, subject only to the restriction suggested, that it will not be permitted to purchase such stock and bonds for the purpose of consolidating competing lines of railway, and thereby creating a monopoly, and taking away from the citizens of the state the benefits of competition.

It is equally true that a corporation has the right to issue and deliver the certificates of its capital stock in payment for any property which it has the right to purchase and hold. In issuing its stock for such purpose, it is not necessary that there should be a subscription to the capital stock of the corporation, and that the money should be paid into the treasury upon such subscription before its capital can be used in the purchase of property which it has the right to buy. The direct method of issuing and delivering its certificates of shares of capital stock for property, is one of the well recognized rights of a corporation.

An issue of stock for the purchase of property by a corporation finds support not only in the decisions of the courts, but in the daily transaction of the business of corporations. The law does not compel a corporation, and the subscriber to its capital stock, to go through the useless form of a payment by the corporation to the subscriber of the value of the property which it seeks to acquire, and an immediate repayment of the

same money by the subscriber to the corporation on his subscription.

Cook on Corporations, Sec. 18, and cases there cited.

So well established is this principle, that the few cases holding the contrary doctrine can no longer be considered good law.

The Iowa corporation, therefore, has the right to purchase the stock of the Chicago, Rock Island & Pacific Railway Company, and to pay for the same in its certificates of capital stock in such amounts and upon such terms and conditions, as may be agreed upon between the shareholders of the old Rock Island Railway Company and the directors of the new Iowa company.

The transfer of the stock of the new Iowa company to the New Jersey company, under the agreement that, in consideration of such transfer, the New Jersey company will deliver to the shareholders of the old Rock Island Railway Company, certificates of the capital stock of the New Jersey company at the ratio of one hundred and seventy dollars for each one hundred dollars of the capital stock of the Chicago, Rock Island & Pacific Railway Company, and when such transfer is made, the stock of the last named company to become the property of the new Iowa company does not in any wise affect the right of the Iowa company to purchase and hold the stock of the old Rock Island company, or invalidate its purchase thereof.

Such transaction is but an additional link in the chain of the transfer of the stock of the Chicago, Rock Island & Pacific Railway Company to the new Chicago, Rock Island & Pacific Railroad Company; that is, the shareholders of the old Rock Island company receive the stock of the New Jersey company in exchange for their stock of the Chicago, Rock Island & Pacific Railway Company, which they transfer to the new Iowa corporation, which, in turn, delivers its stock directly to the New Jersey company.

I have no information as to why this circuitous method of transfer was adopted by the organizers of the two companies; but it is certain that it can in nowise affect the legality of the transaction.

When the Iowa company transferred its stock to the New Jersey company under the agreement, it at once had a beneficial interest in the shares of the stock of the New Jersey company, which were to be transferred to the shareholders of the old Rock Island company. It was in fact the equitable owner thereof. It had agreed that these shares should be transferred to the shareholders of the old Rock Island Railroad Company as a part of the purchase price of the shares held by them, and that the shares of stock of that company should be transferred to and become the property of the new Iowa corporation; and that in addition thereto, it would issue and deliver to such shareholders, of its own four per cent gold bonds, one hundred dollars for each share of stock which it received from the stockholders of the Chicago, Rock Island & Pacific Railway Company through the agreement with the New Jersey company.

When the agreement is carried out between the new Iowa corporation, the New Jersey corporation and the shareholders of the old Rock Island Railway company, the Iowa company becomes the owner of all of the stock of the Chicago, Rock Island & Pacific Railway Company; and under the statute above referred to and its articles of incorporation, it has the right to own and hold the same.

In the acquisition of the stock of the old Rock Island Railway Company by the new Iowa corporation, no law of the state has been, or will be, violated or contravened, and the act of the corporation in obtaining the same is not *ultra vires.*

Upon the transfer of the stock of the Chicago, Rock Island & Pacific Railway Company to the new Iowa company the latter becomes the actual owner of all the railways and railway property owned by the Chicago, Rock Island & Pacific Railway Company. The legal title thereto, of course, remains in that corporation, but the new Iowa company, as the owner of all of its stock, is in fact the owner of all of its property; and, as the owner of its stock, it becomes vested with the power of controlling the corporation, electing its board of directors, and of exercising all other powers which stockholders of a corporation may lawfully exercise.

The fact that the seventy-five millions of stock which it receives from the stockholders of the Chicago, Rock Island & Pacific Railway Company is pledged with the New York Central Trust Company as security for the payment of the seventy-five million dollars of four per cent bonds issued by the Iowa company in nowise affects the right of that company to vote the stock and exercise its rights as holder thereof.

What has been said as to the rights and powers of the Iowa company as the holder of the stock of the Chicago, Rock Island & Pacific Railway Company, is equally true of the New Jersey corporation. It has lawfully acquired the stock of the Iowa corporation. It has the right to own and hold the same, and to exercise all of the rights and privileges of a stockholder of that company. And while it is suggested that the organizers of the New Jersey company will retain control of that corporation by being the holders of a majority of its preferred stock, and in that manner retain control of the Iowa corporation, such action on the part of the stockholders of the New Jersey company is not in violation of any of the laws of this state.

A corporation undoubtedly has the right to issue common and preferred stock. It has the legal right to give the preferred stock privileges which are not given to the common stock. Among such privileges is the right of electing a majority of the directory of the corporation.

There is no rule of public policy which forbids the issue of preferred stock of a corporation, and, in the case under consideration, it amounts only to an agreement of the stockholders as to how the profits of the corporation shall be divided, and who shall be entitled to elect the managing officers thereof.

In *Kent v. Quicksilver Min. Co.*, 78 N. Y., 159, it is said:

> "We know of nothing in the constitution or law that inhibits a corporation from beginning its corporate action by classifying the shares in its capital stock, with peculiar privileges to one share over another."

So that while the control of the Iowa company by the New Jersey company, and the control of the last named company by a majority of its preferred stock, were objects sought to be

attained by the incorporators of both companies, it can not be said that they exceeded their legal rights in prosecuting the plan by which such purpose is accomplished.

The most serious question involved is, whether the state may interfere to prevent the issuance of the stock and bonds of the Iowa and New Jersey companies, for the reason that the aggregate amount thereof proposed to be issued exceeds the market value of the stock of the Chicago, Rock Island & Pacific Railway Company which the Iowa company receives therefor; or whether it may by *quo warranto* have a forfeiture of the charter of the Iowa company declared, on the grounds that such act is *ultra vires* and against public policy.

The seventy-five millions of gold bonds issued by the Iowa company, and secured by the deposit of the stock of the old Rock Island Railway Company, are undoubtedly worth their par value. The stock of the Iowa company, held by the New Jersey company, and the stock of the New Jersey company, transferred to the shareholders of the old Rock Island Railway Company, undoubtedly have some value.

The market value of the stock of the Chicago, Rock Island & Pacific Railway Company, at the time of the making of the contract referred to, was about one hundred and fifty million dollars. In consideration of the transfer of this stock to the Iowa company, it proposes to cause to be delivered to the stockholders of the old Rock Island Railway Company, one hundred and twenty-seven millions five hundred thousand, at its face value, of the stock of the New Jersey company, and seventy-five millions of the bonds of the Iowa company.

Is this transaction such a violation of the laws of the state or of its public policy, as declared by its statutes and courts, as will authorize the state to interfere by legal proceedings?

The stock of the old Rock Island Railway Company is to be purchased at a valuation of two hundred and two millions, five hundred thousand dollars in the stock of the New Jersey company and the bonds of the Iowa company. The transaction is with the consent of all of the stockholders of the different com-

panies. No one is deceived or defrauded; and it is the method whereby the Iowa corporation seeks to obtain the ownership of the Chicago, Rock Island & Pacific Railway Company, and, through the ownership of that stock, the control of its system of railway.

In the absence of statutory prohibition, it is within the power of a corporation to issue its stock and bonds for property purchased by it, although the property received is taken at a valuation in excess of its real value.

Memphis, etc., R. R. Co. v. Dow, 120 U. S., 299;
Brown v. Duluth, M. & N. Ry. Co., 53 Fed. Rep., 889;
Scovill v. Thayer, 105 U. S.,153.

The validity of the issue of stocks and bonds by corporations, in payment for property of less value than the par value of the stocks and bonds issued, is sustained by the decisions of the highest courts in the country.

Memphis, etc., R. R. Co. v. Dow, 120 U. S., 287;
Peoria & Springfield R. Co. v. Thompson, 103 Ill., 187;
Stein v. Howard, 65 Calif., 616;
Handley v. Stutz, 139 U. S., 417;
Clark v. Bever, Ib., 96;
Fogg v. Blair, Ib., 118.

The only provision of our statute upon this subject is section 1627 of the code, which provides:

> "No certificate of shares of stock shall be issued, delivered or transferred by any corporation, officer or agent thereof, or by the owner of such certificate of shares, without having endorsed on the face thereof what amount, or portion of the par value, has been paid to the corporation issuing the same, and whether such payment has been in money or property."

This statute not only does not prohibit the issuance of shares of stock in payment of property, when the actual value of such property is not equal to the face value of the shares of stock issued, but contemplates that such a transaction may be carried out, imposing only the duty of the corporation or shareholder

to endorse, upon the certificate issued or transferred, what amount or portion of the par value, has been paid for the same, and whether such payment was in money or property.

In *Scovill v. Thayer* it was directly held by Judge Harlan that a corporation had the right to issue its stock to its shareholders, where only a portion of the face value was paid therefor by such shareholder under an agreement that it should be fully paid stock, and that the shareholders should not be liable to the corporation for any unpaid portion of the face value thereof, and that, as between the shareholders and the corporation, such agreement was valid and binding; and that it could only be inquired into by a creditor of the corporation.

In *Seymour v. S. F. C. Association,* 144 N. Y., 344, it was held that an issue of bonds of a corporation for the purchase of real estate, largely in excess of the actual value of such real estate at the time of the purchase, was a legal transaction and that the bonds were valid.

The principle decided in *Scovill v. Thayer* goes far beyond the question involved here, and it is clear that in the absence of a statutory provision to the contrary, a corporation may issue its stock and bonds for the purchase of property, although the face value of such stock and bonds so issued is in excess of the actual value of the property received by it, and that such transaction, if free from fraud, can only be inquired into by creditors of the corporation.

The right of a creditor to inquire into a transaction of this character is purely a private right, and sound public policy requires that whatever exclusively pertains to individual interests should be left to the individual. The state should provide and care for the general interests and for those which are beyond the right of an individual, but it has no authority to take up either side of the controversy which relates solely to private rights of individuals.

The law gives to every individual who has suffered a wrong, ample power, methods and liberty to have that wrong redressed; and were the state to attempt to take up the cause of an individual, which pertains only to private rights, it would amount to governmental paternalism, which must be as carefully guarded

against upon the one side as the sovereign powers of the state must be upheld upon the other.

People v. Ballard, 134 N. Y., 397.

The fact that a corporation is an entity, representing an aggregation of skill and capital, does not curtail its right to transact the business which it is empowered by its charter to conduct, with exactly the same freedom as a citizen. So long as, by the policy of this state, the formation of corporations is permitted, so long will the right of such artificial persons to act within the scope of their franchises be in no sense different from the right of the individual.

The control over the business conduct of either by a court of equity is exactly the same. Contracts of either will be rectified, annulled or specifically enforced, and the duties of either as trustee, or its right as *cestui que trust,* will be enforced and protected. Any illegal conduct of either, leading to irreparable injury, will be enjoined. A nuisance created by either will be restrained, and whenever either an individual or a corporation becomes related to any other individual or corporation so that equitable jurisdiction arises to remedy some wrong or secure some right, it matters not whether both parties are individuals, or both corporations, or that one is a natural and the other an artificial being.

Stockton v. Am. Tobacco Co., 36 Atl. Rep., 976.

The charter of a corporation consists of the statutes under which it is formed, and its articles of incorporation required to be executed and filed by the incorporators; and the acts of the Iowa and New Jersey corporations, in transferring their stock and bonds to the shareholders of the Chicago, Rock Island & Pacific Railroad Company, in consideration of the transfer of the stock of that company to the Iowa corporation, are within the powers contained in their respective charters.

The stock of the New Jersey company, issued and delivered, is, at its par value, less than the market value of the stock of the Chicago, Rock Island & Pacific Railway Company, received by the Iowa corporation; and there is no statute of this state, or rule of law governing the conduct of corporations, which

prohibits the Iowa company from issuing and delivering its negotiable bonds to the stockholders of the old Rock Island Railway Company, which, together with the stock of the New Jersey company, is received by such stockholders in payment of the stock of the old Rock Island Railway Company, transferred to the Iowa corporation. Such a transaction would be valid if done by an individual, and it is equally valid when done by the Iowa corporation under the powers given in its charter.

The only material inquiry for a court upon the complaint of a stockholder of either company would be, whether the contract, by which the Iowa company acquired the stock of the old Rock Isand Railway Company, was fairly made, fairly carried out, and the bonds issued by the Iowa company in payment therefor were in fact issued for that purpose.

Farmers Loan & Trust Co. v. Rockaway Valley R. Co., 69 Fed. Rep., 11.

It is suggested that the issue of stock and bonds of the New Jersey and Iowa companies for the acquisition of the stock of the old Rock Island Railway Company, is, at their face value, so largely in excess of the market value of the stock acquired, that the transaction is opposed to the public policy of the state, and it should therefore take some action against the Iowa corporation.

In considering the force of this suggestion, it is first necessary to determine what constitutes the public policy of a state.

In *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.*, 30 L. R. A., 197, it is said by Judge Sanborn:

> "The public policy of a state or nation must be determined by its constitution, laws and judicial decisions, not by the varying opinions of laymen, lawyers or judges as to the demands of the interest of the public."

In the celebrated case of *Vidal v. Girard's Executors*, 43 U. S., 197, Mr. Justice Story said:

> "Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws

and judicial decisions make known to us. The question, what is the public policy of a state, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which can scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ."

Mr. Justice Peckham, in *United States v. Trans-Missouri Freight Ass'n,* 166 U. S., 290, said:

"The policy of the government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials."

In *Heller v. National Marine Bank,* 45 L. R. A., 443, it is said:

"Much was said in the argument, and something is to be found in the books, about such liens in favor of stockholders being void because against public policy; but Sir George Jessel, M. R., in dealing with that indefinite and variable quantity called 'public policy' said, in *Printing & N. Registering Co. v. Sampson,* L. R. 19 Eq. 465: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offense, or to give money or reward to another to commit an immoral offense, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further.'"

Under the statutes of our states and the decisions of our courts, there should be added to the subjects named by the

learned Master of the Rolls, as to which the state has the right to interfere, contracts in restraint of trade, and the creation of monopolies to prevent competition.

The consensus of the judicial expressions upon this question is, that the public policy of a state must be determined by the statute and judicial decisions of that state, and not by the opinions of individuals, no matter how eminent.

Tested by this rule, it cannot be said that the acts of the Iowa corporation are opposed to the public policy of a state, as no act has been done by it which is a violation of the statute of the state, or of its laws, as declared by the decisions of its courts.

It follows, therefore, that while one may be personally opposed to the policy of a state in permitting corporations to issue their stock and bonds for the purchase of property, in amounts in excess of the actual value of such property, the question is one which must be referred to the law-making power of the state for its action, rather than to the courts for their decision under the present statute.

While the fact that there is no statute in this state by which corporations are regulated and controlled as to the issuance of corporate stock and bonds under the circumstances of the transaction under consideration, may be deprecated, that fact exists, and no proceedings in behalf of the state, without legislative action, can be maintained.

For these reasons, I am forced to the conclusion that the acts of the Iowa corporation are not *ultra vires,* nor opposed to the public policy of the state in a sense which will enable the state to arrest the transaction or maintain an action of *quo warranto* for the dissolution of the corporate franchise.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

September 13, 1902.

TO THE HONORABLE A. B. CUMMINS,
Governor of Iowa.

APPROPRIATIONS—Construction of chapters 183 and 177 of the acts of the Twenty-ninth General Assembly.

SIR—In response to your request of the 29th ultimo for a construction of chapters 183 and 177 of the acts of the Twenty-ninth General Assembly, so far as they relate to appropriations made to the public institutions of the state, I submit the following opinion:

The appropriations made by chapter 183, which are not payable quarterly, may be drawn at any time by the officers of the institution for which the appropriation is made, whenever required for the purpose of the appropriation.

The effect of the provisions of chapter 177 upon such appropriations is only to extend the time within which they may be drawn until the end of the fiscal year, viz: June 30, 1903.

Under the provisions of chapter 177, appropriations which are to be paid quarterly should be computed and paid pro rata to the first day of July, 1902, and after that date they should be paid in quarterly installments on the first days of July, October, January and April.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

September 19, 1902.

TO THE HONORABLE GILBERT S. GILBERTSON,
Treasurer of State.

BANKS—SAVINGS DEPARTMENTS OF—It is held that national, state and private banks may organize and conduct savings departments, in connection with their general banking business, and that individuals, partnerships and private corporations may, subject to the same restrictions, engage in and carry on a savings bank business.

SIR—Your favor requesting my opinion upon the following questions is received:

First—Is the organization and operation of savings departments by national banks in violation of and contrary to the laws of Iowa?

Second—Is the organization and operation of savings departments by state banks in violation of and contrary to the laws of Iowa?

Third—Is the organization and operation of savings departments by private banks, corporations, partnerships or persons engaged in business other than banking, in violation of and contrary to the laws of Iowa?

These questions arise under section 1859 of the code, which provides:

> "Any bank, banking association, private banker or person not incorporated under the provisions of this chapter, or any officer, agent, servant or employe thereof, who shall advertise, issue or circulate any card or other paper, or exhibit any sign as a savings bank or savings institution * * * shall be guilty of a misdemeanor," etc.

Before taking up the construction of this statute, it is important to determine the right of persons within the state to conduct a banking business, and the power of the legislature as to the control thereof.

At common law banking in all of its branches is free to all.

> *State v. Woodmanse,* 1 N. Dak., 246;
> *People v. Utica Ins. Co.,* 15 Johns., 358;
> Morse on Banking, sec. 13.

Whether a state legislature has power to prohibit individuals from transacting a banking business, and to confer such right solely upon corporations, is a question upon which the courts differ very widely, and as to which the adjudicated cases are wholly irreconcilable.

In the recent case of *State v. Woodmanse, supra,* the supreme court of North Dakota held that it was within the power of a state legislature to regulate the business of banking, even to the extent of prohibiting private persons or partnerships from engaging therein. This decision is based upon the authority of the early New York cases, and the text of Mr. Morse based thereon. An examination of these cases discloses that the question, as to

the right of individuals to conduct a banking business, was not the precise question upon which the decisions turned.

In *State v. Scougal,* 3 S. Dak., 55, the supreme court of that state held that it was not within the power of a state legislature to prohibit private persons from engaging in the business of banking, placing the decision upon the ground that it is not a constitutional exercise of the legislative power, under the police power of the state, to deprive the citizen of the right to carry on the business of banking, and to confer such privilege exclusively upon corporations organized under an act of the legislature. The position taken by the South Dakota court is upheld by a very able and convincing opinion written by Corson, J.

A careful comparison of the opinion in the *Scougal* case with that in the *Woodmanse* case and the early New York cases, inevitably leads to the conclusion that the doctrine announced by the South Dakota court is the more logical and sounder principle of law.

Taking then the doctrine enunciated in the *Scougal* case as laying down the correct principle of law as to the power of a state legislature to prohibit private individuals from engaging in the business of banking, it follows that every person in the state has the legal right, under the constitution of the United States, to engage in and carry on the business of banking, subject to such reasonable regulations as the state legislature may deem it necessary to make in relation thereto. Such right necessarily extends to all classes of banking, and includes savings as well as commercial banks.

Apparently recognizing this right, the state legislature has not attempted to prohibit any bank, banking association, private banker or person not incorporated under the provisions of chapter 10 of title IX of the code, from engaging in and carrying on the business of a savings bank, but does prohibit such bank, banking association, private banker or person not incorporated under such law, from advertising, by issuing or circulating any card or other paper, or exhibiting any sign, that such bank, banking association, private banker or person, is a savings bank or savings institution organized and transacting business under chapter 10 of title IX of the code.

The purpose of this statute is to prevent the public from being deceived as to the character of the bank with which it may desire to transact business. If a savings bank is conducted by private individuals, it can not seek the confidence or business of the public under the advertisement that it is a savings bank or savings institution organized under the laws of the state and subject to state supervision.

A similar provision is found in section 1862 of the code, which provides that no partnership, individual or unincorporated association, engaged in buying or selling exchange, receiving deposits, discounting notes and bills, or other banking business, shall incorporate or embrace the word "state" in its name. By this section the right of individuals and unincorporated associations to carry on the business of banking is fully recognized, and they are simply prohibited from advertising, by incorporating the word "state" in their names, that they are organized under the banking laws of the state and subject to state supervision.

While there are no adjudicated cases upon the identical questions under consideration, general principles of law have been enunciated by various courts and text writers, which are in harmony with the general principle stated.

In *National Bank v. Ferguson*, 48 Kan., 739, it is said:

> "And a bank may certainly, as a part of its legitimate banking business, receive deposits, pay interest thereon, secure its depositors by bonds or any other lawful means, and loan the money which it receives as general deposits."

This was said with reference to the powers of a national bank.

In Zane on Banks and Banking, section 122, it is said:

> "The power of an ordinary chartered bank to maintain a savings bank department seems not to have been made the subject of adjudication. But since the receiving of deposits is a banking transaction, and since the maintenance of a savings bank department is merely one method of receiving deposits, there ought to be no doubt in the mind of any judge that such a proceeding is within the coporate power of either a national or a state chartered bank."

The powers conferred upon national banks by section 5136 of the Revised Statutes of the United States, are broad enough to

cover the business of conducting a savings department of a national bank; and I find upon inquiry that many national banks under this construction of their powers, have organized and are now conducting savings departments.

In *Western National Bank v. Armstrong*, 152 U. S., 346, it is said that all incidental powers necessary to carry on the business of banking are impliedly granted under the national bank act.

It is undoubtedly within the power of the state to determine the class of business which shall be conducted by banks incorporated under chapter 1 of title IX of the code, and to withhold from such institutions the right to carry on a savings department in connection with their general banking business. Such banks, however, are authorized, under the present law and the charters conferred thereby, to transact a general banking business which may properly include a savings department, unless the right to conduct the same has been withheld by the legislature under the provisions of chapters 11 and 12 of title IX of the code. There is no provision in either of these chapters which prohibits banks organized under the state law from maintaining savings departments.

I have therefore reached the conclusion that, subject to the restrictions of section 1859 of the code, prohibiting the use of the words "savings bank" and "savings institution," in advertising their business to the public, national, state and private banks may lawfully organize and conduct a savings department in connection with their general banking business, and that individuals, partnerships and private corporations may, subject to the same restrictions, engage in and carry on a savings bank business.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

October 31, 1902.

TO HON. FRANK F. MERRIAM,
Auditor of State.

COMMISSIONER OF LABOR—Construction of chapter 150 of the acts of the Twenty-ninth General Assembly.

SIR—You request an official opinion from this office on the question whether chapter 150 of the acts of the Twenty-ninth General Assembly is in conflict or repeals that portion of section 2472 of the code, as amended by section 3 of chapter 97 of the acts of the Twenty-ninth General Assembly, which imposes upon you, as labor commissioner, the duty of giving notice to the owner or person in charge of a factory or building, of the failure to provide such factory or building with a fire escape for the safety of employes, and if the same is not remedied within sixty days after service of such notice, you shall give the county attorney of the county in which such factory of building is situated, written notice of the facts.

In section 4 of chapter 150 of the above acts, a like duty is imposed upon the chief of the fire department or the mayor of each city or town where no such chief of fire department exists, or the chairman of the board of supervisors, in case such building is not within the corporate limits of any city or town, with the further requirement that such notice shall be served upon the agents or lessees of the owner or owners, providing such notice can not be served upon the owner or owners thereof; and further provides that the notice served under this section shall command such owner, owners or agents, or either of them, to place or cause to be placed on said building such fire escape within sixty days after service of such notice.

The distinction between the duty imposed upon you as labor commissioner, and that imposed under section 4 of chapter 150 of the above acts, is that you are only required to serve notice that such owner or owners have failed to provide a fire escape as provided by law; while the duty imposed under section 4 of chapter 150 of the above acts requires that such notice shall command such owner, owners or agents, or either of them, to place or cause to be placed upon said building such fire escape, that is, under the first you report a failure to comply with the law, while under the latter the notice commands a compliance with the law. In this we can see no inconsistency between the

duties imposed under the separate acts of the Twenty-ninth General Assembly.

Under section 2472, as amended, you are not required to go any farther than to serve notice of the failure of such person or persons to provide such building with fire escape. Section 6 of chapter 150 of the above acts repeals acts or parts of acts only which are inconsistent with this chapter.

Having determined that the amendment to section 2472 of the code is not inconsistent with chapter 150 of the above acts, we must therefore conclude that section 6 of chapter 150 does not repeal the amendment to section 2472, imposing upon you the duty above mentioned.

Respectfully submitted,

CHAS. A. VAN VLECK,
Assistant Attorney-General.

November 20, 1902.

To HON. EDWARD D. BRIGHAM,
Commissioner of Labor.

ELECTION—CERTIFICATE OF—AUTHORITY OF GOVERNOR TO WITHHOLD—(1) The work of the canvassing board is ministerial, and it is its duty to compute the number of votes cast for each candidate and issue a certificate in accord therewith, unless it shall be clearly shown or apparent that the returns are false and fraudulent. (2) It is held that a certificate of election given by the board of canvassers is only evidence that the holder has received votes sufficient to elect him, and does not preclude an inquiry into the question of his qualification prior to taking office on a *prima facie* title.

SIR—Upon the question of the power and duty of the governor of the state to withhold a certificate of election from a candidate who has received a majority of the votes cast in a congressional district of the state for representative in congress, I submit the following opinion:

An examination of the authorities upon the question discloses two well settled principles of law:

First—The state board of canvassers are ministerial officers only, whose duty it is to receive the returns from the various counties and declare the results as shown by the face of the returns. This is the general doctrine, and has been declared in the election cases before congress and in the states of Alabama, Arkansas, California, Florida, Illinois, Kansas, Kentucky, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Wisconsin and South Carolina.

Under the Florida statute, which provides that the duty of the state canvassing board is to canvass the votes of the election as shown by the returns, and if any such returns are shown or appear to be so irregular, false or fraudulent that the board are unable to determine the true vote for any officer or member, they shall so certify and shall not include such return in their determination or declaration, it was held by the supreme court of that state that this statute did not give authority to the state board of canvassers to determine whether an election was legally held or the vote legally cast; that by the phrase, "true vote," was meant the vote actually cast as distinguished from the legal vote.

In *People v. Hillard,* 29 Ill., 413, it is said:

> "These officers (the canvassing board) are clothed with no discretionary power. They are to open said returns and make abstracts of the votes as they appear in said returns, and the clerk is to deliver a certificate of election to each of the persons having the highest number of votes as manifested by said return. They are not allowed to reject any returns, or to decide upon their validity, if on their face they are made in compliance with the law, and in the form prescribed by the statute."

In Indiana it was held that the board can not consider any questions as to the validity of the election, but are to cast up the votes given by the proper documents and declare those elected who appear, from the face of the documents, to have the highest number of votes.

Moore v. Kessler, 59 Ind., 152.

Without further quoting from the many decisions in the various states upon this question, it is sufficient to say that the well settled rule of law is that the work of the canvassing board is strictly ministerial, and that it is their duty to compute the number of votes cast for each candidate and to issue a certificate in accord therewith, unless it shall be clearly shown or apparent that the returns are false and fraudulent.

Second—It is an equally well settled rule of law that a certificate of election, given by the board of canvassers, is only evidence that the holder has received votes sufficient to elect him, and does not preclude an inquiry into the question of his qualification prior to the taking of the seat upon a *prima facie* title.

Kentucky Election, 2 Bart. El. Cases, 327;
Smith v. Brown, 2 Bart. El. Cases, 395;
McGee v. Young, 2 Bart. El. Cases, 422.

In the case under consideration, the power of determining the eligibility of Judge Wade to a seat in congress is lodged exclusively in the national house of representatives. It is a matter which that body must determine if objection is made by any one having the right to object to Judge Wade's taking his seat in congress. The failure or refusal of the governor of the state to issue a formal certificate of his election would in nowise affect the power of that body to seat him, upon a showing that he received the highest number of votes cast in the Second congressional district of Iowa at the last general election for a member of the lower house of congress.

Under these principles of law defining the duties of the state canvassing board and the power of congress to determine the eligibility of any person elected to a seat therein, I am of the opinion that a certificate of election should be issued to Judge Wade, if it is found that he has received the highest number of votes cast in the Second congressional district of Iowa for any candidate for a seat in the lower house of congress, and that the question of his eligibility to that office must be left to the national house of representatives, with whom the power to determine such question is lodged.

Under this view it is not necessary to determine the question whether in fact Judge Wade was, at the time of the general election, or now is, ineligible to the office of representative in congress.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

December 9, 1902.

TO THE HONORABLE A. B. CUMMINS,
Governor of Iowa.

BOARD OF MEDICAL EXAMINERS—RIGHT TO PAY ATTORNEYS' FEES—It is held that the board has power to employ attorneys to appear in court for it in actions brought against it for a writ of mandamus, and the fee paid therefor is a proper item of expense to be paid by the board out of its funds.

SIR—Complying with your request of December 10th for my opinion as to whether the item of fifty dollars attorneys' fee shown by the report of the state board of medical examiners is a proper expenditure to be made by such board, I submit the following:

Section 2583 of the code, as amended by chapter 90 of the acts of the Twenty-eighth General Assembly, provides that each member of the board shall receive, out of the fund created by the payment of fees by applicants for examination, the sum of eight dollars a day and necessary traveling expenses for the time he is actually engaged in the discharge of his duties as a member of the board. The secretary shall receive a sum not to exceed twenty-five dollars per month and his necessary expenses incurred for services which can not be performed at the capitol. All printing, postage and other contingent office expenses necessarily incurred under the provisions of this chapter shall be paid from said fund. Any balance of said fund remaining shall be turned over to the state treasurer for the use of the school fund.

While there is no specific provision for the employment of an attorney by the board, or for paying the fees of one who is necessarily employed, I think the provision made for the payment of contingent office expenses should be liberally construed, and if it is necessary in the discharge of its duties to employ an attorney, I think the board has the power to do so, and that the fees charged by such attorney are a legitimate item of expense, which may be paid out of the fund received by the board. No other construction of the law would give to the board the power and efficiency which the legislature evidently designed to confer upon it.

Actions may be brought against it for a writ of mandamus or for other relief, and it is absolutely necessary that the board shall have the power to employ attorneys to appear in court for it in such cases, that its rights, as well as the rights of the state, may be protected; and when it is found necessary to employ an attorney for such purposes, I think the fees paid for the services of such attorney are a proper item of expense to be paid by the board out of its fund.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

December 12, 1902.

To HON. G. S. GILBERTSON,
Treasurer of State.

BOARD OF VETERINARY MEDICAL EXAMINERS—EXPENSES OF—It is held that items reported as paid for printing, postage, attorneys' fees, stenographic work and other items of like character are proper expenditures made by the board.

SIR—Replying to your request of December 10th for my opinion as to whether items of expense contained in the report of the state board of veterinary medical examiners for postage, attorneys' fees, stenographic work and other items in addition to the per diem and traveling expenses of members of the board,

are proper items of expense, which may be paid from the fund received by the board for examination, I submit the following:

It was undoubtedly the intention of the legislature, in creating a state board of veterinary medical examiners, to confer upon such board the powers necessary to make it an efficient, active body, and capable of carrying out the provisions of the statute by which it was created. In order to become efficient, and to carry out the intent of the legislature, it is necessary that it should have substantially the same powers as are conferred upon other state boards of like character, and if such powers are not directly and specifically conferred by the act which created the board, they will be implied because necessary to carry out the will of the legislature.

Printing, postage, stenographic work and other like items are undoubtedly necessary to the efficient work of the board. It is also equally true that if, for any reason, the board finds it necessary to employ an attorney, either to defend the board in actions brought against it, or otherwise, such employment being necessary to enforce the statute and carry out the will of the legislature, the board would, in my opinion, have the power and authority to employ and pay such attorney, and the amount so paid would be a legitimate item of expense to be paid from the fund received by the board.

Any other construction placed upon the statute by which the board was created, would abridge its effective powers and greatly lessen its efficiency as a state instrumentality.

I am therefore of the opinion that the items reported as paid for printing, postage, attorneys' fees, stenographic work and other items of like character, are proper expenditures made by the board, and that the provisions of section 11 of chapter 93 of the acts of the Twenty-eighth General Assembly, which fix the compensation to be received by the members of the board, do not apply to the class of expenses referred to.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

December 12, 1902.

To HON. G. S. GILBERTSON,

Treasurer of State.

MUTUAL INSURANCE ASSOCIATIONS—CHARGES FOR MEMBERSHIP APPLICATION—Such associations cannot charge or collect a contingent fee of one half book or board rate or any other sum except policy and survey fee at the time the application for membership is made, or at the time the certificate thereof is issued.

SIR—Complying with your request of December 17th for an opinion as to what charges mutual insurance associations, organized under chapter 5 of title IX of the code, may require persons to pay at the time application for membership is made, or when certificate of membership is issued, I beg to submit the following opinion:

Section 1765 of the code provides:

> "Such associations may collect policy and survey fees, and such assessments as may be provided for in their articles of incorporation and by-laws, and provide for such expenses and losses as may be required in the conduct of their business."

In enacting this section of the statute, the legislature has given authority to associations, organized under chapter 5 of title IX, to collect from their members policy and survey fees, and such assessments as may be required to meet the losses and expenses incurred by the associations. In so granting authority to collect money for the purposes named, the legislature has withheld from such associations the right to collect money from their members in any other manner or for any other purposes than those named in the section.

No authority of law, therefore, exists for an association of the character named to charge or collect a contingent fee of one-half of book or board rate, or any other sum, except policy and survey fee, at the time application for membership is made, or at the time the certificate thereof is issued, and any such charge is in violation of the chapter of the statute under which these associations are organized. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

December 29, 1902.

TO HON. FRANK F. MERRIAM,
Auditor of State.

INSURANCE COMPANIES—EXAMINATION OF BY AUDITOR OF STATE—(1) It is held that when the auditor or other person appointed by him makes an examination of an insurance company, he or the person so appointed has the right to retain the money paid by the company examined for expenses incurred in making the examination, or as compensation if it is made by one who is not receiving a salary from the state, and that the auditor is not required to account for and pay the money so received into the state treasury. (2) It is held that the phrase "foreign insurance company", used in section 1753 of the code, must be held to mean every insurance company not organized under the laws of the state of Iowa. (3) It is held that it is the duty of the auditor to keep an official record of examinations made or ordered to be made by him of insurance companies, and of the money paid either as expenses or compensation for such examination, and to whom the same was paid.

SIRS—Before taking up the legal questions involved in your request for an opinion as to whether the auditor of state is required by law to account for and pay into the state treasury the expenses and fees received by him, or by any person appointed by him, for the examination of insurance companies doing business in this state, I desire to say that the statutes regulating the business of insurance companies within the state are so conflicting and inharmonious that it is almost impossible to reconcile the various provisions which have been incorporated into the statute by different legislatures.

The insurance laws of the state should, in my judgment, be repealed and a new insurance code enacted, with harmonious provisions which will cure the many glaring defects existing in the present statute.

With this statement as to the present condition of the insurance laws of the state, I will now take up the questions upon which my opinion is requested.

The insurance laws of the state consist of chapters 4, 5, 6, 7, 8 and 9 of title IX of the code, and the amendments thereto since 1897, and chapter 65 of the acts of the Twenty-eighth General Assembly. These statutes recognize and attempt to regulate two general classes of insurance, viz: insurance other than life, and life insurance. Chapters 4 and 5 of title IX regulate companies and associations conducting the business of insurance other than life. Chapters 6, 7, 8 and 9, and chapter 65 of the acts of the Twenty-eighth General Assembly relate to the various classes of life insurance companies and associations, and regulate the same.

Section 1731 of the code, which is a part of chapter 4, authorizes the auditor of state, whenever he shall find it expedient, to appoint one or more persons, not officers, agents or stockholders of any insurance company doing business in the state, to make an examination of the affairs of any insurance company doing business in the state, other than life insurance companies, or he may make such examination himself.

No provision is made in this section, nor in chapter 4, as to the compensation to be paid for making such examination.

At the time this section of the code was enacted, it was undoubtedly the intention of the legislature that all expenses and fees paid by the insurance company or association which was examined by the auditor, or by the person appointed by him for that purpose, should be paid into the state treasury, as is clearly indicated by the language of section 1752, which provides:

> "There shall be paid to the auditor of state for services required under the provisions of this chapter, the following fees, which shall be accounted for by him in the same manner as other fees received in the discharge of the duties of his office:
>
> * * * * * *
>
> "8. For official examination of either domestic or foreign company, the actual expenses incurred."

This provision of section 1752 continued to be the law after the enactment of the code until the eighth day of April, 1898, when it was repealed by chapter 45 of the acts of the Twenty-seventh General Assembly.

Prior to its repeal, the auditor was required to account for all fees and expenses received by him for the examination of insurance companies doing business in the state under the provisions of chapter 4, and to pay the same into the state treasury.

The act of the legislature in repealing subdivision 8 was an explicit declaration by the law making power, that the auditor of state should not thereafter be required to account for, or pay into the state treasury, the money paid to him, or to the person appointed by him, by insurance companies doing business under chapter 4, as the expenses incurred in the examination of such companies.

The repeal of subdivision 8 must be taken as a grant of authority from the legislature, by which the auditor, or the person appointed by him, is authorized to retain the money received from the insurance companies examined, for the purpose of reimbursing themselves for actual expenses incurred, and, in the case of the person appointed by the auditor, as compensation for his services in making such examination.

No other conclusion can be reached in construing the provisions of section 1752 in connection with chapter 45 of the acts of the Twenty-seventh General Assembly.

The repeal of subdivision 8 must also be taken as an expression of the legislature as to the disposition of any money paid by insurance companies doing business under title IX of the code, and as having a bearing upon the construction which must be given to the other provisions of chapters 5, 6, 7, 8 and 9 thereof.

Section 1766 of the code authorizes the auditor to make a personal examination of insurance associations doing business under chapter 5 of title IX, or to appoint some person, not an officer, agent or stockholder of any insurance company doing business in the state, to make such examination, and provides that, if the person so appointed is not receiving a regular salary in the office of the auditor, he shall be entitled to receive five dollars a day for his services, in addition to his actual traveling and hotel expenses; but if such person is a regular employe of the office, he shall be paid only his actual traveling and hotel expenses. Such expenses are to be paid by the association examined, or by

the state upon the approval of the executive council, if the association fails to pay the same. There is no provision of this chapter requiring the auditor, or the person so appointed, to account for or pay into the state treasury the expenses and fees paid by the association for such examination.

The provision of the statute which requires such expenses and fees to be paid by the state to the person entitled thereto, if the same are not collected from the association examined, negatives the idea that it was the intention of the legislature that such fees and expenses should be accounted for and paid into the state treasury, as such a transaction would be simply taking the money out of the state treasury by the person who made the examination, and then at once requiring him to account for the same and pay it back into the treasury. There is certainly no object to be attained by such a transaction, nor any reason upon which it can be based.

Section 1777 of the code provides:

> "The auditor at any time may make a personal examination of the books, securities and business of any life insurance company doing business in this state, or authorize any other suitable person to make the same, and he or the person so authorized may examine, under oath, any officer or agent of the company or others, relative to its business and management. If upon such examination the auditor is of the opinion that the company is insolvent, or that its condition is such as to render its further continuance in business hazardous to the public or holders of its policies, he shall advise and communicate the facts to the attorney-general, who shall at once apply to the district court of the county, or any judge thereof. * * * for an injunction," etc.

There is no provision in this section, or in chapter 6, for the payment of the expenses or compensation of the person conducting such examination. The question of payment, both of expenses and compensation, appears to have been left to the auditor by the legislature. It is of course true upon general principles that the auditor could charge no compensation for making an examination of an insurance company, but would undoubtedly be entitled to any actual expenses incurred by him

in making such examination. It is equally true that if some other person was appointed by him who was not receiving a salary from any of the state departments, such person would be entitled to receive compensation for his labor.

The construction which has always been given this section is that such expenses and compensation are to be paid by the company examined, and there being no provisions requiring the auditor to account for and pay into the treasury the amount of such expenses and compensation, such amounts have always been retained by the persons making the examination.

Section 1790 of the code, which is contained in chapter 7 of title IX, and section 14 of chapter 65 of the acts of the Twenty-eighth General Assembly, which may be considered as an amendment to chapter 7, give to the auditor power to make, or cause to be made, an examination of the affairs of associations organized under chapter 7 of the code, or under chapter 65 of the acts of the Twenty-eighth General Assembly, at the expense of the association examined, and provide that if the examination is made by the auditor or his clerk, he shall receive necessary hotel and traveling expenses only; if made by a person not regularly employed in his office, the association is required to pay the actual cost thereof, not exceeding five dollars a day for the time required, and actual expenses.

There is a further provision in section 14 that if such amounts are not paid by the association examined, they shall be paid by the state upon the approval of the executive council.

There is no provision, either in chapter 7 of the code or chapter 65 of the acts of the Twenty-eighth General Assembly, requiring the expenses of such examination to be accounted for by the auditor and paid into the state treasury.

Section 1829, which is contained in chapter 9 of title IX, relating to fraternal beneficiary societies, provides that the auditor may personally, or by some one designated by him, examine such associations at their home office, and that such examination shall be at the expense of the association, and be limited to five dollars a day and the necessary expenses of travel and hotel bills. There is no provision in this chapter requiring the auditor to account

for or pay into the state treasury any part of the money received for such expenses.

These are all the provisions contained in the chapters of the code relating to insurance, for examination of insurance companies by the auditor, and for the payment of expenses and compensation incurred and to be paid for such examinations, except section 1753, which is as follows:

> "The necessary expenses of any examination of any insurance company made or ordered to be made by the auditor of state under this chapter, shall be certified to by him and paid on his requisition by the company so examined; and in case of failure of the company to make such payment, the auditor shall suspend such company from doing business in this state until such expenses are paid. If such expenses are not paid by the company, they shall be audited by the executive council and paid out of the state treasury. But in no case shall any foreign insurance company be examined, except by order of the executive council."

The effect of the provisions of this section is to empower the auditor to make a requisition upon any insurance company organized or doing business under chapter 4 of title IX of the code, for the expenses of any examination, which he has ordered to be made of the affairs of such company, and if the company refuses to pay such expenses on the requisition of the auditor, he may suspend it from doing business in the state until such expenses are paid. It is the method provided by the legislature of enforcing the collection of the expenses incurred in examining insurance companies, and can not affect the interpretation which must be given sections 1731, 1766, 1777, 1790 and 1829 of the code, and section 14 of chapter 65 of the acts of the Twenty-eighth General Assembly.

Construing the provisions of these sections with section 1752, and taking into consideration the act of the legislature in repealing subdivision 8 of that section, whereby the legislature took from the auditor the duty of accounting for and paying into the state treasury the money received by him, or by any person appointed by him, for the examination of an insurance company, but one conclusion can be reached as to the right of the auditor to retain the money paid him by insurance companies to reim-

burse him for actual expenses incurred in making such examinations; or as to the right of any person appointed by him to make such examinations, who is not receiving a salary from the state, to retain the money paid by such insurance companies as compensation for his services and to reimburse him for actual expenses incurred.

In repealing subdivision 8 of section 1752, the legislature undoubtedly attempted to harmonize in some degree the conflicting provisions of chapters 4, 5, 6, 7, 8 and 9, and to establish a uniform rule as to the disposition of money paid by insurance companies for examinations; and the repeal of the only provision of the statute which required the auditor to account for and pay into the state treasury the money so paid by insurance companies, must be taken as conclusive that it was the intent of the legislature that such expenses and fees should not be paid into the state treasury.

Such expenses and fees are undoubtedly required, by the provisions of the sections referred to, to be paid by the insurance companies to the person making the examination, and the legislature having declared by its act that the amounts received therefor should not be paid into the state treasury, the conclusion necessarily is that such amounts are to be retained by the person making the examination to reimburse him for actual expenses incurred, or to compensate him for the labor performed, as the case may be.

I am therefore of the opinion that when, under the existing statute, the auditor, or other person appointed by him, makes an examination of an insurance company, he, or the person so appointed, has the right to retain the money paid by the company examined for expenses incurred in making the examination, or as compensation, if it is made by one who is not receiving a salary from the state; and that the auditor is not required to account for and pay the money so received into the state treasury.

Second—As to the meaning of the phrase, "foreign insurance company," as used in section 1753 of the code, I am of the opinion that it must be held to mean every insurance company not organized under the laws of the state of Iowa.

This phrase, or one of similar import, occurs in every chapter of the code relating to insurance companies, and it clearly refers to all classes of insurance companies organized in other states and in foreign countries. To give the phrase a different interpretation in the connection in which it occurs in section 1753, would be a violation of every well known rule of statutory construction.

Third—As to whether it is the duty of the auditor to keep an official record of examinations made, or ordered to be made, by him of insurance companies, and of the money paid, either as expenses or compensation for such examinations, and to whom the same was paid, I am of the opinion that it is his duty to keep such official record.

It is part of the official duty of the auditor to make an examination of the business and affairs of insurance companies doing business in the state, as circumstances may demand, and everything connected with such examination should be made a part of the official records of his office. Such records should include a statement of the amount of money paid by insurance companies, and to whom the same was paid, for examinations, so that information as to every material fact connected with the examination of insurance companies may be obtained from the official records of the auditor's office. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

December 31, 1902.

TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

BUREAU OF LABOR STATISTICS—The commissioner has the right to add to the blank form prescribed by statute all questions which he may deem necessary to gain such information as he is required to add under sections 2470 and 2472 of the code, as amended.

SIR—Your request for an opinion from this office as to whether it is mandatory upon you to adhere strictly to the blank

form provided in section 2474 of the code has been referred to me to answer.

The first sentence in the above section makes it the duty of every owner, proprietor or manager of every factory, mill, workshop, etc., or any other establishment where labor is employed as herein provided, to make to the bureau upon blanks furnished by said bureau such reports and returns as said bureau may require for the purpose of compiling such labor statistics as are contemplated in this chapter, and it further provides that such report shall be made within sixty days from the receipt of the blanks furnished by the commissioner.

From this sentence it will be seen that the blanks to be furnished such persons are to be such as the commissioner may require for the purpose of compiling labor statistics, as are contemplated in chapter 8 of title XVIII of the code. This sentence of the section does not require the commissioner to furnish the blank form incorporated at the end of the above section. The commissioner must be the sole judge of the form of the blanks to be furnished such persons for the purpose of ascertaining the information desired to enable him to compile the labor statistics contemplated in the above chapter.

The next sentence in the section provides that any person mentioned within this section, who neglects or refuses to make to the commissioner such report as may be required by the following blanks, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished. This sentence would seem to indicate that the penalty would not attach for a neglect or a refusal to furnish to the commissioner such report or returns as is required by the blank, which is made a part of section 2474.

There seems to be nothing in the above section which limits the commissioner to the blank form incorporated within this section.

It is my opinion that it was the intent of the legislature not to limit the commissioner to the blank form incorporated within the above section, but to leave it a matter within his discretion as to whether this blank included all questions necessary to secure the information desired to enable the commissioner to per-

form all of the duties imposed upon him relating to the compiling of labor statistics provided for in chapter 8, title XVIII of the code.

I am further convinced that such was the intention of the legislature for at a subsequent session thereof sections 2470 and 2472 were amended as to require the commissioner to gain further information relative to labor statistics, than was required of him at the time section 2473 and the blank therein contained were adopted.

I am, therefore, clearly of the opinion that you have the right to add to the blank form above mentioned all questions which you deem necessary to gain such information as you were required to do under sections 2470 and 2472 as amended.

Respectfully submitted,

CHAS. A. VAN VLECK,
Assistant Attorney-General,

January 8, 1903.

TO THE HONORABLE EDWARD D. BRIGHAM,
Commissioner, Bureau of Labor Statistics.

INSURANCE COMPANIES—ASSESSMENT—Sections 1752, 1761 and 1764 of the code construed.

SIR—In reply to your favor of the 17th inst. requesting my opinion as to the construction to be placed upon sections 1752, 1761 and 1764 of the code, I beg to submit the following opinion:

Chapter 5 of title IX of the code provides for the organization and regulation of a certain class of assessment insurance companies, and is complete within itself, so far as the duties of the auditor are concerned with reference to such companies.

Section 1761 provides that they shall not begin business until they have performed the conditions precedent therein named, nor until their acticles of incorporation and form of policy shall be approved by the auditor of state. No provision is made in this chapter for any fee to be paid by the company to the auditor for the approval of the articles of incorporation, the form of

policy, or the issuance of a certificate which entitles the company to commence business.

Subdivision 1 of section 1752 can not be held to apply to companies organized under chapter 5, as the fees provided in that section to be paid by insurance companies to the auditor are by the terms of section 1752 expressly limited to companies organized under chapter 4 of title IX.

Section 1764 provides that associations organized under chapter 5 shall pay the same fees for annual reports and annual certificates of authority as are required to be paid by domestic companies organized and doing business under chapter 4, but does not provide that any fee whatever shall be paid to the auditor for the examination of the articles of incorporation, the form of the policy, the approval thereof, or the issuance of the original certificate to do business.

It is a familiar rule of law that no fees can be charged by a public officer except those which are expressly provided by statute, and in the case under consideration no fees having been fixed by the legislature which such companies are required to pay for the examination of their articles of incorporation, policies and the issuance of the original certificate to do business, no fee can be charged by the auditor for the performance of that duty.

I am not advised as to what has heretofore been the practice in the auditor's office as to the collection of fees from companies organized under chapter 5, but am of the opinion that the only fees which can be properly charged and collected from such companies are those named in sections 1764 and 1766, the latter section relating to the examination of the companies by the insurance department of the state.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

January 22, 1903.

To HON. B. F. CARROLL,
Auditor of State.

TAXATION—EXEMPTIONS FROM—Paragraph 7 of section 1304 of the code construed.

SIR—I beg to acknowledge the receipt of your favor of the 17th inst. requesting my opinion as to whether the exemptions provided for in paragraph 7 of section 1304 of the code, as amended by the acts of the Twenty-ninth General Assembly, apply to both real and personal property. In compliance with such request I submit the following opinion:

Subdivision 7 provides that "the property, not to exceed eight hundred dollars in actual value, of any honorably discharged Union soldier or sailor of the Mexican War or of the War of the Rebellion, or of the widow remaining unmarried of such soldier or sailor," shall be exempt from taxation.

The word "property" as used in this section is in its broadest meaning, and was clearly intended to cover both real and personal property, the object being to give every honorably discharged Union soldier or sailor, or his widow, an exemption of eight hundred dollars upon all taxable property owned by him or her.

The exemption should, in my opinion, be made from the aggregate amount of the assessment, and need not be specifically deducted from any particular property, either real or personal. That is to say, all property subject to taxation should be listed, the value thereof fixed by the assessor, and from the aggregate amount of such value, if less than five thousand dollars, a deduction of eight hundred dollars should be made as the exemption to which such soldier, sailor or widow is entitled under the statute.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

January 23, 1903.

TO HON. B. F. CARROLL,
Auditor of State.

INSURANCE ASSOCIATION—MUTUAL—It is held that it is within the power of the members of such association to determine whether proxies will be allowed at its meetings.

SIR—In response to your request of the 21st inst. for an opinion as to whether a mutual assessment association, organized under chapter 5 of title IX of the code, may, by articles of incorporation, prohibit the use of proxies by its members in voting at its annual or other meetings, I submit the following opinion:

There is no provision of the general incorporation laws of the state regulating the method of voting at corporate meetings, nor does chapter 5 of title IX. provide that members of associations organized thereunder shall have the right to vote proxies which they have received from members who are not present at any of the meetings of the association.

I think it is, therefore, within the power of the members of such association to determine whether proxies will be allowed at its meetings, and that it is competent for them to provide in their articles of incorporation that their members may, or may not, vote at such meetings by proxy.

Under this view I see no objection to an association, organized under chapter 5 of title IX of the code adopting an amendment to its articles of incorporation substantially in effect as that submitted, and providing that the vote at the meetings of the association shall be only by members present.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

January 23, 1903.

To HON. B. F. CARROLL,

Auditor of State.

FARMERS INSTITUTE—APPROPRIATION FOR—Chapter 69 of the acts of the Twenty-ninth General Assembly construed with section 1675 of the code.

SIR—I am in receipt of your favor of the 29th inst. requesting my opinion as to whether a Farmers' Institute, held under the provisions of chapter 3 of title IX of the code, prior to the fourth day of July, 1902, is entitled to the appropriation of seventy-five dollars made by chapter 69 of the acts of the Twenty-ninth General Assembly.

Section 1675, before it was amended, provided that such institutes, when held at any time within the year and remaining in session for not less than two days in each year, should be entitled out of the moneys in the state treasury not otherwise appropriated to a sum not exceeding fifty dollars annually for such institute work. No time is fixed by the statute when such institute work shall be performed, and it may therefore be done at any time during the year for which the appropriation is claimed.

Chapter 69 of the acts of the Twenty-ninth General Assembly amend section 1675 of the code by simply striking out the word "fifty" and inserting in lieu thereof the words "seventy-five." No other change is made in the language of the section.

After this amendment, section 1675 provides that each Farmers' Institute, with a president, secretary, treasurer and executive committee of not less than three outside of the officers, which holds a two days' session in any one year, shall upon proof of such organization and institute work, be entitled to seventy-five dollars out of the state treasury to pay the expenses of its session.

The effect of the amendment is to change the amount which such Farmers' Institute is entitled to draw from the treasury, and does not change the time when the institute work must be performed, or require that it be done after the amendment became a law. Such work may be performed at any time during the year preceding the filing of the bill for expenses; and in the case under consideration I am of the opinion that the Boone County Farmers' Institute, which held its sessions February

22 and June 7, 1902, is entitled to have its expenses paid to an amount equal to seventy-five dollars, although its sessions were held prior to the fourth of July, 1902, when the amendment to section 1675 went into effect.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

January 30, 1903.

To HON. B. F. CARROLL,
Auditor of State.

DISTRICT JUDGE—COMPENSATION OF—It is held that all judges of the district courts in the state, who were elected by the people to fill an unexpired term of a judge who had previously died or resigned, are entitled to compensation at the rate fixed by law at the time of such election.

SIR—I beg to acknowledge the receipt of your favor of the 24th of November, enclosing a letter from the Hon. George W. Dyer, judge of the Eleventh judicial district of Iowa, and requesting my opinion as to whether a judge of the district court, who was elected at the November election, 1902, to fill an unexpired term of a district judge who had previously resigned, is entitled to receive compensation at the rate of thirty-five hundred dollars a year, under the provisions of section 253 of the code, as amended by chapter 13 of the acts of the Twenty-ninth General Assembly, or whether he is entitled to compensation for his services only at the rate of twenty-five hundred dollars per annum, as provided by said section before the same was amended; the facts upon which my opinion is requested being substantially as follows:

The Hon. W. S. Kenyon was elected judge of the district court for the Eleventh district of Iowa at the November election, 1898, and assumed the duties of his office as such judge on the first day of January, 1899. In the summer of 1902 he

resigned, and the Hon. George W. Dyer was appointed by the governor to fill the vacancy existing between the time of the resignation of Judge Kenyon and the November election of that year. At the November election Judge Dyer was elected judge of that judicial district, duly qualified and performed the duties of the office from the time of his election until the first day of January, 1903.

The question presented is, whether Judge Dyer is entitled to compensation from the time of his election in November, 1902, until January 1, 1903, at the increased rate of salary fixed by the Twenty-ninth General Assembly; or whether he is entitled to compensation only as fixed by the code before section 253 was amended by striking out the words "two thousand five hundred" in the second line thereof, and inserting in lieu thereof the words "three thousand five hundred"?

Section 9 of article V of the constitution of the state provides:

> "The salary of each judge of the supreme court shall be two thousand dollars per annum, and that of each district judge one thousand six hundred dollars per annum, until the year eighteen hundred and sixty; after which time they shall severally receive such compensation as the general assembly may by law prescribe, which compensation shall not be increased or diminished during the term for which they shall have been elected."

Is this constitutional provision applicable to the facts in the case under consideration, and is Judge Dyer prohibited thereby from receiving the compensation fixed by the Twenty-ninth General Assembly, for the reason that he was elected to fill an unexpired term of a district judge who had resigned his office?

The determination of these questions rests almost wholly upon the construction given to the provisions of the constitution quoted.

A casual reading of this provision may lead to the conclusion that it was intended to, and does, apply to the entire term of the office for which a judge of the district court was elected, and that neither he nor any successor who is appointed or elected to fill any portion of such unexpired term, can receive

any other or different compensation than that fixed by law at the time such judge was elected for the full term of the office.

The reasoning which may be advanced in support of this construction is that one who is appointed or elected to fill an unexpired term of an officer who has resigned or died during his term of office, stands in the shoes of his predecessor, and is entitled to receive only the compensation which his predecessor was entitled to receive under the law in force at the time of his election. So far as an appointee is concerned, this construction has support both in reason and authority.

In *Larew v. Newman*, 81 Cal., 588, where an officer of that state was appointed to fill an unexpired term of one who had resigned, it was held that the appointee could only receive the salary which his predecessor was entitled to receive during his term of office, although the legislature had increased such compensation during that term and before the appointment of the officer to fill the unexpired term. The decision of this case is grounded upon the reasoning that the person who was appointed to fill an unexpired term of a public office, stood in the shoes of the officer who had resigned such office, and gained no additional rights to compensation under his appointment.

As applied to appointees of public offices, I believe this principle to be sound; there is, however, in my opinion, a wide distinction in the tenure of office between one who is appointed, and one who is elected to fill an unexpired term caused by the resignation or death of a predecessor. An appointee simply takes possession of the office under the authority of the appointive power of the state, and performs the public duties thereof until the people have an opportunity to fill such office by an election. In such case it is clear that the person appointed would be entitled to receive only the salary which his predecessor in office was entitled to receive under the laws of the state in force at the time of his election.

When, however, a person is elected by the people to fill an unexpired term of a public office, his title to the office and his right to the emoluments and compensation thereof, as provided by law, are held directly from the sovereign power of the state, and he does not step into and occupy the shoes of his prede-

cessor; and the construction which in my opinion, should be given to the provision of the constitution quoted, sustains this distinction as to the tenure of office.

This constitutional provision was framed by the constitutional convention and adopted by the people for the purpose of preventing legislatures from influencing judges of the courts by increasing their salaries during the term of office to which they were elected, and to prevent judges, through their power and influence, from inducing legislatures to increase their compensation during their term of office.

The substance of the constitutional provision, as applied to district judges, is that the salary of each judge of the district court shall be one thousand six hundred dollars per annum, which compensation shall not be increased or diminished during the term for which he shall have been elected.

This provision must be held to apply to the judges rather than to the term of office, as the purpose of the framers of the constitution in adopting such provision was to prevent persons holding high office from obtaining an increase in the salary of such office after they had been elected thereto, and not to prevent the legislature from increasing the salary attached to such office during any particular period of time.

This construction of the constitutional provision makes it effective both in its letter and spirit.

Constitutional and statutory provisions of this character are to be liberally construed and strictly enforced.

Garvie v. Hartford, 54 Conn., 440;
Cox v. Burlington, 43 Iowa, 612;
Weeks v. Texarkana, 50 Ark., 81;
Gross v. Kenfield, 57 Cal., 626.

When Judge Dyer was elected judge of the district court of Iowa on the fourth day of November, 1902, he was elected to fill that office for the term beginning upon the day of his election and extending to the first day of January, 1903. That period of time constituted the term of office to which he was elected. So far as he was concerned, it was entirely separate and distinct from the term of office to which his predecessor, Judge Kenyon, had been elected. At the time of his election

the compensation of district judges of the state of Iowa was by law fixed at three thousand five hundred dollars per annum. This law had been in force in the state from and after the fourth day of July, 1902; and when Judge Dyer accepted the office to which he was elected, and began the perfomance of the duties thereof, he accepted it with the salary attached thereto which had been previously fixed by an act of the legislature, and it can not be said that there was any increase in his compensation during the term for which he was elected.

I am aware that the construction which I have given this constitutional provision is a liberal one, but it is, in my opinion, in harmony with the object sought to be attained by its framers.

Under this construction I am of the opinion that the Hon. George W. Dyer, and all other judges of the district court of the state who were elected by the people to fill an unexpired term of a judge who had previously died or resigned, are entitled to compensation at the rate fixed by law at the time of such election; and in the case of Judge Dyer at the rate of three thousand five hundred dollars per annum.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

January 31, 1903.

To HON. B. F. CARROLL,
Auditor of State.

MUNICIPAL CORPORATIONS—ELECTRIC LIGHT PLANTS, WATERWORKS AND GAS PLANTS, CONSTRUCTED AND OPERATED FOR THE PURPOSE OF FURNISHING LIGHT AND WATER TO—It is held that none of this class of works rises to the dignity of internal improvements, and that a corporation organized for the purpose of constructing and operating the same is within the twenty year limit fixed by the statute, and cannot endure for fifty years under the provisions of section 1618 of the code.

SIR—I beg to acknowledge the receipt of your favor of the 29th inst. requesting my opinion as to whether electric light plants, waterworks and gas plants constructed and operated for the purpose of furnishing light and water to municipal corporations, are works of internal improvement, within the meaning of section 1618 of the code, and for that reason entitled to be incorporated for a period of fifty years.

The phrase "any work of internal improvement" as used in section 1618 must be construed according to the generally accepted meaning of the words. It is somewhat difficult to determine just what are, and what are not, works of internal improvement, but there is a line which, with some possible exceptions, appears to me to divide works of *quasi* public character from those which are works of internal improvement. That is, works of internal improvement are those which the people of the entire state are, or are supposed to be, interested in and benefited by, while *quasi* public improvements which only benefit a community locally, and in which a local municipal corporation is alone interested, can not be said to be works of internal improvement.

In *Mayor of Wetumka v. Winter*, 29 Ala., 660, the supreme court of that state defines works of internal improvement as follows:

> "No case can be found, it is apprehended, where the improvement of streets, alleys, markets, etc., of a city or town have been classed as internal improvements. On the other

hand, when internal improvements by or under state authority are spoken of, it is universally understood that works within the state by which the public are supposed to be benefited, are intended; such as the improvement of the highways, the channels of travel and commerce."

In *Dawson County v. McNamar*, 10 Neb., 276, the supreme court of that state said:

"The building of a court house, although an improvement, and necessary county work, has never been classed among works of internal improvement, by which is meant—as the term is here used—only those works within the state in which the whole body of the people are supposed to be more or less interested, and by which they may be benefited; and they more commonly have reference to the improvement of highways and channels of travel and commerce."

Citing *U. P. Ry. Co. v. Commissioners of Colfax Co.*, 4 Neb., 450. The case last cited approves the definition given by the supreme court of Alabama, and holds that a bridge across the Platte river is a work of internal improvement for which bonds could be issued under the Nebraska statute. In deciding this question, it is said:

"The characteristics of the Platte river are a matter of history, and are well known, as well as the difficulty experienced in crossing it. A bridge of this kind affords a safe and convenient means of communication across the river, increases the facility for transportation and travel, and has all the characteristics of a work of internal improvement. * * * Such works must be tested by the benefits to be derived by the public from their construction, rather than by their extent or cost. A public road constructed through an otherwise impassable portion of the country, is a work of internal improvement; railways are said to be improved roads constructed for public use, although owned by private corporations. * * * A bridge of this kind is designed to open an easy and commodious thoroughfare across the river, for the use of the public. * * * We have no doubt a bridge of this kind is a work of internal improvement within the meaning of our statute."

In *DeClerq v. Hager,* 12 Neb., 185, the same court held that bridges built by a county upon the line of its highways, and wholly within such county, are not works of internal improvement according to the constitutional meaning of that term.

The same court in *Getchell v. Benton,* 30 Neb., 870, held that beet sugar manufactories, which did not manufacture sugar from beets for toll, although propelled by water power, were not works of internal improvement.

In *In re* internal improvement fund 24 Colo., 247, it was held that public buildings such as an asylum, state house, etc., were not internal improvements within the meaning of an act of the Colorado legislature, providing that the proceeds of the sale of certain public lands should be paid to the state for the purpose of making internal improvements; and the same court in *In re* Senate resolutions, etc., 12 Colo., 287, held that public reservoirs for the storage of water for irrigation and domestic uses are internal improvements within the meaning of the act of congress of March 3, 1875, providing that five per cent of the proceeds of the sale of agricultural public lands lying within the state of Colorado shall be paid to the state for the purpose of making such internal improvements within the state; as the legislature may direct. In this case, the discretion was lodged with the legislature of Colorado to determine what were works of internal improvement, for which such fund might properly be used, and a large reservoir constructed for the storage of water, to be used for irrigation and domestic purposes, can well be said to be a work by which all of the people of the state are benefited, and therefore a work of internal improvement.

In *Osborne v. County of Adams,* 106 U. S., 181, it is held that a steam grist mill constructed for public use by a county under a statute of the state of Nebraska, authorizing bonds to be issued to aid in the construction of any railroad, or other work of internal improvement, is not a work of internal improvement.

In all of these cases, the distinction between what are, and what are not, works of internal improvement, under the generally accepted definition thereof, is recognized and in some of them clearly expressed. That is, works of internal improvement

are those in which the people of the entire state are interested, and by which they are, or are supposed to be, benefited. The only case which I have been able to find, in which a contrary doctrine is even suggested, is that of *Yester v. Seattle,* 1 Wash. St., 308. The decision in this case is based upon a statute of the state of Washington, the title of which is, "An act authorizing cities and towns to construct internal improvements and to issue bonds therefor, and declaring an emergency." Under this act, cities and towns in the state of Washington are specifically given the power to construct waterworks, light plants and sewers, and to issue bonds therefor. The question arose whether the subject of the legislation was sufficiently expressed in the title of the act. In determining that question, the supreme court of Washington said:

> "The criticism is, that although there is a subject exact, since waterworks, sewers and artificial light plants are pressed, it is not the subject treated of in the body of the not internal improvements within the ordinary meaning of the phrase. Perhaps this is an original use of the term 'internal improvements.' It has certainly not been commonly applied to improvements supposed to have been made by cities for the benefit of their inhabitants, and has been employed more grandiloquently in reference to the improvement of highways and channels of travel and commerce, in the statutes of congress and the state legislatures. And yet, when under it our legislature particularizes waterworks, sewers and light plants which certainly are in fact internal improvements relative to the cities of the state, we do not deem the verbal criticism of sufficient weight to set aside the act."

From this quotation, it will be seen that the supreme court of Washington recognized the common and usual meaning of the phrase "internal improvements," and holds the act in question to be valid upon the ground that waterworks, sewers and light plants may relatively be considered so far as a city is concerned, internal improvements, when so designated by the legislature. The court thus gives to the phrase a special meaning and one different from that usually and generally understood by all legislative bodies.

Such a special and unusual meaning of this phrase can not, in my judgment, be given to it in the connection in which it occurs in section 1618 of the code. It must be held that the legislature, in using the phrase in that section, intended that it should have the usual and ordinary meaning given to it by courts and legislatures, and should not be construed as having a special or unusual meaning.

Waterworks and light plants are constructed and operated for the purpose of furnishing to the inhabitants of municipal corporations, water and light. The general public of the state have no interest therein and are not benefited, or supposed to be benefited thereby, and do not for that reason fall within the class of works commonly known as works of internal improvement. Plants constructed and operated for the purpose of furnishing heat and power to the inhabitants of a municipal corporation fall within the same class.

Under the principles of law and rules of construction laid down in the authorities cited, it appears to me that none of this class of works rises to the dignity of internal improvements, and that corporations organized for the purpose of constructing and operating the same are within the twenty-year limit fixed by the statute, and can not endure for fifty years under the provision of the statute above quoted.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

January 31, 1903.

To HON. W. B. MARTIN,
Secretary of State.

TAXATION—EXEMPTIONS FROM—Chapter 56 of the acts of the Twenty-ninth General Assembly construed.

SIR—Complying with your request for my opinion as to the construction of chapter 56 of the acts of the Twenty-ninth General Assembly, relating to the exemption from taxation of property of honorably discharged Union soldiers and sailors of the Mexi-

can and Civil wars, and of the widows of such soldiers and sailors, I beg to submit the following opinion:

Subdivision 7 of section 1304 of the code, as amended by chapter 56 of the acts of the Twenty-ninth General Assembly, provides:

> "The property, not to exceed eight hundred dollars in actual value, of any honorably discharged Union soldier or sailor of the Mexican war or of the War of the Rebellion, or of the widow remaining unmarried of such soldier or sailor,"

shall be exempt from taxation.

The manner in which such exemption shall be ascertained and given to such soldier, sailor or widow is fixed by the next provision of the subdivision, as follows:

> "It shall be the duty of every assessor annually to make a list of all such soldiers, sailors and widows, and to return such list to the county auditor upon forms to be furnished by such auditor for that purpose, but a failure on the part of any assessor so to do shall not affect the validity of any exemption. All soldiers, sailors or widows thereof referred to herein shall receive a reduction of eight hundred dollars at the time said assessment is made by the assessor, unless a waiver thereof is voluntarily made of such exemption at said time. * * * "

The first provision above quoted exempts eight hundred dollars in value of the property of any such soldier, sailor or widow, but the method by which such exemption is to be given, and the machinery through which the soldier, sailor or widow may derive the benefit thereof, are fixed by the provision of the statute last quoted.

Chapter 56 of the acts of the Twenty-ninth General Assembly became a law on the 4th day of July, 1902, and after all of the property within the state had been assessed under the law in force prior to that time, and a return of such assessment made to the proper authorities.

At the time the assessment of property for the year 1902 was made, the county auditor had no authority to furnish blank forms to the assessor for the purpose of listing soldiers, sailors and their widows, and the assessor had no authority to enter the exemption provided by subdivision 7 upon his assessment

roll; and the fact that he did not do so can not be held to be a failure upon his part to perform any duty which he was required by law to perform.

The entire power of the assessors, and of the machinery whereby the taxable value of the property in the various districts was determined, had been fully exercised and exhausted before chapter 56 of the acts of the Twenty-ninth General Assembly became a law. The members of the Twenty-ninth General Assembly knew that the assessments for the year 1902 would be returned and the power of the assessors fully exhausted before the amendment became a law. No provision is made in such amendment whereby such soldiers, sailors and widows may receive the benefit of the exemptions provided for in subdivision 7 for the year 1902; and the legislature having failed to provide any means or method by which such exemption can be secured to soldiers, sailors or their widows for the year 1902 the act of the Twenty-ninth General Assembly must, in my opinion, be construed to become operative and effective at the time of the first assessment after the 4th day of July, 1902, as that is the first assessment by which the provisions of the act relating to the manner of securing such exemptions can be carried out and made operative through the machinery created by the act, and by which the taxable value of the property of such soldiers, sailors and widows, and the exemption thereof from taxation, can be ascertained.

I am therefore of the opinion that, under the provisions of subdivision 7 of section 1304 of the code, as amended by chapter 56 of the acts of the Twenty-ninth General Assembly, the exemption of eight hundred dollars in value of the property of such soldiers, sailors and widows can not be made as to the taxes assessed thereon for the year 1902, and that the act of the legislature giving such exemption does not become operative until 1903.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 2, 1903.

TO HON. ALBERT B. CUMMINS,
Governor of Iowa.

ASSESSMENT OF CORPORATION—Land held by Iowa corporations in a foreign state or country.

SIR—Complying with your request of January 27th for an opinion upon the following question, viz:

"In estimating the taxable value of shares of stock in Iowa corporations holding land in a foreign state or country, is the assessor to deduct the value of such real estate as recognized by the assessing officers, or assessment laws of the other state or country in which the land is situated," I submit the following opinion:

An examination of sections 1308, 1310, 1313, 1323, 1324 and 1327 of the code leads me to the conclusion that where a corporation, organized under the laws of Iowa, owns land in foreign jurisdictions, and the value of the stock of the corporation is in some degree at least determined by the value of the land, the assessable value of the land, as recognized in such foreign jurisdiction, should be deducted from the gross amount of the stock of the corporation when such stock is assessed for taxation; and each individual stockholder is entitled to his pro rata share of such deduction when the stock which he owns is assessed to him.

Having reached this conclusion, I deem it unnecessary to give an extended opinion upon the question, or to take up the language of the sections referred to and construe each section separately.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 13, 1902.

To HON. W. B. MARTIN,
Secretary of State.

TAXATION—Incorporated newspaper plants and incorporated job printing offices—Sections 1319 and 1323 of the code construed.

SIR—I beg to acknowledge the receipt of your favor of the 7th inst., requesting my opinion as to whether incorporated

newspaper plants and incorporated job printing offices are taxable under section 1319 or section 1323 of the code.

An examination and comparison of sections 1319 and 1323 of the code clearly indicate that section 1319 refers only to manufacturing plants, as described in that section. Newspapers and job printing offices do not, in my opinion, come within the provisions of section 1319, and are not to be taxed under that section of the statute.

Where such plants are incorporated, they fall under the provisions of section 1323, and must make the report therein required and be taxed as provided in that section.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 13, 1903.

To HON. B. F. CARROLL,
Auditor of State.

TAXATION—EXEMPTION FROM—It is held that the homestead of a soldier or sailor who comes within the class designated by the statute, is exempt to the extent of $800, although the title thereof is in the wife; and where neither the soldier nor his wife has property of the actual value of $5,000, although the combined property of the two exceeds that amount, the soldier is entitled to the exemption given by the statute.

SIR—I beg to acknowledge the receipt of your favor of the 4th inst., requesting my opinion upon the following questions:

First—In the case of an old soldier who has no property, but whose wife has some, but not five thousand dollars in actual value, can the deduction allowed the soldier be made from his wife's property?

Second—In case the value of the combined property of the soldier and his wife should be five thousand dollars or more, would the soldier then be entitled to the exemption?

1st—To reach a proper solution of the first question stated in your request, it is necessary to take up and examine the history of the enactment of subdivision 7 of section 1304 of the code.

The exemption thereby given to soldiers, sailors and their widows was first incorporated into the statute of the state by chapter 97 of the acts of the Twenty-first General Assembly, which amended section 797 of the code of 1873, by adding thereto the following provision:

> "The homestead, not exceeding five hundred dollars in value, of the widow of any federal soldier or sailor, who died during the late war while in service, or who has since died of wounds received or disease contracted while in such service. Provided the provisions of this act shall only apply to persons who do not own other real estate than such homestead."

This act became a law on the 4th day of July, 1886, and the exemption therein contained was limited to the homestead of the widow of any federal soldier or sailor who died during the late war while in service, or who has since died of wounds received or disease contracted while in such service. No exemption is given to any soldier of the Mexican or late war.

When the present code was adopted, the exemption given by the act of the Twenty-first General Assembly to the widows of soldiers and sailors was enlarged by an increase of the amount of the exemption from five hundred to eight hundred dollars, and given to any honorably discharged Union soldier or sailor unable to perform manual labor and dependent thereon for the support of himself and family. The exemption thus given by the code was confined to the homestead of the soldier or sailor, or the widow of such soldier or sailor.

Under the construction given this statute by my predecessor, Mr. Remley, it was held that the homestead of a soldier or sailor who had been honorably discharged from the service, and who was dependent upon manual labor for his support and unable to perform the same, although the title to such homestead was in his wife, came within the provisions of the statute and was exempt from taxation to the value of eight hundred dollars. I

fully agree with the interpretation placed upon the statute by my predecessor. It was clearly the purpose of the legislature to exempt the homestead of every soldier or sailor, or the widow of such soldier or sailor, who comes within the provisions of the statute, from taxation to the extent of eight hundred dollars, without reference to who held the legal title to such homestead.

The Twenty-ninth General Assembly re-enacted subdivision 7, and very materially changed its provisions. As it now stands, it provides:

> "The property, not to exceed eight hundred dollars in value, of any honorably discharged Union soldier or sailor of the Mexican war or of the War of the Rebellion, or the widow remaining unmarried of such soldier or sailor. * * * But this exemption shall not apply in the case of any soldier or sailor, or the widow of any such soldier or sailor owning property of the actual value of five thousand dollars, or where the wife of such soldier or sailor owns property to the actual value of five thousand dollars."

This act became a law on the 4th day of July, 1902.

Prior to the enactment of this statute, the exemption allowed had been confined to the homestead of the soldier, sailor or widow, and although such soldier or sailor in all other respects came within the provisions of the law, he received no benefit therefrom unless he was the owner of a homestead. In other words, he or his wife must be able to own a homestead before any property belonging to him could be exempted from taxation under the statute as it then existed.

The Twenty-ninth General Assembly undertook to eliminate this incongruity from the law, and to enlarge the exemption given to soldiers, sailors and their widows. The language of chapter 56 of the acts of the Twenty-ninth General Assembly clearly indicates that it was the purpose of the legislature to enlarge the exemption, allowed, and not to restrict it. The legislature, therefore, provided that property of any honorably discharged Union soldier or sailor, not exceeding eight hundred dollars in value, should be exempt from taxation unless such soldier or sailor, or his wife, owned property to the actual value of five thousand dollars, and the class of property to which the exemp-

tion applies was by this act enlarged so as to include any taxable property owned by the soldier or sailor, subject to the exception stated.

Under the previous statute the property of the wife of the soldier or sailor, if the same consisted of a homestead, was exempt to the extent of eight hundred dollars; and it certainly can not be said that it was the intention of the legislature, in enlarging the class of property to which the exemption should apply, to cut off any exemption of property of the soldier, sailor or his wife given under the previous statute. Any interpretation of the act of the Twenty-ninth General Assembly which would reach such result would be wholly repugnant to the spirit and intent of the legislative act.

Many cases might be cited where such a construction would work a hardship upon the soldier or sailor who was sought to be benefited by the change made in the statute. He may have been unfortunate in business and judgments may have been obtained against him which he is unable to pay, and by hard labor has earned a sufficient amount of money to purchase a modest home for his family, and to prevent the same from being taken by his creditors has placed the title thereof in his wife. Under a strict construction of the law, as it now stands, he would not be entitled to an exemption upon the homestead thus obtained, although such homestead would have been exempt from taxation to the extent of eight hundred dollars under the previous statute.

I can not bring myself to believe that such was the intention of the legislature. The statute under consideration should be construed so as to carry out the intent of the legislature as obtained from the text of the statute itself and the history of its enactment.

In *Holy Trinity Church v. United States*, 143 U. S., 459, it is said:

> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the

substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, make it unreasonable to believe that the legislator intended to include the particular act."

In *Eyston v. Studd*, Plowden, 467, it is said:

"So that a man ought not to rest upon the letter only, but he ought to rely upon the sense, which is temperated and guided by equity, and therein he reaps the fruit of the law, for as a nut consists of a shell and a kernel, so every statute consists of the letter and the sense, and as the kernel is the fruit of the nut, so the sense is the fruit of the statute. And in order to form a right judgment when the letter of a statute is restrained, and when enlarged, by equity, it is a good way, when you peruse a statute, to suppose that the law maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present."

If this rule is applied to the statute under consideration, the answer of the law maker must be that it was not the intention to restrict or abridge the exemption previously given, but to enlarge the same, and not to take away from the soldier the exemption of his homestead to the extent of eight hundred dollars in value, although the title of such homestead was in his wife.

Under the statute of Iowa, a homestead is set apart as exempt from the debts of the husband or wife for the benefit of the family, and although the legal title thereto may be in the wife, the husband has a substantial property right therein. Such right is a present and fixed one, and not merely remote or contingent, and one which he is entitled to protect. He may redeem the homestead from execution or tax sale. He has an insurable interest therein, and if it is destroyed by fire may recover the value from the company which has insured the same. In the proper support of his family it is his duty, if the homestead is liable to taxation, to pay the taxes thereon, whether the

title is in the name of his wife or in his own name, and to preserve the homestead for the benefit of the family.

In short, he has such a fixed and present interest in the homestead, the title of which is in his wife, that it may fairly be said to be his property under the provisions of the statute providing for an exemption from taxation, and that the act of the Twenty-ninth General Assembly does not take away the right of exemption of the homestead of the soldier or sailor to the extent of eight hundred dollars in value, although the title to such homestead is in his wife.

Beyond this the exemption, as to property owned by the wife, does not extend. She is not entitled to any exemption as to other taxable property owned by her, as such exemption is given by statute to the soldier, sailor or widow of such soldier or sailor as to taxable property owned by them, and is not given to the wife as to taxable property owned by her, except where the homestead character attaches. Upon other property owned and held by her, which is the subject of taxation, she must pay the taxes assessed against the same as though she were not the wife of such soldier or sailor.

The construction which I have given this statute is a liberal one, and may not be within its strict letter, but it is certainly within the spirit of the law and carries out the intent of the legislature.

2d—The exemption from taxation is modified and an exception is made thereto in the following words:

> "This exemption shall not apply in the case of any soldier or sailor or widow of such soldier or sailor owning property of the actual value of five thousand dollars, or where the wife of such soldier or sailor owns property to the actual value of five thousand dollars."

By this exception to the exemption given in subdivision 7 of section 1304, the legislature has provided that every honorably discharged Union soldier or sailor of the Mexican war or of the War of the Rebellion, or of the widow of such soldier or sailor, who does not own property of the actual value of five thousand dollars, shall be entitled to an eight hundred dollar exemption from taxation, unless the wife of such soldier or sailor owns

property to the actual value of five thousand dollars. The legislature has not provided that, where the combined property of the soldier or sailor and his wife equals or exceeds the amount of five thousand dollars, no exemption shall be made as to the property of the soldier; and as the provisions of the statute are clear, explicit and susceptible of but one construction, it must be held that the soldier or sailor is entitled to the exemption thereby given, although the value of the property owned by him, added to the value of that owned by his wife, exceeds the sum of five thousand dollars.

I am therefore of the opinion that the homestead of a soldier or sailor, who comes within the class designated by the statute, is exempt to the extent of eight hundred dollars, although the title thereof is in the wife; and where neither the soldier nor his wife has property of the actual value of five thousand dollars, although the combined property of the two exceeds that amount, the soldier is entitled to the exemption given by the statute.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 14, 1904.

TO HON. B. F. CARROLL,
Auditor of State.

SCHOOL DISTRICT—INDEPENDENT—CONSOLIDATION OF—Section 2793 of the code, as amended by section 1 of chapter 80 of the acts of the Twenty-seventh General Assembly, construed.

SIR—I beg to acknowledge the receipt of your favor of the 4th inst., requesting my opinion upon the following questions:

> "1. Does the annexation of West Decorah to the city of Decorah carry with it the annexation of all or any part of the independent school district of West Decorah to the independent school district of Decorah?

"2. If the independent school district of West Decorah has by the annexation of the town of West Decorah become a part of the independent district of Decorah, will said district receive all the assets and assume all the liabilities, including the bonded indebtedness, of the independent district of West Decorah?

"3. If the annexation of the town of West Decorah to the city of Decorah carries with it only that part of the independent district of West Decorah included in the town of West Decorah, how and by whom should the division of assets and liabilities be made?"

Section 2793 of the code was amended by section 1 of chapter 80 of the acts of the Twenty-seventh General Assembly, and now contains the following provision:

"When the corporate limits of any city or town are extended outside the existing independent district or districts, the boundaries of said independent district or districts shall be also correspondingly extended. But in no case shall the boundaries of an independent district be affected by the reduction of the corporate limits of a city or town."

The language of this statute is susceptible of but one construction; that is, when the corporate limits of a city, which is an independent school district, are extended so as to include other territory which, prior to the extension of the corporate boundaries of the city, was not included in the corporation or within the independent school district, the boundaries of the independent district are also correspondingly extended, and the territory taken into the corporate limits of the city is also taken into and becomes a part of the independent school district.

Under this statute the annexation of the town of West Decorah to the city of Decorah carries with it all that part of the independent school district of West Decorah which is included within the corporate limits of the city of Decorah, as extended, and the part of the independent district of West Decorah thus taken into the corporate limits of the city of Decorah becomes, by operation of law, a part of the independent school district of Decorah. The remaining territory of the independent school district of West Decorah, not included within the boundaries of the city of Decorah as extended, would not, upon the extension

of such boundaries, become a part of the independent school district of Decorah and would remain the independent school district of West Decorah until some action is taken to consolidate it, either with the independent school district of Decorah or other contiguous independent district or district township.

Second—In consolidating that portion of the independent school district of West Decorah with the independent district of Decorah, the latter named district takes of the assets, and assumes of the liabilities, of the district of West Decorah, such proportion thereof as the taxable value of the property taken into the independent district of Decorah bears to the taxable value of the property of the independent district of West Decorah, which is not taken into the independent district of Decorah by the extension of the corporate boundaries of that city; and an adjustment and division of the assets and liabilities of the independent district of West Decorah, as it existed before the extension of the corporate boundaries of the city of Decorah, should be made substantially in the manner provided by section 2802 of the code.

Until such adjustment is made, the property owned by the independent district of West Decorah, before the extension of the boundaries of the city of Decorah, remains the property of the West Dcorah district, and it is the duty of the boards of directors of the two districts to meet and make the adjustment and division of the property and liabilities of the district of West Decorah. In case they are unable to do so, or cannot agree upon an equitable division, such adjustment and division should be referred to, and decided by, disinterested arbitrators chosen in the manner prescribed by section 2802.

When such adjustment and division are complete, and a record thereof is made, the title to all of the assets of the independent school district of West Decorah, given to the independent district of Decorah under such adjustment and division, becomes perfect, and the latter named district then becomes liable for the portion of the debts of the district of West Decorah which the

boards of directors or the arbitrators fix as the amount which should be assumed by it. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 20, 1903.

To HON. R. C. BARRETT,
Superintendent of Public Instruction.

BOARD OF CONTROL—Transfer of patients from one hospital to another and prisoners from one penitentiary to another—Expense of to be paid out of what funds—Chapter 118 of the acts of the Twenty-seventh General Assembly and section 2283 of the code construed.

SIRS—Complying with your request of the 9th ult. for my opinion as to what funds of the state the expense of the transfer of patients from one hospital for the insane to another, and prisioners from one state penitentiary to another, shall be paid from, I submit the following:

1. Section 26 of chapter 118 of the acts of the Twenty-seventh General Assembly provides:

> "Patients shall be sent to the state hospital and convicts shall be sent to the penitentiary located in the district embracing the county from which they are committed. But the board may transfer the inmate of any hospital or the convict in any penitentiary to another hospital or to the other penitentiary at the expense of the state, and shall see that the proper record thereof is made at the hospitals and penitentiaries and in the office of the board."

This section gives to the board power to make such transfers as in its judgment shall be advisable, and the cost thereof is to be paid by the state. The payment of such cost is one of the expenditures authorized by chapter 118 of the acts of the Twenty-seventh General Assembly.

Section 4 of that act provides:

> "There is hereby appropriated from any funds in the state treasury not otherwise appropriated, sufficient thereof to pay the salaries and expenditures hereby authorized."

In my opinion the appropriation made by section 4 must be held to cover all expenditures authorized by the act of the Twenty-seventh General Assembly, except such as the legislature has specifically provided shall be paid from other appropriations. The words "hereby authorized" are broad enough to cover every expenditure authorized by that act; and it seems to me to have been clearly the intent of the legislature in making such appropriation to provide a fund out of which all of the expenses incurred under the provisions of chapter 118 should be paid, except where such expenditures are specifically directed to be paid from some other fund.

My attention has been called to an opinion of my predecessor, Mr. Remley, in which he appears to have taken a contrary view of the scope of this section; and while I have the highest regard for him as an able and profound lawyer, I can not agree with the narrow construction placed upon this section by him.

Further than this, the question upon which Mr. Remley's opinion was asked did not involve the question here presented. His opinion was asked as to whether expenditures which were necessary under chapter 118 for books, blanks, etc., which the board of control were required to furnish state institutions, should be paid from the appropriation made by section 4, or whether such expenses should be charged up to the institutions for which such books, blanks, etc., were furnished, and paid from its support fund.

His opinion is that the cost of such books, blanks, etc., should be paid out of the support fund of the institution to which such books, blanks, etc., were furnished, and not from the appropriation made by section 4; and in this he is probably correct. Beyond that question he was not called upon for an opinion, and what is said by him as to the payment of other expenses authorized by chapter 118 from the appropriation made by section 4, may fairly be said to be a dictum, and not an opinion of the

attorney-general upon a question submitted to him for his opinion.

If section 4 had been inserted in the bill which became chapter 118 of the acts of the Twenty-seventh General Assembly at or near the end of that bill, no one would have any question as to what the appropriation was intended to cover. The fact that it is inserted in the act immediately following the section which provides for the furnishing of the offices, the employment of a secretary, clerks and stenographers for the board of control, appears to have influenced the interpretation given the provisions of that section.

I think the act of the Twenty-seventh General Assembly must be taken in its entirety as an expression of the will of the legislature, and all of the provisions of the act must be construed together so as to give full force and effect to the act as an entirety.

Section 26 authorizes the board of control to incur expenses for the removal of patients from one hospital to another, and of convicts from one penitentiary to the other, and that such expense must be paid by the state. And by section 4 the legislature has provided a fund from which the expenses authorized by such act are to be paid.

I am therefore of the opinion that the expenses incurred under the authority given the board of control by section 26 should be paid from the appropriation made by section 4 of the act.

2. There is apparently a slight conflict in the provisions of section 28 of chapter 118 of the acts of the Twenty-seventh General Assembly, and section 2283 of the code. Under well known rules of construction, these two sections must be so construed as to give meaning to the provisions of each if possible, and I think a construction can be placed upon the language of both sections which will practically harmonize their provisions.

Section 2283 of the code provides:

> "Patients in a hospital, having no legal settlement in the state, or whose legal settlement can not be ascertained, shall be supported at the expense of the state. If a patient has a legal settlement within another state, the commissioners of insanity may direct the sheriff to remove such patient to

> the place of his legal settlement, and the sheriff shall receive as compensation therefor three dollars per day and his actual expenses, which will be itemized, sworn to and filed with the county auditor, and the same paid as other claims against the county."

This section clearly makes it the duty of the commissioners of insanity, whenever they find that an insane person has a legal settlement in another state or country, to direct the sheriff to remove such patient to the place of his settlement.

Section 28 of chapter 118 of the acts of the Twenty-seventh General Assembly further provides:

> "Before the county authorities shall send to a hospital for the insane a patient whose residence is unknown, and whose maintenance is charged to the state, such authorities shall notify the board, who shall immediately inquire as to the residence of such person and the propriety of his commitment to the state hospital. If the residence of said person is found to be in another state or country, the board shall see that he is sent to his residence, or, if he is confined in the state hospital, the board shall direct an attendant from the hospital to convey the patient thereto."

This section places the further duty upon the commissioners of insanity of the county to notify the board of control before an insane patient, whose residence is unknown, and whose maintenance is to be charged to the state, can be sent to one of the hospitals for the insane, and upon receiving such notification the board must immediately inquire as to the residence of such person and the propriety of his commitment to the state hospital. If it ascertains that he is not a resident of the state of Iowa, and has a legal settlement in another state or country, the board must then require that he be sent to the place of his legal settlement as provided for in section 2283 of the code. This must be done by the county authorities as provided for in that section, and the expense must be paid by the county.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

March 5, 1903.

TO THE HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

HOME ASSOCIATION FOR WOMEN AND BABIES—Unexpended balance of appropriation—change of name thereof.

SIR—Complying with your request of the 18th inst. for an opinion as to whether the Women's and Babies' Home Association of Sioux City, Iowa, would be entitled to have paid to it the unexpended balance of the appropriation made by the Twenty-ninth General Assembly, if such Home should become a branch home of the Florence Crittenden Mission of Washington, D. C., I beg to submit the following:

The right of the home to receive the unexpended balance of the appropriation does not depend upon its name. It does, however, depend upon its organization and management. When the appropriation was made by the legislature, the home was an Iowa institution, managed and controlled by citizens of Iowa, and for the benefit of the people of this state, and such facts were undoubtedly potent reasons for the granting of the appropriation by the legislature.

If, after the granting of the appropriation, the persons controlling such home should turn the management and control thereof over to persons residing outside of the state of Iowa, and such home should in fact, as well as in name, become one of a number of similar institutions, managed and controlled by an association, board or corporation outside of the state, and should not be conducted for the exclusive benefit of the people of the state, it would not, in my opinion, be entitled to receive the unpaid balance of the appropriation granted by the legislature.

If, on the other hand, although the name should be changed to a branch of the Florence Crittenden Mission, it should remain an Iowa institution, conducted for the benefit of the people of Iowa, and controlled and managed exclusively by citizens of Iowa, I think the change in the name would not affect its right to receive the appropriation.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

March 19, 1903.

To HON. B. F. CARROLL, *Auditor of State.*

FARMERS INSTITUTE—APPROPRIATION FOR.

SIR—In compliance with your verbal request as to whether the account of sixty-three dollars and fifty-five cents ($63.55), incurred in holding a farmers' institute in Woodbury county in the year 1901, and which was filed in the office of the auditor of state on the 31st day of October, 1902, should be paid from the appropriation made by section 1675 of the code, I submit the following opinion:

The appropriation made by section 1675 is not for any definite sum which is credited upon the books of the treasurer and the auditor for the purposes of the appropriation. It is in the nature of an open account, to be paid from any money in the treasury not otherwise appropriated, and for that reason does not stand upon the same footing with definite appropriations made for specific purposes, which are credited annually upon the books of the treasurer and auditor. No time is fixed by statute when the certified account for expenses incurred in holding a farmers' institute shall be filed with the auditor, and the appropriation made by the section referred to is not charged off the books of the auditor and treasurer at the end of the fiscal year, as are appropriations for a definite sum.

The account upon the books of the auditor and treasurer is, therefore, in the nature of an open account, and although the claim for the expenses incurred was not certified and filed with the auditor within the time in which such claims are ordinarily certified and filed, I see no reason why it should not be paid from the appropriation made by section 1675, if the institute was in fact held and the expenses charged in the account were incurred therefor.

The delay in filing the claim appears to have occurred through some misunderstanding as to the time within which accounts of this character should be certified and filed with the auditor, but as the persons who held the farmers' institute and incurred the expenses charged in the account did so in good faith, they should not lose their right to have such expenses paid from the appropriation made by the legislature, because of such delay, and the amount owing upon such account should, in my opinion,

be paid from the appropriation by warrant drawn upon the treasurer therefor.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

March 21, 1903.

To HON. B. F. CARROLL,
Auditor of State.

FARMERS INSTITUTE—Railroad fare of delegates from and to agricultural convention—Such expense is not an item which comes within the provisions of section 1675 of the code, nor can it be paid from the appropriation made to the farmers institute under that section.

SIR—Complying with your request of the 19th inst. for an opinion as to whether the railroad fare of a delegate from a farmers' institute to the agricultural convention held at Des Moines, is a proper item of expense to be charged to and paid from the appropriation made to farmers' institutes by section 1675 of the code, I submit the following:

An annual appropriation of fifty dollars is made by section 1675 of the code for the purpose of paying the expenses of holding a farmers' institute in each county in the state, the amount of the expenses thereof to be remitted by the auditor of state to the treasurer of the county in which the institute is held, upon an itemized statement being filed with the auditor, showing the manner in which the money has been expended in the payment of the expenses of the institute. This section was amended by chapter 69 of the acts of the Twenty-ninth General Assembly, by increasing the appropriation from fifty to seventy-five dollars annually.

The purpose of the appropriation is to pay the expenses incurred in holding a farmers' institute in the different counties of the state. It was clearly the intent of the legislature in enacting this statute, and in making the appropriation, to limit the

sums of money which should be paid therefrom to the actual expenses incurred in the farmers' institutes held in different counties in the state; and that before any part of such expenses could be paid from the appropriation, an itemized account thereof should be filed with the auditor of state, showing the actual expenses incurred in holding such institutes.

The expenses of a delegate, selected by a farmers' institute to attend an agricultural convention held at Des Moines, pursuant to the provisions of section 1657 of the code, as amended by section 3 of chapter 58 of the Twenty-eighth General Assembly, and section 1 of chapter 165 of the Twenty-ninth General Assembly, is not an item of expense which comes within the provisions of section 1675; nor can it be paid from the appropriation made to farmers' institutes under that section.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

March 21, 1903.

TO HON. B. F. CARROLL,

Auditor of State.

JUDGES OF THE SUPREME COURT—INCREASED SALARIES OF—

Chapter 12 of the acts of the Twenty-ninth General Assembly construed.

SIR—Complying with your request of the 31st of January, for a construction of the provisions of chapter 12 of the acts of the Twenty-ninth General Assembly, relating to the salaries of the judges of the supreme court, I submit the following opinion:

It is an elementary principle governing the construction of all statutes, that the intent of the legislature shall be ascertained, if possible, and an interpretation given the statute which will effectuate that intent.

In determining the true intent of an act of the legislature, where the meaning of the act is not plain, a court is warranted

in availing itself of all legitimate aids to ascertain the true intention of the law-making body, and to avail itself of certain extraneous facts as an aid in reaching the true interpretation.

Sutherland on Stat. Const., Sec. 292.

In enacting chapter 12 of the acts of the Twenty-ninth General Assembly, the legislature sought to attain two distinct objects:

(1) To require a continuous session of the supreme court to be held at the capital of the state.

(2) To increase the salaries of the judges of that court.

At the time that the bill which became chapter 12 of the acts of the Twenty-ninth General Assembly was before that body, it was a matter of common knowledge that there was a demand throughout the state that the supreme court should hold a continuous session at Des Moines for the submission and determination of causes, as it was believed that the dispatch of the business of the court would, by that means, be greatly facilitated, and that the plan by which such continuous session should be carried out, should be put in force as soon as it could reasonably be done.

It was also a well known and conceded fact that the salaries of the judges of the court were inadequate to the amount and character of the work required, and that there was a general demand throughout the entire state that their salaries be increased, and that they should have the benefit of such increase at as early a date as was possible under the provisions of the constitution.

In compliance with these well known demands, House file No. 128 was introduced, passed both houses of the legislature, and was approved on the 7th day of April, 1902.

Section 5 of the act provides:

> "Each judge of the supreme court hereafter elected shall receive a salary of six thousand dollars per year."

Section 7 of the act provides:

> "This act shall take effect and be in force on and after January 1st, 1904."

It is with the interpretation of these two sections we now have to deal.

It is undoubtedly a general rule which governs the construction and interpretation of statutes, that the words "heretofore" or "hereafter," when used in legislative acts, will be held to refer to the time before or the time after the act takes effect. This general principle is enunciated in numerous adjudicated cases, which it is not necessary to cite here.

The rule, however, is not a fixed and ironclad rule, or of absolutely universal application; and where it would defeat the manifest intent of a legislative act, it has been held by courts of high authority not to be applicable.

Perhaps no better or clearer statement of the true rule of statutory construction can be given than that stated by Mr. Chancellor Kent:

> "In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion."
>
> 1st Kent's Commentaries, 461.

It has been well said by a learned writer:

> "From this judgment and the cause of it the reader may observe that it is not the words of the law but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz, of body and soul; the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, *quia ratio legis est anima legis.* And the law may be resembled to a nut which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel. And as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law if you rely only upon the letter; and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter. And

it often happens that when you know the letter you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. * * * And in order to form a right judgment when the letter of a statute is restrained and when enlarged by equity, it is a good way, when you peruse a statute, to suppose that the law-maker is present and that you have asked him the question you want to know touching the equity. Then you must give yourself such an answer as you imagine he would have done, if he had been present."

2 Plowden's Reports, 464, 467.

"The modern doctrine is that to construe a statute liberally, or according to its equity, is nothing more than to give effect to it according to the intention of the law-maker, as indicated by its terms and purposes. This construction may be carried beyond the natural import of the words when essential to answer the evident purpose of the act; so it may restrain the general words to exclude a case not within that purpose."

Sutherland on Stat. Const., Sec. 415.

So—

"When the scope and intention of an act are ascertained by all the aids available, words whose ordinary acceptation is limited, may be expanded to harmonize with the purpose of the act. This interpretation is admissible of statutes generally. * * * It is applicable to every case within the object of the act, if it can be reasonably brought within its language."

Sutherland on Stat. Const., Sec. 417.

If, guided by these rules of construction, an interpretation can be given the sections of the statute under consideration, which will be in harmony with the rule announced and at the same time effectuate the intent of the legislature, it is clear that the statute should receive such interpretation.

When a bill for an act of the legislature passes both houses of that body, is approved by the governor, and published with the other acts of the legislature in the manner provided by law, it becomes a law of the state at the time provided by the consti-

tution, although by the terms of the act the operation of its provisions is postponed beyond the time when it in fact becomes a law of the state. That is to say, a law which is enacted by the legislature, approved by the governor, and published in the manner provided by law, becomes in fact a law of the state at the time fixed by the provisions of the constitution; and every person is charged with notice and knowledge of such law, although the operation of its provisions may be, by the language of the act, postponed to a time long after the date when the act becomes a law.

Stein v. Bennett, 13 Minn., 153.

In this case it is said:

> "This act, upon its passage by the legislature and approval by the governor, had all the constitutional requisites of a law of our state. As a public law, therefore, although by its provisions not to take immediate effect, all persons were required, from its approval, or at least from its publication, to take notice of its existence and terms and that at the time appointed its provisions would be operative for all purposes; this gave notice to all, that a change in the law regulating the remedy upon the causes of action embraced in the act, would take place at the time appointed to determine its suspension, and that thereafter the remedy could be enforced only within six years from the time the cause of action accrued."

The same principle of law is recognized in the case of *Parsons v. Circuit Judge,* 37 Mich., 287.

If, therefore, the word "hereafter," as used in section 5 of the act, will admit of a construction which will make it refer to the time when the act became a law of the state, rather than to the time when the provisions of the act went into effect under the provisions of section 7 thereof, an interpretation will thereby be given the statute which will be in harmony with the rules of construction laid down by the authorities and with the intent of the legislature.

The bill for the act under consideration passed both houses of the legislature, and was approved by the governor in regular form. It became a law of the state for all purposes on the

4th day of July, 1902, except that certain of its provisions are not to take effect or be in force until January 1, 1904. The question therefore arises, Does the word "hereafter," as used in the fifth section of the act, refer to the time when the act in fact became a law of the state, or to the time when certain of its provisions became operative under section 7 thereof?

The supreme court of this state has held in several cases, in which the question arose, that the words "heretofore" and "hereafter" refer to a time before and after the taking effect of the statute which was under consideration in the particular cases. This rule was first announced in *Charless & Blow v. Lamberson,* 1 Iowa, 435, and the decision in that case is based upon the provisions of section 35 of the code of 1851, which provides:

> "The terms 'hereafter' and 'heretofore,' as used in this code, have relation to the time when this statute takes effect."

In *Bennett v. Bevard,* 6 Iowa, 82, the same rule of construction was announced and based upon the same provisions of the code of 1851. The rule laid down in *Blow v. Lamberson* was again reaffirmed in *Thatcher v. Haun,* 12 Iowa, 303.

In *City of Davenport v. D. & St. P. R. R. Co.,* 38 Iowa, 624, the same rule of construction as to a provision of the code of 1873 was announced and based upon section 53 of that code, which is a re-enactment of section 35 of the code of 1851.

The same rule was again announced in *Thompson v. District of Allison,* 102 Iowa, 97.

In *Kendig v. Knight,* 60 Iowa, 29, the question of the meaning of the word "hereafter", as used in a city ordinance, came before the court for determination. In that case it was contended, under the doctrine of *Blow v. Lamberson* and the other cases cited, that the word "hereafter", as used in the ordinance, must be construed as relating to the time when the ordinance took effect and not to the time of its passage by the city council. In passing upon this question, and determining the meaning of the word as used in the ordinance, Mr. Seevers, C. J., speaking for the court said:

> "These cases hold that the word 'hereafter' or similar words, as used in certain sections of the code of 1851, re-

late to the time the code or certain portions thereof took effect, and not to the passage thereof. We do not think these cases have much bearing on the question before the court, because the word 'hereafter' may mean either period, and the object, intent and purpose in view must be considered in determining which. * * * The ordinance was in fact passed by the council before the resolutions were adopted, and we see no reason for holding that the word 'hereafter' in the former should be construed to mean after, by its terms, the ordinance took effect. On the contrary, we think when the object and purpose are considered, the word 'hereafter' should be construed to mean the time when the ordinance was in fact passed."

Chapter 12 of the acts of the Twenty-ninth General Assembly must, in my opinion, be held to have passed the legislature and become a law of the state under the provisions of the constitution on the 4th day of July, 1902, although certain of its provisions do not become operative until a year and six months thereafter.

It follows, therefore, that, if the word "hereafter", as used in the act, is held to relate to the date of the passage of the act, that date is fixed as the 4th day of July, 1902, and not the 1st day of January, 1904.

This interpretation is in harmony with the rules of construction referred to, and with the adjudicated cases, and one which effectuates and carries out the manifest intent of the legislature. It is absolutely certain that the legislature never intended to provide that the increase made in the salaries of the judges of the supreme court should be postponed until the 1st day of January, 1904, and that the judges who were elected after that date only should be entitled to such increase.

One of the manifest purposes of the act was to increase the salaries of judges who were elected after the passage of the act, and to give to such judges the benefit of the increase when they entered upon the term of the office for which they were elected. Another purpose of the act was to provide for a continuous session of the court at the capitol of the state. The operation of this provision of the act is by section 7 postponed until January 1, 1904. Under this construction, a part of the act becomes operative at once upon its passage, and the operation of another provision is postponed to a later day.

In giving this construction to the statute, no violence is done, either to the rules of interpretation or to the language of the statute itself.

In *Plummer v. Jones,* 84 Me., 58, it is held that a construction of a statute, whereby one provision becomes operative *in presenti,* and the operation of another provision was postponed until a future date, and the provisions of the statute thereby harmonized with the intent of the legislature, was fully authorized under well known rules of interpretation.

Under these rules of construction, and as declaring the intent of the legislature, I am of the opinion that the word "hereafter", as used in section 5 of the act, must be held to refer to the 4th day of July, 1902, when the act became a law of the state, and not to the 1st day of January, 1904, when certain provisions of the act became operative; and that all of the judges of the supreme court who were, or are, elected after the 4th day of July, 1902, are entitled to the increase of their salaries provided for in the act, such increase beginning with the term for which they were or are so elected.

Any other construction of this statute would be incongruous and inharmonious with its clear intent, and would require a part of the judges of the court to give their time and labor to the holding of a continuous session of the court at Des Moines for many years before they would receive the benefit of the increase of their salaries; and the judge who will be elected in November, 1903, and enter upon the duties of his office on the 1st day of January, 1904, would be compelled to perform the duties of the office in the manner provided by chapter 12 of the acts of the Twenty-ninth General Assembly, for a period of six years without receiving the benefit of the increase of salary provided in that act.

It is clear that no such result was intended by the legislature, and no construction should be placed upon the act which will produce that result.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

March 31, 1903.

To HON. B. F. CARROLL,
Auditor of State.

DEPOSITORY FOR THE FUNDS HELD BY THE TREASURER OF STATE—Approval of by executive council.

SIR—I beg to acknowledge the receipt of your favor of the 31st ult. submitting to me the following facts, and requesting my opinion thereon:

> "Under the law it is made the duty of the execuitve council to approve the selection of the treasurer of state of depositaries in the city of Des Moines. These depositaries are required to give bond, and the bonds must also be approved by the executive council.
>
> "A depositary makes application and gives a bond for two hundred thousand dollars, with individual sureties, and afterwards offers an additional bond for one hundred thousand dollars with a surety company as surety. These bonds are identical in form, covering the same contingencies, but do not in any way refer to each other.
>
> "What would be the effect, if any, upon the sureties of the first bond if the council were to accept and approve the second bond?"

It is, I think, a well settled principle of law that where a bond has been given to indemnify against a default, and afterward a second bond is given by the same person with different sureties, covering the same contingencies, and to indemnify against the same default, such second bond is a cumulative obligation, and the acceptance thereof does not release the sureties upon the first bond from any liability assumed by them thereunder.

Finch v. State, 71 Texas, 53;
Allen v. State, 61 Ind., 268;
State v. Sappington, 67 Mo., 529;
Moore v. Baudinot, 64 N. C., 190;
Chester v. Broderick, 131 N. Y., 549;
Coonradt v. Campbell, 29 Kansas, 391;
Beck v. People, 164 Ill., 267;
People v. Curry, 59 Ill., 35.

Upon the same principle it has been held that all bonds given during the continuance of a trust, for the purpose of indemnifying the *cestui que trust* against default of the trustee, are cumu-

lative, and that the giving and acceptance of additional and subsequent bonds do not release the sureties upon the first.

Pickens v. Miller, 83 N. C., 543;
Dugger v. Wright, 51 Ark., 232;
Lingle v. Cook, 32 Grat., 262;
Lane v. State, 24 Ind., 421.

I think there is no doubt as to the soundness of the principle of law declared by these cases.

The giving of a second bond to indemnify against the same default is not an alteration of the first obligation which will release the sureties thereon; and it has been held that, as the second bond is merely cumulative, it establishes the relation of co-sureties between the successive promisors.

Stearns on The Law of Suretyship, p. 490, and cases cited.

The case under consideration falls within the rule of law announced by the authorities cited, and if the treasurer of state has, with the advice and approval of the executive council, designated a bank in the city of Des Moines as a depositary for the collection of any drafts, checks and certificates of deposit received by him on account of any claim due the state, and the bank so designated has given security under the provisions of section 112 of the code, and afterward such bank tenders an additional bond with other sureties for the purpose of indemnifying the state against the same default for which the first bond was taken, the second bond so tendered by the bank designated as a depositary is an additional and cumulative bond, and an acceptance thereof by the executive council will not release, discharge or in any manner affect the liability of the sureties upon the bond previously given by such bank .

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

April 1, 1903.

To HON. ALBERT B. CUMMINS,
Governor of Iowa.

COUNTY SEAT—RELOCATION OF—REMONSTRANCE TO—It is held that the question whether the names attached to the remonstrance were signed thereto, is one which cannot be properly raised before the board of supervisors, and that tribunal must count all names of legal voters of the county signed to the remonstrance, without regard to the question whether the same were so signed before or after the petition was filed.

DEAR SIR—In response to your favor of April 1st, in which you ask whether names signed to a remonstrance against the relocation of a county seat, where such remonstrance was circulated and signed before the petition for the relocation was filed with the auditor, can be counted by the board of supervisors, I submit the following opinion:

The proceeding prescribed by the statute for the relocation of a county seat is special in its character, and the supervisors can exercise no powers in relation thereto except those specifically given by the statute.

It is true that the determination of the sufficiency of the petition and remonstrance, and the number of names signed to each, is a judicial act on the part of the board, but the tribunal authorized to determine the questions properly submitted to it under the statute is clothed with no other powers than those conferred by the statute creating such tribunal. These powers are clearly set forth in the statute, and are defined in *Loomis v. Bailey*, 45 Iowa, 400, as follows:

(1) The reception of petitions and remonstrances; (2) to determine the genuineness of the signatures and whether the signers be legal voters; (3) to count those persons who both petition and remonstrate as remonstrants only; (4) to determine whether the number necessary to authorize the submission of the question to the electors of the county petitioned therefor; (5) to order an election, if the petition be signed by the proper number of voters, or to refuse to do so if the petitioners be not the number required by law.

No power is given the board by statute to pass upon or determine any other question which may arise in a controversy for the relocation of a county seat. It is required by statute to act upon the petition and remonstrance, after the qualifications of the signers as voters, and the genuineness of their signatures, have been determined. It has no power to inquire into the circumstances under which the signers to the petition, or the remonstrance, affixed their names thereto, or whether the remonstrance was signed before or after the petition was filed.

The proceeding being special, and the powers of the board limited to such as are expressly conferred by statute, and the proofs upon which it must act being expressly prescribed, it can not take into consideration any matters not included in such proofs. The provisions of the statute require that the supervisors shall consider the affidavits attached to the petition and remonstrance in deciding what names appearing upon such petittion and remonstrance shall be counted; but there is no authority in the statute authorizing them to consider other proof relating to the affixing of the signatures to the petition or remonstrance. They have no authority to go beyond the consideration of the affidavits accompanying the petition and remonstrance in determining what names appearing upon these papers shall be counted.

Herrick v. Carpenter, 54 Iowa, 340.

No specific power being given the board to determine when the names signed to the remonstrance were attached thereto, or to reject any names thereon which were signed before the petition was filed with the auditor, it necessarily follows, under the rules laid down in the cases cited, that it has no power to inquire or determine when the names attached to the remonstrance were signed thereto, and has no power to refuse to count any names thereon, although they may have been signed to such remonstrance prior to the time of the filing of the petition.

The question is one which can not be properly raised before the board of supervisors, and that tribunal must count all names of legal voters of the county signed to the remonstrance, with-

out regard to the question whether the same were so signed before or after the petition was filed.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

April 4, 1903.

To HON. JOSEPH MEKOTA,
County Attorney Linn County, Cedar Rapids, Iowa.

TITLE TO LANDS WITHIN THE MEANDER LINES OF THE DES MOINES RIVER—Right of the state to lease islands or tracts of dry lands which lie between high water marks of the banks.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 30th ult., in which you say you are directed to request my opinion in writing as to what, if any, title or interest the state of Iowa has in and to the dry land within the meander lines of the Des Moines river in Iowa.

In compliance with such request I submit the following:

It is a well settled rule of law in this state that riparian owners, whose lands border upon meandered streams, take the title of the land to ordinary highwater mark.

Carr v. Moore, 93 N. W. Rep., 52;
Wood v. C., R. I. & P. R. Co., 60 Iowa, 456;
Serrin v. Grefe, 67 Iowa, 196.

The question presented in *Wood v. C., R. I. & P. R. Co.* and *Serrin v. Grefe* was whether the title of riparian owners, whose lands abut upon the Des Moines river, extends to the center of the river, or to highwater mark only; and the supreme court in passing upon that question held that the title of the owners of such lands does not extend beyond the highwater mark, nor into the bed of the stream.

In *Serrin v. Grefe* there is a statement by the learned judge who wrote the opinion in that case to the effect that meander lines along the Des Moines river constitute the boundary of the

lands abutting thereon, and that the title to the bed of the stream is in the general government. Such statement is clearly a dictum which was not carefully considered at the time it was written.

It is a well settled rule of law that the meander lines of a water course are not ordinarily boundary lines. They are surveyed for the purpose of marking out and ascertaining the amount of arable land subject to sale by the government, and are supposed to follow the banks of the stream which is meandered. But where they do not follow the sinuosities of the stream, and there is dry land between the meander line and highwater mark, the title of the riparian owner extends to ordinary highwater mark and includes such dry land, although the same may be beyond the meander line of the government survey.

If the dry land referred to in your inquiry lies between the meander line and highwater mark of the river, it belongs to the abutting riparian owner, as his title extends to highwater mark without reference to such meander line.

If such dry land is in the form of an island, and exists between the highwater mark of either bank of the stream, it belongs to the state and not to the general government, as the state holds the title to the bed of the stream and all lands lying within the highwater mark, by virtue of its sovereignty.

The stream is a public highway, and the state holds the title thereto and to the land underneath the water, as trustees for the general public; and while it probably has the right to lease such islands or tracts of dry land as lie between the highwater marks of the banks, it has no power or authority to make any lease or contract of such land which will interfere with the rights of the public in such highway.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

April 7, 1903.

To MR. A. H. DAVISON,

Secretary of Executive Council.

INSURANCE ASSOCIATION—MUTUAL—Right to collect an assessment at the time of issuing policy—right to collect policy and survey fee.

SIR—I beg to acknowledge the receipt of your favor of the 3d inst., requesting my opinion upon the following questions:

First.—"Is a mutual insurance association, organized under the provisions of chapter 5 of title IX. of the code, authorized to collect, in advance, assessments at the time of issuing the policy of insurance, provided such assessments be used only for the purpose of paying losses and expenses of such associations?"

Second.—"If such associations be so authorized, for how long a time in advance may such assessments be collected?"

Complying with your request I submit the following opinion:

Section 1765 of the code provides:

"Such associations may collect policy and survey fees, and such assessments as may be provided for in their articles of incorporation and by-laws, and provide for such expenses and losses as may be necessary in the conduct of their business."

Under this section of the statute, authority is given associations organized under chapter 5 of title IX. of the code, to provide, in their articles of incorporation or by-laws, for the collection of such assessments as may be necessary to meet their expenses. No time is fixed by statute when assessments may be made and collected for that purpose, nor is there any provision which restricts the levying of such assessments to a time when they are necessary to pay losses which have accrued.

In the transaction of the business of such an association it is important, proper and necessary to provide funds to meet its current expenses, and to collect assessments from its members at the time the policy or certificate of membership is issued, to prevent insuring the property of its members without receiving any compensation for the risk assumed by the association.

In *Corey v. Sherman*, 96 Iowa, 131, it is said:

"The company, in issuing assessment policies, required the payment of one assessment when the policy was issued.

> That practice was authorized by the section of the by-laws quoted, and was important and proper to provide funds for the current necessities of the company, to prevent insuring property without compensation, and was not a violation of the law which required it to do a mutual business."

Section 1160 of the code of 1873, under which the decision of *Corey v. Sherman* was made, was not as broad in its terms as section 1765 of the present code. The statute at that time provided:

> "And such companies, organized under this section, shall pay the same fees for annual reports as are now paid by stock companies, but such associations or companies shall receive no premiums, nor make any dividends; but the word 'premium' herein shall not be construed to mean policy and survey fees, nor the necessary expenses of such companies";

while the present code expressly provides that an association organized under chapter 5 may collect such assessments as are provided for in its articles of incorporation or by-laws, and which are necessary to meet the expenses and losses incurred by such association in the conduct of its business.

Construing the present statute in the light of the decision of *Corey v. Sherman,* I am of the opinion that an association, organized under chapter 5 of title IX. of the code, may, in its articles of incorporation or by-laws, require the payment of one assessment from each member taking a certificate of membership or a policy of insurance of the association, at the time such certificate or policy is issued, and that the proceeds of such assessment may be used in defraying the necessary current expenses of the association.

In this connection I deem it proper to say that, in an opinion given by me to Hon. F. F. Merriam, auditor of state, on the 29th day of December, 1902, an expression appears which is possibly susceptible of a construction contrary to the rule herein stated. In that opinion it is said:

> "No authority of law, therefore, exists for an association of one-half of book or board rate *or any other sum* except of the character named to charge or collect a contingent fee policy and survey fee at the time the application for membership is made. * * *"

The words, "or any other sum", as used in that opinion, were intended to refer to a fixed and stipulated fee or premium, and not to an assessment authorized by section 1765 of the code. The question which was then presented to me was, whether a fixed and definite contingent fee could be charged and collected as a premium by an association organized under chapter 5 of title IX; and it was not intended that the opinion given upon that question should hold that such an association could not provide in its articles of incorporation or by-laws, for an assessment which should be levied and collected at the time the certificate of membership or policy was issued, for the purpose of meeting the current expenses of the association, and to pay its losses.

Second—What has been said with reference to the first question herein is substantially an answer to the second; that is, but one assessment can be levied and collected at the time the policy or certificate of membership is issued, and such assessment can only cover the period of the current year in which it is made.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

April 9, 1903.

To HON. B. F. CARROLL,
Auditor of State.

ARTICLES OF REORGANIZATION AND CONSOLIDATION OF A RAILWAY COMPANY TO BE FILED IN THE OFFICE OF THE SECRETARY OF STATE—FEE PAID THEREFOR—It is held that under existing facts a certain railway company is entitled to have its agreement of consolidation and its contract of reorganization filed and recorded in the office of the secretary of state, without paying the statutory fee fixed by section 1610 of the code as amended.

SIR—In response to your verbal request for an opinion as to whether the Minneapolis & St. Louis Railroad company is en-

titled to file its articles of reorganization and consolidation in the office of the secretary of state, without paying the fee fixed by statute for the filing of articles of incorporation of corporations organized under the laws of the state of Iowa, or the articles of incorporation of foreign corporations required by the laws of the state to be filed with the secretary of state, I submit the following:

Prior to April 20, 1881, the Minneapolis & Duluth Railroad company and the Minneapolis & St. Louis Railway company were corporations of the state of Minnesota; and the Minnesota & Iowa Southern Railroad company and the Fort Dodge & Fort Ridgely Railway company were corporations of the state of Iowa. Each of these corporations had caused its articles of incorporation to be filed in the office of the secretary of state in which it existed, and each had paid the incorporation fee required by the statute of that state.

On the 20th day of April, 1881, the two Minnesota corporations and the two Iowa corporations were consolidated into a single corporation under the statutes of Minnesota and Iowa. Such consolidation was authorized by the statutes of both states, and the Iowa statute upon that subject then in force being as follows:

> "Any such corporation may join, intersect and unite its railway with the railway of any other corporation at such point on the boundary line of this state as may be agreed upon by such corporations. And with the assent of three-fourths in interest of all the stockholders may, by purchase, or sale, or otherwise, merge and consolidate the stock, property, franchises and liabilities of such corporations, making the same one joint stock corporation upon such terms as may be agreed upon not in conflict with the laws of this state."

The consolidation agreement entered into on the 20th day of April, 1881, was filed in the office of the secretary of the state of Iowa on the 31st day of May of the same year.

Under this agreement of consolidation, the Minneapolis & Duluth Railroad company, the Minneapolis & St. Louis Railway company, the Minnesota & Iowa Southern Railroad company, and the Fort Dodge & Fort Ridgely Railroad company,

became one corporation, having its domicil in both the states of Iowa and Minnesota.

In 1888 all of the property belonging to such corporation, and existing in both Iowa and Minnesota, was placed in the hands of a receiver pursuant to an order of court made by the district court of Webster county, Iowa, and the district court of Hennepin county, Minnesota, and was subsequently sold under a decree of foreclosure and purchased by a committee which reorganized the same properties and franchises under the name of the Minneapolis & St. Louis Railroad company. A new corporation was organized in Iowa known as the Minneapolis & St. Louis Railroad & Telegraph Company of Iowa, and its articles of incorporation were filed in the office of the secretary of state on the 19th day of January, 1895. After the organization of the new Iowa corporation, the Minneapolis & St. Louis Railroad company, as reorganized, deeded to the Iowa company all that part of the railroad owned by the consolidated corporation lying within the state of Iowa.

After such conveyance, and on the first day of February, 1895, an article of agreement was entered into between the Minneapolis & St. Louis Railroad company and the Minneapolis & St. Louis Railroad & Telegraph Company of Iowa, by which the two corporations were consolidated and made a single corporation under the name of the Minneapolis & St. Louis Railroad Company.

Under these facts, the question now arises whether the Minneapolis & St. Louis Railroad Company is entitled to have its agreement of reorganization, and the agreement of the consolidation of the Minneapolis & St. Louis Railroad Company and the Minneapolis & St. Louis Railroad & Telegraph Company of Iowa, filed in the office of the secretary of state, without paying the incorporation fee now fixed by statute for the filing of articles of incorporation.

The law, requiring a fee to be paid to the secretary of state for the filing of articles of incorporation in that office, was enacted by the Twenty-sixth General Assembly and became in force on the 15th day of April, 1896. Under the statute then enacted, the maximum fee which could be charged by the secre-

tary of state was three hundred and fifty dollars. This statute was again amended by the Twenty-seventh General Assembly by increasing the amount of the maximum incorporation fee to the sum of two thousand dollars. It was again amended by the Twenty-ninth General Assembly by striking out the words which fixed the maximum amount of the fee which could be charged.

It is a well settled principle of law that where two or more corporations, existing in different states, consolidate and become a single corporation under the authority of the statutes of the state in which they exist, the consolidated corporation becomes a citizen, and has its domicil in both the states in which the corporations existed prior to the consolidation.

In *Union Trust Company v. Rochester & P. R. Co.*, 29 Fed. Rep., 609, it is said:

> "It has been authentatively adjudged that where a corporation, created by the laws of several states, is sued in a federal court, in any one of those states it must be regarded, for the purpose of jurisdiction, as a citizen of that state, whatever its citizenship may be elsewhere."

In *Fitzgerald v. Mo. Pac. Ry. Co.*, 45 Fed. Rep., 814, it is said:

> "It has long been settled law that when a consolidated company is formed by the union of several corporations chartered by different states, it is a citizen of each of the states which granted the charter to any one of its constituent companies."

This principle of law has been frequently announced by the supreme court of the United States, and in *Graham v. Boston, Hartford & Erie R. R. Co.*, 118 U. S., 169, it is said:

> "The Boston, Hartford & Erie Company, therefore, though made up of distinct corporations chartered by the legislatures of different states, had a capital stock which was a unit, and only one set of shareholders who had an interest by virtue of their ownership of shares of such stock in all of its property everywhere. In its organization and action, and in the practical management of its property, it was one corporation, having one board of directors, though,

> in its relations to any state, it was a separate corporation governed by the laws of that state as to its property therein. It, therefore, had a domocil in each state."

In *Nashau Railroad Co. v. Lowell Railroad Co.*, 136 U. S., 375, it is said:

> "There are many decisions, both of the federal and state courts which establish the rule that however closely two corporations of different states may unite their interests, and though even the stockholders of the one may become the stockholders of the other, and their business be conducted by the same directors, the separate identity of each as a corporation of the state by which it was created, and as a citizen of that state, is not thereby lost."

Under this principle of law it follows that when, on the 1st day of February, 1895, an agreement was entered into between the stockholders of the Minneapolis & St. Louis Railroad Company and the stockholders of the Minneapolis & St. Louis Railroad & Telegraph Company of Iowa whereby the two corporations were consolidated under the name of the Minneapolis & St. Louis Railroad Company, the consolidated corporation became, and since that time has remained, a citizen of the state of Iowa, and is a domestic corporation so far as being amenable to the laws of the state.

This consolidation was made prior to the enactment of chapter 98 of the laws of the Twenty-sixth General Assembly, which required a fee to be paid to the secretary of state for filing articles of incorporation; it was authorized by statute; and the corporation has the right to have its articles of consolidation filed and recorded in the office of the secretary of state.

It is not a case of a foreign corporation which is required to file its articles of incorporation in the office of the secretary of state and pay the fee fixed by statute therefor before it can transact its business in Iowa; nor is it a corporation amending its articles of incorporation whereby its capital stock is increased, and for that reason required to pay the filing fee fixed by statute for such increase; but is a corporation having its domicil in this state, which presents a contract of reorganization and of consolidation authorized by the laws of the state, and asks that

the same be filed in the office of the secretary of state for the purpose of making a complete record of such reorganization and consolidation.

It is a well settled rule of law that no public officer can charge a fee for any service performed by him except such as is fixed by law. The legislature has not seen fit to fix any fee which may be charged and collected by the secretary of state for the filing of an agreement of reorganization of a corporation, or of the consolidation of two corporations, one existing under the laws of the state of Iowa, and the other under the laws of an adjoining state. It is certainly clear that no fee can be charged where such reorganization and consolidation took place prior to the enactment of chapter 98 of the acts of the Twenty-sixth General Assembly.

As to whether such fee could be charged if the reorganization and consolidation occurred after the enactment of that chapter, or after the enactment of section 1610 of the present code as amended, I do not now determine, but I am clear that under the existing facts in this case the Minneapolis & St. Louis Railroad Company is entitled to have its agreement of consolidation and its contract of reorganization filed and recorded in the office of the secretary of state without paying the statutory fee fixed by section 1610 of the code, as amended, for filing articles of incorporation in the office of the secretary of state.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

May 2, 1903.

To HON. W. B. MARTIN,
Secretary of State.

BOARD OF MEDICAL EXAMINERS—EXEMPTION FROM EXAMINATION OF PHYSICIANS WHO HAVE BEEN IN PRACTICE IN THE STATE FOR FIVE CONSECUTIVE YEARS—Construction of section 2579 of the code.

SIR—Your communication of the 12th inst. requesting my opinion as to the construction of the provision of section 2579 of the code, relating to the exemption of physicians, as defined in that section, who have been in practice in this state for five consecutive years, three years of which time shall have been in one locality, from the penalty provided in chapter 17 of title XII, is received, and in compliance with such request I submit the following opinion:

Section 2579 of the code was originally passed by the Twenty-first General Assembly as section 8 of chapter 104 of that legislature. The enactment of chapter 104 of the acts of the Twenty-first General Assembly was the first attempt of the Iowa legislature to definitely regulate the practice of medicine within the state, and in fixing the penalties prescribed by the statute which could be enforced against persons practicing or attempting to practice medicine contrary to the provisions of the act, the legislature undertook to exempt from such penalties all physicians who had been in practice in the state for five consecutive years, three of whom were in one locality.

In making this exception, it was clearly the intent of the legislature to have it apply to physicians only who had been practicing in the state of Iowa for the period of five years before the law went into effect. In other words, that physicians who had been engaged in the practice of medicine for five years in the state of Iowa prior to the enactment of the law were permitted to continue to practice their profession, and were not amenable to the penalties prescribed in the act.

The exception contained in section 2579 can not, in my opinion, be held to include any persons illegally practicing the profession of medicine in the state since the 4th day of July, 1886. The fact that a person has illegally and in violation of the provisions of chapter 17 of title XII of the code practiced

the profession of medicine for five years or more in this state, does not relieve him from the penalties prescribed in that chapter.

Second—I know of no provision of statute which authorizes the state board of medical examiners to issue a certificate to practice medicine or treat patients in this state, except upon an examination made by the board.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

May 19, 1903.

To HON. J. F. KENNEDY,
Secretary of State Board of Medical Examiners.

BOARD OF CONTROL—Right to investigate charges made against private institutions in which insane persons are kept. It is held that the board is without such power.

SIRS—In compliance with your request of June 6th, in which you ask my opinion—

First—As to the power of the state board of control to investigate charges made against a private institution in which insane persons are kept, and as to whether the board, or any of its members, has power under the law to investigate such charges and to subpoena and enforce the attendance of witnesses, administer the proper oath to them and to compel them to testify.

Second—If such power is given the board, or any of its members, can it be exercised in case the complaint is made by one not at the time an inmate, and as to acts alleged to have taken place when he was an inmate, or is the exercise of the power limited to the case of one who, while an inmate, complains of acts done while he was in the institution—

I submit the following:

By chapter 144 of the acts of the Twenty-eighth General Assembly, all county and private institutions where insane per-

sons are kept were placed under the supervision of the board of control of state institutions. Section 2 of that act provides for the visitation of such institutions by one or more of the members of the board of control, or by some competent person whom the board shall appoint, who shall carefully examine into the capacity of such institutions for the care of insane patients, the number kept therein, their sex, the arrangement of buildings and the method of their construction, their adaptation for the purpose intended, and other matters connected with the proper care of such insane persons, and making a written report of all such matters to the board.

Section 3 of the act provides that the person making such examination shall give each of the patients an opportunity to converse with him out of the hearing of any officer or employe of the institution, and shall investigate and inquire into any complaint by making inquiry of the persons in charge of said institutions and others and report the result thereof in writing to the board.

No provision is made in chapter 144 for the examination of the persons connected with the institution under oath, nor is any power given the board to compel the attendance of witnesses or the production of books and papers connected with the institution. All of these powers are fully conferred upon the board of control so far as the examination and investigation of state institutions are concerned, by section 10 of chapter 118 of the acts of the Twenty-seventh General Assembly; but no such powers are conferred upon the board by the act which placed county and private institutions, where insane persons are kept, under the supervision of the board. Apparently it was not the intention of the legislature to give to the board of control in the investigation of such county and private institutions, the powers which are conferred upon them by section 10 of chapter 118 of the acts of the Twenty-seventh General Assembly in relation to state institutions, and to confine their powers with reference to county and private institutions to an inquiry as to the condition of such institutions and the manner in which the patients therein are kept, and to give any patient an opportunity to converse with a member of the board out of the hearing of any

officer or employe of such institution, and to make a full written report to the board of control as to the condition in which such institution is found, for such action as may thereafter be thought advisable.

Under the provisions of the act placing such county and private institutions under the supervision of the state board of control, I am clear that no power is given the board or any of its members to subpoena and enforce the attendance of witnesses, administer the proper oath to them and compel them to testify, or to make such an investigation as is within the power of the board as to state institutions under the provisions of section 10 of chapter 118 of the acts of the Twenty-seventh General Assembly.

Having reached the conclusion that the board is without such power, it is unnecessary to go further, as such conclusion fully answers the second question asked in your communication.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

June 25, 1903.

TO THE HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

EDUCATIONAL BOARD OF EXAMINERS—SPECIAL CERTIFICATES ISSUED BY—Section 2630 of the code as amended by section 2 of chapter 96 of the acts of the Twenty-eighth General Assembly, construed.

SIR—Complying with your request of June 13th, I submit the following opinion as to the construction of section 2630 of the code, as amended by section 2 of chapter 96 of the acts of the Twenty-eighth General Assembly.

This section, as amended, provides:

> "The educational board of examiners may issue a special certificate to any teacher of music, drawing, penmanship or other special branches, or to any primary teacher of

> sufficient experience, who shall pass such examination as the board may require in the branches and methods pertaining thereto, for which the certificate is sought. Such certificates shall be designated by the name of the branch, and shall not be valid for any other department or branch. * * * "

The question arising upon the construction of this statute is the meaning of the phrase, "or other special branches."

It is suggested in the letter of Mr. O. J. McManus, enclosed with your request, that under the provisions of this section the state board of examiners has authority to issue a certificate in mathematics, which would embrace arithmetic, algebra, geometry, trigonometry and like branches; that it also might issue a certificate in English, which would embrace composition, grammar, rhetoric, literature, etc.; or in political science, which would embrace civics, economics, commercial law and like branches, and so on through the entire list of subjects which are embraced in a high school or academic course.

I am unable to agree with the interpretation put upon the provisions of this section by Mr. McManus. Such an interpretation does not conform to the rules by which statutes of this character are to be construed.

It is a fundamental rule of statutory construction that where general words follow particular and specific words, such general words must be confined to things of the same kind and character. So it has been said:

> "Where general words follow particular ones, the rule is to construe the former as applicable to persons or things *ejusdem generis.*"

This rule of construction limits the scope of general words following a specific enumeration to things of the class enumerated, and does not enlarge that class. As illustrations of the application of this rule of construction, it was held in *Lyndon v. Standbridge*, 2 H. & N., 51, that the words, "boat, barge or other vessel" in an act of parliament did not include ships, as ships or vessels are not *ejusdem generis* with boats and barges.

So where an act of parliament imposed certain duties on copper, brass, pewter, tin and all other metals not enumerated, it

was held that the latter words did not include gold and silver, as they were not *ejusdem generis* with the metals enumerated in the act.

This rule of construction has been recognized by nearly every state in the Union, and enters into the interpretation of every statute of this character.

Section 2630, as amended, gives to the educational board of examiners authority to issue a special certificate to any teacher of music, drawing, penmanship or other special branch. Such other special branches, then, must be of the same character as those which are enumerated, and do not include the branches generally taught in a high school, academy or college. Mathematics, English, political science, physics, history, language, modern and ancient, are branches which are usually and ordinarily taught in high schools, academies and colleges, and can not be said to be *ejusdem generis* with the special branches of music, drawing and penmanship. The former are, therefore, not included within the general words of the statute, and no power is given the state board of educational examiners to issue special certificates therefor.

The special certificates which the educational board of examiners is authorized to issue under the section referred to are confined to music, drawing, penmanship and other special branches of like character, and to any primary teacher of sufficient experience who shall pass such an examination as the board may require in the branches and methods pertaining to primary teaching. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

June 25, 1903.

To HON. R. C. BARRETT,
Superintendent of Public Instruction.

FIRE ESCAPES—It is held that a hotel building three stories in height with a third story unoccupied at the present time must be equipped with fire escapes in the manner provided by chapter 150 of the acts of the Twenty-ninth General Assembly.

SIR—In compliance with your request of May 8th for my opinion as to whether a hotel building three stories in height, with a story unoccupied at the present time, must be equipped with fire escapes, I beg to submit the following:

Section 1 of chapter 150 of the acts of the Twenty-ninth General Assembly, which is incorporated in the supplement to the code as section 4999-e thereof, provides:

> "The owners, proprietors or lessees of all buildings, structures or enclosures of three or more stories in height now constructed or hereafter to be erected, shall provide for and equip said buildings and structures with such protection against fire and means of escape from such buildings as shall hereafter be set forth in this bill."

Section 2 of the same act classifies the buildings to which the act is applicable, and section 3 specifies the number and character of fire escapes which must be provided for the respective classes.

While the act referred to falls within the class of legislation which must be strictly construed, the language of section 1 leaves no room for difference of opinion as to the intent of the legislature. It provides in express terms that all buildings, structures or enclosures of three or more stories in height shall be provided and equipped with such protection against fire and means of escape in case of fire, as are set forth in the bill. It is doubtful if broader language could have been used by the legislature. The act embraces every building, structure or enclosure of three or more stories in height, and no exception is made as to the use of the building or any other fact connected with its occupancy.

It was clearly the intent of the legislature that every person who erected or constructed a building of any kind or character,

of more than two stories in height, should, as a part of the building, construct and maintain fire escapes without reference to the use to which such building was put, and subject only to the provisions of section 3 of the act which provides the number of fire escapes which shall be constructed and maintained, such number being determined by the superficial area of the floor space.

In conformity with these views as to the construction of the statute, I have reached the conclusion that a hotel building, three stories in height, with the third story unoccupied at the present time, must be equipped with fire escapes in the manner provided by chapter 150 of the acts of the Twenty-ninth General Assembly.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

June 30, 1903.

To HON. ALBERT B. CUMMINS,
Governor of Iowa.

PAYMENT BY CHECK for labor is not in violation of the statute. (2) A coal miner or other person is not compelled to accept check tendered in payment of earnings due for labor performed.

SIRS—I am in receipt of your request of the 7th inst., asking my opinion upon two propositions relating to the manner of the payment of miners by coal operators, and am informed that there is now a dispute between the operators and miners upon the propositions referred to me, and that a strike now exists because of the dispute between the miners and operators. These propositions are stated as follows:

(1) Is the issuance of a bank check by a coal company to a coal miner for labor performed, a violation of the statute of Iowa relating to the payment of miners?

(2) Is a coal miner compelled to accept a check of a coal operator tendered in payment of earnings due the miner for

labor performed for the coal operator who offers the check as payment?

These two propositions will be considered in the order stated.

First—Is the payment of the amount due a miner for labor performed by him by a bank check which is made by the coal operator and delivered to and accepted by the miner a violation of any provision of the statute?

It is contended that such a transaction is in violation of section 2490 of the code, as amended by the acts of the Twenty-eighth General Assembly, which provides:

> "Where ten or more miners are employed, such owner or agent shall not sell, give, deliver or issue, directly or indirectly, to any person employed, in payment for labor done, or as advances for labor to be performed, any script, check, draft, order or other evidence of indebtedness payable or redeemable otherwise than in money at the face value. * * * "

It is clear that the phrase, "payable or redeemable otherwise than in money at the face value," refers to and qualifies every character of evidence of indebtedness previously referred to, and prohibits the payment of the miner in any character of script, check, draft or other evidence of indebtedness which is not redeemable in money at its face value.

The purpose of this statute is clear. It was to prohibit mine operators from paying miners by giving orders upon company stores or other mercantile houses which would be payable in goods or property. It never was intended to apply to checks drawn upon banks, which are redeemable or payable in money at the face value thereof. So, upon the first proposition, then, it is clear that there is no prohibition in the statute of Iowa which prevents a mine operator from paying the miners in bank checks for the labor performed by them, if the miners are willing to receive and accept such checks in payment.

This brings us to the second proposition which is the real question involved, which is—

Is a coal miner compelled to accept a check of a coal operator, tendered in payment of earnings due the miner for labor performed for the operator, who offers the check as payment?

In this respect a miner and operator stand upon no different footing than that of any other debtor and creditor. The question, therefore, is a broad one as to whether any debtor can compel a creditor to accept a check in payment of a debt which such debtor owes to the creditor.

It is a well settled and universally recognized rule of law that when a debtor has given his check for the amount of his indebtedness, the presumption arises that the check was taken merely as conditional, not absolute, payment, and in case the check is not honored upon due presentation, the original indebtedness for which it was given, continues to exist, and may be recovered by the creditor without resorting to the debtor's liability on the check. This rule of law is based upon the fact that a check is not cash, but is an order upon another person to pay the cash upon due presentation of the check.

Under this rule it has been frequently held that the offer of a check in payment for a sum acknowledged to be due from the debtor to the creditor is not a sufficient tender of the amount owing by the debtor.

Following this principle to its logical conclusion, it is clearly the right of any creditor to refuse to accept a check in payment of the debt owing by the debtor, because the creditor can not be compelled to accept an order for money drawn upon a third party which, when delivered to him, is at most only a conditional payment of the debt due. Every creditor is entitled to have the debt which is owing to him paid in money, unless he has previously made a contract by which he has agreed to accept something else as payment.

Applying this principle to the question, it is clear that a miner is not compelled to accept the check of a coal operator tendered in payment of earnings due the miner for labor, for which the operator offers the check in payment. A miner may stand upon his legal rights and demand that a debt owing to him be paid in money and not by check, and may refuse to accept a check tendered in payment.

This, I believe, fully answers the questions submitted for my determination, and I will not elaborate them further.

In giving this opinion I desire to add that it is done with the distinct understanding on the part of all of the persons interested, that my decision shall be final and that all parties shall acquiesce therein, and that the strike now pending on the part of the miners shall at once be abandoned.

Respectfully submitted this 7th day of July, 1903.

CHAS. W. MULLAN,
Attorney-General.

TO JOHN P. REESE,
Commissioner Iowa Coal Operators Association;

EDWIN PERRY,
President Iowa Miners' Association, Pleasant Valley Coal Company, and Craig & Donovan Coal Company.

ASSESSMENT OF INTERURBAN RAILWAYS—A railway operated by electricity upon the streets of any city or town, which extends beyond the limits of such city or town, and to any other city, town or village, is an interurban railway under the statute, and is assessable by the executive council.

SIRS—Complying with your request of June 1st communicated to me through your secretary for an opinion as to whether, under the present statute, interurban railways are to be assessed by the executive council or by the local authorities, and particularly whether the Cedar Rapids & Marion City Railway and the Boone Electric Railway, or either of them, are assessable by the executive council under the provisions of chapter 81 of the acts of the Twenty-ninth General Assembly, I submit the following:

In *C. R. & M. C. Ry. Co. v. Cedar Rapids,* 106 Iowa, 476, it was held that the railway of the plaintiff corporation was a street railway, and therefore subject to assessment by the local assessors and not by the executive council of the state. The decision in that case is based upon the fact that the railway was constructed and operated under authority of chapter 32 of the acts of the Eighteenth General Assembly, which relates to the

extension of street railways beyond the limits of a city or town, and the location thereof along any highway which is one hundred feet or more in width. At the time that decision was rendered, there had been no legislation relating to interurban railways, and the opinion of the court clearly states the law applicable to the facts in that case as they existed under the statute then in force. In the course of the opinion it is said:

> "The fact that the line between Cedar Rapids and Marion was laid and operated along the highway as authorized by said act, relating exclusively to street railways, seems to us conclusive that the plaintiff is a street railway corporation and not a railway corporation within the meaning of section 1317 of the code of 1873."

When the present code was adopted, a provision was incorporated in section 1343 in these words:

> " * * * the lands, buildings, machinery, poles, wires, overhead construction, tracks, cables, conduits and fixtures belonging to individuals or corporations operating railways by cable or electricity, * * * shall be listed and assessed in the assessment district where the same are situated."

If there had been no subsequent legislation upon this subject, the language of section 1343 would be conclusive, and such railways would be subject to assessment by the local assessing authorities. But the Twenty-ninth General Assembly passed an act relating to interurban railways, which appears to have been specifically intended to fix their status under the law. This act appears as chapter 4A of title X. of the supplement to the code, and is the first act of the legislature of the state which specifically defines interurban railways and recognizes them as works of internal improvement within the state.

Section 2 of that act provides:

> "The words railway, railway company, railway corporation, railroad, railroad company and railroad corporation, as used in the code and acts of the general assembly now in force or hereafter enacted, are hereby declared to apply to and include all interurban railways and all companies or corporations constructing, owning or operating such interurban street railways, and all provisions of the code and

> acts of the general assembly now in force or hereafter enacted affecting railways, railway companies, railway corporations, railroads, railroad companies and railroad corporations are hereby declared to affect and apply in full force and effect to all interurban railways and all interurban railway companies or railway corporations constructing, owning or operating such interurban railways."

The provisions of this section are as broad and far reaching as language can make them. Under this section every provision of the code and acts of the legislature which relate to steam railways is made to apply to and include interurban railways within the state.

Section 1334 of the code; as amended by the acts of the Twenty-ninth General Assembly, provides:

> "On the second Monday in July in each year, the executive council shall assess all the property of each railway corporation in the state, * * * ."

Following this provision of the statute are provisions directing the manner of such assessment. With these provisions we have nothing to do at present. The question here to be determined is whether the words "railway corporation", as used in the provision quoted, include interurban railways constructed and operated within the state.

Except for the provisions of section 1343 above quoted, no doubt could be entertained that, under the provisions of section 2 of chapter 81 of the acts of the Twenty-ninth General Assembly, interurban railways are included within the provisions of section 1334 of the code, and are therefore assessable by the executive council and not by the local assessing authorities.

It is a rule of statutory construction that repeal by implication is not favored by the courts, and that an existing statute will not be held to have been repealed by a subsequent one because the subsequent one is repugnant thereto, if the provisions of both statutes can be given force and effect. It is also an equally well known rule of statutory construction that, where there is a specific act of the legislature covering a particular subject, general statutes covering the same subject, if repugnant

to such special act, must give way and the special statute will control.

Chapter 81 of the acts of the Twenty-ninth General Assembly is a statute relating to a specific subject matter, viz: interurban and street railways. The provisions of that statute clearly and specifically make all of the provisions of section 1334 of the code apply to interurban railways with the same force and effect as they apply to steam railways. The effect of this provision must, in my judgment, be held to repeal the provisions of section 1343 quoted, and to give to the executive council the same power and authority to assess interurban railways which it has to assess steam railways under the provisions of section 1334.

I am therefore of the opinion that all interurban railways within the state, whether within or without the corporate limits of any city or town, must, under the present statute, be assessed by the executive council, and not by the local assessing authorities.

As opposed to this view it has been suggested that section 3 of chapter 81 of the acts of the Twenty-ninth General Assembly makes all interurban railways within the limits of an incorporated city or town, street railways, and therefore assessable by the local authorities. A careful reading of the provisions of this section will show that it was not the intention of the legislature to change the general status of interurban railways where the same were located and operated upon the streets of a city or town. The provisions of this section are as follows:

> "Any interurban railway shall, within the corporate limits of any city or town, or any city acting under a special charter, upon such streets as it shall use for transporting passengers, mail, baggage and such parcels, packages and freight as it may carry in passenger or combination baggage cars only, be deemed a street railway and be subject to the laws governing street railways."

It will be observed that all interurban railways which are to be deemed street railways and subject to the laws governing such within cities and towns, are only those which are operated upon the streets of such city or town for the purpose of carrying passengers and baggage only. The purpose of this provision of

the statute was to permit interurban railway companies to lay their tracks and operate their cars along the streets of a city or town, without paying damages to the abutting property owners where such railways carried passengers and baggage only; and as to all other streets upon which such interurban railways might be operated and over which it carried freight as well as passengers and baggage, the law requiring steam railways to pay abutting damages before laying down their tracks, applies equally to interurban lines.

This provision of the statute does not, in my opinion, affect the method of taxing interurban railways as provided by section 2 of chapter 81 of the acts of the Twenty-ninth General Assembly and section 1334 of the code above referred to.

I am aware of the many difficulties arising in the practical application of the rule herein announced, as in many instances interurban railway companies operate other properties connected with their railway lines, such as electric light and electric power plants. But in cases of this character, such an equitable adjustment of the values of the connected properties should be reached by the executive council as shall cause each to bear its just proportion of the burden of taxation.

In reaching this conclusion I have endeavored to harmonize, so far as possible, the conflicting statutes, and to ascertain the manifest intent of the legislature as expressed by its latest act.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

July 20, 1903.

TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

TAXATION OF FREIGHT LINES AND EQUIPMENT COMPANIES WITHIN THIS STATE—Under the provisions of chapter 62 of the acts of the Twenty-ninth General Assembly, in determining the number of miles traveled by cars of freight line and equipment companies for the purpose of taxing the same, the miles traveled by such cars outside of the state are not to be taken into consideration.

SIRS—Complying with your verbal request for a construction of the provisions of section 2 and section 4 of chapter 62 of the acts of the Twenty-ninth General Assembly, relating to the report required to be made by every freight line and equipment company transacting business in Iowa of the aggregate number of miles traveled by its cars during the preceding calendar year, and the number of cars necessary for the mileage so reported, and the duty imposed upon the executive council of assessing for taxation the cars of said companies which are so used within the state, I submit the following:

The manifest intention of the legislature, as gathered from the entire act, was that the property of freight and equipment companies, used in conducting and carrying on their business within the state, should be taxed in proportion to its value, the same as other property within the jurisdiction of the taxing power of the state.

The property sought to be reached and taxed by this act of the legislature is personal property and, so far as it has a situs within the state, is perhaps a proper subject of taxation. The information which such companies are required to furnish the executive council under the provisions of subdivisions 6 and 7 of section 2 of the act, is for the purpose of enabling that body to ascertain the amount of property belonging to such companies as may be said to have a situs within the state, that it may be listed and made to bear its just proportion of the burden of taxation. The language of the act should, therefore, receive such construction as will effectuate the intent of the legislature, if susceptible of being so construed.

Subdivision 6 provides:

> "The aggregate number of miles traveled by its cars during the preceding calendar year while said cars were used in transporting freight, either between two points in this state, or between a point within this state and a point without this state; but not including the mileage in this state or elsewhere of its cars while the said cars are used in transporting freight not consigned either to or from some point within this state."

Subdivision 7 requires that such companies report "the number of cars necessary for the mileage so to be reported under the circumstances that ordinarily attend the use of such cars, and where different classes of cars are used by one such company as to the matters embraced in this and the preceding paragraph, it shall furnish the required information as to each class of such cars."

The language of the statute, if construed according to the literal strictness of the letter, would require these companies to report the mileage of their cars traveled outside of the state of Iowa in transporting freight to the state, or from the state to some other point outside of its boundaries, and to report the number of cars necessary for the mileage so traveled, both within and without the state; and would further require the executive council to levy a tax upon the number of cars necessary to such entire mileage.

If the provisions of such a statute were valid and enforceable, the result would be to compel such companies to pay to the state of Iowa a tax upon their personal property which had no situs within the state and which in fact existed in other states. In other words, it would be an attempt upon the part of the state of Iowa to extend its taxing powers beyond the boundaries of the state, and to tax personal property existing in other states. The power of taxation of every state is necessarily confined to subjects within its jurisdiction, and any act of the legislature by which property, having a situs in other states, is sought to be taxed within this state, is of no validity, as the state clearly has no power to reach out and assess for taxation property beyond its territorial jurisdiction.

In the construction of statutes it is a familiar rule that the legislative purpose and the object sought to be attained are to be borne in mind, and that where the language of the act is susceptible of more than one construction, it is to receive that which will bring it in harmony with the object and purpose of the legislature, rather than that which will tend to defeat such object and purpose.

It is clear that the manifest intention of the legislature in passing the act under consideration was to tax the property of freight line and equipment companies within this state, and the act should have such a construction as will accomplish the purpose of the legislature, if its language will permit such construction to be given.

If the language of the sixth subdivision of section 2 of the act is construed to require the companies to report the aggregate number of miles traveled in the state of Iowa by its cars during the preceding calendar year while such cars were used in transporting freight, either between two points in the state, or between a point within the state and a point without the state, and the language of subdivision 7 of the same section is construed to refer to the mileage of such companies within the state, then no attempt has been made by the legislature to extend the taxing powers of the state beyond its jurisdiction, or to levy taxes upon property having its situs in another state.

Such a construction will give effect to the entire act, and to the intention of the legislature as ascertained from such act, and compel the property of the companies, which may be fairly said to have a situs within this state, to bear its just burden of taxation.

Under such construction the act may be held to be a valid law, while if the literal language of the statute were adhered to without regard to the purpose or intent of the legislature, it must be held invalid .

Taking this view of the statute, I think it should be so construed by the executive council as to require freight line and equipment companies to report the aggregate number of miles traveled in Iowa by its cars during the preceding calendar year in transporting freight, either between two points within the

state, or between a point within the state and a point without the state, and that the number of cars necessary for the mileage traveled in so transporting freight should be taken as the number which may be fairly said to have a situs within the state, and to be liable to taxation therein.

In submitting this opinion I do not undertake to pass upon any question which may arise as to the constitutionality or validity of the entire act, and only attempt to give to the provisions of subdivisions 6 and 7 of section 2 a construction which is consistent with the manifest purpose of the statute.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

July 23, 1903.

TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

PHYSICANS AND SURGEONS—Under the provisions of section 2581 of the code, as amended by the acts of the Twenty-ninth General Assembly, the state board of medical examiners has no power to discriminate between physicians residing within the state and those who are non-residents; and if they fall within the provisions of the statute a license must be issued to non-resident physicians, unless some other valid reason exists why such license should not be given.

DEAR SIR—In response to your request of July 13th for an opinion as to whether the state board of medical examiners exceeded its authority in resolving not to issue a certificate to an itinerant physician who is not a resident of the state, I submit the following:

Section 2581 of the code, as amended by the acts of the Twenty-ninth General Assembly, provides:

> "Every physician practicing medicine, surgery or obstetrics, or professing or attempting to treat, cure or heal dis-

> eases, ailments or injuries, by any medicine, appliances or method, who by himself, agent or employee goes from place to place or from house to house, or by circulars, letters or advertisements solicits persons to meet him for professional treatment at places other than his office at the place of his residence, shall be considered an itinerant physician; and any such itinerant physician shall, in addition to the certificate elsewhere provided for in this chapter, procure from the state board of medical examiners a license as an itinerant, for which he shall pay to the treasurer of state for the use of the state of Iowa the sum of two hundred and fifty dollars per annum. Upon payment of this sum the secretary shall issue to the applicant therefor a license to practice wtihin the state as an itinerant physician for one year from the date thereof. The board may, for satisfactory reasons, refuse to issue such license or may cancel such license upon satisfactory evidence of incompetency or gross immorality. * * * "

The provisions of this section include physicians who are non-residents of the state, as well as those who reside within the state, and it is not within the power of the state board of medical examiners to discriminate between physicians residing within the state and those who are non-residents, if they are equally entitled to the license provided for in this section.

The provision of the section which authorizes the board to refuse to issue such license for satisfactory reasons, would not authorize it to refuse to issue such license to a physician otherwise entitled to receive the same, because he was a non-resident of the state. The phrase "satisfactory reasons," as used in the statute, must be construed to be such reasons as a court would say were sufficient to authorize the board to refuse to issue the license; and as there is no attempt in the statute to make any discrimination between resident and non-resident physicians, the fact that one is a non-resident of the state would not be a sufficient reason to refuse to issue to him a license.

Beyond this, there is the further question as to whether it is within the power of the legislature, or of any board created by it, to refuse to permit a physician or surgeon, who is a non-resident of the state, to practice his profession within the state upon the same terms and the same conditions as a resident.

Under the view that I have taken of the statute, however, I do not think it necessary to go into this constitutional question, as the statute itself does not attempt such discrimination, and the board must be governed strictly by its provisions.

In my opinion the board exceeded its legal powers in passing the second paragraph of the resolution submitted, so far as the same relates to physicians who are non-residents of the state, and that the resolution, so far as it relates to such physicians, can not be enforced by the board. I am

Very respectfully yours,

CHAS. W. MULLAN,

Attorney-General.

Des Moines, Iowa, July 24, 1903.

DR. J. F. KENNEDY,

Secretary State Board of Medical Examiners.

PHYSICIANS AND SURGEONS—**A physician or surgeon who has been in the regular practice in this state for five consecutive years, three years of which have been in one locality, is entitled to a certificate from the state board of medical examiners without examination.**

DEAR SIR—I beg to acknowledge the receipt of your favor of the 28th instant.

The law which exempts a physician who has been in practice in this state for five consecutive years, three years of which were in one locality, from the examination of the board of state medical examiners, and which entitles such practitioner to a certificate without such examination, was enacted by the Twenty-first General Assembly, and became a law on the 4th day of July, 1886. It undoubtedly applies to all physicians who had been practicing medicine within the state for five years prior to that date, and if the proper proof of such practice is made before the board, I think it would be its duty under the present statute to issue a certificate. The proof must show that the physician applying for the certificate under the exemption provided in the

statute, had practiced five consecutive years in the state, three years of which must have been in one locality, prior to the time the law went into effect, i. e., July 4, 1886, and no practice after that date could be considered by the board.

Yours respectfully,
CHAS. W. MULLAN,
Attorney-General.

Des Moines, Iowa, July 28, 1903.

DR. A. M. LINN, *Des Moines, Iowa.*

TAXATION—EXEMPTION OF PROPERTY OF SOLDIERS AND SAILORS FROM—The raising of the valuation of the whole property within a taxing district does not affect the specific valuation of the property of soldiers, sailors or their widows from exemption from taxation, although the additional rise added to the original assessment may bring the value of the property of the soldier, sailor or widow seeking the exemption above the amount upon which an exemption is given by statute.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 28th inst. enclosing a letter of Mr. R. C. Jackson, auditor of Linn county, in which my opinion is requested upon the following question:

> "Where an old soldier, sailor or widow of such has been assessed by the assessor, and not having property of the value of five thousand dollars is allowed an exemption of eight hundred dollars under section 1304, subdivision 7, and the county board of review (board of supervisors) or the executive council raises the assessment in the district where the same was made such a per cent that the amount is increased to more than five thousand dollars, is the person assessed still entitled to the exemption of eight hundred dollars, and if not who should correct the assessment?"

While it is no part of my duty to advise county officers upon questions touching the administration of the duties of their

offices, inasmuch as the question asked in Mr. Jackson's letter is one which may arise in other counties in the state, and as to which it is advisable there should be a uniform rule of action, I will briefly give you my views.

Subdivision 7 of section 1304 provides:

> "All soldiers, sailors or widows thereof referred to herein shall receive a reduction of eight hundred dollars at the time said assessment is made by the assessor, unless a waiver thereof is voluntarily made of said exemption at said time."

This statute clearly contemplates that, when the property of any soldier, sailor or widow of such soldier or sailor is assessed, and the actual value of the property owned by him or her is less than five thousand dollars, as fixed by the assessor at the time the assessment is made, a reduction of eight hundred dollars shall then be made by the assessor and entered upon his assessment book as an exemption to such soldier, sailor or widow.

If thereafter, in equalizing the assessed value of the property in the different taxing districts of the county, the board of supervisors, sitting as a board of review, finds it necessary to increase the value of all of the property in the taxing district in which the property of the soldier, sailor or widow so assessed is located, by adding a percentage thereto, such action does not, in my judgment, affect the right of the soldier, sailor or widow to the exemption provided by section 1304.

The board of supervisors, when acting as a board of review, has power to raise or lower the assessed value of all of the property in any taxing district, but has no power to increase or diminish the assessed value as fixed by the assessor of any specific property within such taxing district; and in my opinion the valuation which is placed upon the property of such soldier, sailor or widow by the assessor at the time the assessment was made, determines whether he or she is entitled to such exemption.

It may very easily occur that a specific piece of property is assessed at its full value, and perhaps beyond such value, and yet, in order to equalize the average valuation of all of the prop-

erty in the taxing district where such property is located, with the property in other taxing districts in the county, it may be found necessary to increase the average valuation of such district, and because of such increase the owner of the particular piece of property may be compelled to submit to an increased valuation, although his property was originally assessed at its full value.

The theory upon which the county board of review acts in equalizing the different assessment districts of the county, is that the average valuation of such district as a whole is raised or lowered, and that the valuation of specific property is not disturbed. While this theory is not strictly true, I think any increased valuation of the whole property within a taxing district does not increase the value of any specific property within such taxing district so as to affect the exemption from taxation given to soldiers, sailors and their widows under section 1304.

In holding that the increase in the valuation of property of any taxing district by the board of supervisors of a county does not affect the exemption allowed to soldiers, sailors and their widows under section 1304, I do not attempt to determine what the effect would be if the value of the specific property owned by such soldier, sailor or widow should be increased by the local board of review of the taxing district in which such property is located. I only hold that the increase in the taxing value of the property of such soldier, sailor or widow by the board of supervisors in adding a percentage to the entire taxing value of all the property within such district, does not take away from the soldier, sailor or widow the exemption allowed by section 1304, although the actual value of his or her property would be increased to an amount equal to or more than five thousand dollars, if such percentage, as fixed by the board of supervisors, was added to the original valuation made by the assessor.

I am, Yours respectfully,

CHAS. W. MULLAN,
Attorney-General.

Des Moines, July 30, 1903.

TO HON. JOSEPH MEKOTA,
County Attorney Linn County, Cedar Rapids, Iowa.

TERM OF COMMITMENT, PAROLE, AND DETERMINATION OF SENTENCE.—(1) Where a person is committed to prison by an order of court, his term of imprisonment begins on the day of the sentence. (2) Where a prisoner is paroled by the executive authority, his term of sentence continues to run during the time of such parole and will determine on the day fixed by the original sentence, without regard to the actual time served by him.

SIR—Complying with your request of the 6th inst., I submit the following opinion upon the questions submitted to me, viz:

(1) "Does the term for which a person is committed to a hospital for inebriates, under chapter 93 of the acts of the Twenty-ninth General Assembly, commence on the day of his commitment, or on the day he is actually received in the hospital?"

(2) "If a patient committed under the act specified is paroled by the governor, but is returned for failing to comply with the conditions of his parole, should he be discharged at the end of the term fixed in the original order of commitment as though he had not been absent on parole? If not, should he be given credit for the time he was detained in the hospital before he was released on parole, or should he be detained and treated from and after the date on which he was returned to and received in the hospital for the violation of his parole for the full term of his original commitment?"

These questions will be considered in the order stated.

There is some conflict of the adjudicated cases upon the question as to when a term of sentence begins, where a person is committed to prison by an order of court, but I think the weight of authority is that the day on which a prisoner is sentenced must be reckoned as a part of his term of imprisonment.

In *People v. Lincoln,* 62 Howard's Prac., 414, the supreme court of New York in passing upon the question said:

"In the case in hand, we are of the opinion that the sentence began to run from the day it was pronounced;

> that all of the time the respondent was in custody after that day has to be credited upon her sentence."

The question came before the Missouri supreme court in *Ex parte Meyers,* 44 Mo., 249, and in passing upon it, it is said by that court:

> "As a general rule, the day on which a prisoner is sentenced will be reckoned as a part of his term of imprisonment; * * * "

The same rule is recognized by the supreme court of Florida, in *Miller v. Florida,* 15 Fla., 576, where it is said:

> "And it has been held that the term of imprisonment under a sentence of the court, upon conviction, commences at the date of the sentence (*Ex parte* Meyers, 44 Mo., 279), and, unless a different day be appointed for the commencement of the term of imprisonment, we do not see how it can be otherwise."

These cases, in my opinion, announce the correct rule of law which is decisive of the question. When a prisoner is sentenced by a court to serve a term in the penitentiary, or other place of detention, he is delivered by the court pronouncing such sentence to the sheriff, or other proper officer, to serve the term for which he is sentenced. He is no longer in custody of the court by which he was tried or which pronounced the sentence, nor is he awaiting any further order or judgment of that court. From the moment the judgment, by which the sentence is imposed, is pronounced, he is under a sentence to serve the term fixed by the court in the jail, penitentiary, or other place of detention, designated and there can be no hiatus of time between the day on which the sentence is pronounced, and the time when the prisoner begins to serve the sentence so imposed by the court. He is detained by the officer and restrained of his liberty because of the sentence pronounced against him. Such detention and restraint is an imprisonment under the sentence pronounced by the court and must therefore be reckoned as time served by the prisoner.

Second.—Upon the second question there is a sharp conflict of the authorities. Nearly all of the cases, however, arose under

statutes permitting a conditional pardon, which, it may be said, differs materially from a parole authorized by chapter 93 of the acts of the Twenty-ninth General Assembly.

Section 2 of that act provides:

> "If it shall be determined by said district court or judge, that such person is addicted to dipsomania, inebriety, or to the excessive use of narcotics, he or she shall be committed to the hospital for inebriates, as may be established by the board of control, as above provided for. The term of detention shall be for the first commitment not less than one, nor more than three years; and for the second commitment, not less than two, nor more than five years. The governor shall parole a patient on conditions named in the following section."

Section 3 sets forth the terms and conditions upon which a parole shall be granted, and then provides:

> "And if at any time the patient on parole, for any reason fails to make the above report, the sheriff of the county wherein such patient resides shall without further writ or warrant, return said patient at once to the hospital from which he or she has been paroled on receiving notice of such failure from the clerk of the district court of the county wherein the patient resides, or any three reputable citizens thereof. And the patient so returned shall be detained and treated during the full term of his commitment."

The parole granted by the governor under the provisions of this act does not relieve the person convicted thereunder of the sentence pronounced by the judge of the district court. He is still a prisoner under the sentence of commitment, who, under the authority of the law and the parole granted by the governor, is permitted to go beyond the confines of the hospital to which he has been committed. All of the consequences of the judgment and sentence imposed by the court are upon him, except that he has leave of absence from such hospital. He is required to report to the governor on the first day of every month during the parole, which report must be inquired into and approved as correct by the clerk of the district court of the county where he resides. He is required to furnish such clerk with satisfactory evidence of his sobriety and good habits. If he fails

in the performance of any of the conditions of the parole, he may be summarily arrested by the sheriff of the county without a warrant and returned to the hospital to which he was committed. He is in the full sense of the term a prisoner serving his sentence, who is, by reason of his good conduct, not kept in close confinement but permitted to go beyond the walls or grounds of the institution to which he is sentenced. The purpose of the parole is to benefit the patient and to aid his recovery from the disease of which he is suffering. It is a method fixed by the legislature for restoring the patient to health.

It was undoubtedly the intention of the legislature in enacting the chapter referred to, to provide that the governor should grant to such a patient the liberty of going away from the institution to which he was committed during the term of his sentence, and to remain away from the same so long as he did not violate the terms of his parole, and at the same time to be subject to the sentence imposed by the court.

The wisdom of this provision is obvious.

Under this construction of the statute and the rules of law governing questions of this character, I am of the opinion that where a patient, who has been committed under the provision of chapter 93 of the acts of the Twenty-ninth General Assembly, is returned to the hospital for a violation of the conditions of his parole, he must be discharged at the end of the term fixed by the original order of commitment, and that he can not be detained in the hospital for a longer period including the time of his parole than that for which he was committed by the judge of the district court.

As supporting the view which I have taken of this question I call attention to *Woodward v. Murdock*, 124 Ind., 439, and *Fuller v. State*, 122 Ala., 32.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

August 11, 1903.

TO THE HON. JOHN COWNIE,
Chairman Board of Control of State Institutions.

MINOR—PUBLIC OFFICE—A public elective office can only be filled by a qualified elector, and a minor is not eligible thereto.

SIR—Complying with your verbal request for an opinion as to whether a minor is eligible to be elected to the office of county superintendent, I submit the following:

Section 1 of article II. of the constitution of the state provides:

> "Every male citizen of the United States of the age of twenty-one years who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law."

In the case of the *State v. Van Beek,* 87 Iowa, 569, the supreme court of this state, in passing upon the question of the right of an alien to hold office under the constitutional provision, said:

> "Our first inquiry is, whether an alien can hold the office of sheriff under the laws of Iowa. There is no provision in our constitution or statute upon that subject, yet it is certainly a fundamental principle of our government that none but qualified electors can hold an elective office unless otherwise specially provided. This precise question was passed upon in *State v. Smith,* 14 Wis., 497. Smith, an alien, who had been elected, was holding the office of sheriff without being naturalized. In speaking of our form of government the court says: 'As to all such governments it is an acknowledged principle which lies at the very foundation, and the enforcement of which needs neither aid of statutory nor constitutional enactments or restrictions, that the government is instituted by the citizens for their liberty and protection, and that it is to be administered, and its powers and functions exercised, only by them and through their agents.' After reasoning with marked ability upon the question the court said in conclusion: 'We entertain no doubt, upon the facts stated in the complaint, that the defendant was ineligible.' "

Under the principles announced by the court, it is clear that a minor is ineligible to the office of county superintendent. The office is an elective one, and can only be filled by a qualified elector, unless there is a statutory provision to the contrary. There is no provision of our statute which permits an infant to hold an elective office in this state. He is not a qualified elector, and therefore clearly ineligible.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

September 11, 1903.

To HON. R. C. BARRETT,
Superintendent of Public Instruction.

TAXATION—PUBLIC HIGHWAY—BRIDGE—APPROACH—A continuous embankment or trestle necessary for access to a bridge is a part of the bridge and should be assessed by the assessor of the local taxing district in which it is situated, and not by the executive council.

DEAR SIR—Complying with the request of the executive council, as communicated by you, for an opinion as to whether the easterly approach of the bridge across the Missouri river at Sioux City, Iowa, should be assessed by the executive council as a part of the railway which passes over the bridge, or be assessed by the local authorities as a part of the bridge, I submit the following:

Since the reference of this matter to me about a year ago, evidence as to the physical construction of the easterly approach of this bridge, and of its length and height, has been submitted to me by the railway company. I find from such evidence that the bridge across the Missouri river at the point named is sixty feet above the ordinary water level, and that the approach by which such bridge is reached is constructed of an embankment and trestle work beginning at the center of Leach street in Sioux

City, and extending to the main structure of the bridge. The length of this approach is eighty-six one-hundredths (.86) of a mile, and in that distance it rises from the level of the railway track to a height of sixty feet, and is the approach by which the main structure of the bridge across the river is reached from the easterly side.

It is universally held by the courts of this country that a contiguous embankment or trestle necessary to access to a bridge is a part of the bridge, and this rule has been adopted by the courts of this state. It is true that the question as to what constitutes a bridge is one of fact rather than law; but when the facts establish that an approach, constructed either of an earth embankment or frame trestle work, is necessary to access to the bridge, such approach has always been held a part of the bridge itself.

The evidence in this matter clearly establishes that the embankment which begins at the center of Leach street in the city of Sioux City, and extends from that point to the main structure of the bridge (a distance of .86 of a mile, and which within that distance rises to a height of sixty feet), is an approach necessary to access to the bridge; and being an approach of that character, it must be held to be a part of the bridge and not a part of the railway.

This approach being a part of the bridge and not a part of the railway, should, in my opinion, be assessed by the local assessor of the district in which it is situated, and not by the executive council.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

Des Moines, Iowa, October 22, 1903.

To MR. A. H. DAVISON,
Secretary Executive Council.

EXTRADITION—FUGITIVE FROM JUSTICE—Where a person leaves a state in the ordinary course of his affairs, without any knowledge that he has committed a crime against its laws, and lives for a long number of years in other states of the Union without any attempt of concealment, he ceases to be a fugitive from justice, although such a status may have attached to him when he left the state whose laws are claimed to have been violated.

SIR—I beg to acknowledge the receipt of your communication of the 12th inst., containing a request that I examine the requisition made by the governor of Kentucky for the extradition of J. D. Wurtsbaugh, together with the evidence attached to the requisition, and advise you as governor of the state whether in my opinion such requisition should be honored and Wurtsbaugh returned to the state of Kentucky for trial for the offense claimed to have been committed in that state. In response to such request I beg to submit the following opinion:

The facts in the case, as disclosed by the undisputed evidence, are these:

On the 27th day of February, 1884, Wurtsbaugh was married to one Stella A. Rowland in the state of Oregon, where he then resided. It appears that Wurtsbaugh and his wife lived together but a short time after this marriage. Soon after their separation his wife began an action for a divorce in the circuit court of Oregon and a decree was entered in the case on the 22d day of April, 1885. After the separation of Wurtsbaugh from his wife he left the state of Oregon and went to the town of Columbia City in Indiana, where he engaged in the practice of law. While there he was informed by a letter written to him by a friend who resided in Lane county, Oregon, that his wife had obtained a divorce from him.

I think the evidence fairly shows that he believed this information to be true, as he knew the action was pending against him, and, as he made no defense, had reason to believe that the court would render a decree of divorce in favor of his wife when the cause was heard.

After receiving this information and on the 1st day of April, 1885, and twenty-one days before the decree of divorce was rendered in the case brought by his wife in the Oregon court, he went to the city of Owensboro, Ky., for the purpose of marrying one Terressa E. Jones. He and Terressa E. Jones were married on the evening of the 1st day of April, 1885, and the next morning they left the state of Kentucky together as husband and wife and went to the town of Columbia City, Ind., where they lived together for several years. They then separated and Wurtsbaugh began an action for a divorce, his wife filed a cross petition in the same action upon which a divorce was granted to her by the court. After this divorce was granted, Wurtsbaugh continued to live in Columbia City, Ind., until August, 1893, when he left Indiana, went to the state of Nebraska, and came from Nebraska to Iowa in 1897, where he has since resided.

Under these facts two questions arise, both of which must be determined in the affirmative before a requisition for a return of Wurtsbaugh to Kentucky should be honored.

First—Did Wurtsbaugh in mrarying the prosecutrix Terressa E. Jones commit a crime against the laws of the state of Kentucky?

Second—If he did commit a crime against the laws of the state of Kentucky by such marriage, is he now a fugitive from justice within the meaning of the federal constitution?

I think it may be fairly said that at the time Wurtsbaugh married Terressa E. Jones of Owensboro, Ky., he believed that his Oregon wife had obtained a divorce from him and that he was free to marry, and that he did not knowingly or intentionally commit the offense of bigamy. While it has been held in some of the states that if a man or woman marries, honestly believing that a former wife or husband had been legally divorced, and that no impediment existed to a second marriage, the person so marrying can not be convicted of the crime of bigamy, for the reason that the intent to commit such crime is wholly lacking. This, however, is not the law of the state of Kentucky, as it has been held by the supreme court of that state that the intent is not necessary to the commission of the offense;

and under the decisions of that state Wurtsbaugh was guilty of the crime of bigamy when he married Terressa Jones, as he then had another wife living from whom he had not been divorced.

Is Wurtsbaugh now a fugitive from justice?

The federal constitution provides :

> " * * * a person, charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Whether a person charged with a crime who is found in another state than that in which the charge is made is a fugitive from justice, is a question of fact rather than a question of law. The undisputed evidence submitted in this case shows that Wurtsbaugh believed he had the legal right to marry Terressa Jones, and did not know that he was committing any offense under the laws of Kentucky at the time of such marriage. That immediately after the marriage he returned with the woman whom he married to the state of Indiana under the belief that she was his legal and lawful wife, and continued to live with her under such belief for a number of years. His departure from the state of Kentucky was strictly in accord with the ordinary course of his affairs, and the fact that he had violated the laws of that state in marrying the prosecutrix had nothing to do with his leaving the state, as he then had no knowledge that he had committed an offense against its laws.

Eighteen years have elapsed since the time of that marriage and his departure from the state of Kentucky. During all or nearly all of that time the prosecutrix has known his whereabouts, and it is only after he has failed to pay a judgment which she obtained against him in the courts of this state that she now asks to have him delivered up to the authorities of Kentucky to be tried for the offense of bigamy.

In *Roberts v. Reilly*, 116 U. S., 97, it is said by Justice Matthews:

> "To be a fugitive from justice in the sense of the act of congress regulating the subject under consideration, it is

> not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another."

When this statement of the law is applied to the facts in the case in which the statement occurs, it will be found that it was announced by Mr. Justice Matthews where the person sought to be extradited had knowingly committed a crime in the state of New York and was afterward found in the state of Georgia. The question of the knowledge of the commission of an offense, or the intention to commit an offense by the person sought to be extradited did not arise in the case, and what is said by the learned judge can only be held as applicable to a case resting upon facts similar to those in *Roberts v. Reilly*. This doctrine has not been applied to cases where a person, without intent to do so, commits a crime against the laws of a state while temporarily sojourning therein, and then, without knowing that he has committed a crime, departs from such state for his ordinary and permanent residence.

In a case which came before Governor Fairchild of Maine he said:

> "Where a person who committed a crime in a state where he was temporarily sojourning departed from it for his ordinary and permanent residence in Pennsylvania, the attorney-general of the latter state advised the governor thereof that the person could not be considered a fugitive from justice under the constitution and act of congress."

And in the same case it is further said by that governor:

> "Now what will constitute a fleeing within the meaning of the constitution? Making the charge in one state and finding the accused in another will not. I am clearly of the opinion that where one is conscious of having committed treason, felony or other crime in one state, and leaves that state knowing that by remaining he is subject to prosecution, a sufficient time not having elapsed or other circum-

> stances occurred to remove all reasonable apprehension of a prosecution, he may fairly be regarded as a fugitive from justice within the meaning of the fourth article of the constitution."

In the Matter of Adams, the superior court of New York City said:

> "If a man within a state secretly commits a crime and suddenly departs, the crime not being discovered till months after his departure, though he may have left for purposes other than fleeing from the justice of the state against which he offended; yet he surely might be treated and proceeded against as a fugitive from justice. The consciousness of his having committed the crime, of his being amenable to the laws of the state against which he offended, might and would probably be regarded as the motive for going out of its limits, and form a legitimate basis for an executive requisition and surrender."

All of the adjudicated cases apparently take into consideration the fact that the person sought to be extradited has knowingly committed a crime against the laws of the state to which he is sought to be returned, as one of the elements inducing such person to depart from the state where the offense is claimed to have been committed and to find an asylum in another. The knowledge of the person charged with the crime that he has actually committed an offense against the laws of the state seeking his return, is an element which must be considered by the courts in determining whether he left the state, whose laws have been violated, for the purpose of escaping punishment for the offense which he had knowingly committed.

It is difficult to conceive how a person who is temporarily sojourning within a sister state, and who ignorantly and unintentionally violates a law of that state and then, without knowing that he has committed any offense against its laws and in the ordinary course of the affairs of his life, departs to his home in another state, can become a fugitive from justice.

But without basing the conclusion which I have reached wholly upon this proposition, there is another fact involved which to my mind is conclusive, and that is the length of time which has elapsed since the offense was committed.

It may be possible, if an application had been made within a reasonable time after Wurtsbaugh left the state of Kentucky to have him returned there to be tried for the crime of bigamy, that such request, if made upon the executive of the state where he then was, should have been honored, and that he should have been delivered to an agent of that state for return and trial; but it is now more than eighteen years since the alleged offense was committed. During all of that time, as has been suggested, his whereabouts was known to the prosecutrix and no attempt was made to have him returned to the state of Kentucky.

Where a man leaves a state in the ordinary course of his affairs, without any knowledge that he has committed a crime against its laws, and lives for a third of a lifetime in other states of the Union without any attempt of concealment, there certainly must come a time when he ceases to be a fugitive from justice, although such a status may have attached to him when he left the state whose laws are claimed to have been violated.

In a case of this character which came before Governor Cullom of Illinois in 1878, certain persons were sought to be returned to the state of Pennsylvania for the commission of an offense against the laws of that state. The evidence submitted showed that such persons were residents of the state of Pennsylvania at the time of the alleged offense, and that soon thereafter, and without any attempt to conceal their destination, they came to Illinois and took up their residence at Springfield in that state, where they lived for a period of twelve years. That during this period of time there was intercourse by correspondence and otherwise between the persons charged with the commission of the crime and their families and other persons residing at the place where the crime was charged to have been committed. There was no attempt on the part of the persons sought to be returned to the state of Pennsylvania to conceal their place of residence, and no attempt was made to have them arrested or returned to the state of Pennsylvania for trial until they had lived in the state of Illinois for twelve years.

Under these facts it was held by Governor Cullom that, although the persons for whom the extradition was asked were fugitives from justice at the time they left the state of Penn-

sylvania, the fact that no attempt was made by the authorities of that state to have them arrested and returned there for trial for a period of twelve years, during which time they had been citizens of the state of Illinois, must be held as conclusive that the status of fugitives from justice which attached to them when they left the state of Pennsylvania, had ceased to exist, and that they could not be so considered under the provisions of the constitution.

This decision of Governor Cullom certainly recommends itself to the common sense of everyone who has given cases of this character any thought.

It is unreasonable that the status of a fugitive from justice when once attached to a person for an offense less than murder should continue during his natural life, and particularly so where the person charged did not know that he was guilty of the commission of a crime. If he lives the life of an upright and honest citizen in the state to which he goes, there certainly will come a time when he must be treated as such by the authorities of the state of which he is a resident. Governor Cullom has said that twelve years is sufficient to remove the status of a fugitive from justice in Illinois, and it certainly seems to me that eighteen years is sufficient to remove such status within the state of Iowa .

It is repugnant to every sense of justice to say that where a person leaves a state in the ordinary course of his affairs without any attempt of concealment, and for eighteen years lives an upright life, he may then be arrested and returned to the state where the crime is claimed to have been committed eighteen years before, to be put on trial for that offense, unless he is charged with murder or treason.

This view, as it appears to me, is based upon the soundest principles of public policy; that is, if the authorities of a sister state desire the arrest and return of a fugitive from justice, the application therefor must be made within a reasonable time under all of the circumstances of the case after the commission of the offense. The request now made by the governor of Kentucky for the arrest and return of J. D. Wurtsbaugh for an offense charged to have been committed more than eighteen

years ago in that state, does not fall within this rule. If the authorities of Kentucky desired to try Mr. Wurtsbaugh for the offense of bigamy, an application for his return to that state should have been made with reasonable promptness after the offense was committed.

Under all of the circumstances of this case I am of the opinion that Wurtsbaugh can not now be held to be a fugitive from justice under the provisions of the federal constitution. If that status ever attached to him for a violation of the laws of the state of Kentucky, it has now ceased to exist because of the length of time which has elapsed since the commission of the offense charged.

The request of the governor of Kentucky should not, therefore, in my opinion, be complied with, and Wurtsbaugh should not be arrested and returned to that state to answer the charge preferred against him.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

October 26, 1903.

TO THE HONORABLE A. B. CUMMINS,
Governor of Iowa.

INSURANCE—FOREIGN LIFE INSURANCE COMPANIES—RIGHT TO TRANSACT BUSINESS IN THE STATE—Any foreign insurance company or other foreign corporation may legally invest its money in Iowa securities and purchase, hold and deal in the same, although it has not filed a certified copy of its articles of incorporation with the secretary of state, nor paid the incorporation fee required by statute, nor received a permit to transact business within the state.

SIR—Sometime ago the question as to whether foreign life insurance companies desiring to transact business within the state of Iowa were compelled under the statute to file certified copies of their articles of incorporation with the secretary of

state and obtain a permit from him before transacting any business within the state, came to me in an informal way and without a written request from any department of the state for an opinion thereon. Since that time circumstances have arisen which make it desirable that the question should be determined so far at least as the right of such foreign corporations to purchase notes, bonds, mortgages and other securities within the state is concerned.

I have recently received from the Honorable Secretary of the Treasury of the United States a letter asking that I determine the question so that foreign life insurance companies desiring to invest their funds in Iowa securities may know whether they can legally do so or not. I therefore submit the following opinion:

Section 1637 of the code provides:

> "Any corporation for pecuniary profit other than for carrying on mercantile or manufacturing business, organized under the laws of another state or of any territory of the United States, or of any foreign country, which has transacted business in the state of Iowa since the first day of September, 1886, or desires hereafter to transact business in this state, and which has not a permit to do such business, shall file with the secretary of state a certified copy of its articles of incorporation duly attested, accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state; said application to contain a stipulation that such permit shall be subject to the provisions of this chapter."

The section also provides that before such permit is issued, the corporation shall pay to the secretary of state the same fee required for the organization of corporations in this state, and upon the filing of such application and the payment of the fee fixed by law, the secretary of state shall issue a permit to the corporation authorizing it to conduct and carry on its business within this state. The closing provision of this section is as follows:

"Nothing in this section shall be construed to prevent any foreign corporation from buying, selling and otherwise dealing in notes, bonds, mortgages and other securities."

Two questions arise under this section of the statute—

(1) Do the provisions of the section requiring all foreign corporations, other than those organized for the purpose of carrying on mercantile and manufacturing business, to file certified copies of their articles of incorporation with the secretary of state, and to pay the incorporation fee fixed by statute before they are permitted to transact business within the state of Iowa, apply to foreign life insurance companies?

(2) Does the provision of the section above quoted, which permits foreign corporations to buy, sell and otherwise deal in notes, bonds, mortgages and other securities, permit foreign life insurance companies which have not filed certified copies of their articles of incorporation with the secretary of state, or paid the incorporation fee fixed by statute, to buy, sell and deal in the class of securities named within the state of Iowa?

It is unnecessary at this time to determine the first question which arises under this statute, and, for reasons which appear to me sufficient, I shall for the present refrain from expressing any opinion in relation thereto.

The second question must be determined by the construction given the last clause of the section of the statute referred to. This provision of the statute is as broad as language can make it. It provides that nothing in the section referred to shall be construed to prevent any foreign corporation from buying, selling and otherwise dealing in the class of securities named. The purpose of this provision was to permit any foreign corporation to legally invest its money in Iowa securities, and to purchase, hold and deal in such securities although it had not filed a certified copy of its articles of incorporation with the secretary of state, nor paid the incorporation fee required by statute, nor received a permit to transact business within the state.

Foreign life insurance companies are corporations which clearly fall within the class named in this provision of the statute, and under such provision it is not necessary that they should

file certified copies of their articles of incorporation in the office of the secretary of state, or pay the incorporation fee fixed by statute, before they are permitted to invest their money in the class of securities referred to, and to buy, sell and deal in the same as they may see fit. The right to do so is clearly given them by statute, and does not depend upon a permit issued by the secretary of state authorizing them to transact business therein.

The right to buy, sell and deal in the class of securities named within the state of Iowa carries with it the absolute right to enforce payment of any notes, bonds, mortgages or other securities owned and held by foreign life insurance companies, and to purchase, and hold under foreclosure or judgment sale any property, real or personal, upon which such notes, bonds, mortgages and other securities are, or may become, a lien.

As to the power to enforce payment of such securities, and to purchase and hold any property upon which the same may be a lien, a foreign corporation has, under the statute referred to, the same right as a citizen of this state. No other construction can be placed upon the provisions of the statute quoted, and under those provisions it is clear that foreign life insurance companies have the right to buy, sell and otherwise deal in notes, bonds, mortgages and other securities of like character within the state of Iowa, and to enforce payment thereof, without filing certified copies of their articles of incorporation with the secretary of state, or paying to him the incorporation fee fixed by law.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

Des Moines, November 20, 1903.

TO HON. B. F. CARROLL,
Auditor of State.

CITIES AND TOWNS—The city council of a city of the second class has no power to confer upon an individual the powers which are ordinarily exercised by the board of public works in a city of the first class, and an ordinance by which such powers are attempted to be conferred is invalid.

DEAR SIR—I beg to acknowledge the receipt of your esteemed favor of the 5th inst., in which you again request my opinion as to the validity of the resolution adopted by the city council of Webster City authorizing the appointment of a general superintendent who shall have the supervision of all public works within and for the city, including electric light plant, waterworks, steam heating, streets and alleys and all public improvements operated and owned by the city, with the power to purchase all supplies under the supervision of the purchasing committee, and providing that all employes of the city, except the police force, shall be under the orders and subordinate to such general superintendent.

On the 8th of October I wrote a letter to the mayor of Webster City in which I stated that I could see no reason why the city council should not delegate administrative powers to a superintendent of the electric light plant, waterworks and other properties of that character. At that time I did not understand that my opinion as to the validity of the resolution was desired upon the other questions which arise under its provisions. Complying with your request, I now submit an opinion as to the validity of the various provisions contained in the resolution.

First—There can be no objection to the city council appointing a general superintendent of electric light plant, waterworks and steam heating plant, who shall have charge of the operation of the same. Such an act by the city council is eminently proper and within the power of that body. The provisions of the resolution which give to such a superintendent the entire charge of the streets, alleys and public improvements of the city, and the power to purchase all supplies, and make

all employes of the city, except the police force, subject to his orders and subordinate to him, are clearly in excess of the powers which may be delegated to an individual by the city council of a city of the second class. Section 651 provides:

> "In cities of the first class the council at the first meeting after the biennial election shall appoint a clerk, a physician, a street commissioner, and when deemed necessary a wharf master. If there is a board of public works such board shall appoint the street commissioner. In cities of the second class the council shall appoint a clerk and such other of the above named officers as are necessary. * * * "

No authority is given by this section to appoint a superintendent of streets, alleys, public works and public improvements by the city council, and unless a street commissioner is appointed under the provisions of the section referred to, the supervision of the streets, alleys and public grounds of the city must be performed by the city council itself, through its appropriate committee.

It is said by Mr. Dillon in his work upon Municipal Corporations:

> "The principle is a plain one, that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, can not be delegated to others."

This statement of the law by Mr. Dillon is in harmony with the provisions of section 668 of the code, which provides:

> "All legislative and other powers granted to cities and towns shall be exercised by the councils, except those conferred upon some officer by law or ordinance."

The law makes no provision for the appointment of a superintendent of streets, alleys, public works and public improvements in a city of the second class, and it is beyond the power of the city council to create such an office, to appoint an incumbent thereof, or to define the duties of a person so appointed.

Second—It is equally beyond the power of the city council of a city of the second class to elect or appoint any officer,

whose office is not created by statute, to whom all of the employes of the city, except the police force, are made subordinate.

Section 651 of the code provides for the appointment of a city clerk and a physician and street commissioner when deemed necessary. Such officers, when appointed by the city council, have independent duties to perform, as fixed by the statute and by the ordinances of the city, and can not be made subordinate to a superintendent of public works appointed without authority of statute and under a resolution of the city council.

It may also be suggested that the powers attempted to be given to the general superintendent by the resolution, approach very nearly to those conferred upon a board of public works in a city of the first class; and that the powers which may be conferred upon a board of public works in a city of the first class are distinctly withheld by statute from a city of the second class.

It necessarily follows that any act or resolution of a city council of a city of the second class, by which the powers exercised by a board of public works in a city of the first class are sought to be conferred upon an individual, is inoperative and invalid.

Under these principles of law I think it must be held that the provisions of the resolution, so far as they attempt to give to such general superintendent the supervision of all public works, public improvements, streets and alleys within the city, and to make all of the employes of the city, except the police force, subordinate to him, are invalid.

In so holding I do not mean to be understood that the city council has not the power to employ a superintendent of an electric light plant, waterworks or steam heating plant, and to make all of the employes in such plants subject to the direction and control of such superintendent; nor do I mean to be understood as saying that it is not within the power of the city council to employ a general superintendent of any public improvement, which has been determined upon by the council, and to give to such superintendent the general supervision of the completion of such public work. The dis-

tinction is that in the one case there is an attempt upon the part of the city council to delegate its discretionary power to an individual who is designated as a general superintendent, and in the other a general superintendent is employed simply to perform the ministerial duties which devolve upon the city council.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

Des Moines, November 24, 1903.

To HON. GEORGE F. TUCKER, Webster City, Iowa.

INSURANCE—An association organized for benevolent purposes and composed wholly of members of one occupation may, by complying with the provisions of chapter 7 of title IX of the code, place itself under the supervision of the insurance department of the state, and when it does so must comply with all the provisions of such department.

SIR—Complying with your request of September 10th for an opinion—

First—Whether the Iowa State Traveling Men's Association is such an association as, under the provisions of section 1798 of the code, is not amenable to the provisions and requirements of chapter 7 of title IX of the code.

Second—Should such association be desirous of placing itself under the supervision of the insurance department of the state and making annual reports thereto, is there any legal objection to its doing so?

Third—Is its organization such that it may properly be classified as an assessment accident association within the meaning and definition of chapter 7 of title IX of the code?

Fourth—If so, are its articles of incorporation, by-laws and certificate of membership in harmony with the provisions of said chapter?

I beg to submit the following:

First—The association referred to falls within the provisions of section 1798 of the code, as it is an association organized solely for benevolent purposes and composed wholly of members of one occupation.

Second—Section 1798 provides:

> "But any such society may, by complying with the provisions hereof (chapter 7, title IX), become entitled to all the privileges thereof, in which event it may be amenable to the provisions of this chapter so far as they are applicable."

This provision of the statute undoubtedly gives the Iowa State Traveling Men's Association the right, by complying with the provisions of chapter 7 of title IX of the code, to place itself under the supervision of the insurance department of the office of the auditor of state and make annual reports thereto; but it must comply with the provisions of such chapter before the insurance department of the office of the auditor of state can exercise supervision over it or receive its annual reports under the provisions of that chapter. If it desires to avail itself of the privileges given by chapter 7 of title IX, it must comply with the conditions and provisions of section 1787 thereof. When it does so, it then becomes an assessment insurance association, as defined by section 1784, as amended by the acts of the Twenty-eighth General Assembly. If it desires to do this, article 2 of its articles of incorporation should be amended by adding a clause thereto setting forth that it is organized for the purpose of conducting an insurance business under the provisions of chapter 7 of title IX of the code, as amended by the acts of the Twenty-eighth General Assembly.

Third—I think in its present form of organization it can not properly be classified as an assessment accident association within the meaning of the provisions of chapter 7 of title IX, and that its articles of incorporation should be amended as suggested and that its certificate of membership should be made to comply with the requirements of the insurance department

of the auditor's office in relation to assessment accident insurance associations.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

December 2, 1903.

To HON. B. F. CARROLL,
Auditor of State.

BANKS—INVESTMENT OF FUNDS—Savings banks, organized under the statutes of this state, are prohibited from investing their funds in the shares of stock of other banks or loan and trust companies.

SIR—Complying with your request for an opinion as to the right of a savings bank organized under the statutes of this state to invest its funds in the capital stock of another bank or trust company and carry such stock among its assets in an amount not exceeding ten per cent of its capital, I submit the following:

Section 1850 of the code specifies the kind and character of securities in which the funds and capital of savings banks in this state may be invested, the first provision of that section being as follows:

> "Each savings bank shall invest its funds or capital and all moneys deposited therein and all its gains and profits only as follows:"

Subdivision 5 of the section provides:

> "It may discount, purchase, sell and make loans upon commercial paper, notes, bills of exchange, drafts or any other personal or public security, but shall not purchase, hold or make loans upon the shares of its capital stock."

The question whether this provision permits savings banks to invest in the stock of other banks arose in the office of the auditor of state in September, 1899, and an opinion was then requested of the attorney-general upon the question.

Mr. Milton Remley, then attorney-general of the state, was of the opinion that the provision of the statute quoted did not

authorize savings banks to purchase or invest their funds in the stock of another bank, and in his opinion upon the question it is said:

> "You will notice that the purchase of stock by a savings bank, either of another bank or another corporation, is not one of the investments which the statute authorizes; hence such investments are prohibited by law. The prohibition is a wise one. A savings bank by investing its funds in the stock of a national bank or other bank in case of the insolvency of such bank may be made liable on the stock owned by the savings bank, and in case of the failure of such national bank or other corporation the savings bank might be carried down with it. I do not think there is any question in regard to savings banks being prohibited from thus investing their funds, nor can there be any reasonable doubt as to the wisdom of the law."

It may be urged with some force that the phrase, "other personal or public security," in a broad sense includes the stock of other banks, as such stock is a security of a personal character as distinguished from real property; but I am clearly of the opinion that the phrase was not used by the legislature in the sense which includes all securities which are of a personal nature. The sense in which the word "personal" is used in the statute referred to, was intended to describe securities containing a personal obligation, and as to which a personal liability exists. Shares of bank or other corporate stock do not come within this interpretation of the provision of the statute, and in my opinion it was not the intention of the legislature to permit the funds of savings banks to be invested in that class of securities.

An investigation of the question leads me to the same conclusion reached by Mr. Remley, and I concur in his opinion in holding that savings banks organized under the statutes of this state are prohibited from investing their funds in the shares of stock of other banks or loan and trust companies.

Respectfully submitted,
CHAS. W. MULLAN,
Attorney-General.

December 3, 1903.

To HON. B. F. CARROLL,
Auditor of State.

HISTORICAL DEPARTMENT—SUPPLIES—The historical department is entitled to draw from the executive council postage, stationery and other supplies required for the transaction of the business of the department, when authorized by the board of trustees of the state library and historical department.

SIRS—Complying with your request communicated to me by your secretary, Mr. A. H. Davison, for an opinion whether the Historical Department since its consolidation with the State Library is entitled to draw supplies from the executive council, or whether the same should be furnished by the library, or being a part of the library the library only is entitled to draw supplies, I submit the following:

Section 2880 of the code provides:

> "The curator (of the Historical Department) shall be paid an annual salary of twelve hundred dollars and allowed such assistants, postage, stationery and incidental expenses as the trustees may authorize."

Under this provision of the statute, and prior to the passage of chapter 144 of the acts of the Twenty-eighth General Assembly, the Historical Department was entitled to draw supplies from the executive council under authority given by the trustees and such right now exists, unless it is taken away from the department by a subsequent act of the legislature.

On the first day of January, 1901, the board of trustees of the Iowa State Library and the board of trustees of the Historical Department were, by an act of the Twenty-eighth General Assembly, which became a law on the 13th day of March, 1900, consolidated and ceased to exist as indepnedent boards. The same act provides for the consolidation of the miscellaneous portions of the Iowa State Library, or so much thereof as may be regarded by the board as advisable, with the Historical Department, and vests the control and management of the business and affairs of that department in the consolidated board.

The annual appropriation for the support of the Historical Department, provided for by section 2879 of the code, is re-

pealed, and the annual salary of the curator is increased from twelve hundred to sixteen hundred dollars. In lieu of the appropriation made to the Historical Department by section 2879 of the code, an annual appropriation of ten thousand dollars is made by the act of the Twenty-eighth General Assembly for the use of the State Library and Historical Department to be expended under the direction of the consolidated board of trustees. The act does not, however, abridge the powers of the Historical Department, and the duties, responsibilities and powers of its board of trustees as the same existed prior to the consolidation are expressly imposed and conferred upon the consolidated board.

The provisions of section 2880 of the code are not repealed or amended, except to increase the annual salary of the curator. The other provisions of that section, giving the Historical Department the right when authorized by the trustees to draw postage, stationery and other supplies from the executive council, remain in force. The power to authorize the Historical Department to draw supplies from the executive council under the provisions of the section quoted, is expressly conferred upon the consolidated board by the act of the Twenty-eighth General Assembly.

Under these provisions of the statute, I am of the opinion that the Historical Department is entitled to draw from the executive council the postage, stationery and other supplies required for the transaction of the business of that department, when so authorized by the board of trustees of the State Library and Historical Department of Iowa.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

December 4, 1903.

TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

CITIES AND TOWNS—CORPORATE FRANCHISE—A city ordinance which attempts to confer a corporate franchise upon individuals, a part of whom are officers or councilmen of the city, is void as against public policy.

DEAR SIRS—Complying with your request for an opinion as to the validity of the proposed ordinance of the city of Webster City granting to Mr. J. M. Funk and others a franchise authorizing the erection, maintenance and operation of a gas plant in the city of Webster City, I submit the following:

The facts as presented to me are there: That on the 3d day of November, 1903, the question of granting a franchise authorizing J. M. Funk, C. W. Burleson, J. W. Young, F. A. Edwards, W. E. Hunter, R. G. Clark, J. M. Richardson, R. E. Jones, W. J. Zitterell and George W. Teed, their associates, successors or assigns, to construct, maintain, own and operate works for manufacturing, supplying and transmitting gas, and to manufacture, supply and transmit gas to public or private buildings, persons, firms or corporations in the city of Webster City, Iowa, and adjacent thereto, for illuminating, fuel, heating and other purposes, was submitted to the electors of Webster City, and that a majority of votes cast at such election were in favor of the granting of such franchise.

That Mr. F. A. Edwards, one of the persons named in the proposition submitted, is the mayor of the city of Webster City.

A copy of the ordinance by which it was proposed to grant the franchise to the persons named was attached to the ballot cast by the electors in voting upon the proposition.

Subsequently to such election the same ordinance was presented to the city council for passage under which the franchise is sought to be obtained by the persons named.

The question which arises under this state of facts is whether it is within the power of the city council of the city of Webster City to adopt a valid ordinance granting such a franchise to the persons named, when one of the grantees is the mayor of the city. The question is one not without difficulty, and in the examination of the authorities I have been unable to find any case directly in point. I have, however, reached a conclusion upon

the general principles of law involved, and will state that conclusion as briefly as possible.

Section 720 of the code, as amended by the acts of the Twenty-ninth General Assembly, provides:

> "They (the city council) shall have power to purchase, erect and maintain and operate within or without the corporate limits of any city or town, heating plants, waterworks, gas works or electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, holes, wires, burners, machinery, apparatus and other requisites of said works or plants, and lease or sell the same. They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew or extend the term of such grant; but no exclusive franchise shall be thus granted, extended or renewed. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed, unless a majority of the legal electors vote thereon in favor of the same at a general or special election."

Section 721 of the code provides the manner in which the question shall be submitted to the electors.

The electors of a city have no power under these sections of the statute to grant any franchise or privilege to any individual or corporation. They can only authorize the power, which is lodged by statute in the city council, to be exercised by that body. The power to grant a franchise of the character of that under consideration is conferred upon the city council, but can only be exercised with the consent of the electors of the city.

It follows, therefore, that the attaching of a copy of the proposed ordinance to the ballot gives no power to the city council to grant the franchise which would not have been given had the proposition carried by a vote of the electors without the ordinance being attached to the ballot. The affirmative vote upon the proposition is simply the consent of the electors of the city that the city council may grant a franchise to erect, maintain and operate a gas plant in the city of Webster City, in which the rights of the public are properly guarded. The duty of

guarding the rights of the public by incorporating in such franchise proper conditions and restrictions, is imposed upon the city council and must be performed by that body in the exercise of its judgment and discretion.

The vital question is therefore presented: Is an ordinance adopted by a city council, whereby a valuable franchise is sought to be granted by the city to several persons, valid, when one of the grantees is the mayor of the city granting the franchise?

In Tiedeman on Municipal Corporations, section 166, it is said:

> "It is a well founded principle of law and of equity, the justice and fairness of which is evident, that he who acts as agent or trustee can not be allowed to make profit out of the transaction in which he acts, over and above the compensation which has been agreed upon between him and his principal or the beneficiary of the trust. The agent of the buyer can not act at the same time as an agent for the vendor; nor can an agent to buy be himself the vendor.
>
> "The opportunities to defraud, and the judicial conviction, that one can not act justly towards his principal, when he is himself interested adversely in the transaction, are the grounds for holding all such transactions to be tainted with fraud, either actual or constructive, and for that reason to be voidable at the instance of the principal or beneficiary of the trust, as the case may be. However much this rule may be violated by municipal and other public officials, there is no doubt of the application of the rule to them, and the decisions are numerous, in which contracts with municipalities, in which officials were financially interested, have been set aside. Thus, when the mayor secretly contracted to purchase at a discount a large amount of municipal debentures, which were afterwards issued by ordinance, in the enactment of which he was actively engaged, he was held to be a trustee for the city, to the amount derived by him from the transaction."

In *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. Law, 522, it is said:

> "The position thus assumed by the plaintiff rests upon the broad principle that it was the duty of the director to so deal with the property and franchises of the corporation---

to so manage its affairs as would most conduce to the corporate interest, and that he could not perform that duty while contracting with it in his own behalf, or if by possibility his own interest was consistent with the best interest of the company in so contracting, yet, so insidious are the promptings of selfishness and so great is the danger, that it will over-ride duty when brought into conflict with it, that sound policy requires that such contracts should not be enforced or regarded. After an examination of all the cases cited, and such others as I have found, and a careful consideration of the principle and the results of regarding and of disregarding it, I have come to the conviction that the true legal rule is, that such a contract is not void, but voidable, to be avoided at the option of the *cestui que trust,* exercised within a reasonable time. I can see no further safe modification or relaxation of the principle than this."

The case of *State v. Consumers Water Co.*, 28 Atl. Rep., 578, discusses the question under consideration at length and cites many authorities bearing upon it. In the course of the opinion it is said:

"It is a fundamental rule applicable to both sales and purchases that an agent employed to sell can not make himself the purchaser; nor if employed to purchase can he be himself the seller. The expediency and justice of this rule are too obvious to require explanation. * * * Nor is this doctrine confined to transactions of private agents. It is applicable wherever the fiduciary relation arises out of the contract, or condition of agency exists. The rule is enforced whether the agency is public, quasi-public or private. 'It is well settled,' says Mr. Beach, 'that directors or managers of corporations and other companies are equally within the rule which guards and restrains the dealings and transactions between trustee and *cestui que trust*, an agent and his principal. Directors are disqualified from acting in the right and in behalf of themselves and of their companies at the same time, and transactions between themselves, or wherein they are interested, are voidable either by the company or by its stockholders, or by its creditors.' A director of a corporation can not make for himself or for his own benefit, a contract which will bind the company. * * * From the general prevalence of this doctrine in all classes of agencies and the strictness with which it has been held in this state, it would seem that

aside from any statutory condemnation, the contract created by the ordinance and its acceptance, is voidable. The suggestion that the passage of the ordinance was a legislative act only, can not be entertained."

In the case of *Stewart v. Lehigh Valley R. R. Co.*, above cited, it is further said:

"The vice which inheres in the judgment of a judge in his own cause, contaminates the contract; the mind of the director or trustee is the forum in which he and his *cestui que trust* are urging their rival claims, and when his opposing litigant appeals from the judgment there pronounced, that judgment must fall. It matters not that the contract seems a fair one. Fraud is too cunning and evasive for courts to establish a rule that invites its presence. There may be isolated cases in which the trustee is willing to make a contract on more favorable terms for the *cestui que trust* than any one else, but the opportunities for self-advancement, at the expense of those whose concerns he has in charge, and under circumstances where concealment is easy, are so much more numerous than these isolated cases, that in declaring a rule the latter are not worthy of consideration."

The same principle of law is announced in *Doll v. State*, 45 O. St., 449, where it is said:

"To permit those holding offices of trust or profit to become interested in contracts for the purchase of the property for the use of the state, county or municipality of which they are officers, might encourage favoritism and fraudulent combinations and practices not easily detected, and thus make such officers charged with the duty of protecting those whose interests are confided to them, instruments of harm."

The same doctrine is enunciated in *Pickett v. School District*, 25 Wis., 554.

Under the principle of law as declared by these authorities, it is the duty of the agents of a municipal corporation to so act as to best promote the interests of the corporation whose affairs they are conducting. As agents of the corporation they have duties to discharge of a fiduciary character, and it is a rule of universal application that no one having such duties to dis-

charge shall be allowed to enter into engagements in which he is personally interested conflicting, or which may conflict, with the interest of those he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the contract entered into. No inquiry on that subject is permitted.

Where a public franchise is sought to be obtained from a municipal corporation by a member of its council, it is a case of a trustee of such corporation dealing with his co-trustees for the benefit of himself. The real party, the public, is absent except as represented by the trustees to whom its business has been entrusted. It has been well said:

> "The watchful and effective interest of the director or trustee seeking a bargain is not counteracted by the equally watchful and effective self-interest of the other party who is there only by his representatives, and the wise policy of the law treats all such cases as that of a trustee dealing with himself. The number of the directors or trustees does not lessen the danger or insure a security that the interests of the *cestui que trust* will be protected. The moment the directors permit one of their number to deal with the property of the stockholders, they surrender their own independence and self control. If five directors permit the sixth to purchase the property entrusted to their care, the same thing may be done with others if they desire it."
>
> *Pickett v, School District, supra.*

Under these authorities it is clear that an ordinance which seeks to grant to the mayor of a city a public franchise, is void unless there is some particular fact or circumstance which takes it out of the general rule.

Does any such fact or circumstance exist in the case under consideration?

It may be suggested that the ordinance was or will be passed without the mayor taking any part in the action of the city council. In my opinion such fact does not change the rule of law.

In *Stewart v. Lehigh Valley R. R. Co., supra,* it is said:

> "Nor is it proper for one of a board of directors to support his contract with his company, upon the ground

> that he abstain from participating as a director in the negotiations for and final adoption of the bargains by his co-directors; the very words in which he asserts his right, declare his wrong. He ought to have participated, and in the interest of the stockholders. If he did not and they have suffered loss, of which they shall be the judges, he must restore the rights he has obtained. He must hold against them no advantage that he has got through neglect of his duty toward them."

It may be said that under our statute a mayor of a city of the second class is not a member of the council. He is, nevertheless, by virtue of his office, a trustee of the corporation and charged with the duty of affirmative action in the protection of the rights of such corporation; and in this respect he stands upon the same footing as the members of the city council. It is, to say the least, as much his duty as that of any member of the city council to see that the rights of the public are fully guarded and protected when a franchise is granted by the city to private individuals. If he is the grantee in such franchise, he is at once placed in a position where his personal interests are opposed to the interests of the city. It is to his interest to obtain a grant from the city as free from restrictions as possible, and in determining whether the restrictions which are incorporated in the proposed franchise properly protect the interest of the public, he becomes a judge in his own cause.

A judge can not hear and decide his own case or one in which he is personally interested. He may decide it conscientiously and according to law; that is not enough. The law will not permit him to reap a personal advantage from an official act performed in favor of himself. Nor will it permit him to reap any advantage from a transaction wherein he has failed to perform the duties imposed upon him by virtue of his office.

It is the duty of a mayor of a city to be present at the meetings of the city council, to take part in the deliberations of that body, and as far as lies within his power to protect the rights and interests of the public. He can not, therefore, legally put himself in the position of asking a grant of a franchise from the city, and at the same time assent to that grant by either affirmative or negative action.

It may be suggested that the vote of the electors of the city is in the nature of a ratification of the action of the city council given in advance, and this position has some slight support in the case of *Beatty v. North-West Transportation Co.*, decided by the House of Lords upon an appeal from the supreme court of Canada—12 Appeal Cases, 589; but a careful reading of that case clearly shows that the principle announced by the House of Lords is not applicable to the question under consideration.

The vote of the electors of Webster City consenting that a franchise, should be granted by the city council, in nowise relieves the mayor or any member of the council of that city from his duty to fully protect the interests of the public.

In the case referred to, one of the directors of a private corporation made a bargain with the other directors to sell a steam ship to the corporation. The question whether such purchase should be made was submitted to the stockholders of the corporation at a special meeting called for that purpose, and a majority of the stockholders voted in favor of the purchase. This vote was held to be a ratification by the stockholders of the contract between the director and his co-directors for the purchase of the ship. No such ratification is involved here. The vote of the electors of the city of Webster City, consenting that the city council may grant a franchise for the erection, maintenance and operation of a gas plant for the purpose of furnishing gas to the city and its inhabitants, can not be held to authorize such grant to be made to the mayor or any trustee of the city.

The ordinance by which such franchise is proposed to be granted to the mayor of the city and to other persons, if adopted by the city council, must, in my opinion, be held to be void as against public policy.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

Des Moines, December 19, 1903.

To MESSRS. W. F. HUNTER AND R. G. CLARK,
Webster City, Iowa.

INSURANCE—GUARANTEE FUND—A mutual fire insurance company organized under the laws of the state has power to provide a guarantee fund. Such guarantee fund should be raised by obligations of the guarantors upon which assessments can be made by the board of directors. The financial statement of the company should show the amount of the guarantee fund secured to be paid, and the amount advanced and not repaid should be returned as a debt in such statement. The guarantors to such fund are not stockholders of the company, and the guarantee fund cannot be treated as a part of its capital stock.

SIR—Complying with your request of the 12th ult., I herewith submit my opinion upon the questions contained in your letter of that date. These questions will be taken up in a slightly different order than that in which they are presented in your letter.

First—(1) The fourth question upon which my opinion is requested is:

> "What power, if any, does a mutual fire insurance company, organized under the provisions of chapter 4 of title IX of the code, possess to provide for a so-called guarantee fund? And how should such guarantee fund, if authorized, be raised, and how should it be treated in the financial statement of the company?

The power of a mutual fire insurance company, organized under chapter 4 of title IX of the code, to provide for and create a guarantee fund, will be first considered.

This question first arose in this state in the case of *Berry v. Anchor Mutual Fire Ins. Co.*, 94 Iowa, 135. The articles of incorporation of that company provided that there should be a guarantee fund of not less than twenty-five thousand dollars, which should be divided into shares of one hundred dollars each, and that the fund might be increased by a vote of two-thirds of the stockholders. That it should be secured by the obligations

of the contributors, to be known as guarantee fund notes, which should be subject to assessment for the purpose of meeting losses and expenses of the company when there was not sufficient money in the fund created for that purpose to pay such losses and expenses at the time the same became due and payable.

It was insisted in that case that such guarantee fund notes are not recognized or provided for by the statute, and that the same were void. In passing upon the question of the power of a mutual fire insurance company to create such a guarantee fund, and to take obligations upon which assessments could be made when it became necessary to pay losses or expenses out of such guarantee fund, the court said:

> "We do not find, however, that the creation of a guarantee fund is itself illegal. It is the purpose of the statute to afford to the members of insurance companies indemnity against loss. Provision is made for accumulating and investing funds, and while it is not the intent of the law that accumulations for mutual companies shall be made for permanent investment, yet it is in harmony with its provisions to provide funds for such demands as can not be met within a reasonable time by the assessments for which the law in terms provides. In the absence of restriction, corporations have the implied power to do whatever is necessary or proper to carry on the business for which they were organized. * * * We are of the opinion that guarantee fund notes which are designed to furnish money to the company for temporary use, in paying its legitimate expenses and losses, which is to be refunded from money realized from assessments duly made on obligations given by members for insurance, may be entirely in harmony with the purposes of a mutual insurance company and the statute under which it exists and does business, and that when notes are given for such a purpose they are valid."

The question again arose in *Corey v. Sherman,* 96 Iowa, 114, and the principle announced in *Berry v. Anchor Ins. Co.* was there affirmed.

It again came before the court in *Smith v. Sherman,* 113 Iowa, 601, in which it is said:

> "In *Berry v. Ins. Co.,* 94 Iowa, 135, and in *Corey v. Sherman,* it was held that such guarantee fund was not

> inconsistent with the organization or purpose of a mutual insurance company. In view of these decisions it is clear that the creation of such fund does not in any way change the character of the insurance organization from that of a purely mutual company to that of a joint stock company, and it must logically follow that the only liability incurred by the defendants when they subscribe to such fund was for the advancement of such sums as might from time to time be called for by the board of directors, and that they are not on account of such subscription liable to plaintiff as stockholders owing unpaid subscriptions."

Under the authority of these decisions, it is within the power of a mutual fire insurance company, organized under the provisions of chapter 4 of title IX of the code, to create and maintain a guarantee fund to be used for the purpose of paying the expenses of the company and its losses when there is not sufficient money in the funds provided for such purpose to meet such expenses or losses. Such fund can not, however, be made any part of the working capital of the company, and may properly be designated an emergency fund to be drawn upon only when the money received from assessments is insufficient to pay losses or expenses of the company when due; and all money obtained from such guarantee fund is to be regarded as a mere temporary advancement or loan to be refunded upon the order of the directors of the company.

(2) How should such guarantee fund be raised, and how should it be treated in the financial statement of the company?

It should be provided for and raised by obligations of the guarantors upon which assessments can be made by the board of directors as the necessity of the company may demand. Such obligations may be in the form of a promissory note or other written contract whereby the guarantors bind themselves to pay such assessments as may be legally made by the board of directors of the company for the benefit of the guarantee fund, and it may be very properly provided by the articles of incorporation, or its by-laws, that the guarantors shall receive a legal rate of interest upon the money so advanced by them upon their obligations.

The persons giving such obligations do not thereby become stockholders or members of the association. They simply guarantee the payment of the losses and expenses of the company to the extent of the obligation given, and are creditors of the company to the extent of the amount of money advanced by them upon such obligations. In other words, all money advanced to the guarantee fund of the association is a loan which must be repaid by the company to the guarantors with such legal rate of interest as may be agreed upon.

The financial statement of the company should show the amount of the guarantee fund secured to be paid by the obligations of the guarantors; and the amount advanced by them and not repaid should be treated as a debt owing by the association to the guarantors, and so returned in its financial statement made to the auditor of state.

Second—"Is article VI of the articles of incorporation of the said company * * * in conformity with law, and may the powers therein assumed be exercised by the company?"

Article VI of the articles of incorporation of the company provides:

"For the purpose of promptly providing for the payment of expenses incident to organization and any losses and expenses that may be subsequently incurred that the money on hand realized from assessments will not promptly pay, a guarantee fund is hereby provided to be created not exceeding fifty thousand dollars, and divided into shares or portions of one hundred dollars, each par value, for which certificates shall be issued signed by the president and secretary of the company, to such persons as may be entitled thereto, which said certificates may be transferred by assignment on the books of the company kept for that purpose, and not otherwise. The holders of such shares shall be members of this company during the time the certificates are held. Such certificates shall be subject to assessment by the board of directors in an amount not exceeding ten per cent when the company is fully organized and ready for business, and be subject to such future assessments as the board of directors may deem expedient and necessary; but no assessment can be made for a greater amount than

ten per cent of the face value of certificates outstanding, nor can an assessment be made oftener than once in three months, nor can the certificate be assessed in total amount to exceed the face value thereof, nor can assessments be made for any other purpose than as a temporary advancement to provide for the payment of losses and expenses, and shall be repaid with interest at the rate of eight per cent per annum from the moneys realized from assessments upon pledges of its members for insurance and for premiums. The board of directors may at their discretion pay up all or any portion of the moneys advanced on certificates of the guarantee fund and retire such certificates or any part thereof."

This article does not in my opinion conform to the laws authorizing the organization of mutual fire insurance companies, and the creation of a guarantee fund to be used for the payment of losses or expenses in cases of emergency.

It is obvious that the value of such guarantee fund depends wholly upon the financial responsibility of the guarantors. The law does not contemplate, nor does it in my opinion permit a guarantee fund of this character to be accumulated and invested by a mutual insurance company. Nor does it permit the guarantors of such fund to pay the entire amount into the treasury of the company and receive interest or dividends thereon. Guarantors may be called upon by the directors to advance money to the association when the amount received from assessments upon its members and from other sources is insufficient to meet the losses and expenses of the company when due, and they would be entitled to interest upon such advancements until repaid by the association.

Under article VI above quoted, no obligation is given by any guarantor for the payment of such assessments as may be made upon him for the benefit of the guarantee fund. The holders of the certificates issued under the provisions of article VI are only personally liable so long as they are the owners of such certificates. It is true that the article provides that such certificates may be assessed to the amount of their face value, but the manner in which they are issued, and the ease with which they can be transferred, make the power of such assessment of little financial value. The certificates may have been originally issued

by the company to persons of financial responsibility, and afterward assigned and transferred to others who are not financially responsible, and from whom no assessment could be collected.

Closely connected with the question as to the right of the company to carry out the provisions of article VI, is the question whether the certificate issued by the company is of the character and form authorized to be issued by mutual insurance companies for the creation of a guarantee fund.

The certificate provides upon its face that the person to whom the same is issued is the owner of a certain number of fully paid shares of the guarantee fund of the American Mutual Fire Insurance Company, and is in form and substance a stock certificate issued by a stock company. It contains no obligation on the part of the holder to pay any sum into the guarantee fund upon the call of the board of directors, and whatever obligation exists is created by the articles of incorporation, which provide for an assessment upon the holder of such certificate. Across the face of the certificate is printed an agreement on the part of the company to pay dividends at the rate of eight per cent per annum payable semi-annually on July and January first of each year, which in effect makes it a preferred stock certificate upon which an eight per cent dividend is guaranteed.

It is only by referring to article VI of the articles of incorporation of the company that the truth as to how such certificate is issued, and upon what its value rests, can be obtained. From the provisions of that article it is clear that the certificate was issued without any payment being made by the holder thereof at the time the same was issued; that its holder was subject to an assessment not to exceed ten per cent of the face value of the shares named therein when the company was organized; and that after such organization any holder of such certificate might be assessed not exceeding ten per cent of the face value of his certificate at any one time to the amount of the face value of the shares therein named.

By the provisions of article VI and the certificate issued thereon, an attempt has been made to combine a stock company feature with the business of a mutual insurance company, and to issue certificates of stock upon the guarantee fund of the asso-

ciation as fully paid when nothing has been paid thereon, except such assessments as were made after the certificates were issued.

The powers sought to be exercised under the provisions of article VI are clearly outside of those conferred upon mutual insurance companies by the laws of Iowa, and the certificate issued thereunder is not the proper form of contract for the creation and maintenance of a guarantee fund of the association.

Third—"If the company has authority to issue these certificates, would the holders of such certificates have any right to vote at the annual meeting of the company, assuming they are not policy holders?"

A question of this character arose in the case of *Berry v. Ins. Co.* above cited, and in that case it is said:

> "Persons having insurance in a mutual insurance company are members of it while their insurance continues in force. There is no statutory provision making any one else members. Persons contributing to a guarantee fund are not, by reason of that fact, members of the company, for their interests are not thereby made of the same character as those of persons who have insurance. Those persons are liable for their proper share of the losses which occur while they are members. The contributors to the guarantee fund are liable for such losses only when the funds of the company for which the statute provides are not sufficient to pay them; and when they are liable it is only to advance money which is to be repaid with interest when it can be raised by assessment upon pledges of the members of the company given for their own insurance. The paramount interest of guarantee fund holders would be to make profitable investments for themselves, and to so assess pledges given by members for insurance as to promote that interest. That might not be in accord with the general interests of the company, and the purposes it was designed to accomplish. Therefore, to make contributors to the guarantee fund members of the corporation and to require all directors to be selected from their number, thus giving to them the sole control and management of the business of the corporation, is not only not authorized by the statute in terms, but is contrary to its spirit and intent. We are of the opinion that so far as the articles of incorporation of the defendant attempted to make guarantee fund

holders members of the corporation and to require that the directors should be selected from them alone, they are void."

That this holding of the supreme court of Iowa is in strict accord with the spirit and intent of the statute authorizing the organization of mutual fire insurance companies, can not be questioned. The members of every mutual insurance company are the holders of its policy contracts. Such persons are associated together under an incorporated organization for the mutual protection of each other. Their interests are identical and each undertakes to pay his just proportion of any loss which may be sustained by any other member of the company. No person other than a policy holder of such an association is or can be a member thereof, and no person not a member of the association is entitled to vote at its annual meeting.

The fact that a person has given his obligation upon which assessments may be made for the benefit of the guarantee fund of the association, does not constitute him a member of such association, nor can he be made so by any provision of the articles of incorporation, as such provision must be held to be absolutely void because in contravention of the letter and spirit of the statute under which such company is permitted to be organized.

Fourth—"Is not the form of certificate submitted of such a nature and character that the issuance of the same by a mutual company is in conflict with the provisions of section 1690 of the code?"

The answer to this question has been suggested in a previous division of this opinion, and it is only necessary here to say that the form of the certificate and the manner in which it is issued are not authorized by the statutes of Iowa, and that it is in conflict with the provisions of section 1690 of the code. It is, as has been suggested, an attempt to combine the plan of business of a mutual and a stock fire insurance company, which is directly prohibited by the section referred to. The so-called guarantee fund of the association is treated as a part of its capital, and certificates, which upon their face purport to be fully paid, are issued therefor. The fund upon which these certificates are

issued has no existence, except as a debt owing by the association to the persons who have loaned it money for the purpose of meeting its expenses and liabilities, and which should be paid from the proceeds of assessments made upon its members. The issuing of certificates of stock, under these circumstances, is unauthorized by statute and is clearly illegal.

In conclusion I will add that article VI of the articles of incorporation of the association should be so amended as to permit the association to have such a guarantee fund as is authorized under the statute, if it desires the creation and maintenance of a fund of that kind. The guarantors of such fund should execute to the association personal obligations upon which such assessments may be made and collected as may be found necessary to meet and pay the losses and expenses of the company when the assessment of the members of the association is insufficient for that purpose.

All of the stock certificates issued by the company should at once be called in and canceled, and the association required to carry on a strictly mutual insurance business as provided by chapter 4 of title IX of the code.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

December 30, 1903.

To HON. B. F. CARROLL,

Auditor of State.

SCHEDULE G.

CLERKS OF COURTS—DEPUTIES—A deputy appointed by a clerk of courts is not a county officer, and it is not necessary that he or she should have the qualifications of an elector.

Des Moines, January 31, 1902.

HON. OLIVER GORDEN,
Forest City, Iowa.

DEAR SIR—Permit me to acknowledge the receipt of your favor of the 30th inst.

The matter concerning which you write is not one upon which I am required to give an official opinion, but as you have written me for such information as I am able to furnish concerning it, I will reply briefly:

The clerk of the courts of Iowa is a ministerial officer, except in certain special instances where he is required to act in a judicial capacity.

Section 298 of the code gives him the power to select his deputy and clerks. He and his surety are responsible for their acts. He has the authority under this section to appoint whomsoever he pleases. The person appointed as his deputy acts for him; or, in other words, he acts through such deputy.

His choice is not confined to any race, sex, color, age or previous condition of servitude. The deputy appointed by him is not a county officer, and it is not necessary that he or she should have the qualifications of an elector.

This question has been before several courts, and the doctrine as above stated has met with approbation.

See *Moore v. Graves,* 3 New Hampshire, 408; Golding's Petition, 57 New Hampshire, 146; *Jeffries v. Harrington,* 11 Colo., 191; *Wilson v. Newton,* 87 Mich., 498. The last case cited being directly in point.

Very truly yours,
CHAS. W. MULLAN.

BOARD OF HEALTH—EXPENSES—LIABILITY OF COUNTY FOR—A county is liable for the enforcement of the regulations of the board of health, and the support of those needing assistance. The persons receiving the assistance are liable for the cost thereof.

Des Moines, February 17, 1902.

HON. N. WILLETT,
Decorah, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 14th inst.

Section 2570 of the code provides that the local board of health may make such provisions as are best calculated to preserve the inhabitants against danger from an infectious disease, by removing any person afflicted therewith to a separate house, when it may be done without injury to his health, and providing nurses, needful assistants and supplies, which shall be charged to the person, or those liable for his support, if able to pay, and if unable it shall be done at the expense of the county.

Section 2571 provides:

> "All expenses incurred in the enforcement of the provisions of this chapter, when not otherwise provided, shall be paid by the town, city or township; in either case, all claims to be presented and audited as other demands. In the case of townships, the trustees shall certify the amount required to pay such expenses, to the board of supervisors of the county, and it shall advance the same, and at the time it levies the general taxes, shall levy on the property of such township a sufficient tax to reimburse the county, which, when collected, shall be paid to and belong to the county."

Construing these two sections together, they in effect provide that the county shall be liable for the enforcement of the regulations of the board of health, and the support of those needing assistance, and that such amount may be collected from the persons receiving the assistance, if able to pay. If not able to pay, then the city or township must pay back to the county in the form of tax, or otherwise, the amount advanced by the county.

Yours very truly,
CHAS. W. MULLAN.

ASSESSMENT—TAXATION—EXPRESS COMPANIES—Manner of ascertaining the value of the property of express companies for taxation.

Des Moines, March 12, 1902.

MR. D. E. REPLOGLE,
Farragut, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 10th inst.

The matter concerning which you write is not one upon which I am permitted to express an official opinion, unless the same is referred to me by one of the departments of the state. It is strictly within the jurisdiction of your county attorney, who is by law made your legal adviser.

Inasmuch, however, as your county attorney may not be familiar with the method of the executive council in making assessments against express companies, I will give you that method in brief, without expressing any opinion.

Chapter 45 of the laws of the Twenty-eighth General Assembly, which provides the manner of assessing express companies, requires them to make a complete statement annually to the auditor of all lines, property, etc., owned and operated by such company, together with the amount of stock, mortgages, bonds and indebtedness of such company. The value of the property of the company is ascertained by adding to the aggregate market value of all shares of capital stock the amount of the mortgage indebtedness of the company.

The executive council then ascertains the actual value in localities where the same is situated of the several pieces of real estate and all bonds, mortgages and other personal property situated without the state of Iowa and used exclusively outside of the general business of the company, and deducts the value thereof from the gross actual value of the property before ascertained. From the entire actual value of the property within the state ascertained by the executive council, there shall be deducted—

First—The actual value of all real estate, buildings, machinery, appliances and personal property not used exclusively in the

conduct of the business within the state which are subject to local taxation.

Second—Specific properties locally assessed within the state.

The council then divides the total value as ascertained by the number of miles within the state, and the result is the actual value per mile of the property of the company. This value is certified to the different local taxing authorities for assessment and collection of taxes.

You will observe that from the general aggregate of value ascertained in the method pointed out by the statute, there is first deducted all property outside of the state not used in connection with the business.

Third—All property within the state not exclusively used in connection with the business.

Fourth—All property locally assessed within the state, so that the assessment made by the executive council and certified to each local taxing district does not include the value of any property within such district which is not used in connection with the business of the company, or which is locally taxed within such district. I am, Yours very truly,

CHAS. W. MULLAN.

ELECTIONS—REGISTRATION—An officer elected at an election held without registration where registration is required by law, who qualifies and assumes the duties of the office, is an officer *de facto*.

Des Moines, March 13, 1902.

MR. J. W. HANSON,
Oelwein, Iowa.

DEAR SIR—I am in receipt of your favor of the 11th inst.

While the matter concerning which you write is one upon which I can not express an official opinion, unless it is referred to me by one of the departments of the state, I will make the following suggestion:

There is a considerable conflict of authority as to the legality of an election held without registration where registration is required by law, and I think the weight is probably against the legality of such an election. If, however, there is no contest made as against the officers thus elected, and they qualify and give bonds in compliance with the statute, they become officers *de facto,* and their acts are in all respects as legal as though there was no question as to the legality of the original election. All elections of this character are *prima facie* legal, and if the time elapses within which a contest could be made, no question could arise as to the legality of the election of the officers chosen at such election by the voters. When such time arrives and your successor becomes an officer *de facto* of the school district, I think you could turn the funds of the district over to him as such officer and relieve yourself from liability.

Yours very truly,

CHAS. W. MULLAN.

INSANE PERSONS—LIABILITY OF ESTATE OF PATIENT FOR COSTS AND EXPENSES—**The costs incurred in the investigation of the condition of a person as to his sanity or insanity should be borne by the county, and such person's estate is only liable for his support.**

Des Moines, March 15, 1902.

HON A. J. WALSMITH,
Sheldon, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 13th inst.

The provisions of section 2297 of the code only contemplate that the cost of the support of an insane patient shall be chargeable to his estate.

Section 2309 provides that the cost of the investigation and of conveying the patient to a hospital shall be paid out of the county treasury, and no provision is anywhere made for charging such cost and expense to the estate of the insane person or for a recovery of the same by the county.

It seems to me clear that it was the intent of the legislature that all costs and expenses of investigating the condition of a person against whom an information is filed for insanity, shall be borne by the county, and that only the cost of his support is chargeable to his estate. I am, Yours very truly,

CHAS. W. MULLAN.

CEMETERIES—REMOVAL OF BODIES—**The local authorities may only remove bodies from cemeteries without the consent of their friends when the public health demands such removal.**

Des Moines, April 29, 1902.

MR. I. S. DAVIS,
Keota, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 28th inst.

The question of abandoning a cemetery and removing the bodies to another place is not without difficulty. I would suggest that the friends of all the persons buried in the old cemetery which it is desired to abandon, be notified and asked to remove the bodies of those buried at that place; and if it is impracticable for them to comply with such request, that they consent to such removal by the trustees of the township. In this way the bodies could be removed and the cemetery abandoned without incurring any liability on the part of the trustees.

Where a piece of land is conveyed to a church for cemetery purposes, and is accepted by the persons of that church and others, and used for cemetery purposes, those using it have the right to have their friends remain buried there, unless a time shall come when it becomes necessary, because of the increase of population or otherwise, to remove the cemetery to a less densely populated neighborhood. In such case the removal may be made by the proper authorities without the consent of the friends of those who are buried; but unless some necessity ex-

ists why such removal shall be made, the authorities do not ordinarily have the power to arbitrarily make such removal. I am, Yours very truly,

CHAS. W. MULLAN,

CORPORATIONS—RENEWAL—FEES—**The life of a corporation can only be extended by an amendment to its articles of incorporation, and upon the payment of the fees provided by law.**

Des Moines, May 26, 1902.

HON. OLE O. ROE,
Des Moines, Iowa.

DEAR SIR—I see no way by which the State Bank of Story County can renew its corporate existence without paying the renewal fee provided for by chapter 56 of the acts of the Twenty-eighth General Assembly.

When the bank originally organized and adopted its articles of incorporation, it fixed its corporate life at ten years. The statute gave it the power, under section 1618 of the code, to create a corporate existence for any term not exceeding twenty years. Its incorporators elected to create a corporation which should endure for ten years only, and at the end of the ten years its life expires by reason of the limitation contained in its articles of incorporation. This life can only be extended by an amendment to its articles of incorporation increasing the term of its corporate existence. This is a renewal of a corporation, the life of which has expired by the limitation fixed in its articles, and falls within the provisions of chapter 56 of the laws of the Twenty-eighth General Assembly.

No other construction can, in my opinion, be placed upon these provisions of the statute. Yours very truly,

CHAS. W. MULLAN,

COLLATERAL INHERITANCE TAX—DEDUCTION OF DEBTS—Only such debts are entitled to be deducted from the estate of the decedent as are named by statute.

Des Moines, May 27, 1902.

DEACON & GOOD,
Cedar Rapids, Iowa.

DEAR SIRS—I am in receipt of your esteemed favor of the 26th inst.

I regret to say that I can not agree with your construction of the statute relating to the deduction of debts from an estate subject to the payment of collateral inheritance tax. The section of the statute providing what debts may be deducted as enacted by the Twenty-eighth General Assembly, divides the debts into four classes:

(1) Debts owing by decedent at the time of his death.

(2) Local or state taxes due from the estate prior to his death.

(3) A reasonable sum for funeral expenses, court costs, including the cost of appraisement made for the purpose of assessing collateral inheritance tax.

(4) Statutory fees of executors, administrators or trustees.

The debts owing by the decedent at the time of his death, as defined in the statute above quoted, do not include local or state taxes. These are placed in a class by themselves and the legislature has provided that only such local or state taxes as are due from the estate of the decedent prior to his death, can be deducted from the estate for the purpose of ascertaining the amount upon which the collateral inheritance tax shall be assessed.

The taxes owing by the estate of Mrs. Leghorn were not due at the time of her decease, and hence do not fall within the class of debts which the statute permits to be deducted.

I see no escape from this conclusion and no other construction which can be placed upon the statute.

Yours very truly,
CHAS. W. MULLAN.

TAXATION—MUNICIPAL CORPORATIONS—CONSTITUTIONAL LIMIT—The limit fixed by the constitution was intended to be applied to the actual value of the property as shown by the tax list, and not to the value at which it is assessed under the code.

Des Moines, June 12th, 1902.

HON. G. I. LONG,
Manson, Iowa.

DEAR SIR—While the matter concerning which you write is not one upon which I can express an official opinion, unless the same is referred to me by one of the departments of the state, of which I am the legal adviser, upon an actual case pending therein, I will offer the following suggestions:

Under the law in force at the time of the adoption of section 3 of article 11 of the constitution of the state, it was contemplated that all property not exempt from taxation within the state, should be assessed at its actual cash value, although in actual practice this was not done.

The limit fixed by the constitution was intended to apply to the actual value of the property as shown by the tax lists, which were supposed to set forth such value. When the code of 1897 was adopted, the method of making the assessment of property was changed by a provision which required the actual value of the property to be stated in the tax list, and fixing the taxable value thereof at twenty-five per cent of its actual cash value.

The fact that property is now assessed under the present law at twenty-five per cent of its actual value, deos not change the application of the provision of the constitution, which was intended to apply to the actual value of the property, and not to the value at which it is now assessed under the present provisions of the law.

The actual value must appear in the tax lists, and it is upon this value that five per cent indebtedness of municipal corporations can be created.

Yours very truly,
CHAS. W. MULLAN.

CORPORATIONS—FEES OF—The law requires that all corporations organized under the laws of the state, shall maintain their offices and place of business within the state, and a failure to do so subjects them to liability of dissolution.

Des Moines, June 20, 1902.

MR. J. C. WILLIAMS,
Oskaloosa, Iowa.

DEAR SIR—I doubt the propriety of my expressing an opinion upon the question contained in your favor of the 19th inst., unless such question should be referred to me by one of the departments of the state, upon a case actually pending therein.

I will, however, take the liberty of suggesting to you what various courts have said concerning the organization of a corporation in one state, where it is intended not to transact business within the state where the corporation is organized, but in another state or states.

In *Land Grant Ry. v. Coffee County,* 6 Kansas, 245, that court said:

> "No rule of comity will allow one state to spawn corporations and send them forth into other states to be nurtured and do business there, when the first mentioned state will not allow them to do business within its own boundaries."

The same court in *State v. Topeka Water Co.,* 52 Pac. Rep., 422, held that the charter of a corporation may be forfeited at the instance of the state if the corporation fails to keep its general office and the office of its treasurer within the state in accordance with the terms of the statute.

In *Duke v. Taylor,* 37 Fla., 64, it was held that where a charter is taken out in one state, and the organization meetings are held in another state, the presumption is that no corporation is organized, and that the stockholders are liable as partners.

In *State v. Park,* etc., 58 Minn., 330, the charter of a corporation was forfeited on the ground that the company had not complied with the statute in having its place of business and

keeping its books within the state where the corporation was organized, approving the decision of the Wisconsin supreme court to the effect that at common law a charter may be forfeited where the corporation keeps its principal place of business, books and records out of the state to such an extent that it is impossible for the state and its courts to have full jurisdiction and visitorial powers over the corporation.

In *Simmons v. Norfolk*, etc., 113 N. C., 147, it was held that where a corporation removes all of its offices from the state, a stockholder may apply under a statute for dissolution on the ground of an abuse of powers.

While the language of section 1612 is perhaps not as clear as could be wished, I will suggest that in the granting of powers to corporations organized under the laws of the state, it is the intention of the state, as expressed by its acts of legislation, that all such corporations must, at all times, be within the absolute control of the state; and that their books, papers and records must be where they can be reached by state process, and that it was not the intention of the legislature, in permitting the organization of corporations with powers exceeding those of individuals, to give to such corporations the right and power to transact business in other states, without being subject to the laws of this state by which they are created.

Yours very truly,
CHAS. W. MULLAN.

TAXATION—INTEREST—Interest shall be charged on omitted taxes assessed by the auditor or treasurer at the rate of six per cent from the time such taxes became due and payable.

Des Moines, July 12, 1902.

HON. D. W. TELFORD,
Mason City, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 10th inst.

While the statute and the construction placed thereon by the supreme court are not absolutely clear as to when interest shall be charged upon the delinquent taxes assessed by the county treasurer or auditor, I think a careful reading of section 1374 of the code, with the fourth division of the opinion in *Galusha v. Went,* 87 N. W., 516, will substantially answer the question you ask.

Section 1374 provides:

> "When the property subject to taxation is withheld, overlooked, or from any other cause is not listed and assessed, the county treasurer shall, when apprised thereof, at any time within five years from the date at which such assessment should have been made, demand of the person, firm, corporation or any other party by whom the same should have been listed, or to whom the same should have been assessed, or to the administrator thereof, the amount the property should have been taxed in each year the same was so withheld, overlooked and not listed and assessed, together with six per cent interest thereon from the time the taxes would have become due and payable had such property been listed and assessed. * * * "

Under the provisions of section 1403 taxes become due and payable on the first day of January of each year, and delinquent on the first day of March following:

Section 1374 provides that the amount of the omitted taxes shall bear six per cent interest from the time the same would have become due and payable had the property been listed and assessed as required by law. This provision has been held in *Galusha v. Went* to be valid as to all taxes assessed after the present code went into effect, and that no penalty could be charged for omitted taxes for any year prior to the time of the taking effect of the code.

Under this section and the construction given it in *Galusha v. Went,* the omitted taxes assessed by the auditor or treasurer will bear interest at six per cent per annum from the time the same would have become due and payable had they been assessed by the ordinary method; that is, from the first day of January of the year when they would have become due and payable if so listed and assessed.

Yours very truly,

CHAS. W. MULLAN.

TAXES—APPORTIONMENT BY COUNTY TREASURER—INTEREST THEREON—All taxes collected by the county treasurer and the interest thereon shall be apportioned to the different funds, and each fund is entitled to its pro rata share of the interest collected.

Des Moines, Iowa, August 7, 1902.

MR. W. W. EBY, *County Treasurer*,
Oskaloosa, Iowa.

DEAR SIR—Your letter of June 5th to the auditor of state, with other correspondence relating to the collection of omitted taxes, and interest upon taxes in your county, belonging to the state, has been referred to me by the auditor.

In relation thereto permit me to say that the apportionment of the taxes, collected in the various counties, to the different funds is fixed by law, and it is the duty of the county treasurer to apportion the taxes among the different funds in the manner provided by statute.

It makes no difference whether the taxes collected are by means of tax ferrets or otherwise. Whatever money, from such source, comes into the hands of the county treasurer must be disposed of by him in accordance with law.

The same is true of all interest collected upon delinquent taxes.

The board of supervisors has no authority or power in determining what disposition shall be made of taxes collected after the same are paid to the county treasurer, except as to the disbursements of the funds of the county, over which it has control.

No resolution of a board of supervisors will protect the county treasurer in his failure to make the proper apportionment of taxes collected by him, and any other disposition of the money which comes into his hands, through the collection of taxes, than that provided by law, is a misappropriation, for which he and his bondsmen are liable.

I am informed that no interest has been forwarded upon delinquent taxes which have been collected for the state since January, 1902, and that no part of the omitted taxes, which have been collected through the medium of tax ferrets, which belong to the state, have been forwarded.

As indicated in this letter, all taxes, and all interest thereon, collected by the county treasurer, must be apportioned to the different funds as provided by law, and that which under such apportionment belongs to the state should be forwarded to the treasurer of state without delay. Yours very truly,

CHAS. W. MULLAN.

PLATS—ABSTRACTS—Section 917 of the code, requires that the abstract of land platted into town lots should be recorded with other evidence of the title to the land.

Des Moines, August 25, 1902.

HON. S. B. REED,
Waterloo, Iowa.

DEAR SIR—I am receiving numerous inquiries from recorders in different counties in the state and others relative to the act of the Twenty-ninth General Assembly requiring an abstract to be attached to a plat before the same is recorded, and asking my opinion as to whether it is the duty of the recorder to record such abstract.

My first thought was that it was not necessary to record the abstract, but upon a further and more careful examination of the statute I am inclined to change that opinion, and to hold that the abstract must be recorded. The language of the act, when taken in connection with the language of section 917 of the code, indicates that it was the intention of the legislature that the abstract should be made a matter of record in the same manner as the other evidence of the title of the land included in the plat.

Section 915 as amended reads:

> "Every such plat shall have a complete abstract of title attached thereto and shall be accompanied by a statement to the effect that the subdivision * * * as appears on this plat is with the free consent and in accordance with the desire of the proprietor, which shall be signed and acknowledged by him before some officer authorized to take acknowledgments of deeds."

It is clear that the statement required by section 915 must be entered of record under section 917, and I think it was the inten-

tion of the legislature that the abstract should be treated as a part of the statement attached to the plat.

Yours very truly,
CHAS. W. MULLAN.

PUBLIC OFFICERS—COMPENSATION OF—The compensation of sheriffs is increased by the acts of the Twenty-ninth General Assembly, and such officers are entitled to such increase from the time the act became a law.

DesMoines, August 26, 1902.

MR. C. W. CRIM,
Estherville, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 25th inst.

I do not understand that it is any part of my official duty to advise the boards of supervisors of the various counties of the state. The law makes the county attorney of their county their legal adviser, and if by reason of his interests, or otherwise, he is unable to do so, they should employ other counsel and pay for the advice which they require, the same as any other individual.

As a matter personal to you, however, I will give my views as to the time of the taking effect of chapters 18, 27 and 124 of the acts of the Twenty-Ninth General Assembly.

There is no provision in the state constitution which prevents the legislature from increasing or diminishing the compensation of county attorneys, sheriffs and county superintendents, during the term of office for which they are elected. The power to increase or diminish the compensation of these officers, therefore, rests wholly with the legislature.

By chapters 18, 27 and 124 of the acts of the Twenty-ninth General Assembly the compensation of these officers has been changed, and I think increased, by the legislature of the state. These acts of the legislature took effect and became a law on the fourth day of July, 1902. They supersede and repeal the previous laws fixing the compensation of these officers. From the fourth day of July no other law is in force, within the state, by

which their compensation is fixed, or by which it can be determined.

It follows, therefore, that from and after the fourth day of July, 1902, the compensation to be paid these officers is the amount fixed by the acts of the Twenty-ninth General Assembly. If their compensation is increased by such acts they are entitled to the benefit thereof from and after that date.

Yours very truly,
CHAS. W. MULLAN.

MUNICIPAL CORPORATIONS—LIGHTING PLANTS—BONDS—The authority to erect and maintain lighting plants includes the authority to enlarge and extend the same, and bonds may be issued for such extensions. A city is not authorized to issue bonds in anticipation of an indebtedness.

Des Moines, September 3, 1902.

HON. SAM C. SMITH, *City Solicitor,*
Winterset, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 29th ult.

The question which you suggest is one as to which there is considerable doubt. I will give you, however, my views briefly, as supported by what I consider the best authority upon the subject.

Section 720 of the code gives ample authority to cities and towns to erect, maintain and operate electric light plants for the purpose of lighting the city. The authority to erect and maintain such plants necessarily includes the authority to enlarge and extend the same, as the necessities of the city may demand.

Section 726 gives the authority to a city to issue bonds for the purpose of purchasing or erecting such electric light plants, and I think gives the implied power to issue bonds for the purpose of enlarging the same, as the demands of the city may require.

Wherever a city has created a debt for any purpose within the powers conferred upon it by statute, it undoubtedly has the right

to issue negotiable bonds as evidences of such debt. Several of the states have gone beyond this and held that a city has the right to anticipate the creation of a debt, and the collection of taxes to be levied for the payment thereof, and to issue and negotiate bonds for the purpose of obtaining money, which may be immediately used for the purpose desired by the city.

This is the rule in Ohio, Wisconsin and Nebraska. The same rule, with a slight modification, obtains in Indiana. Pennsylvania has gone the full length of holding the right of a city, without express statutory authority, to issue negotiable paper in advance of any debt created, for the purpose of using the money obtained upon the sale of bonds for street improvements.

Judge Dillon in his work on Municipal Corporations takes exception to the holding of these courts, and in commenting thereon uses this language:

> "If the judment of the court in this case is to be taken as holding that a municipal corporation, merely by virtue of its authority to pave streets, may, without any express power, borrow money, issue its negotiable bonds in advance, and sell them as a means of raising money, to be applied to that purpose; may issue them in any sum it pleases, and sell them for any price it can obtain; and that bonds so issued are commercial paper, with all the qualities and incidents of such paper,—if such is the doctrine of the court, we feel constrained to say that we are unable, notwithstanding the ability with which it is supported, to regard it as otherwise than unsound and dangerous."

The supreme court of the United States, by a divided court, has held that a municipal corporation possesses no inherent or incidental power to raise loans or borrow money, where no debt proviously exists, putting it upon the ground that such a power must be conferred by legislation expressly, or by plain implication.

I think, however, that it is the law, as declared by all courts in which the question has arisen, that where a debt actually exists, the city has the power to issue its negotiable bonds therefor, within the statutory or constitutional limitation. In the case under consideration, that power is specifically given by section 726 of the code. No power is, however, given by the pro-

visions of our code for issuing negotiable bonds of a city, for the purpose of purchasing, erecting or extending electric light plants in anticipation of the revenues of the city, and before the debt therefor is created; and I very seriously doubt the authority of a city to issue its bonds for that purpose in advance of the creation of a debt contracted for the purchase, erection or extension of such plants.

It is within the power of a city, clearly, to contract a debt for the extension of an electric light plant. It may issue its city warrants as an evidence of such debt, and when the extension is completed, and the entire debt incurred, there can be no doubt as to its right to issue its negotiable bonds for the purpose of taking up such warrants and funding its debt.

Yours very truly,
CHAS. W. MULLAN.

SHERIFFS—COMPENSATION OF—The acts of the Twenty-ninth General Assembly became a law on the 4th day of July, 1902, and sheriffs whose compensation was increased by such act are entitled to receive the increase from that date.

Des Moines, September 4, 1902.

HON. WILLIAM LARRABEE, JR.,
Clermont, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 3d inst.

The act of the last general assembly fixing the compensation of sheriffs went into effect on the fourth day of July, and the compensation which the sheriffs of the various counties of the state are entitled to receive from and after the fourth day of July, is that which is fixed by the act of the Twenty-ninth General Assembly. There is no constitutional or statutory prohibition against either increasing or diminishing the compensation of sheriffs during their term of office, and the legislature has the right to either increase or diminish such compensation at will,

and may fix the time when such increase or diminution shall take effect.

In the case under consideration they have fixed that date as the fourth day of July, 1902, when the act took effect as a law.

Yours very truly,
CHAS. W. MULLAN.

SUPERIOR COURTS—ESTABLISHMENT OF—When a superior court is established by a vote of the people, the judge thereof must be appointed by the Governor, and will hold office until the next general election.

Des Moines, September 4, 1902.

MR. E. L. ELLIOTT,
Oelwein, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 3d inst.

The provisions of chapter 9 of the laws of the Twenty-eighth General Assembly have given me a good deal of trouble in placing a construction thereon. I have finally, however, reached this conclusion, which, while not entirely satisfactory, is the only one, as it seems to me, which can be reached under the peculiar wording of the act.

The provision of section 1 is:

> "Upon the petition of one hundred citizens of any such city, the mayor, by and with the consent of the council, may, at least ten days before any general election, issue a proclamation, submitting to the qualified voters of said city the question of establishing said court. Should a majority of all of the votes cast at such election upon such proposition be in favor of said court, the same shall be thereby established."

This part of the section is clear, and no question can arise as to its construction. The court must be established by a majority vote of the qualified voters of the city at a general election.

The next provision is the one which is difficult of interpretation, that is:

> "The judge of all superior courts now or hereafter established shall be elected at the last general election preceding the expiration of the term of office of the present incumbent."

The legislature could hardly have chosen language more difficult of construction. A judge or other officer can not be elected to an office which does not exist, and there can be no present incumbent in any office which has not yet been created under the provisions of the statute. But as giving force to all of the provisions of the statute, so far as can possibly be done, I think that the court should first be created and established by a vote of the citizens of the city in which it is sought to establish the same. The office is thereby created, but is without an incumbent. A vacancy exists which must be filled by appointment by the governor under the provisions of section 1272 of the code.

In your case I would suggest that you submit to the people at the coming election, the question of establishing a superior court in your city. If a majority of the ballots of the electors of the city are in favor of the establishment of such court, it is thereby established under the provisions of chapter 9 of the laws of the Twenty-eighth General Assembly. A certificate from the judges of the election, showing that such court has been established by a majority vote, should then be transmitted to the governor, and upon receipt of such certificate, with a showing that there is a vacancy in the office of judge, he will appoint a judge of the court to fill such vacancy, who will hold office until the next general election, when his successor will be elected under the provisions of chapter 9 of the laws of the Twenty-eighth General Assembly.

I see no other method of procedure by which the machinery of a superior court can now be created, established or put in motion under the laws as they exist. Yours very truly,

CHAS. W. MULLAN.

LAND—SUBDIVISIONS OF—The phrase "each government subdivision" in section 1 of chapter 60 of the laws of the Twenty-ninth General Assembly, refers to a quarter-quarter section or a lot containing less than forty acres.

Des Moines, September 5, 1902.

HON. M. C. WOODRUFF,
Land and Tax Com'r Chi. Great Western Ry.,
St. Paul, Minn.

DEAR SIR—I am in receipt of your favor of the 4th inst., asking a construction of the phrase, "each government subdivision", as used in section 1 of chapter 60 of the laws of the Twenty-ninth General Assembly.

Section 2397 of the Revised Statutes of the United States provides:

> "In every case of the subdivision of a quarter section, the lines for the subdivision thereof shall run north and south, and the corners and contents of half quarter sections which may thereafter be sold, shall be ascertained in the manner and on the principles directed and prescribed by the section preceding; * * * and in every case of a division of a half quarter section, the line for the division thereof shall run east and west, and the corners and contents of quarter-quarter sections, which may thereafter be sold, shall be ascertained, as nearly as may be, in the manner and on the principles directed and prescribed by the section preceding; and fractional sections containing fewer or more than one hundred and sixty acres shall, in like manner, as nearly as may be practicable, be subdivided into quarter-quarter sections under such rules and regulations as may be prescribed by the secretary of the interior."

The construction, which has been placed upon this statute by the courts of the United States and of this state, is that the smallest governmental subdivision of a section is a quarter-quarter section, or forty acres.

This construction is recognized in:

Corbin v. De Wolf, 25 Iowa, 124;
Stewart v. Corbin, 25 Iowa, 144;

Eldridge v. Kuehl, 27 Iowa, 160;
Bulkley v. Callanan, 32 Iowa, 461;
Smith v. Easton, 37 Iowa, 584.

While it is true that in subdividing a section no corners are located intermediate between the section and half section corners, such corners are in law regarded as equidistant between the two established corners. The subdivision of quarter sections into half quarter section and quarter-quarter sections is authorized by act of congress approved April 5, 1832.

The legislature of the state, having in mind the decisions of our own court referred to, and the provisions of the statutes of the United States, and the regulations of the interior department at the time of the passage of chapter 60 of the laws of the Twenty-ninth General Assembly, undoubtedly used the phrase, "each government subdivision", as referring to the smallest division of a section, namely; a quarter-quarter section, or a lot containing less than forty acres, as shown by the government survey.

Yours very truly,
CHAS. W. MULLAN.

ELECTION—REGISTRY OF VOTERS—Voters whose names are not upon the poll books of the last general election, and who have not voted at any subsequent election, must register to entitle them to vote.

Des Moines, October 28, 1902.

MR. SCOTT SKINNER,
Creston, Iowa.

DEAR SIR—In response to your request, I make the following suggestions as to the registry list which must be prepared by the registry boards for the election of 1902.

I desire to preface what I here say with the statement that the matter is not within the jurisdiction of this office, nor one upon which I can express an official opinion, unless it should be referred to me by one of the departments of the state. I simply give my views of the requirements of the statute as a lawyer, and not in my official capacity.

Section 1084 of the code provides:

> "A new registry of voters shall be taken in each year of a presidential election. For all other state or municipal elections, general or special, the registers shall prepare a new registry book in each year, by copying from the poll book of the preceding general election all the names found therein, adding thereto those of all persons registered and voting at any subsequent election, which new registry book shall show all the facts of qualification of each voter as they appear on the last preceding registry book, which, when thus made up, shall be used at each election until a new registry book is prepared as required by law. Every person thus registered shall be considered as entitled to vote at any election at which said registry book may be used, unless his name shall be dropped by the correction of registration, as authorized by law."

Under the provisions of this section, it is the duty of the registry board to prepare a new registry book in each year, by copying from the poll book of the preceding general election the names of all of the persons who voted at that election, and by adding thereto the names of all electors registered and who voted at any subsequent election. The book so prepared constitutes the registry list, and the persons whose names are thus carried on to the new book so prepared, are entitled to vote without further registration.

It follows from the provisions of this section that the names of persons which were upon the registry list at the last presidential election, and which do not appear upon the poll book of the last general election, can not be carried forward and entered upon the new registry book, as the names of those only who voted at the last general election, and whose names appear upon the poll books of that election, and such others as voted at a subsequent election, are entitled to be thus entered in the new registry book.

All voters, whose names are not upon the poll book of the last general election, and who have not voted at any subsequent election, must appear before the registry board and register as electors, to entitle them to vote at the election for which the new

registry book is prepared, subject only to the right to register upon election day, if they fall within the provisions of section 1082 of the code.

Yours very truly,
CHAS. W. MULLAN.

OSTEOPATHS---RE-EXAMINATION OF—An osteopath who has failed in his examination is entitled to a second examination within three months thereafter without further fee.

Des Moines, December 10, 1902.

DR. J. F. KENNEDY,
Secretary State Board of Medical Examiners.

DEAR SIR—Your letter of the 8th ult., asking whether osteopaths who fail in an examination, are entitled to a re-examination by the board without the payment of an additional fee, is received.

Section 2583, as amended by the Twenty-ninth General Assembly, provides:

> "The fee for said examination, which shall accompany the application, shall be ten dollars, and the examination shall be conducted in the same manner, and at the same place, and on the same date, that physicians are examined, as prescribed by section 2576 of the code."

Section 2576 provides:

> "Any one failing in his examination shall be entitled to a second one within three months without further fee."

Construing the provisions of these two sections together, as they must be, I am of the opinion that the provision above quoted from section 2576 must be held to apply to the examination of osteopaths as well as to physicians, and that any osteopath who has failed in his examination shall be entitled to a second examination within three months thereafter, without further fee.

Yours very truly,
CHAS. W. MULLAN.

ROADS—ROAD SUPERVISORS—The road supervisors elected at the general election in the year 1902 hold office until a consolidation of the road districts under the township system.

Des Moines, December 12, 1902.

HON. W. B. ROWLAND,
Harlan, Iowa.

DEAR SIR—Please pardon my delay in answering your letter of the 22d of October, but absence from my office and the pressure of business has prevented my reaching it before.

The matter is not one upon which I should give an official opinion, unless it should be referred to me by one of the departments of the state, of which I am the legal adviser.

As a matter of courtesy to you, however, I will suggest that section 1075 of the code provides:

> "At the general election in each even-numbered year, there shall be elected in each civil township, one township clerk, and where not otherwise provided, one assessor, and one road supervisor in each road district, to be elected by the voters of such district, who shall hold their office for the term of two years."

If your county is under the old road district system, there was undoubtedly elected at the last general election held in November of the present year, a road supervisor in each road district. His term of office would be two years from the first Monday in January, 1903, except for the provisions of chapter 55 of the acts of the Twenty-ninth General Assembly. The road supervisors, elected at that time, should qualify on the first Monday in January and hold their respective offices until the taking effect of chapter 53 of the laws of the Twenty-ninth General Assembly, when the consolidated township system will become effective under that act. During their period of office they would have the control and supervision of the roads of their respective districts as though no such law had been enacted by the last general assembly. When the consolidation provided for by chapter 53 is accomplished, and the new system inaugurated, their

duties as road supervisor will necessarily cease, and the improvement and care of the roads of each consolidated district will then fall within the duties of the township trustees.

Yours very truly,
CHAS. W. MULLAN.

CONTAGIOUS DISEASES—BOARD OF HEALTH—PEST HOUSES—

A board of health of a city has power to erect, maintain and control a pest house outside of the corporate limits of the city.

Des Moines, December 12, 1902.

HON. DELL G. MORGAN,
Council Bluffs, Iowa.

DEAR SIR—Your favor of October 1st has been upon my desk a long time, and pressure of other business has prevented me from answering before.

I will call your attention to section 2575-a, which is found upon page 272 of the supplement to the code, relating to the location of pest houses for the treatment of infectious or contagious diseases.

By sections 2575-a and 2575-b, the legislature undoubtedly intended to provide that a city should be allowed to maintain a pest house or hospital for patients affected with contagious or infectious diseases, outside of the city limits, and that the municipal authorities should have exclusive jurisdiction and control of such pest house or hospital. That if a controversy should arise between the city and the local authorities outside of the municipal corporation, as to the erection and maintenance of such pest house, such controversy shall be referred to the president of the state board of health, who shall forthwith appoint a committee of three, who shall, upon two days' notice to the parties interested, investigate the matter and make such order in the premises as the facts warrant, and that their order shall be final.

If for any reason the township outside of your city objects to the location of a pest house within its limits, the matter should be referred to the president of the state board of health, a com-

mittee should be appointed by him, and the location of the pest house determined by such committee, and when so determined the order made by the committee is final and conclusive.

Yours very truly,
CHAS. W. MULLAN.

ADMISSION TO THE BAR—QUALIFICATION AND EXAMINATION OF APPLICANTS--Evidence of preliminary educational qualifications must be presented to the board of state law examiners in the manner required by the rules.

Des Moines, December 12, 1902.

MR. CHAS. N. GREGORY,
Dean of College of Law, State University,
Iowa City.

MY DEAR MR. GREGORY—I beg to acknowledge the receipt of your esteemed favor of the 11th inst.

I fully appreciate the situation in which you find yourself upon the question of admitting students who are not graduates of a high school to your law class. The board of law examiners has encountered this difficulty since the time of its organization, and it has so far adhered to the strict rule that the applicant for examination must bring his certificate of graduation in the regular course of study from the school from which he graduated, or submit to the preliminary examination required by statute.

Our reason for holding to the strict rule is largely because applicants for examination for admission to the bar who had not regularly graduated from a high school having a course of three years, appeared to find no serious difficulty in obtaining certificates from superintendents of schools that they had taken the full three years' course although they had not graduated. Others presented certificates that they had taken a course of study fully equal to the three years' course of a high school which fitted pupils for entrance into the Iowa University. While others produced certificates and affidavits from principals and superintendents of high schools that, while they had not graduated from any high school, their educational qualifications were equal to those of a high school graduate, and such as would admit them to the state university.

To simplify the difficulty in determining the various questions arising under certificates and affidavits given by school superintendents, the board adopted the simple rule that each applicant must present his diploma or certificate of graduation, which alone would be accepted as evidence of his educational qualifications, or submit to the preliminary examination required. We have found this rule to be a good one, as now every applicant for a law examination understands that he must be a graduate of a high school, academy or college, and present his certificate of graduation as evidence of that fact, or take the preliminary examination.

I believe the rule established by the board to be one which is very beneficial to students who intend to enter the law, as they know in advance that they must complete their course of study and graduate before they can be admitted to the bar, and if a rule of this character should be adopted by the university and generally understood throughout the state, I believe that it would be equally beneficial to the university law class.

While, as is suggested in your letter, it seems a hardship to refuse a man the right to enter who has pursued three full years of study and brings the proper certificate thereof, and accept another student who brings his diploma of graduation showing the same course, it is perhaps a question of different forms of evidence, but the evidence which can be accepted in cases of this kind must be determined by the board of law examiners and the officers of the university; and so far the board has thought it wise to accept no other form than the diploma of graduation, and the result has been very satisfactory.

If you abandon this form of evidence, and permit certificates given by school superintendents or principals, who are disposed to favor and assist young men wishing to enter the law class, the standard required by the statute will unquestionably be lowered, and the result will be detrimental to the law class and to the bar of the state.

I will submit a copy of your letter to the different members of the board, and ask them to give me in full their views upon the question, and will then write you again upon the subject.

Yours very truly,

CHAS. W. MULLAN.

SHERIFFS—FEES—A sheriff is entitled to retain all mileage collected by him in the service of civil process. All other mileage received by him must be accounted for to the county, and he must account for and pay over fees received by him when acting in his official capacity in cases before justices of the peace, mayors, referees, etc.

Des Moines, Iowa, December 12, 1902.

HON. T. M. MCADAM,
Mt. Pleasant, Iowa.

DEAR SIR—Pressure of business and absence from my office have prevented my answering your favor of the 24th of September before. I may also suggest that the matter is not one upon which I should give an official opinion, unless the same should be referred to me by one of the departments of the state, of which I am the legal adviser. As a matter of courtesy, however, I will say that section 1 of chapter 27 of the acts of the Twenty-ninth General Assembly specifically provides that the sheriff shall be allowed to retain all mileage collected by him in the service of civil process. There is no provision contained in the law which permits him to do so upon criminal process. It therefore logically follows that the legislature, having specifically provided what mileage may be retained by the sheriff, all other received by him is excluded from the provision of the statute, and he must account to the county for the same.

As to whether he must account for fees received in criminal cases before justices of the peace, mayors, federal referees, notaries, etc., I think the true rule is this: Wherever he is called upon, as sheriff of the county, to act in his official capacity, the fees which he receives for the service he is thus required to perform must be accounted for to the county. It is impossible to give an abstract rule more clearly than the one stated, which will apply to all classes of cases. Yours very truly,

CHAS. W. MULLAN.

ADMISSION TO THE BAR—QUALIFICATIONS OF APPLICANTS—Examination as to preliminary educational qualifications made by persons other than the state board of law examiners will not be accepted by the board.

Des Moines, December 18, 1902.

HON. CHAS. N. GREGORY,
Iowa City, Iowa.

MY DEAR GREGORY—Enclosed herewith I hand you the letters of the other members of the state board of law examiners, relating to the question of proof of the educational qualifications of law students, which I will be pleased to have returned to me after you have read the same.

I hardly see how it is possible to make an exception of the University, so far as the examination of its law class is concerned, and to put such examination on a basis different from that required of other law schools. If the state board should adopt the examination made by the University examiner as to the educational qualification of the law students, it could be very reasonably urged that the same rule should apply to other law schools; and if this should be done, one of the results, sought to be attained by the enactment of the law under which the board is appointed, would be entirely lost.

It may be suggested that the University is a state institution, and that therefore the examination made by its examiners as to the educational qualification of students seeking to enter the law class, should be accepted by the state board. I can, however, hardly agree with this proposition, as it seems to me the University is simply a state institution whereby the state furnishes to its people an opportunity to acquire an education, and when its students have taken the course prescribed by the University they are then ready to apply for admission to the bar upon exactly the same footing as though they had taken a like course at any other institution of learning.

Holding this view, I am unable to see how the board can accept any examination as to the educational qualification of law students in lieu of that required by the statute to be made by the board.

Personally I have no doubt that the examination made by your examiner would, to say the least, be as thorough as one made by the board, but the law requires that applicants for admission to the bar, who are not graduates, must take a preliminary educational examination, given by the state board of law examiners, before they are admitted to the law examination, and this provision should, in my opinion, be carried out in letter and in spirit by the board.

No student will suffer any hardship by a strict enforcement of this rule. If he is not a graduate at the time that he enters the law class, he knows that he must submit to a preliminary examination before he can be admitted to the bar, and he must prepare himself for such examination. If by any chance he should fail, such failure does not prevent his taking a second examination and being admitted after he has prepared himself therefor.

Yours very truly,

CHAS. W. MULLAN.

ROADS—LEVY OF TAXES FOR—It is the duty of the township trustees at their April meeting, 1903, to levy the road tax for that year, and also the road tax for the year 1904; the road tax of 1903 to be collected and expended as provided by the code prior to the acts of the Twenty-ninth General Assembly.

Des Moines, January 29, 1903.

HON. F. P. GREENLEE,
Red Oak, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 26th inst.

Under section 1540, as amended by the Twenty-ninth General Assembly, I think the township trustees must levy the property road tax for the year 1903 as provided in that section of the code before it was amended. This tax is to be paid in cash and to be collected and expended during the year 1903. They must also in 1903 levy the road tax for the year 1904, which shall be certified to the county auditor and entered upon the tax

books and collected by the county treasurer as other taxes; that is, the levies for 1903 and 1904 must both be made in the spring of 1903, the first levy to be collected and expended, as provided by section 1540 of the code, during 1903; the other levy to be certified, collected by the county treasurer and be made available for the year 1904.

I see no objection to both of these levies being made at the April, 1903, meeting, and at the same time, and I think this was the intent of the legislature in amending section 1540.

In reply to your questions submitted I will answer—

First—That it is the duty of the township trustees at their April, 1903, meeting to levy the road tax for the year 1904.

Second—That it is their duty at their April, 1903, meeting to levy the road tax for the year 1903, which shall be collected and expended as provided by the code before the amendments made to chapter 2 of title VIII by the Twenty-ninth General Assembly.

I think your interpretation of the statute is the correct one, and that the acts of your board are in compliance with the provisions of the law.

Yours very truly,

CHAS. W. MULLAN.

COLLATERAL INHERITANCE TAX—**A bequest by a decedent to a priest to pay for services to be rendered in performing masses for the soul of the deceased, is liable to collateral inheritance tax.**

Des Moines, February 5, 1903.

HON. G. S. GILBERTSON,
Treasurer of State.

DEAR SIR—I have given the questions raised in the letter of Messrs. Longueville & Kintzinger of February 3d, consideration, and beg to make the following answer thereto:

Section 1467 of the code provides:

> "All property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which

shall pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, sale or gift, made or intended to take in possession or in enjoyment after the death of the grantor or donor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of an adopted child of a decedent, or to or for charitable, educational or religious societies or institutions within this state, shall be subject to a tax of five per centum of its value, above the sum of one thousand dollars, after the payment of all debts," etc.

The provisions of this section are clear and explicit, and no question can arise as to their proper construction, or the character of property which falls within its provisions.

In the estate of Anton Hemmi under consideration, it appears that the decedent bequeathed one thousand dollars to three different priests named in the will. It is claimed by the executor that such bequest is not in the nature of a legacy to these priests, but is money set aside to them for the payment of services to be rendered.

The position is clearly untenable. The money so given to the priests passes by the will of the decedent, and takes effect after his death, and it makes no difference whether it is in payment of services to be thereafter performed, or whether it is a legacy given without any services to be rendered therefor. Any property which passes by will or by deed, grant, sale or gift, where such bequest or property conveyed by deed, grant, sale or gift, is intended to take effect after the death of the testator, grantor or donor, if given or conveyed to any person other than the father, mother, husband, wife, lineal descendant, adopted child, lineal descendant of an adopted child, or to or for charitable, educational or religious societies or institutions within the state, is subject to pay the collateral inheritance tax under the statute.

The one thousand dollars bequeathed by Anton Hemmi is property conveyed by his will and passes to the enjoyment of the beneficiaries after his death, and the fact that such beneficiaries, in consideration of such bequest, are to perform masses for the soul of the decedent, does not take the property so given out of the class which is liable to pay the collateral inheritance tax.

The fact that the services to be rendered by the priests are of a religious character can make no difference, as the statute only exempts property given for charitable purposes or to educational or religious societies or institutions, and a priest does not fall within any of the classes or institutions to which property may be given by a decedent and be exempt from the collateral inheritance tax.

I think the one thousand dollars so given by the will of Anton Hemmi is liable to pay the collateral inheritance tax.

Yours very truly,
CHAS. W. MULLAN.

SHERIFFS—FEES—If the receipts of the office received by a sheriff with the salary allowed by the board of supervisors do not amount to the sum to which he is entitled under the statute, the deficiency must be made up by the county.

Des Moines, February 10, 1903.

MR. J. P. BOSSERT,
Primghar, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 7th inst.

While the matter concerning which you write is not one upon which I can express an official opinion, unless the same should be referred to me by one of the departments of the state, of which I am the legal adviser, upon an actual case pending therein, I will make the following suggestion:

Your county having a population of 17,000, falls within the provisions of section 510, as amended by the acts of the Twenty-ninth General Assembly, which are as follows:

> "In counties having a population of over eleven thousand and less than twenty-eight thousand, the sheriff shall receive, in full compensation for his services, including the salary provided by section 511 of the code, the sum of two thousand dollars per annum, the same to be paid out of the receipts of the office. * * * And that in counties having

a pouplation of less than twenty-eight thousand, in which the receipts of the office and the salary allowed in section 511 of the code, do not amount to the sum of eighteen hundred dollars per annum, the board of supervisors shall, at the January session thereof, make an allowance to the sheriff of a sum equal to the difference between the receipts of the office for the previous year and eighteen hundred dollars. * * * And, provided further, that all fees earned and uncollected at the end of each year shall belong to the county and when paid by the clerk of the district court to be reported to the board of supervisors and paid into the county treasury."

The construction which must be placed upon this statute is that a sheriff is entitled to retain the fees collected by him as his compensation for services in counties of the class of O'Brien to the sum of two thousand dollars; and if the receipts of the office, together with the salary allowed by the board under section 511, do not amount to the sum of eighteen hundred dollars per annum, the board of supervisors shall make an allowance, at its January session, of a sum which shall bring the compensation of the sheriff up to eighteen hundred dollars.

The board is not authorized to fix a stated salary of eighteen hundred dollars, its only authority being to make the annual appropriation for a sufficient sum to bring the compensation of the sheriff to that amount in case the receipts of the office are less.

In addition to this the sheriff is entitled to be reimbursed from the county for all expenses necessarily incurred and actually paid in the performance of his official duties in serving criminal process or commitments to the penitentiary, industrial schools, or asylums, which shall be audited and allowed by the board of supervisors, as other claims against the county.

He is also entitled to retain all mileage collected by him in the service of civil process.

The sums which he is entitled to from the county upon the order of the board of supervisors should be paid by an order upon the treasury the same as other debts of the county.

Yours very truly,

CHAS. W. MULLAN,

ELECTION—REGISTRATION—SCHOOL DISTRICTS—School districts may be divided into different voting precincts by the board of directors, and a separate register of the voters of each precinct must be prepared by the board of directors when the school district falls within the class in which registration is required.

Des Moines, February 12, 1903.

MR. JAMES SHIREY,
Centerville, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 10th inst.

While the matter concerning which you write is not one upon which I can express an official opinion, unless the same should be referred to me by one of the departments of the state, I will call your attention to section 2755 of the code, as amended by the acts of the Twenty-eighth and Twenty-ninth General Assemblies; the amendment of the Twenty-eighth General Assembly being section 1 of chapter 105, and that of the Twenty-ninth General Assembly being sections 1 and 2 of chapter 125. The section in its complete form will be found in the supplement to the code upon pages 318 and 319.

It gives the school corporation the power to divide the district into such number of voting precincts as the board of directors may determine, and provides that a separate register of the voters of each precinct shall be prepared by the board from the register of the electors of any city included within such school corporation, which register shall be revised and corrected annually by a comparison with the last register of election of such cities.

The fact that a school district is not divided into different voting precincts in nowise changes the rule as to registration, as it is required in all school corporations having five thousand or more inhabitants.

Second—The members of the board of directors may act on the election board or appoint some suitable person or persons to do so. The appointee so serving should be paid by the district.

Yours very truly,
CHAS. W. MULLAN.

MUNICIPAL CORPORATIONS—COUNCILMEN—COMPENSATION—The members of a city council of the second class are entitled to receive one dollar for each regular or special meeting not exceeding in the aggregate in one year the sum of fifty dollars, except for services as members of the board of review, and such compensation covers all committee service.

Des Moines, February 12, 1903.

HON. H. T. MCCORMACK,
Knoxville, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your esteemed favor of the 10th inst.

The question propounded by you does not come within the jurisdiction of my office, unless it should arise upon a prosecution for malfeasance in office; that is, I can not undertake to be the adviser of every city or town council as to their rights and duties under the statute. These should be determined by a city solicitor, elected for that purpose.

As matter of courtesy to you, however, I will say that a careful reading of section 669, as amended by the acts of the Twenty-eighth General Assembly, leads me to the conclusion that the members of a city council of the second class, and of incorporated towns, shall receive only one dollar for each regular or special meeting, and the amount of their compensation shall not in the aggregate exceed fifty dollars in any one year for all services performed by them, except services as members of the board of review, for which they are entitled to one dollar for each session of not less than three hours, which is to be paid out of the county treasury. The compensation thus specified by statute covers all services performed by such councilmen, either in their capacity as members of the council at its meeting or for committee service. And any sum taken by them in excess of the amount thus fixed by statute would be an unlawful appropriation of the public funds, and an unlawful receipt by them of money in excess of the amount to which they are legally entitled.

Yours very truly,
CHAS. W. MULLAN.

SHERIFFS—COMPENSATION OF—Uncollected fees belong to the county, and the board of supervisors should make an allowance to bring the compensation of the sheriff up to the amount fixed by statute.

Des Moines, February 13, 1903.

HON. JOHN HAMMILL,
Britt, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 11th inst.

While it is no part of my duty as attorney-general to furnish opinions to county attorneys or boards of supervisors, I will, as a matter of courtesy, however, give you my views upon the questions propounded in your letter.

Section 510 of the code, as amended by the acts of the Twenty-ninth General Assembly, provides that all fees earned and uncollected at the end of each year shall belong to the county, and when paid by the clerk of the district court, be reported to the board of supervisors and paid into the county treasury.

Under the facts of the case which you suggest, if the sheriff had only received five hundred dollars as fees up to the end of the year, and there were still two hundred dollars fees uncollected, which had been earned, the board of supervisors should make an allowance of four hundred dollars to bring his compensation for the half year to nine hundred dollars, and all of the two hundred dollars earned fees which had not been collected would then belong to the county and be paid into the treasury when collected.

Second—Under the provisions of section 308, the salary fixed by the board of supervisors for the county attorney at the beginning of the year 1902, would continue during that year, and the minimum salary provided by the legislature could not be paid or received until the year following the enactment of the statute.

Yours very truly,
CHAS. W. MULLAN.

COLLATERAL INHERITANCE TAX—Where personal property was bequeathed to a collateral heir, charged with a life estate and placed in the hands of a trustee for the benefit of the person holding the life estate and the person to whom the bequest is made, before the enactment of the collateral inheritance tax law, it does not become liable to pay such tax upon the death of the life tenant, as the title thereto passed prior to the enactment of the law.

Des Moines, February 14, 1903.

HON. G. S. GILBERTSON,
Treasurer of State.

DEAR SIR—After a full and careful examination of the question as to whether the property now in the hands of the trustee appointed by the will of Helen P. Griffith, and in which Helen E. Groverman had a life estate with remainder over to Susan R. Groverman, I have reached the conclusion that the money in the hands of the trustee is not liable to pay the collateral inheritance tax. Upon the death of Helen P. Griffith, the money directed by her will to be placed in the hands of the trustee, and in which Helen E. Groverman took a life estate vested at once in Susan R. Groverman by the terms of the will. The title thereto passed under the will to Susan R. Groverman and she became the owner thereof in fee subject to the life estate given Helen E. Groverman, before the enactment of the collateral inheritance tax law. It therefore follows that upon the death of Helen E. Groverman, the life tenant Susan R. Groverman became entitled to the possession of the property, to which she had held the legal title before. She did not succeed to the title to the property after the enactment of the collateral inheritance law.

For these reason the property is not liable to such tax.

Yours very truly,
CHAS. W. MULLAN.

TOWNSHIP CLERK—COMPENSATION OF—A township clerk is entitled to five per cent upon all money coming into his hands by virtue of his office, except money received from his predecessor and except money collected and paid out for road purposes, upon which he shall be allowed two per cent only.

Des Moines, February 20, 1903.

MR. J. E. SNEDAKER,
Mount Ayr, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 18th inst.

Should not your inquiry be referred to the county attorney of your county rather than to the attorney-general, as it is a matter strictly within his jurisdiction, and not within the jurisdiction of this office, nor is it one upon which I can express an official opinion, unless it should be referred to me by one of the departments of the state.

I will, however, suggest that the provisions of the statute relating to the compensation of township clerk seem to be very clear and explicit.

First—He is entitled to five per cent of all money coming into his hands by virtue of his office, except money received from his predecessor in office, unless otherwise provided by law.

Second—Section 1538 provides that he shall receive two per cent on all money collected by him and paid out for road purposes.

The section last referred to is a limitation, and must be construed in connection with subdivision 2 of section 591; and the two construed together would read in substance:

> "He shall be entitled to five per cent upon all money coming into his hands by virtue of his office, except money received from his predecessor, and except money collected and paid out for road purposes upon which he shall be allowed only two per cent."

Your construction of the statute is, in my opinion, correct.

Yours very truly,
CHAS. W. MULLAN.

EXTRADITION—PROOF OF COMMISSION OF OFFENSE AND OF INFORMATION OR COMPLAINT FILED—The application for the extradition of a person charged with the commission of a crime in another state should be accompanied by an affidavit setting forth the circumstances of the commission of the offense, and a duly attested copy of the indictment, preliminary information or complaint before the request for extradition is granted.

Des Moines, February 21, 1903.

MR. JOHN BRIAR,
Private Secretary to the Governor.

DEAR SIR—An examination of the requisition, made by the governor of Kentucky upon the governor of this state, for the extradition of J. D. Wurtsbaugh for the crime of bigamy claimed to have been committed in Kentucky, discloses that such requisition and the evidence in the form of written affidavits attached thereto, does not comply with the requirements of our statute.

Section 5171 of the code provides:

> "No executive warrant for the arrest and surrender of a person demanded by the executive authority of another state or territory, as a fugitive from justice of such state or territory, * * * shall be issued, unless the requisition from the executive authority of such other state or territory, * * * is accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, preliminary information or complaint, made before the court or magistrate authorized to receive the same."

The affidavit of Mr. H. Edwin Rowe, attorney for the commonwealth of the Sixth district of Kentucky, states in his sworn application for a requisition that the said J. D. Wurtsbaugh is a fugitive from justice. Such statement is a conclusion of law which must be inferred from the facts in the case, and the facts upon which such conclusion is based is nowhere set forth in the application.

In *Jones and Atkinson v. Leonard*, 50 Iowa, 107, it is said:

> "There are grave doubts whether such a statement constitutes the evidence required by the statute. Whether the plaintiffs were such fugitives is a mixed question of law and fact. The latter being stated or ascertained, a legal conclusion would follow or be based thereon. Instead of stating facts, the affidavit states nothing more than the legal conclusion of the person making the affidavit. The statute requires the governor to determine whether or not the person or persons are fugitives from justice. Sworn evidence is to be submitted to him to enable him to do so. Such evidence may be in the form of affidavits. But instead of any facts being stated, upon which an independent judgment could be formed, the governor must have relied wholly on the legal conclusion of another. It seems to us that to sanction such a proceeding would be establishing a dangerous precedent."

There should be attached to the application for the requisition, an affidavit fully setting forth the facts and circumstances of the commission of the offense, and the facts, circumstances and time when the person charged fled from the jurisdiction of the state in which the crime is claimed to have been committed.

Second, there should be a duly attested copy of an indictment, preliminary information or complaint made before the court or magistrate authorized to receive the same, specifically charging the person sought to be extradited with the crime which it is claimed he has committed. If an indictment has been found, a duly attested copy thereof, under the seal of the court to which it has been returned, should be attached to the application. If a preliminary information or complaint has been filed before any court or magistrate, having jurisdiction to try the case upon preliminary information or otherwise, a certified copy of such preliminary information or complaint, given under the hand of the magistrate or clerk of the court, together with a certificate of such magistrate or clerk, showing that the same has been duly filed by such magistrate or clerk, and that the hearing thereof is pending the arrest or extradition of the person charged, should be attached to the application.

I find an affidavit, duly sworn to by P. E. Wurtsbaugh, which purports to charge Jesse D. Wurtsbaugh of the crime of bigamy committed in the county of Davis and state of Kentucky, but there is no evidence that such affidavit was ever filed in any court or by any magistrate as a preliminary information upon which a warrant could issue for the arrest of the said Jesse D. Wurtsbaugh.

I would suggest that the requisition with all of the affidavits and papers attached thereto be returned with the information to the persons desiring the arrest and extradition of Jesse D. Wurtsbaugh, that an affidavit be made by some one having personal knowledge of the facts, setting forth explicitly the commission of the offense charged and the fact that thereafter, if it is true, the said Jesse D. Wurtsbaugh fled from the state of Kentucky to avoid punishment for the crime charged. That a preliminary information be duly prepared, sworn to and filed before a proper magistrate having jurisdiction of the case, and a warrant be issued thereon for the arrest of the said Jesse D. Wurtsbaugh, and that certified copies of such information and warrant, given under the hand of the magistrate or court in which the information is filed, be attached to the application. Further than this, I think there should be evidence in the form of an affidavit, showing that no divorce was granted the said Jesse D. Wurtsbaugh or to Stella A. Wurtsbaugh, dissolving the bonds of matrimony existing between them after their marriage on the 27th day of February, 1884. As the presumption of law is, in the absence of evidence to the contrary, that the impediment which is claimed to exist as to his marriage with Eva T. Wurtsbaugh was removed before such second marriage by divorce or otherwise. And such affidavit should further show that the said Stella A. Wurtsbaugh was living at the time of such second marriage.

Very respectfully,

CHAS. W. MULLAN.

JUDICIAL DISTRICTS—COMPENSATION OF JUDGES.

Des Moines, February 21, 1903.

HON. HENRY BANKS,
Fort Madison, Iowa.

DEAR SIR—Your letter of the 17th inst. to Hon. B. F. Carroll, Auditor of State, has been referred to me, together with his request that I determine what salary you are entitled to receive under the act of the Twenty-ninth General Assembly.

There seems to be some confusion in the statutes regarding the election of judges in the first judicial district, and I will be pleased to have any assistance which you can give me in arriving at the facts in the case.

Prior to the adoption of the code of 1873, Lee, Henry, Des Moines and Louisa counties constituted the first judicial district of Iowa. I think the district remained without change until 1886, when it was changed by chapter 134 of the acts of the Twenty-first General Assembly. Henry and Louisa counties were taken out of the district, and it was then composed of the counties of Lee and Des Moines. It then continued without change until 1896, when Des Moines county was taken out of the district and Lee county created the first judicial district of the state.

Section 584 of the code of 1873 provides:

> "A district judge and a district attorney shall be chosen in each judicial district, except the twelfth and thirteenth, at the general election in the year 1874, and each fourth year thereafter."

Lee county having always formed a part of the first judicial district, and a judge having been elected therein in the year 1874, who, under the constitution, would hold his office for four years from and after the first day of January following such election, I am unable to understand the language of section 5 of chapter 121 of the acts of the Twenty-sixth General Assembly.

Section 2 of that act creates Lee county as the first judicial district of the state. At the time the act went into effect, there must have been one or more judges of that district who had been

elected under the law as it existed prior to the passage of chapter 121. In the regular course of the expiration of the terms of office of such judges, the offices should have been filled at the general election in the year 1888; and I am free to say that I do not now understand why the legislature designated such election to take place in the year 1899.

If, under section 5 of chapter 121 of the acts of the Twenty-sixth General Assembly, you were elected for the term of four years, could a subsequent legislature abridge your term of office?

If in the regular course of the expiration of the term of office of judge of that judicial district, you were elected in the year 1898, it seems clear to me that your office was for the term of four years, and that it must again be filled by the election in 1902. But, as I have indicated, I am at a loss to understand why the year 1899 was fixed by the Twenty-sixth General Assembly as the year when a judge in that district should be elected.

It may be in the hasty examination which I have given this matter, I have overlooked some act of the legislature that may explain this apparent discrepancy, and I will be pleased to have your views upon the question before giving the auditor my opinion.

Yours very truly,

CHAS. W. MULLAN.

JUDICIAL DISTRICTS—ELECTION OF JUDGES—COMPENSATION OF—The date "1899" fixed by the act of the Twenty-sixth General Assembly for the election of judges in the first judicial district is an error, and should be "1898." The judge of that district elected in 1902 is entitled to the increased compensation fixed by the Twenty-ninth General Assembly.

Des Moines, February 27, 1903.

HON. B. F. CARROLL,
Auditor of State.

DEAR SIR—In response to your verbal request that I advise you as to whether the judge of the first judicial district of Iowa

is entitled to the increased compensation fixed by the Twenty-ninth General Assembly, I have to say that from the time of the enactment of the code of 1873 to the present time, each judge of that district has been elected every four years beginning with the year 1874, after the code went into effect. These elections have occurred since that time in 1878, 1882, 1886, 1890, 1894, 1898 and 1902. At the time the act of the Twenty-sixth General Assembly went into effect, the judge of that district was then serving the term for which he had been elected in 1894, and which would expire the first day of January, 1899. The election to fill that office, after the expiration of the incumbent term on the first day of January, 1899, would necessarily have to be the November election of 1898, and it is clear that the Twenty-sixth General Assembly simply made a mistake when it declared that the office should be filled at the general election in 1899, as such provision would have left the district without a judge from the first day of January, 1899, to the first day of January, 1900, unless it could be held that the act extended the term of the incumbent one year, and this I think is not tenable. The simple fact is that the figure 9 was inadvertently written in the act instead of the figure 8, and the error was not discovered until the passage of the bill. The present incumbent was elected in the year 1898. No election was held in 1899. His term of office would expire on the first day of January, 1903. He was re-elected at the general election of 1902. This makes a straight succession in office by an election held every four years from 1874 to 1902. Judge Banks, having been legally elected at the November election of 1902, qualified and taken his office on the first day of January, 1903, is clearly entitled to the increase of salary fixed by the act of the Twenty-ninth General Assembly.

Yours very truly,

CHAS. W. MULLAN.

SHERIFFS—DEPUTIES—COMPENSATION OF—A deputy appointed by a sheriff must be paid out of the receipts of the office, and if such receipts are insufficient to pay the salary allowed the deputy and to give the sheriff the compensation fixed by law, the deficiency must be made up by the county.

Des Moines, February 27, 1903.

HON. ED. P. INGHAM,
Muscatine, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 26th inst.

Pardon me for suggesting that it is no part of my duty as attorney-general to determine questions arising in the administration of county affairs, unless such questions are referred to me by one of the departments of the state, of which I am the legal adviser; and that whatever I say upon questions of that character is simply voluntary and is not binding upon any court or tribunal before whom the question may come.

As a matter of courtesy to you, however, I will offer the following suggestions as to the construction of sections 1 and 2 of chapter 27 of the acts of the Twenty-ninth General Assembly.

Section 1 provides:

> "In counties having a population of over twenty-eight thousand, and less than forty-five thousand, the sheriff shall receive in full compensation for his services, except the expenses hereinafter provided for, three thousand dollars per annum, the same to be paid out of the receipts of the office. * * * And in counties having a population of more than twenty-eight thousand, and less than forty-five thousand, in which the receipts of the office and salary allowed by the board do not in any year amount to the sum of two thousand dollars, the board of supervisors shall, at the January session thereof following, make an allowance to the sheriff of a sum equal to the difference between the receipts of the office for the previous year, and two thousand dollars."

Section 2 provides:

> "In all counties the sheriff shall, in writing, appoint one or more persons not holding a county office as deputy or deputies. * * * In all cases the board of supervisors shall fix the number of deputies and shall fix the salary of such deputies at not exceeding one thousand dollars per annum each in counties having a population over twenty-eight thousand. * * * And in all counties, the chief deputy shall be paid by the sheriff out of the compensation allowed him under the provisions of the preceding section, and all other deputies shall be paid by the county."

The construction which must be placed upon this statute appears to me to be this: That the chief deputy must be paid out of the receipts of the office. If at the end of the year such receipts are insufficient, together with the salary allowed the sheriff under section 511 of the code, as amended by the Twenty-seventh General Assembly, to pay the salary of the deputy, as fixed by the board, and to pay the sheriff a compensation of two thousand dollars, then the board must, under the provisions of section 1 of chapter 27 of the acts of the Twenty-ninth General Assembly, make an allowance to the sheriff of a sufficient amount to bring his compensation up to the sum of two thousand dollars.

If the receipts of the office are sufficient to pay the salary allowed the chief deputy, and to give to the sheriff, with the salary which he receives under section 511, a compensation of two thousand dollars, no allowance should be made by the board.

If the receipts are sufficient, after paying the salary allowed the deputy to pay the sheriff a compensation of three thousand dollars with the salary allowed him, he is entitled to retain that sum as his compensation. All receipts above that amount must be turned over to the county.

Yours very truly,

CHAS. W. MULLAN.

COUNTY AUDITOR—PUBLICATION OF REPORT—It is the duty of the county auditor to make and publish the financial statement provided for in section 480 of the code, as amended by the acts of the Twenty-ninth General Assembly, and such report must contain comparison with previous years.

Des Moines, February 27, 1903.

MR. O. B. PETERSON,
Nevada, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 26th inst.

While I doubt the advisability of my giving an opinion upon questions referred to me by county officers, as it is no part of my duty to advise them as to their legal rights, and the county attorney is by law made their legal adviser, I will, however, say that I think there can be but one construction placed upon section 480 of the code, as amended by chapter 23 of the acts of the Twenty-ninth General Assembly, and that is that it is the duty of the auditor to make and publish the financial statement provided for in said section in 1903, showing the expenditures of the county during the year 1902; and that such duty is obligatory upon him.

The provisions of the closing portion of the section clearly indicate that such was the intent of the legislature, as it is provided that the comparison required by the section need not be made in the first report published, and the second report need only contain a comparison with the preceding year, and the third report with the last two years, the fourth report with the last three years, and the fifth report with the last four years. That is to say, a statement of the business of 1902 must be published in 1903, without comparisons. A statement of the business of 1903 must be published in 1904 with a comparison of the business of 1902, and so on.

It seems to me the statute is susceptible of no other interpretation.

Yours very truly,
CHAS. W. MULLAN.

SALOON MULCT TAX—Any saloon or place where intoxicating liquors are sold at retail is liable to pay the mulct tax, whether operating under the mulct law or not.

Des Moines, March 5, 1903.

MR. S. HENDRIX,
Loville, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 4th inst.

While the matter concerning which you write is not one upon which I can express an official opinion, unless the same should be referred to me by one of the departments of the state, I will make the following suggestions in regard to your action as assessor.

If any one in your assessor's district is conducting a place for the sale of intoxicating liquors, other than as authorized under the pharmacy law, it is the duty of the assessor to assess the mulct tax against him, whether he has received a permit to carry on such place under a petition signed by sixty per cent of the voters of the county or not. The assessment of the mulct tax against a saloon is not dependent upon the fact that such saloon is running under a petition of sixty per cent of the voters of the county. If it is conducted and carried on, either under such petition or without such petition, it is in either case equally liable to pay the mulct tax, and should be assessed therefor.

Yours very truly,
CHAS. W. MULLAN.

COUNTY ATTORNEYS—COMPENSATION OF—County attorneys are not entitled to a percentage upon fines, unless the same are collected by the county.

Des Moines, March 11, 1903.

HON. L. C. RINARD,
Mason City, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 7th inst.

Section 308 of the code provides:

> "In addition to the salary above provided he (the county attorney) shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines *collected* and school fund mortgages foreclosed."

Under this provision, a county attorney can not, in my opinion, be paid an attorney fee upon any fine which is assessed by the court, unless such fine is collected and paid into the treasury; that is, he is entitled to the percentage of all fines collected and paid into the county treasury upon the same scale as attorneys' fees are allowed where judgments are obtained upon written instruments. The provisions of this section are in harmony with the original act of the Twenty-first General Assembly, which provided that the county attorney, in addition to the salary fixed by the board of supervisors, should also be paid ten per cent upon all fines collected. It was not the intent of the legislature to make the county liable for such compensation, nor that the same should be paid from the county treasury, unless the fines were actually collected.

Yours very truly,

CHAS. W. MULLAN.

PUBLIC OFFICERS—JURORS—COMPENSATION OF—Where the compensation of a public officer or a juror is fixed by statute, the court has no power to legally grant a greater compensation; but it is within the power of the court to order that the board and lodging of jurors be paid by the county where they are required not to separate during a trial.

Des Moines, March 11, 1904.

HON. CLAUDE R. PORTER,
Centerville, Iowa.

DEAR SIR—Enclosed herewith I hand you a copy of a letter written to Mr. Greenlee, county attorney of Montgomery county,

relating to the question of the levy, assessment and collection of road taxes for the years 1903 and 1904, which I believe will cover the ground of inquiry in your letter.

I believe it is a well settled principle of law that where the compensation of any public officer, juror, or any other person performing services for the state, is fixed by the statute, he can not legally receive any other compensation than that fixed, and I very seriously doubt the power of any court to legally grant or order a greater compensation to be paid to a juror than that fixed by section 354 of the code. If the jurors are ordered not to separate during the trial of any case, I think the court has power to order that the cost of their sustenance, that is their board and lodging, be paid during the time they are kept together; but it can not legally direct that they be paid any greater sum as compensation for their services than that fixed by law, and any such order would not be binding upon the board of supervisors.

Yours very truly,

CHAS. W. MULLAN.

SURVEY OF PUBLIC LAND--MEANDERED LAKE BEDS--STATUTE AND CASES RELATING THERETO.

Des Moines, March 19, 1903.

HON. A. B. CUMMINS,
Governor of Iowa.

DEAR SIR—In compliance with your request of yesterday, I give below the statutes and adjudicated cases bearing upon the question of the duty of the governor to request a survey of lands which were originally meandered as permanent lakes by the government survey, for the purpose of permitting the present claimants to obtain title thereto through a patent from the general government.

The statute which was cited by Mr. Evans as authorizing the governor to make a request for a survey of such meandered lakes and lands, is section 3 of chapter 138 of the acts of the Fifth General Assembly, which was approved January 25, 1855. This act was inserted in the Revision of 1860 without change,

as sections 953, 954 and 955 thereof. It was not inserted in the code of 1873, and it seems to me a serious question whether it now has any force and effect whatever.

Section 47 of the code of 1873 provides:

> "All public and general statutes passed prior to the present session of the general assembly, and all public and special acts the subject whereof are revised by this code, or which are repugnant to the provisions thereof, are hereby repealed."

It seems to me the act of 1855 must be held to be a general law, as it applied to every governor of the state during the time the act was in force. If it was a general law, and was omitted from the code of 1873, I do not see how to escape the conclusion that it was repealed by the enactment of that code, although that question does not appear to have been raised as to the law, and the supreme court in *Rood v. Wallace,* 109 Iowa, 13, refer to the act as being in force.

As bearing upon the question of the status of lands of this character, and of the duty and power of the governor in relation thereto, I call your attention to the cases of

Rood v. Wallace, 109 Iowa, 13;
Schlosser v. Hemphill, 90 N. W. Rep., 842;
Carr v. Moore, 93 N. W. Rep., 52.

Please command me if I can be of any further service to you.

Yours very truly,

CHAS. W. MULLAN.

TELEPHONE COMPANIES—ROADS AND HIGHWAYS—Telephone companies have no right to erect their poles and maintain their wires in the streets of a city or incorporated town except with the consent of the municipal authorities.

Des Moines, March 24, 1903.

HON. GEO. SOKOL,
Monmouth, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 20th inst.

I doubt the propriety of my expressing an opinion upon the question of the right of telephone companies to place their poles in the streets of a town without having a franchise therefor, for the reason that whatever I may say upon the subject will not be binding upon any court or tribunal before whom the question may come. I will, however, give you briefly my view of the present provisions of the law.

Section 1324 of the code of 1873 gave the right to any person or company to construct a telegraph or telephone line along the public highways of the state. This remained the law until the adoption of the code of 1897, by which the language of the section was changed so that it now reads: "Any person or firm, and any corporation organized for such purpose, within or without the state, may construct a telegraph or telephone line along the public roads of the state;" the words "public highway" in the original section being struck out and the word "road" substituted therefor.

The words "public highway" is a broader term than the word "road." It is a generic term and includes all roads, streets and alleys. Under section 1324 of the code of 1873, telephone companies undoubtedly had the right to locate their poles along the streets and alleys of cities and towns without obtaining a franchise therefor.

In adopting the code of 1897, the legislature, by striking out the words "public highway" and inserting the word "roads", undoubtedly intended to abridge the right of telegraph and tele-

phone companies and to confine their right to locate, erect and maintain poles along the public highways of the state to what are known as roads, as distinguished from public highways.

"Road" is defined in Bouvier's Law Dictionary as: "A passage through the country for the use of the people," citing 3d Yeates, 421; and this definition has been followed in *Chollar-Potosi Mining Co. v. Kennedy,* 3 Nevada, 373. And in *In re Woolsey,* 95 N. Y., 135, it was held that a provision of the New York constitution prohibiting the passage of a private or local bill laying out, opening, altering, etc., roads, highways or alleys, is not applicable to city streets and avenues.

While the adjudicated cases are not all in accord as to the distinction between a public highway and a road, it seems to me clear that it was the purpose of the legislature in striking out the words "public highway" in section 1324 of the code of 1873, and inserting the word "roads" in section 2158 of the present code, to make the clear technical distinction, and to take away from telephone and telegraph companies the right to locate, erect and maintain their poles along the streets and avenues of a city, except with the consent of the city authorities.

As bearing out this construction of the statute, I call attention to section 775 of the code, which provides:

> "Cities and towns shall have power to *authorize* and regulate telegraph, district telegraph, telephone, street railway and other electric wires and poles and other supports thereof by general and uniform regulation, and to provide the manner in which and places where the same shall be placed upon, along or under the streets, roads, avenues, alleys and public places of such city or town."

This section gives to the city or town council the power to authorize, as well as to regulate, the erection and maintenance of such telephone poles along the streets and highways of a city.

Taking this section in connection with the change made in the statute referred to, I am clearly of the opinion that no telephone company is authorized, under the present law, to locate, erect and maintain its poles along the streets and public highways of a city or town, unless it receives a franchise therefor from such city or town.

Yours very truly,

CHAS. W. MULLAN.

SCHOOL DISTRICTS—POWERS OF ELECTORS AT ANNUAL MEETING—(1) The provisions of section 2749 of the code relating to the submission of any proposition upon petition signed by ten voters, do not apply to any proposition which the voters of the district township have the right to pass upon at their annual meeting. (2) It is within the power of the electors to determine that a particular branch of study may be added in one subdistrict and not in others of the township. (3) When assembled at the annual meeting, the electors have power to pass upon one or all of the different propositions included in section 2749, and no notice that such questions will be voted upon is necessary.

Des Moines, March 24, 1903.

MR. JOHN ORTNER,
R. R. No. 5, Waterloo, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 19th inst.

While the matter concerning which you write is not one upon which I can express an official opinion, unless the same should be referred to me by one of the departments of the state, of which I am the legal adviser, I will make the following suggestions in relation to the questions asked in your letter:

First—I know of no provision of the statute which makes the vote of the corporate meeting of a school district invalid because only eight persons are present and vote at such meeting. The provisions of section 2749, relating to the submission of any proposition authorized by law to the voters at the annual meeting upon a petition signed by ten voters in any school township, do not apply to or affect any proposition which the voters of the district township are given the right to pass upon, and which is in fact voted upon by them at the annual meeting.

Second—Section 2749 of the code gives to the electors assembled at the annual meeting the right to determine as to what added branches shall be taught in the schools of the township,

and I know of no reason why it may not determine that a particular branch of study may be added in one subdistrict and not in others of the township.

Third—I do not think it is necessary to the validity of any vote of the electors assembled at the annual meeting, in carrying out the powers which are given by section 2749 of the code, that the notice of the meeting should state that a vote will be taken upon either of the propositions which the electors are by that section authorized to pass upon. When they are assembled at the annual meeting they have the power to pass upon any one or all of the different propositions included in section 2749, and no notice that such questions will be voted upon at the meeting is necessary to give the vote thereon validity.

Yours very truly,
CHAS. W. MULLAN.

ROADS—WORKING OF—(1) The township trustees may let the road work or any part of it to the lowest responsible bidder. (2) If the work is not let by contract, they may employ a superintendent to oversee and carry out the same. (3) Trustees are not eligible as superintendents of roads, nor can a contract for working the same be let to either of them.

Des Moines, March 25, 1903.

HON. T. P. HARRINGTON,
Algona, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 21st inst.

Replying to your inquiry as to whether the township trustees may, without letting the work on the roads by contract, dispense with the services of a superintendent as provided by statute, I will say that my construction of the present road law is that the trustees may pursue either of two methods of working the roads in their township:

First—They may let the work or any part of it to the lowest responsible competent bidder, and in such case it may not be

necessary to appoint a superintendent of roads, and the work may be under the supervision of the trustees or either of them.

Second—If the work is not let by contract, I think it is the duty of the trustees to appoint a superintendent of roads to oversee the work, and that the same is performed according to the plan adopted by the trustees.

I think the trustees are not eligible as superintendents of the roads, nor can a contract be let to either of them for working the same.

Yours very truly,
CHAS. W. MULLAN.

MUNICIPAL CORPORATIONS—COMPENSATION OF COUNCILMEN—Councilmen of cities of second class are entitled to $1.00 only for each regular or special meeting of the council, and in the aggregate their compensation can not exceed $50 in any one year, except that they are entitled in addition thereto to receive $1 for each meeting as a board of review. The amount so paid for services as councilmen covers all committee services, and any ordinance or resolution adopted by the city which provides a greater compensation than $1 for each meeting of the council, or for services performed as members of committees, is in violation of law.

Des Moines, March 31, 1903.

MR. H. RHYNSBURGER,
Pella, Iowa.

DEAR SIR—Your letter of the 23d inst., with enclosures, to the governor of Iowa, has been by him referred to me with the request that I answer the same.

Complying with such request, permit me to say that I hardly see how there can be any misunderstanding as to what is said in my letter of February 12th to Hon. H. T. McCormack of Knoxville, Iowa. However, as there seems to be some doubt as to the exact views expressed in that letter, I will now endeavor to

state my view of the law so clearly and explicitly that no doubt can arise as to my position.

Without going into the question at length, and stating it as succinctly as possible, I will say that section 669 of the code, as amended by chapter 17 of the acts of the Twenty-eighth General Assembly, fixes the compensation which the councilmen of cities of the second class and of incorporated towns are entitled to receive. Under the provisions of this section they are entitled to receive from the public funds of the city one dollar for each regular or special meeting of the council, the aggregate of such compensation, however, not to exceed fifty dollars in any one year, and in addition to such compensation they are entitled to receive for services as members of the board of review an amount not exceeding one dollar for each session of not less than three hours, which shall be paid out of the county treasury.

The compensation fixed by this section of the statute is all that a councilman of a city of the second class, or of an incorporated town, is entitled to receive for his services, either for attendance at the meetings of the council, or for committee work performed by him. That is to say, no member of the council of a city or town, of the character indicated, is entitled to receive from the public funds of the city any sum of money as compensaiton for any services performed by him, either as a member of the city council or as a member of any committee thereof, in excess of one dollar for each meeting of the city council during the year, which amount can not exceed fifty dollars in any year.

Any ordinance or resolution passed or adopted by the council of a city or town, of the character indicated, which provides a greater compensation than one dollar for each meeting of the council to be paid to the members thereof, either for attendance at the meetings of the council or for services performed by them as members of committees appointed by the mayor or by the council, is in violation of the provisions of the statute referred to, and void.

Yours very truly,

CHAS. W. MULLAN.

BANKS—TAXATION—The shares of stock of savings banks must be assessed as provided in section 1322 of the code, and the value of real estate which is otherwise taxed should be deducted from the total value of the shares in arriving at the taxable value thereof. The stock of any other bank or corporation cannot be deducted from the value of the shares of the bank which are assessed.

Des Moines, April 10, 1903.

HON. W. H. RAMSAY,
Garner, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 8th inst.

While I can not give an official opinion upon the question asked in your letter, unless the same should be referred to me by one of the departments of the state, I will briefiy, as matter of courtesy to you, give you my views regarding the same.

First—I will say that in my judgment section 1321 does not apply to savings banks organized under the laws of the state. It is by its terms expressly applicable to private banks, bankers and persons other than corporations elsewhere specified in the statute relating to the asessment of taxes. The method of assessing savings banks is specifically provided in section 1322, and their shares of stock must be assessed as therein provided; and section 1321 has no application to such banks.

Second—Section 1322 provides the manner in which the value of the shares of such banks shall be ascertained by the assessor, and specifically states what property, which is otherwise taxed, may be deducted in ascertaining the real value of such shares. It is provided in that section that the value of one class of property, viz, real estate, which is otherwise taxed, may be deducted from the total value of the shares in arriving at the actual value thereof, and the specific naming of such property in the statute excludes all other deductions.

Any portion of the capital or surplus of a savings bank which is invested in the stock of an incorporated state bank, or the

stock of any other corporation organized for pecuniary profit, which pays the taxes assessed against the same as provided by law, is an investment of the capital stock of such savings bank, and the fact that the property in which it is invested is elsewhere taxed is a factor in determining the actual value of the shares of the stock of the bank; that is, if such property was not elsewhere taxed, the value of the shares would be greater, and the fact that such property is elsewhere taxed to that extent reduces the value of the shares; but such property itself may not be deducted from the total value of the shares ascertained under the provisions of section 1322.

Yours very truly,
CHAS. W. MULLAN.

INEBRIATES—SYNOPSIS OF LAW RELATING THERETO.

Des Moines, April 18, 1903.

MR. J. K. CAIN,
1013-1015 Harrison Building,
Philadelphia, Pa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 16th inst.

Our statute for the detention and treatment of inebriates provides:

First—That the board of control of state institutions shall make provisions in the hospital for the insane for the receiving of persons sent to such hospital under the statute.

Second—That all inebriates and persons addicted to the excessive use of morphine or other narcotics, citizens of the state and residents of the county from which they are committed, may be brought before the district court or the judge thereof for examination upon an information filed against them. The question as to whether they are persons who should be detained and sent to the hospital for treatment is tried as a question of fact before the judge, and without the intervention of a jury. The same proceeding obtains as the investigation as to whether a person is of sound mind or not, except that such investigation is made before a judge of the court instead of the commissioners

of insanity. If the court or judge finds the person brought before him a fit subject for detainment and treatment, he may commit him to the hospital for a term of not less than one nor more than three years.

If after thirty days' treatment the patient shall appear to be cured, he may be paroled by the governor upon a pledge to refrain from the use of all intoxicating liquors as a beverage, or other narcotics. If he violates such pledge he may be returned to the hospital for further treatment.

During the time of his parole he is required to make monthly reports to the superintendent of the hospital to which he was sent, and if he fails to make such reports the sheriff of the county of his residence is required to arrest him and return him to such hospital, where he shall be detained and treated during the full term of his commitment.

The general effect of the law appears to be beneficial to the people of the state, and it is upheld by public sentiment.

Yours very truly,
CHAS. W. MULLAN.

SHERIFF—DEPUTY—It is obligatory upon a sheriff of a county to appoint at least one deputy, and upon the board of supervisors to fix his compensation. A sheriff cannot increase the compensation allowed him by statute by failing to appoint a deputy.

Des Moines, April 24, 1903.

HON. JOHN HAMMILL,
Britt, Iowa.

DEAR SIR—I think the provisions of section 2 of chapter 27 of the acts of the Twenty-ninth General Assembly are mandatory, both upon the sheriff and the board of supervisors; that is, the sheriff of each county must appoint at least one person in the county as a deputy, and the board of supervisors must fix the compensation of such deputy.

If the board of your county has fixed the compensation of a deputy sheriff, and the sheriff has failed to comply with the

law and appoint such deputy, the amount of the compensation of the deputy may, in my judgment, be deducted from the compensation given the sheriff.

The purpose of the statute requiring a sheriff to appoint a deputy is that the public may have the benefit of two persons qualified to perform the duties of that office, and thereby give the public better service. The statute requires that the chief deputy shall be paid by the sheriff out of the compensation which he is entitled to receive, and I think he can not increase the compensation allowed him by statute by a failure to perform a duty which is expressly imposed upon him by law, viz: the appointment of a deputy within his county.

On the other hand, it is equally the duty of the board of supervisors to fix the compensation of such deputy, which of course shall not exceed six hundred dollars per annum. If the board has failed to fix such compensation, it is equally remiss in its duty as the sheriff is in not appointing such deputy, and I very seriously doubt, under such circumstances, the right of the board to deduct from the compensation of the sheriff the maximum compensation of the deputy fixed by statute.

The compensation should be fixed and the sheriff required to appoint his deputy as provided by law. If it is so fixed and he fails to appoint, the amount of the deputy's salary should not be paid to the sheriff.

Yours very truly,
CHAS. W. MULLAN.

A DEPUTY COUNTY OFFICER HAS NO CLAIM AGAINST THE COUNTY FOR COMPENSATION, FOR THE REASON THAT HIS PRINCIPAL IS PREVENTED FROM TAKING POSSESSION OF THE OFFICE TO WHICH HE IS ELECTED BY THE REFUSAL OF HIS PREDECESSOR TO SURRENDER THE OFFICE.

Des Moines, May 22, 1903.

J. W. HAMMOND and W. E. SMITH,
Guthrie Center, Iowa.

DEAR SIRS—Replying to your esteemed favor of the 12th inst., I beg to say that I very seriously doubt the propriety of

my expressing an opinion in regard to your rights to recover any compensation for the time you were not employed during the pendency of the action to test the validity of the Titus amendment.

I may, however, suggest that while a county officer would probably have a valid claim for his compensation during the time he was deprived of the emoluments of his office by an incumbent who refused to surrender the office to him, I do not see how a deputy or other employe of the office, who was not elected by the people, can have any claim against the county for any compensation which he did not receive, because the question of the right of his principal to the office had not been determined by the courts. His case stands upon an entirely different footing than that of a man elected by the people to fill a public office, and who is prevented from taking possession of the office by reason of the refusal of his predecessor to surrender the office to him. In the one case the officer was entitled to the possession of his office and the emoluments thereof by reason of his election thereto; in the other, the deputy is appointed by such officer and is only entitled to begin his work as such when his principal has been inducted into the office. It is of course a peculiar and unfortunate situation, but I do not, under the circumstances, see how the county can be held liable.

Yours very truly,
CHAS. W. MULLAN.

ROADS—SUPERINTENDENTS OF—A township trustee cannot be a contractor or employed as superintendent in the construction or repair of roads in the township.

Des Moines, May 22, 1903.

HON. E. C. SPAULDING,
Marble Rock, Iowa.

MY DEAR SENATOR—I beg to acknowledge the receipt of your favor of the 13th inst. I think perhaps I owe you an apology for not answering your former letter and yours of the 13th

before, but the fact is that I have been so extremely pressed with business since the convening of the supreme court that my correspondence has fallen behind.

In reply to your favor will say that I see no objection under the present road law to the township trustees employing more than one overseer of the road work in the township.

I may say, however, in this connection, as I have written several county attorneys, that I do not think the law contemplates that a township trustee can either be a contractor of the road work or a supervisor. The trustees constitute a body which must let the contracts and employ the superintendent, and an employer can not act in the capacity of employer and employe at the same time. If contracts for the road work are let to different persons, and the work is being carried on in different places in the township at the same time, I think it is within the power of the trustees to employ more than one superintendent, as the circumstances may demand. I am, Yours very truly,

CHAS. W. MULLAN.

BOARD OF HEALTH—ELECTION OF HEALTH OFFICER—A majority of a quorum of the board of health is competent to elect a health officer and transact any business which legally comes before the board.

Des Moines, May 27, 1903.

DR. J. F. KENNEDY,
Secretary State Board of Health.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 13th inst., enclosing letters from Dr. H. H. Clark and Mr. F. G. Bell, relating to the appointment of a health officer in the city of McGregor.

In reply to the question asked in such letters permit me to say that section 2568 of the code provides:

> "The mayor and council of each town or city, or the trustees of any township, shall constitute the local board of health within the limits of such towns, cities or townships

of which they are officers, * * * which board shall appoint a competent physician as its health officer, who shall hold office at its pleasure."

The facts, as I gather them from the letter of Mr. Bell in the case under consideration, are these: That a meeting of the city council of the city of McGregor was held at which five councilmen and the mayor were present. Immediately after the adjournment of the regular meeting of the city council, the councilmen present and the mayor met as a local board of health, and for the purpose of transacting business as such. After the meeting was organized the question of the appointment of a physician as health officer of the city came up, and five of the members of the local board of health voted upon the selection of a health officer, three voting for one person and two for another, one member of the board of health, the mayor, not voting at all upon the question.

The question arising upon this state of facts is, Was the person so selected by the local board of health legally appointed health officer of the city of McGregor?

No specific method of appointing a health officer of a city is pointed out by statute. The mayor is the chairman of the local board of health and should preside at its meetings. I know of no rule of law which compels him to vote upon a question arising before the local board of health unless his vote is necessary to decide a question.

In the case under consideration a quorum of the board of health was present, and it was therefore competent to transact any business which legally came before it. A majority of that quorum voted upon the question of the selection of a health officer. A majority of those so voting would be sufficient to make the selection, and the person so selected by such majority would, in my opinion, be legally appointed under the provisions of section 2568 of the code.

Yours very truly,

CHAS. W. MULLAN.

ROADS—ROAD TAXES—EXPENDITURE OF—MUNICIPAL CORPORATIONS—A city or town has the right to control the expenditure of money arising from the road taxes levied upon the property within its corporate limits.

Des Moines, June 19, 1903.

HON. F. A. O'CONNOR,
New Hampton, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 5th inst.

While, as you are aware, it is no part of my duty as attorney-general to give opinions to the boards of supervisors in the different counties of the state, or to county attorneys who are by law made the legal advisers of such boards, I will, as matter of courtesy to you, make the following suggestions as to the interpretation of section 1530 of the code, as amended by the acts of the Twenty-ninth General Assembly.

This section provides that the road tax levied thereunder by the board of supervisors shall be known as the county road fund. Such taxes shall be collected by the treasurer of the county in the same manner as other taxes, and shall be paid out by him only on the order of the board of supervisors for work done on the roads of the county in such place as the board may determine, except that so much of the county road fund as arises from property within any city or incorporated town, shall be expended on the roads or streets within such city or town, or on the roads adjacent thereto, under the direction of the city or town council.

This exception to the general provisions of the section gives to the city or town council the right of expending the money arising from the taxation of the property within such city or town as such council shall, in its discretion, deem advisable.

While the language of the statute as to the manner in which the work shall be done on the roads is meager, I think the fair construction of it is that the work must be done under the supervision of the city or town council. Otherwise there would be a conflict of authority as between the board of supervisors and the city or town council. The city or town is responsible for the

condition of its streets and highways, and is liable for any damage that may occur because the same are not kept in a safe condition for travel. No such responsibility or liability rests upon the county as to the streets and public highways within the corporate limits of a city or town. The evident intent of the legislature in enacting the statute was that all of the money arising from the road fund tax outside of the incorporated limits of cities and towns should be expended in the improvement of the highways of the county by the board of supervisors, and all of such tax arising from property within the corporate limits of cities and towns should be expended by the council of such city or town.

The supreme court of Illinois in considering a somewhat similar statute held that where authority was given any particular board or body to expend money for public purposes, that such authority carried with it the right to control the fund which it was authorized to expend. *Supervisors Mercer Co. v. Town of New Boston*, 13 Ill. App., 278.

This principle is also recognized in *C., R. I. & P. Ry. Co. v. Murphy*, 106 Iowa, 43, although the exact question did not there arise.

Under this construction of the statute, I think a city or town council has the right to control the expenditure of money arising from the taxes levied upon the property within the corporate limits of such city or town under the provisions of section 1530 of the code, and that it is not to be expended by the board of supervisors in the same manner as the taxes arising from the property outside of such corporate limits.

Yours very truly,
CHAS. W. MULLAN.

TAXES—CONTRACTS—A contract to pay an attorney 15 per cent upon all taxes collected from omitted property where tax ferrets have been employed under the provisions of chapter 50, of the Twenty-eighth General Assembly, is void.

Des Moines, June 24, 1903.

HON. B. F. CARROLL,
Auditor of State.

DEAR SIR—Without giving a formal opinion upon the question presented by the letters of Auditor Hayes of Buchanan county, I will say that while the question is possibly a debatable one, I think a contract, entered into by a board of supervisors to pay an attorney fifteen per cent upon all taxes coming from omitted property, where tax ferrets have been employed to assist the county officers in finding property omitted from the tax lists under chapter 50 of the laws of the Twenty-eighth General Assembly, is void.

The identical question was before Judge Kenyon in the case of *Heath v. Albrook,* and he held that such contract was void upon two grounds:

First—That it was an attempt on the part of the board of supervisors to employ some other person to discharge the duties of the county treasurer of the county.

Second—That it was in contravention of chapter 50 of the acts of the Twenty-eighth General Assembly of the state of Iowa.

This case is now pending in the supreme court and has not yet been decided. I think, however, the position which should be taken by the state officers is that such contracts are void and can not be recognized by them. Yours very truly,

CHAS. W. MULLAN.

LAKES—RIPARIAN OWNERS—No riparian owner upon a navigable lake has a right to place any obstruction therein which interferes with the free passage of boats upon the same.

Des Moines, June 24, 1903.

HON. L. C. RINARD,
Mason City, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 20th inst., enclosing a petition of residents of Clear Lake and vicinity, asking that action be taken in relation to the removal of a fence existing in Clear Lake. In reply will say that no riparian owner on the lake has a right to extend his fence out into the lake so as to interfere with the free passage of boats thereon, and the maintenance of such an obstruction within the lake would be a public nuisance which could be enjoined by a civil action.

A lake which is in fact navigable is a public highway, the title to which is in the state for the benefit of the general public, and no riparian owner has any right to place any obstruction therein which shall prevent the free passage of boats over and upon the waters of the lake, except that he may build docks, piers or wharves from the land owned by him out to the part of the lake which is in fact navigable, such piers, docks and wharves being necessary for his use of the waters of the lake. Beyond this he can not go, and an action in the name of the state of Iowa can be maintained for any other obstruction placed by him therein.

As you have made an examination of the facts involved in this case, I submit the whole matter to your judgment as to whether it is advisable to bring an action against the riparian owner under the circumstances of this particular case. If you conclude that it is so advisable, institute it in the name of the state in your district court, and prosecute it to termination.

I herewith return you the petition enclosed in your letter.

Yours very truly,
CHAS. W. MULLAN.

SCHOOL BOARDS—SCHOOLHOUSES—DIPSOMANIACS—(1) It is within the power of a school board to call a special meeting and submit to the electors the question of levying a tax for the construction of a schoolhouse when the schoolhouse of the district has been lost by fire or otherwise. (2) The sheriff of a county in which a dipsomaniac is found who has escaped from the hospital to which he was sent, has the right to arrest and return him to such hospital without a warrant.

Des Moines, June 24, 1903.

HON. V. A. ARNOLD,
Spirit Lake, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 17th inst.

While the matter concerning which you write is not one upon which I can express an official opinion, unless the same should be referred to me by one of the departments of the state, I will, as matter of courtesy to you, give you my views upon the sections of the code referred to.

Section 2750 was amended by the Twenty-eighth General Assembly by striking out the words "Wherever the corporation has lost the use of a schoolhouse by fire or otherwise." The purpose of this amendment was to give the board of directors the right to call a special meeting of the voters of any school corporation for the purpose of voting for or against the levy of a tax for the purpose of purchasing a site, and the construction of any schoolhouse necessary, although the corporation had not lost the use of a schoolhouse by fire or otherwise.

Under this section I think it is within the power of the board to call a special meeting and submit the question to the electors of the district at such meeting, and if a majority of the votes cast upon the question shall be in favor of the levy of a tax for the purpose of constructing a schoolhouse, bonds may be issued for that purpose as provided by the other sections of the statute.

Section 4 of chapter 93 of the acts of the Twenty-ninth General Assembly makes the provisions of the statute relating to

incorrigibles applicable to patients committed for dipsomania, and the sheriff of the county in which such dipsomaniac is found undoubtedly has the right to arrest him and return him to the hospital from which he has escaped.

Yours very truly,
CHAS. W. MULLAN.

INSURANCE—CASUALTY—The word "casualty" used in paragraph 1, of section 1709, permits fire insurance companies to insure plate glass against breakage.

Des Moines, June 25, 1903.

HON. B. F. CARROLL,
Auditor of State.

DEAR SIR—I find upon my desk a letter from Hon. James C. Davis to you, asking for a construction of the language of paragraph 1 of section 1709 of the code, which authorizes companies organized under chapter 4 of title IX to insure houses, buildings and other kind of property against loss or damage by fire or other casualty, and particularly whether such language permits such companies to insure plate glass against breakage.

Without going into the question at length, I will say that after an examination I have reached the conclusion that the word "casualty", as used in paragraph 1 of section 1709, is sufficiently broad to permit such companies to insure plate glass against breakage. While it is true the word "casualty" generally refers to something of greater magnitude than the breaking of glass in the windows of a building, yet such an accident is a casualty, although of slight magnitude. A casualty is an unforeseen accident, and the breaking of a plate glass window can well be said to be a casualty to the building and which therefore falls within the class of accidents which companies organized under chapter 4 are entitled to insure against. Yours very truly,

CHAS. W. MULLAN.

INSURANCE—POLICIES OF—SIGNATURE TO—The statute does not require policies of insurance other than life to be signed by a resident agent.

Des Moines, June 25, 1903.

HON. B. F. CARROLL,
Auditor of State.

DEAR SIR—Replying to your verbal inquiry as to whether policies issued by insurance companies for fidelity, plate glass, burglary insurance, etc., require the signature of a resident agent, will say that I find no statute requiring such signature. The statute requires the policies issued to be signed by the president or secretary or other officer of the company duly appointed thereunto by the board of directors, but does not require that they be signed by a resident agent.

Enclosed I return you the letter of J. S. Anderson & Son.

Yours very truly,
CHAS. W. MULLAN.

ACKNOWLEDGMENT—MORTGAGES—(1) An acknowledgment of a mortgage to a corporation taken by an officer thereof, is invalid. (2) Such invalid acknowledgment does not invalidate the mortgage as between the parties. (3) The county recorder has authority to file such mortgage. (4) The filing and recording of such mortgage in no way affects its validity or invalidity, and is not notice to subsequent purchasers or incumbrancers.

Des Moines, June 26, 1903.

MR. H. B. CRADDICK,
Nevada, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your esteemed favor of the 25th inst. Please pardon me for suggesting that it appears to me that the questions asked in your letter should be propounded to your private attorney rather than to the attorney-

general of the state, as they strictly concern private and not public affairs.

I will, however, as matter of courtesy to you, answer the questions which you have asked.

1. An acknowledgment of a mortgage given to a corporation which is taken before a notary public who is an officer of the corporation, is not valid.

2. Such invalid acknowledgment does not invalidate the mortgage as between the parties.

3. I think the county recorder has the authority to file such a mortgage, as he can not pass upon the validity of such an acknowledgment.

4. The fact that the recorder accepts and files such mortgage does not in any way affect the validity or invalidity of the instrument. Such filing and recording would not be notice to any persons subsequently purchasing the property or taking an incumbrance thereon.

Yours very truly,

CHAS. W. MULLAN.

BOARD OF TRUSTEES—VOTING BY PROXY—A member of a board of trustees cannot legally vote upon any question which comes before the board at any meeting at which he is not present by written ballot or otherwise.

Des Moines, July 24, 1903.

HON. J. B. HUNGERFORD,
Chairman of Board of Trustees.

DEAR SIR—Complying with your verbal request for my opinion as to whether a member of the board of trustees of the Iowa State College of Agriculture and Mechanic Arts, may vote upon a question coming before the board, when such member is not present, by forwarding to the chairman or other member of the board a written ballot to be deposited in the ballot box by the member to whom it is sent and be counted as a vote cast by such absent member, I will say that in my opinion no member of the board of trustees can legally cast any ballot or vote upon any

question which comes before the board at any meeting thereof, who is not present in person at such meeting of the board.

The theory upon which the business of the college must be conducted is that only members of the board who are present at a meeting thereof, and take part in the deliberations of such board as to the matters coming before it, are entitled to vote upon the questions which the board are called upon to determine.

I know of no rule of law or custom which will permit a member of a board of this character, who is not present in person, to vote upon any question which comes before the board, whether such vote be offered in writing or otherwise.

Yours very truly,
CHAS. W. MULLAN.

STATE BOARD OF MEDICAL EXAMINERS—REVOCATION OF CERTIFICATE—NOTICE OF CHARGES—Where the state board of medical examiners undertakes to revoke a certificate issued to a physician to practice medicine within the state, such physician must be served with notice of the proceedings before the board has jurisdiction to act.

Des Moines, July 2, 1903.

DR. A. M. LINN,
Des Moines, Iowa.

DEAR SIR—Replying to the inquiries contained in your favor of the 10th instant, will say—

First—That in every case where the state board of medical examiners attempts to revoke the certificate issued to a physician to practice medicine within the state, the person holding such certificate must have a fair opportunity to appear before the board and meet the charges made against him. Such opportunity necessarily includes the service upon him of a notice of the time and place when the hearing will be had, and of the charges made against him. The fact that such notice was mailed to him by registered letter would not, in my judgment, be suffi-

cient to give the board jurisdiction to act upon the charges made and to revoke his certificate, unless it should be affirmatively established by evidence that he received the letter thus addressed to him.

The better method of procedure in cases of this character is that the notice shall be personally served upon the physician whose certificate is sought to be revoked by the board.

* * * * * * *

Fourth—Where a physician is called by the local board of health for the purpose of determining whether a contagious disease exists, or for taking means of suppressing such disease, the reasonable charges and expenses of the physician so called are proper items of expense incurred by the local board of health, for which the county is liable. The board of supervisors of the county should allow and pay the bill as a part of the necessary expenses incurred by the local board, and should be included in the amount for which a tax is levied upon the city, town or township, as provided by statute. Yours very truly,

CHAS. W. MULLAN.

MULCT TAX—DIVISION OF BETWEEN TOWN AND TOWNSHIP—**Where a saloon is operating under the mulct tax in an unincorporated village, such village is, after becoming an incorporated town, entitled to one-half the tax from the date of its incorporation.**

Des Moines, July 31, 1903.

HON. W. J. KEEFE,
Clinton, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 29th inst.

As matter of courtesy to you I will give you my views upon the questions contained in your letter, although it is not within the duties of my office.

The quarterly mulct tax, which is required to be paid by any one conducting a place for the sale of intoxicating liquors on the first days of January, April, July and October, is paid for the

three months preceding the time when such quarterly payment becomes due. The tax in the case suggested by you was assessed. and a considerable part of the three months had elapsed, before the town of Lost Nation was incorporated. During that period of time the business of the sale of intoxicating liquors was conducted outside of the limits of any city or town, and if the town of Lost Nation had not been incorporated, one half of the tax should be paid to the clerk of the township in which the business is conducted.

After the town of Lost Nation was incorporated, it then became entitled, from that time on, to one half of the tax assessed against persons selling intoxicating liquors within its limits, and I see no way of reaching a fair and just decision of the matter except to have the treasurer ascertain exactly when the town of Lost Nation was incorporated, and when it became entitled to one half of the mulct tax assessed against persons selling intoxicating liquors within its limits, and then divide the tax so paid between the township and the town, paying to each the proportion to which it is entitled according to the time that the business was carried on in the township before the incorporation of the town, and the time which it was carried on in the town after such incorporation.

Second—If the town of Lost Nation has no assessor, one should be appointed by the city council. If this is not done, then I think the auditor should assess the mulct tax and place it upon his books and return the amounts to the treasurer.

Third—The county auditor should, in my opinion, divide the assessment of the township assessor and separate the property within the town of Lost Nation from that in the township outside of such town so that in the collection of the taxes levied upon such assessment each will receive its proportion.

Fourth—The supervisors should make a levy upon the property included within the town of Lost Nation, as asked by the officers of that town.

Yours very truly,

CHAS. W. MULLAN.

APPEALS—Either party to an action for the violation of a city ordinance has the right to appeal from the judgment of the district court to the supreme court, and the same rules of practice obtain as in appeals in other criminal cases.

Des Moines, August 7, 1903.

MR. NICHOLAS COLSCH, JR.,
Waukon, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 5th inst.

I doubt the propriety of my expressing any opinion in regard to the question asked, for the reason that it is strictly within the jurisdiction of the county attorney, who is by law your legal adviser, and not within the jurisdiction of this office, unless the question should be referred to me by one of the departments of the state.

I will, however, call your attention to sections of the statute bearing upon the question involved. Section 692 of the code provides:

> "The proceedings before a mayor or police court shall be, as far as applicable, in accordance with the law regulating similar proceedings before a justice of the peace, unless otherwise provided. * * * Appeals and writs of error shall be taken from the mayor or the police court in the same time and manner, and subject to the same restrictions."

Section 5620 provides that in cases which are appealed to the district court from a justice of the peace, either party may appeal from the judgment of the district court to the supreme court in the same manner as from a judgment in a prosecution by indictment. The provisions of these two sections give to either party to an action for the violation of a city ordinance before a mayor, the right to appeal from the judgment of the district court to the supreme court of the state, in the same manner as an appeal could be taken from a judgment in a prosecution by indictment in that court:

Section 5450 referred to by you provides:

> "When an appeal is taken, it shall be the duty of the clerk of the court in which the judgment was rendered to forthwith prepare and transmit to the attorney-general a certified copy of a notice of appeal in the case, with the date of service thereof, and, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office, * * * and transmit the same to the clerk of the supreme court."

Construing the provisions of these several sections together, it is clear that section 5450 is applicable to cases where the city appeals to the supreme court from the judgment of the district court in an action brought for a violation of a city ordinance. and that the same rules of practice obtain in such a case as in an appeal from a judgment of the district court in a prosecution by indictment.

Yours very truly,

CHAS. W. MULLAN.

RIPARIAN OWNERS—MEANDER AND BOUNDARY LINES—Riparian owners whose lands border upon a lake own to the highwater mark of such lake without regard to the meander lines. The state has no authority to lease the lands between the meander lines and the waters of the lake.

Des Moines, September 10, 1903.

MR. W. MCDEAN,
Lake View, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 9th inst.

I doubt the propriety of my expressing any opinion as to the question asked in your letter, unless the same should be referred to me by one of the departments of the state. Anything which I should say upon the subject otherwise would be purely voluntary and would not be binding upon any one.

I will, however, make this suggestion: That all riparian owners whose lands border upon the lake in question, own the

land to the highwater mark of the lake, without regard to the meander lines. Such lines are not boundaries of the lands and are simply run by the government surveyor for the purpose of ascertaining the number of acres which the tract or lot contains according to the government survey. As these lands extend to the highwater mark of the lake, I do not see how the state can execute a lease of any land between the meander lines and the water; nor do I see how your town obtained any valid lease to any such lands. I do not know under whose authority such lease was executed, and seriously question the power of the state to execute a lease of any lands lying between the meander lines and the water of a lake or stream. Yours very truly,

CHAS. W. MULLAN.

TOWNSHIP—DIVISION OF—The division of a township under sections 556 and 557 of the code, does not take effect until the first Monday of the January following the time of the division, except for election purposes.

Des Moines, September 17, 1903.

HON. GEORGE A. HEALD,
Pocahontas, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 15th inst.

Are not the questions presented in your communication controlled by sections 556 and 557 of the code; that is, that the division of the township does not take effect until the first Monday of the January following the time of the division and that the new township then enters upon its new duties as a separate organization, except for election purposes; and is it not the duty of the board of supervisors under section 557 to designate where such a place of election shall be held and appoint the clerks and judges thereof? This appears to me to be the intention of the statute. It would seem advisable to have the board of supervisors designate the place where the general elections are usually held as the place of the election for the new township.

It is undoubtedly true that the proceeds of the road tax should be equitably divided between the two townships.

Yours very truly,
CHAS. W. MULLAN.

PUBLIC OFFICER—RESIGNATION OF—A resignation of a public officer takes effect at the time stated in his resignation, and not at the time such statement is received by the person to whom it is sent, and a vacancy is not created in the office by the receipt of a resignation to take effect at a future day.

Des Moines, October 19, 1903.

HON. M. J. FITZPATRICK,
County Auditor, New Hampton, Iowa.

DEAR SIR—Your letter of the 14th inst. to the auditor of state has been referred to this office for answer, and we submit the following as our opinion respecting the resignation of a member of your board of supervisors.

Resignation is the act of an officer by which he declines his office and renounces further right to use it. To constitute a complete and operative resignation there must be an intention to relinquish a portion of the term of the office, accompanied by the act of relinquishment.

Statutory provisions govern with respect to the privilege of a public officer to resign his office.

Section 1265 of the code provides that every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified, unless he resigns, etc.

Section 1266, subdivision 4, provides that every civil office shall be vacant upon the resignation or death of the incumbent.

Section 1268, subdivision 4, provides that resignations in writing by all county and township officers shall be made to the county auditor.

Section 1272 provides that in case of a vacancy in the membership of the board of supervisors, the vacancy shall be filled by the clerk of the district court, auditor and recorder.

Section 1275 provides that persons appointed to fill vacancies shall qualify within ten days from such appointment in the same manner as those originally elected or appointed to such offices.

Section 1278 provides that if a vacancy occurs in an elective county office, fifteen days prior to a general election, it shall be filled at such election, unless previously filled at a special election.

These are the statutory provisions governing the vacancy caused by the resignation of a member of the board of supervisors, and under these provisions it must be determined whether the resignation in question shall be construed to take effect from the date of filing it, October 6, 1903, or from the date which the resignation recites it shall be effective, December 31, 1903.

Under the statute the supervisor in question had the right to resign and it has been held in this state that a resignation in writing made to the proper officer creates a vacancy without any formal acceptance on the part of such officer.

Gates v. Delaware County, 12 Iowa, 405.

It must be conceded that such a person resigning his office would be privileged to name the date upon which such resignation shall take effect, and until that date is reached there would be no vacancy in such office. A resignation is not consummated unless there is an intention to relinquish accompanied by the act of relinquishment. In this case the intention to resign is clearly expressed, but it can not be said that the resignation is effective until the date nominated in the resignation.

It was held under a Virginia statute that a letter to the court from their clerk declaring his intention to resign his office at the next term and giving them notice to prepare to choose another at that time as he would not continue in office after that date, is such a resignation as authorizes the court to appoint a clerk at that term to execute his duties immediately after that term ends.

Smith v. Dyer, 1 Call (Va.), 562.

In conformity with this opinion the names of the candidates of the political parties who have made and filed nomination papers can not legally be put on the ticket and voted for at the

November election. The vacancy will occur December 31, 1903, and at that time such vacancy may be filled as provided by statute.

Very respectfully yours,
LAWRENCE DE GRAFF.

ELECTION—BALLOT—NAME WRITTEN THEREIN—A voter may write the name of any person he desires at the proper place upon a ballot where a blank has been left therein, and the marking of a cross in the square opposite the name so written in entitles the ballot to be counted.

Des Moines, November 17, 1903.

HON. WILLIAM EATON,
Sidney, Iowa.

DEAR SIR—I have just returned to my office after an absence of two weeks, and find your favor of the 5th inst. awaiting reply. You say that you will be called upon early in the week ending November 14th to give an opinion as county attorney as to the right of the judges of election to throw out the ballot, a copy of which you enclose in your letter.

The only ground which I can see for the ballot being rejected is the writing of the name Mattie E. Fair in the blank for superintendent of schools, and the marking of the cross at the left of such name.

Section 1119 of the code provides that a voter may also insert in writing in the proper place the name of any person for whom he desires to vote, making a cross opposite thereto; and as amended by the acts of the Twenty-eighth General Assembly it further provides the writing of such name without making a cross opposite thereto, or making a cross opposite such blank without writing a name therein, or the unnecessary marking of a cross in a square below a marked circle, shall not affect the validity of the vote.

The person who cast the ballot, a copy of which you enclose, undoubtedly had the right to write the name of Mattie E. Fair in the blank left in the ballot, and to vote for her as superin-

tendent of schools. This is done in due form, the square opposite her name is marked with a cross, and in my judgment the ballot should be counted.

I herewith return the copy of the ballot enclosed.

Yours very truly,
CHAS. W. MULLAN.

COUNTY ATTORNEY—COMPENSATION OF—CENSUS—**The last census, national or state, controls the acts of public officers and the board of supervisors in fixing the compensation of a county attorney until another official enumeration is made. The board of supervisors has no power to enumerate the people in the county, or make an estimate thereof, for the purpose of fixing the salary of a county attorney.**

DesMoines, November 24, 1903.

HON. F. E. NORTHRUP,
Marshalltown, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 22d ult. Absence from my office and extreme pressure of business have prevented me from answering the same before.

In reply will say that in my opinion sections 176 and 177 must be held to control the action of the board of supervisors in fixing the salary of the county attorney, as well as in all matters which relate to the population of the county. The national census of 1900 is the official enumeration which governs and controls the acts of public officials until another official enumeration is made under the provisions of the statute. This view is fully sustained in *In re Sale of Intoxicating Liquors,* 108 Iowa, 368, in which it is said:

> "It is entirely clear that these words are used in the same sense in these sections, and that whenever the number of inhabitants or population of counties, cities or towns is to be determined, the last census, as shown by the official register, must control so far as the proceedings under consideration

> are concerned. Whatever the right of the cities and towns may be as to taking enumerations of their inhabitants, we think a proceeding like this may not be based upon such an enumeration. To so hold would lead to frequent contests as to such enumerations and defeat what we think is the plain purpose of the statute, namely: that proceedings like this must be based upon the last census."

There is no provision of statute under which the board of supervisors is authorized to take an enumeration of the people of the county. Such an act is beyond the jurisdiction and power given by statute, and no official act of the board could be predicated thereon.

The provisions of section 308 of the code do not, in my opinion, authorize the board of supervisors to determine the population of a county for the purpose of fixing the salary of the county attorney, and it must act in fixing such salary upon the last preceding official census.

In fixing the salary of a county attorney, the board has no discretion except within the limits prescribed by statute, nor has it any authority to base the compensation upon any estimate of the population of the county made by it.

I regret to be compelled to reach this conclusion, as I am fully aware that the compensation paid to county attorneys is inadequate, but I see no escape from it.

Yours very truly,
CHAS. W. MULLAN.

CITIES AND TOWNS—VACANCY IN OFFICE—When a vacancy in the office of mayor or councilman occurs, and there are sixty days of an unexpired term, the vacancy must be filled by special election; and the council may appoint a qualified elector to act as mayor until such special election. If less than sixty days, the vacancy may be filled by appointment. If an elector is appointed to act as mayor, and no special election is called, such elector would be *de facto* mayor of the city or town, and his official acts valid.

Des Moines, December 2, 1903.

MR. THOS. W. BITTLE,
Manilla, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 1st inst.

While the matter concerning which you write is not one upon which I can express an official opinion, I am pleased to call your attention in an informal way to the provisions of section 1272 of the code, which provides that any vacancy in the office of councilman or mayor of any town shall be filled by the council at its first regular meeting after such vacancy occurs, or as soon thereafter as is practicable.

A preceding provision of the section, relating to the appointment of mayor or councilman to fill a vacancy in a city, provides that when there are sixty days of an unexpired term, such vacancy shall be filled by special election, to be called by the council as soon thereafter as practicable, and the council may appoint some qualified elector to act as mayor until the qualification of the officers elected at such special election, and if such unexpired term is less than sixty days the vacancy shall be filled by appointment.

I think this provision is applicable to incorporated towns as well as cities, but if the vacancy is filled by the council of an incorporated town as provided in the last clause of the section, and no special election is thereafter called by the city council, the person so appointed would be *de facto* mayor and would con-

tinue to hold his office until the next general election, and all of his official acts would be valid.

Yours very truly,
CHAS. W. MULLAN.

CITIES AND TOWNS—LICENSES—FIRE INSURANCE AGENTS—A city or town has no authority to require transient fire insurance agents to procure a license befere writing insurance.

Des Moines, December 31, 1903.

MR. I. J. SAYRS,
Jewell, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 29th inst.

I doubt the propriety of my expressing an opinion upon the questions contained in your letter, unless they should be referred to me by one of the departments of the state. Otherwise whatever I should say would be purely voluntary and not binding upon any court or tribunal. I will, however, make the following suggestions:

The power granted an incorporated city or town to require licenses for the transaction of any business, is contained in section 700 of the code, and by reference to that section you will see that power is granted to license and tax hotels, restaurants, eating houses, to define by ordinance who shall be considered transient merchants, to regulate, license and tax their sales and those of auctioneers, bankrupt and dollar stores, and the like, and to license and tax peddlers, plumbers, bill posters, itinerant doctors, itinerant physicians, surgeons, junk dealers, scavengers, pawn brokers and persons receiving actual possession of personal property as security for loans, with or without a mortgage or bill of sale thereof. I take it to be a well settled rule of law that a municipal corporation has no power except that which is expressly conferred by the legislature, or absolutely necessary to carry out the power which is expressly conferred.

As to the authority of a city council to pass an ordinance requiring all transient fire insurance agents to take out a license, I call your attention to the cases of

City of Marshalltown v. Blum, 58 Iowa, 184;
Town of Pacific Junction v. Dyer, 64 Iowa, 38;
City of Ottumwa v. Zekind, 95 Iowa, 622,

which appear to be conclusive upon the question.

Yours very truly,

CHAS W. MULLAN.

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