FIFTH BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA

CHAS. W. MULLAN
ATTORNEY-GENERAL

TRANSMITTED TO THE GOVERNOR, JANUARY, 1906

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FIFTH 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 in this office during the years 1904 and 1905.

Schedule A is a complete list of all appeals in criminal cases submitted to the supreme court during the years 1904 and 1905, and also of all rehearings asked in criminal cases during that period, and the schedule shows the final disposition of the cases.

Schedule B is a list of all criminal cases pending on the first day of January, 1906.

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 me during the years 1904 and 1905.

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 an opinion. They relate to matters of public interest as to which uniform action throughout the state is desirable, and it is therefore thought advisable to include such letters in this report.

APPEALS IN CRIMINAL CASES.

There has been a slight increase in the number of appeals in criminal cases during the last biennial period.

At the September term, 1905, there were seventy appeals in criminal cases upon the docket of the supreme court. Of this number eleven were in cases where the defendants had been indicted for the crime of murder.

Among the important criminal cases tried during the last biennial period are the *State of Iowa vs. American Express Company* and *State of Iowa vs. Adams Express Company.*

The question involved in these cases was the right of the state to prohibit the shipment into the state and the sale of intoxicating liquors to persons residing therein through the medium of express companies. In each of these cases an order was given to a liquor house in a foreign state for certain intoxicating liquors. The liquors so ordered were shipped by express C. O. D. to the consignee, and by the express company carried to the place of destination and delivered to the consignee upon payment by him to the express company of the purchase price thereof and the express charges thereon. The express companies so delivering such intoxicating liquors were indicted by the grand jury of the counties where the delivery was made, for selling intoxicating liquors in violation of law. They were tried upon such indictment

and, under the instructions given by the judge of the district court, were convicted and a fine was imposed for the violation of the Iowa statute. From the judgment of the district court the companies appealed to the supreme court, and the judgment of the court below was affirmed. The cases were then taken to the supreme court of the United States upon a writ of error, and that court held that the sale of the intoxicating liquors was made in the foreign state where the same were delivered to the common carrier, and therefore came within the interstate commerce clause of the federal constitution. That the fact that such liquors were shipped C. O. D. was not sufficient to change the rule that a delivery of goods to a common carrier is a delivery to the consignee.

The principle decided by the supreme court of the United States is an important one, as it permits a traffic in intoxicating liquors by liquor dealers in other states, which is contrary to the spirit of the laws of Iowa. Numerous dealers in other states have agents in this state soliciting orders for intoxicating liquors to be shipped by express C. O. D. The unfortunate result of the decision is that minors and persons addicted to the immoderate use of intoxicating liquors, who are unable to purchase from dealers operating saloons under the mulct law, are able to obtain such liquors through the medium of express companies transacting business in Iowa.

During the biennial period there have been thirty-four appeals in cases in which the defendants were convicted of the crime of murder. This number is substantially the same as the number of appeals in murder cases during the preceding biennial period.

CIVIL CASES.

Among the important civil cases which have been determined since the last report is the case of *Greenwich Insurance Company et al vs. Carroll.*

This was an action brought by a number of foreign fire insurance companies, transacting business in the state of Iowa, against Carroll as Auditor of State, for the purpose of having the provisions of section 1754 of the code declared to be unconstitutional and invalid. The action was brought in the United States Circuit Court, for the Southern District of Iowa, and the judge of that court held the statute to be unconstitutional and issued an injunction restraining the Auditor from enforcing its provisions in the manner provided by section 1755 of the Iowa code. From the judgment and order of the circuit court the state appealed to the supreme court of the United States, and that court reversed the judgment and order of the circuit court and held the statute to be constitutional and that it was within the power of the state legislature to regulate the business of fire insurance in the manner therein provided, and to prohibit agreements between insurance companies which might affect the cost of insurance.

In this connection I desire to express my appreciation of the services of the Hon. Charles A. Clarke, who was associated with me in the argument of the case.

LAKE BEDS.

The question of the title of the state to the lake beds is still in a somewhat unsettled condition, although the act of the thirtieth general assembly by which the legislature assumed the title of such lake beds to be in the state, and directed the manner in which they may be disposed of, is an important step in settlement of the question of the ownership of such lake beds. I think it must be held, whenever the question comes before the courts, that the state, by virtue of its sovereignty, is the absolute owner of all the lake beds in the state which were excluded from the government survey.

The act of the legislature referred to has I think, been very satisfactory in its operation.

LANDS OF ABANDONED RIVER CHANNELS.

The thirtieth general assembly passed an act by which the title to all of the lands within abandoned river channels in the state, and all bars or islands in the channels of navigable streams not before surveyed or platted by the United States or by the state of Iowa, was assumed to be in the state, and provided that such lands should be surveyed and sold in the manner set forth in the act.

Under this act a considerable amount of land within the abandoned channels of the Missouri river has been surveyed, appraised and sold by the state. The act also caused numerous actions to be commenced against the Secretary of State to restrain him from surveying and offering for sale other tracts of land which fall within the provisions of the statute. The most valuable and important tract, as to which the title is now in dispute, is a tract of about one thousand acres lying within the corporate limits of the city of Omaha. A large portion of this tract is claimed by the East Omaha Land Company, and smaller portions by other claimants. The land is very valuable because of its proximity to the city of Omaha.

Seven separate actions have been brought by claimants of this tract of land in the federal court against the secretary of state and are now pending therein.

The title to the land, as asserted by the state, is based upon the claim that almost all of the one thousand acres is an accretion to an island which existed in the Missouri river at the time of the original survey of the lands in Pottawattamie county. That about 1877 the channel of the Missouri river was suddenly changed by an evulsion, and the lands in question by reason of such evulsion and change of the channel of the river, became dry and arable lands.

It is claimed by the complainants that the lands in question are accretions to lands which were surveyed and

sold by the United States government and which abutted upon the Missouri river prior to the evulsion referred to.

The question of the ownership and title of the lands, therefore, must be determined by evidence as to the condition of the Missouri river at the point where these lands lie prior to the time of the evulsion. In order to obtain such evidence, it will be necessary for some one to find witnesses now living who knew the condition of the river, where its main channel existed prior to the evulsion, and the fact that the lands in question were an accretion to an island which existed in the bed of the river many years prior to the change of its channel. To do this will require a large amount of time and some expense. It is impossible for the attorney general or his assistant to take the time from the other business of the office which will be required to obtain the evidence necessary to the establishment of the title of the state to the lands in question. Special local counsel should, therefore, be employed by the state, who is familiar with the present conditions of the river and land in question, and who will be able, because of his local knowledge, to obtain the names and places of residence of witnesses who knew the condition of the river and land prior to the change of its channel.

If the state desires its title to the land in question defended, and to receive the benefit of the value thereof, it must employ local counsel for the purposes suggested, as its rights cannot in any other manner be fully protected.

A similar condition exists as to land in an abandoned channel of the Missouri river in the corporate limits of the city of Sioux City, which is estimated to be of the value of about $25,000. It is also necessary that local counsel be employed there to find the witnesses and obtain the testimony of the condition of the river and land prior to the time the old channel of the river was abandoned.

I suggest that the condition of these lands along the Missouri river, and of the state's title thereto, and the necessity of the employment of local counsel to protect

the interest of the state, be called to the attention of the legislature, that suitable appropriation may be made to pay such special counsel.

CORPORATIONS.

In my last report I suggested that a law should be enacted by the general assembly requiring that all articles of incorporation should be approved by the attorney general before the same are filed with the secretary of state and a permit issued thereon authorizing the corporation to transact business.

I am more firmly than ever convinced of the necessity of such a law. The acceptance of articles of incorporation and the issuance of a permit by the secretary of state constitute a contract between the state and the corporation, and no such contract should be entered into or agreed upon on the part of the state until its terms have had the approval of its legal department.

There are now many corporations transacting business in the state under articles which the promoters should never have been permitted to file with the secretary of state, and which certainly would never have had the approval of the attorney general.

The importance of corporations and the fact that a large portion of all of the business in the state is transacted by them, make it essential that all articles of incorporation offered for record should be carefully examined by the attorney general before a contract is entered into between the corporation and the state, and that all corporations should be strictly confined to the class of business which they are organized to carry on.

MONEYS RECEIVED.

I have received and paid over to the state treasurer during the last biennial period $2,449.49; $2,447.39 of which came from the collection of a judgment in favor of

the state and against the estate of John Thornton, an insane patient who came from Missouri to Iowa. The balance of the sum received by me consists of small items of costs advanced in cases in which the state was a party, which have been refunded.

NEEDS OF THE OFFICE.

The office is now fairly well equipped with law books and furniture, but the two rooms in which the attorney general, his assistant, and two stenographers are required to transact the business of the office, are wholly inadequate to its necessities. It is certainly a very unwise and unfortunate policy which permits societies which have no connection whatever with the administrative affairs of the state, to occupy commodious suites of rooms in the State House to the exclusion of a department through which so large a portion of the administrative business and affairs of the state must pass.

In my last report I urged the necessity of rooms adequate for the transaction of the business of this office, and have in other ways called the attention of members of the legislature to such necessity, but as yet no steps have been taken, either by the legislature or the executive council, to assign to the attorney general rooms adequate for the transaction of the business of the office.

The question is no longer a personal one with me, as my term of office will expire in a few months, but the necessity is so urgent that I cannot refrain from again calling your attention to it, and expressing the hope that something will be done at an early day toward the furnishing of suitable and adequate rooms for the transaction of the business of this office.

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 terms of office.

I also desire to acknowledge the valuable and faithful services of my assistant, Mr. Lawrence DeGraff, and

those of Mrs. Hunt and Miss Gilpin. Their work is deserving of high commendation, and whatever credit the work of this office is entitled to 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 1904 and 1905 and the final disposition of the cases:

Title of Case.	County.	Decisions.	Offense.
State v. Atkins, Bert, et al, appellants.....	Polk.....	Affirmed January 14, 1904.	Assault with intent to commit robbery.
State v. Anderson, Walter, appellant.....	Wapello.	Affirmed October 27, 1904	Rape.
State v. Armour Packing Co., appellant...	Polk.....	Affirmed June 10, 1904.... (Petition for rehearing overruled October 27, 1904.)	Selling imitation butter.
State v. Ashpole, Cy, appellant	Winnebago...	Reversed July 11, 1905 ...	Larceny.
State v. Andrews, Chas., appellant	Polk.....	Affirmed November 14, 1905	Rape.
State v. Anderson, Edward, appellant	Woodbury....	Dismissed September 26, 1905.....	Receiving a bribe.
State v. Alexander, W. E., appellant.....	Polk..... ...	Affirmed October 23, 1905	Murder.
State v. Arthur, James, appellant.....	Pottawattamie	Reversed December 16, 1905	Breaking and entering.
State v. Barr, Wm., appellant..... ...	Delaware.....	Reversed February 17, 1904	False pretenses.
State v. Bebb, Thomas, appellant (rehearing)	Muscatine	Reversed October 27, 1904	Rape.
State v. Birkby, John, appellant.....	Fremont	Reversed January 13, 1904	Larceny.
State v. Burns, James, appellant	Polk.....	Affirmed May 12, 1904....	Murder.
State v. Brown, Henry, appellant.....	Warren	Affirmed May 11, 1904 ..	Seduction.
State v. Busse, Louis appellant	Bremer.....	Affirmed July 13, 1904.... (Petition for rehearing overruled July 14, 1905)	Murder.
State v. Baird, Frank. appellant.....	Marion.....	Affirmed May 8, 1905.....	Burglary.
State v. Blatsky, Robert, appellant	Polk.	Affirmed October 22, 1904	Using false weights and measures.
State v. Brothers, Wm., appellee.....	Polk	Affirmed November 3, 1904	Assault with intent to inflict great bodily injury.
State v. Bullard, W. B. C., appellant.....	Clay	Reversed April 4, 1905...	False pretenses.

State v. Bird, C. E., appellant	Pottawattamie	Affirmed November 21, 1904	Robbery.
State v. Brunton, Robert G., appellant	Boone	Affirmed February 14, 1905	Liquor nuisance.
State v. Brown, Stewart C., appellant	Iowa	Affirmed March 7, 1905 (Petition for rehearing overruled October 23, 1905)	Perjury.
State v. Bodgny, Joseph, appellant	Monroe	Affirmed September 22, 1905	Murder.
State v. Bartlett, George et al, appellants	Monroe	Reversed October 17, 1905	Larceny.
State v. Brower, Fred, appellant	Johnson	Affirmed July 11, 1905	Breaking and entering.
State v. Beuche, Chas., appellant	Polk	Affirmed May 16, 1905	Keeping house of ill fame.
State v. Bennett, Myron, appellant	Boone	Reversed November 14, 1905	Assault with intent to commit murder.
State v. Bartlett, Vincent, appellant	Winneshiek	Affirmed July 11, 1905	Incest.
State v. Burke, Peter D., appellant	Pottawattamie	Affirmed June 12, 1905	Assault with intent to commit murder.
State v. Barkley, W. H., appellant	Sac	Reversed December 16, 1905	Rape.
State v. Blydenburgh, E. S., appellant	Hardin	Affirmed October 25, 1905	Murder.
State v. Carpenter, Chas., appellant	Mahaska	Affirmed March 8, 1904. (Petition for rehearing overruled September 28, 1904.	Rape.
State v. Clemenson, Wm., appellant	Hancock	Reversed April 11, 1904.	Conspiracy.
State v. Cobb, Major, and Certain Intoxicating Liquors, appellants	Monroe	Reversed April 12, 1905.	Liquor nuisance.
State v. Crowell, Albert, et al, appellants	Lee	Affirmed February 9, 1904	Larceny.
State v. Carmean, N. A, appellant	Marshall	Reversed January, 10, 1905	Embezzlement.
State v. Cobley, Wm., appellant	Monroe	Affirmed April 5, 1905 (Petition for rehearing overruled November 21, 1905.)	Murder.
State v. Conroy, Michael, appellant	Scott	Reversed February 8, 1905	Burglary.
State v. Colvin, John, et al, appellees	Dallas	Reversed June 14, 1905.	Nuisance.
State v. Cummings, Mike, appellant	Cherokee	Affirmed October 17, 1905.	Assault with intent to inflict great bodily injury.
State v. Crill, Chas., appellant	Mahaska	Affirmed September 22, '05	Keeping a gambling house.
State v. Campbell, S. A., appellant	Mills	Reversed December 13, '05	Liquor nuisance.
State v. Dale, J. J., appellant	Woodbury	Affirmed October 21, 1904	Larceny.
State v. Davison, Edward, appellant	Wapello	Affirmed March 18, 1904	Assault with intent to commit rape.
State v. Dominisse, Chas, et al appellants	Shelby	Affirmed May 3, 1904	Liquor nuisance.
State v. Dover, Boyd, appellant	Monroe	Dismissed Sept. 20, 1904	Rape.

SCHEDULE "A"—CONTINUED.

Title of Case.	County.	Decisions.	Offense.
State v. DeGroate, Harry C., appellee	Dallas	Reversed Feb. 9, 1904	Assault with intent to commit murder.
State v. Duffy, Frank, appellant	Fayette	Reversed Sept. 23, 1904	Robbery.
State v. Daily, John, appellant	Polk	Reversed June 14, 1905	Extortion.
State v. Donohue, Tom, appellant	Polk	Affirmed October 22, 1904	Breaking and entering.
State v. Dickerhoff, John and Emma, appellants	Polk	Affirmed May 2, 1905	Enticing to house of ill fame.
State v. Dickerhoff, John and Emma, appellants	Polk	Affirmed October 22, 1904	Keeping house of ill fame.
State v. Donovan, Dan, appellant	Muscatine	Affirmed October 19, 1904	Breaking and entering.
State v. Donovan, Ed, appellant	Lyon	Affirmed March 10, 1905 (Petition for rehearing overruled Sept. 26, 1905	Seduction.
State v. Drake, Lawrence, appellant	Winneshiek	Affirmed October 17, 1905	Seduction.
State v. Davis, Rosser, appellant	Mahaska	Affirmed Sept. 22, 1905	Manslaughter.
State v. Denhardt, Ed, appellant	Greene	Affirmed Decemb'r 12, 1905	Illegal fishing.
State v. Egbert, Ed, appellant	Monroe	Reversed October 27, 1904	Assault with intent to commit rape.
State v. Evans, Plum, appellant	Monroe	Reversed January 15, 1904	Assault with intent to commit murder.
State v. Evenson, Ed appellant	Worth	Reversed January 12, 1904	Assault with intent to inflict great bodily injury.
State v. Edmunds, J. Wilson, appellee	Wright	Reversed November 17, 1904. (Petition for rehearing overruled June 14, 1904)	Practicing medicine as an itinerant physician.
State v. Erdlen, John C., appellant	Wapello	Reversed June 13, 1905	Possession of burglar's tools.
State v. Erb, B. F. et al, appellant	Polk	Affirmed October 20, 1905	Liquor nuisance.
State v. Fuller, Wm. H. appellant	Monroe	Affirmed October 22, 1904	Assault with intent to commit murder.
State v. Finnegan, Peter, appellant	Cerro Gordo	Reversed April 10, 1905	Larceny.
State v. Gallaugher, Sarah Ellen, appellant	Johnson	Reversed March 19, 1904	Perjury.
State v. Gathman, Albert, appellant (rehearing)	Pottawattamie	Dismissed September 22, 1904	Seduction.

State v. Goldsberry, Joe, appellant	Appanoose	Dismissed January 18, 1904	Liquor nuisance.
State v. Greenland, F. A., appellant	Decatur	Affirmed July 12, 1904. (Petition for rehearing overruled January 16, 1905)	Larceny.
State v. Hohl, Fred, appellant	Warren	Affirmed February 15, 1904.	Larceny.
State v. Hortman, Harry, appellant	Cherokee	Reversed January 12, 1904.	Murder.
State v. Hromadko, Frank J., appellant	Linn	Reversed May 3, 1904	Forcible defilement.
State v. Haupt, Richard, appellant	Greene	Reversed December 16, 1904.	Seduction.
State v. Humbles, Frank, appellant	Monroe	Affirmed February 7, 1905. (Petition for rehearing overruled May 9, 1905).	Assault with intent to commit murder.
State v. Hampton, Samuel, appellant	Appanoose	Affirmed January 14, 1904.	Nuisance.
State v. Halden, A. W. appellant	Appanoose	Dismissed May 9, 1904	Nuisance.
State v. Harris, W. W. appellant	Appanoose	Affirmed January 12, 1904.	Nuisance.
State v. Hasty, J. C. appellant	Keokuk	Affirmed October 23, 1903. (Petition for rehearing overruled February 17, 1904)	Adultery.
State v. Heath, G. H. appellee	Boone	Reversed November 17, 1904	Practicing medicine without a license.
State v. Hewitt, Eugene, appellant	Cerro Gordo	Affirmed March 15, 1904	Nuisance.
State v. Hohl, George, appellant	Warren	Affirmed May 11, 1904	Liquor nuisance.
State v. Hummer, Albert, appellant	Johnson	Reversed September 27, 1905	Seduction.
State v. Hartman, Vernie, appellant	Boone	Affirmed February 11, 1905.	Liquor nuisance.
State v. Hellwege, Ernest, appellant	Boone	Affirmed February 13, 1905:	Liquor nuisance.
State v. Hill, Walter, appellant	Monona	Affirmed September 22, 1905	Sodomy.
State v. Icenbice, Elvin, appellant	Poweshiek	Affirmed November 15, 1904 (Petition for rehearing overruled May 9, 1905)	Rape.
State v. John, Zenas W., appellant. (Rehearing)	Muscatine	Reversed May 12, 1904	Perjury.
State v. Jones, Marion, appellant	Mahaska	Affirmed April 13, 1905 (Petition for rehearing overruled October 27, 1904).	Assault with intent to commit murder.
State v. Jacoby, Joe, appellant	Tama	Dismissed April 5, 1905	Liquor nuisance.
State v. Jackson, H. O., appellee	Jasper	Affirmed October 18, 1905.	False pretenses.

SCHEDULE "A"—CONTINUED.

Title of Case.	County.	Decisions.	Offense.
State v. King, Hayden, appellant. (Rehearing)	Polk.	Petition for rehearing dismissed February 10, 1904	Larceny.
State v. Krueger, Sophia, appellant.	Howard	Affirmed November 23, 1904.	Murder.
State v. Kono, Levi, appellant	Jasper.	Dismissed September 26, 1904	Seduction.
State v. Kirkpatrick, Wm. et al, appellants.	Mahaska.	Affirmed October 20, 1905	Breaking and entering.
State v. Koller, Wm. W., appellant	Pottawattamie	Reversed December 12, 1905	Adultery.
State v. Keegan, Chris, appellant	Fayette	Affirmed June 12, 1905	Nuisance.
State v. Leibe, Oliver, appellant	Delaware.	Affirmed October 25, 1904.	Rape.
State v. Leighton, Roy, appellant	Mahaska	Dismissed August 25, 1904	Assault with intent to commit murder.
State v. Leuhrsman, E. H., appellant	Benton.	Affirmed April 8, 1904	Assault with intent to inflict great bodily injury.
State v. Loser, Leon, appellant	Pottawattamie	Reversed July 11, 1905	Conspiracy.
State v. Lucas, Wm., appellant	Page	Affirmed January 14, 1904	Murder.
State v. Leighton, Clay, appellant	Mahaska	Dismissed July 11, 1904	Resisting an officer.
State v. Leuth, August, appellant	Cedar	Affirmed May 2, 1905	Kidnapping.
State v. Lamont, Arthur, appellant	Allamakee	Affirmed June 14, 1905	Assault with intent to inflict great bodily injury.
State v. Levich, Morris, appellant	Woodbury	Affirmed July 11, 1905. (Petition for rehearing overruled September 26, 1905)	Receiving stolen property.
State v. Latham, Albert, appellant	Polk	Affirmed October 23, 1905.	Assault with intent to commit murder.
State v. Loftus, Mary, appellant	Keokuk,	Reversed October 17, 1905.	Adultery.
State v. Loomis, George, appellee	Clayton	Affirmed December 13, 1905.	Larceny.
State v. McCay, C. B., appellant	Monona	Reversed February 9, 1904	Rape

State v Mahoney, L. D., appellant	Polk	Affirmed January 15 1904	Breaking and entering.
State v Miller, H. G., appellant	Cerro Gordo.	Affirmed July 12, 1904.	Assult with intent to commit rape.
State v. Motto, Henry appellant	Mahaska.	Affirmed February 18, 1904	Robbery.
State v Matheson, George, appellant.	Pottawattamie	Reversed April 10, 1905	Assault with intent to commit murder.
State v. McGruder, Chas., appellant	Hancock	Reversed December 13 1904	Sodomy.
State v McPherson, J. E , appellant	Page	Affirmed December 14, 1904	Breaking and entering.
State v Martin, Richard, appellant	Winneshiek	Affirmed December 13, 1904	Lewdness.
State v Moore, C R., appellant	Winneshiek	Affirmed December 13.1904	Resisting an officer.
Stafe v. Morris, R. E., appellant	Polk	Reversed November 14, 1905	Assault with intent to commit manslaughter.
State v. Moore, W. L., appellant	Linn	Affirmed June 14, 1905.	False pretenses.
State v. Mendenhall, E. B , appellant	Mahaska.	Affirmed September 22, 1905	Keeping a gambling house.
State v. Morton, Chas., appellant	Polk	Affirmed October 20, 1905	Murder.
State v. Norris, Levi S., appellant	Jones	Reversed January 14, 1904	Rape.
State Norris, Levi S., appellant	Jones	Modified and affirmed July 11 1905	Rape.
State v. Panor, Sam, appellant	Polk	Affirmed Feb. 17, 1904	Nuisance.
State v Peterson, Zeb, appellant	Decatur	Affirmed January 20 1904	Robbery.
State v. Poe, Claude J., et al, appellants	Union	Reversed Feb. 16, 904	Robbery.
State v. Pray, Richard, appellant	Decatur	Affirmed June 7, 1904. (Petition for rehearing overruled May 4, 1905)	Arson.
State v. Price, George H., appellant	Ringgold	Reversed April 12, 1905	Incest.
State v. Pinegar, Wm., appellant	Polk	Affirmed October 22, 1904	Assault with intent to commit murder.
State v. Pingle, Julius, appellant	Clinton	Affirmed October 17, 1905	Embezzlement.
State v. Phillabaum, Arthur, et al, appellants	Polk	Affirmed May 10, 1905	Breaking and entering.
State v. Perry, Lewis, appellant	Fremont	Affirmed Dec. 16, 1905	Incest.
State v Price, T. J. et al, appellants	Mahaska	Affirmed Sept. 22, 1905	Nuisance.
State v. Raphael, Joseph, et al, appellants	Black Hawk	Affirmed April 7, 1904	Burglary.
State v. Rea, B. D., appellant	Emmet	Reversed Nov. 23, 1904	Practicing medicine as an itinerant physician.
State v Reagan, Woodson, appellant	Appanoose	Affirmed January 19, 1904	Murder.
State v. Richards, W. A. appellant	Warren	Affirmed February 9, 1905	Burglary.
State v. Rivers, F. S., appellant	Dallas	Affirmed March 10, 1904 (Petition for rehearing overruled Sept. 28, 1904)	Forgery.

SCHEDULE 'A"—CONTINUED.

Title of Case.	County.	Decisions.	Offense.
State v. Roan, Sam, appellant	Polk	Affirmed January 14, 1904	Murder.
State v. Robinson, Thomas C., appellant	Howard	Affirmed Dec. 13, 1904	Murder.
State v. Robirds, Fred, et al, appellants	Page	Reversed Sept. 23, 1904	Robbery.
State v. Richards, W. A. et al, appellants	Marion	Affirmed May 6, 1905	Nuisance.
State v. Runyon, J. H., appellant	Wayne	Affirmed July 13, 1905	Nuisance.
State v. Robison, J. R., appellant	Polk	Affirmed October 25, 1905	Lewdness.
State v. Rogers, Wm. C., appellant	Pottawattamie	Affirmed December 16, '05	Murder.
State v. Roscum, David, appellant	Des Moines	Reversed October 17, 1905	Malicious mischief.
State v. Roberts, D. B, appellant	Taylor	Dismissed Sept. 20, 1904	Practicing as a physician without a license.
State v. Rennick, T. J., appellant	Calhoun	Affirmed April 12, 1905	Incest.
State v. Sandiland, Andy, appellant	Pottawattamie	Affirmed April 11, 1904	Breaking and entering.
State v. Scroggs, L. P., appellant (Rehearing)	Shelby	Petition for rehearing overruled June 15, 1904.	Assault with intent to commit rape
State v. Smith, Hervey, appellant	Wapello	Affirmed June 9, 1904. (Petition for rehearing overruled September 30, 1904)	Seduction.
State v. Smith, Thomas, appellant	Monroe	Reversed April 15, 1904	Murder.
State v. Smith, Lewis, appellant	Pottawattamie	Affirmed May 7, 1904. (Petition for rehearing overruled November 23, 1904)	Murder.
State v. Starchirch, George, appellant	Appanoose	Dismissed January 16, 1904	Liquor nuisance.
State v. Seligman, Max, appellant	Polk	Affirmed May 2, 1905	False pretenses.
State v. Shaw, Leona, appellant	Mahaska	Affirmed October 26, 1904 (Petition for rehearing overruled January 20, 1905)	Prostitution.

State v. Steen, Mrs. Herb, appellant.....	Mahaska	Affirmed October 22, 1904. (Petition for rehearing overruled January 20, 1905)	Prostitution.
State v. Stuart, Mr. and Mrs, Nick, appellants	Mahaska	Affirmed September 23, 1904.....	Prostitution.
State v. Sanborn, S. H., appellant.....	Boone.....	Affirmed February 11,1905,	Liquor nuisance.
State v. Sheetz, A. C., appellant...	Lyon.....	Affirmed February 7, 1905 (Petition for rehearing overruled July 14 1905)	Assault with intent to commit rape.
State v. Smyth, O. V., appellant.....	Boone.....	Affirmed February 11 1905.	Liquor nuisance.
State v. Stanley, Arthur, appellant.... ...	Appanoose ...	Affirmed July 11, 1905....	Seduction.
State v. Stuart, Harry, appellant.....	Jones	Affirmed June 12, 1905....	Desertion of wife.
State v. Smith, Joseph C., appellant.	Monroe.....	Affirmed June 6, 1905....	Murder.
State v. Sharp, Chas., appellant.....	Keokuk.....	Reversed June 6, 1905 ...	Assault with intent to commit murder.
State v. Schneider, Chas., appellant.....	Jones.....	Affirmed September 22, 1905	Breaking and entering.
State v. Savre, L., appellee.....	Mitchell	Reversed December 12, 1905	Illegal voting.
State v. Thompson, Wilifred, appellant ...	Johnson.	Affirmed October 27, 1904	Assault with intent to commit murder.
State v. Trusty, Marion, appellant..	Winnebago ..	Affirmed January 12, 1904	Rape.
State v. Tyler, Chester, appellant..	Jasper.	Affirmed January 12, 1904 (Petition for rehearing overruled May 12, 1904.)	Murder.
State v. Tabor, Wm., appellant.....	Polk.	Affirmed May 11, 1904	Larceny.
State v. Thompson, R. Dague, appellant	Linn	Reversed May 5, 1905	Assault with intent to commit murder.
State v. Usher, Joseph, appellant....	Linn	Reversed January 10, 1905	Murder
State v. Wagner, Harry, appellant..	Van Buren...	Affirmed March 9, 1904	Desertion of wife.
State v. Walker, John, appellant	Polk.	Reversed July 12, 1904	Murder.
State v. Wasson, C. G., appellant.....	Linn	Reversed January 11, 1905	Robbery.
State v. Williams, Richard, appellant	Mahaska.	Reversed January 13, 1904	Murder.
State v. Wilson, Josephine, appellant	Mahaska	Affirmed June 7, 1904 (Petition for rehearing overruled October 27, 1904.)	Keeping house of ill fame.
State v. White, Jack, appellee	Boone.....	Reversed April 5, 1904	Gambling.
State v. Worthen, Owen, appellant..	Benton.....	Affirmed July 12, 1904	Burglary.

SCHEDULE "A"—CONTINUED.

Title of Case.	County.	Decisions.	Offense.
State v. Warren, Chas., appellant	Polk	Affirmed November 23, 1904	Assault with intent to commit murder.
State v. Welch, C. E., appellant	Hardin	Dismissed June 8, 1904	Neglect of official duty.
State v. Wolf, Orris, appellant	Poweshiek	Affirmed October 18, 1904	Rape.
State v. Wescott, Martin, appellant	Cerro Gordo	Affirmed July 11, 1905	Murder.
State v. Whitsel, Isaac, appellant	Washington	Affirmed September 22, 1905	Larceny of domestic fowl
State v. Wheeler, Hugh, appellant	Butler	Reversed November 18, 1905	Assault with intent to maim and disfigure
State v. Weigert, H. C., appellant	Pocahontas	Affirmed November 18, 1905	Practicing medicine without a certificate.
State v. Willing, L. G., appellant	Black Hawk	Reversed November 18, 1905	Arson.
State v. Whitnah, Fenton, appellant	Page	Affirmed December 15, 1905	Murder.

SCHEDULE "B."

The following is a list of criminal cases pending in the Supreme Court of Iowa on January 1, 1906:

Title of Case.	County.	Offense.
State v. Andrews, Chas., appellant (Rehearing)	Polk	Rape.
State v. Brown, Jerome V., appellant	Butler	Assault with intent to main and disfigure.
State v. Bernstein, S., appellant	Warren	Giving intoxicating liquors.
State v. Blydenburgh, E. S., appellant (Rehearing)	Hardin	Murder.
State v. Caine, D. F., appellant	Woodbury	Conspiracy.
State v. Crouch, F., appellant	Palo Alto	Carnal knowledge of an imbecile.
State v. Crofford, J. W., appellant	Clarke	Murder.
State v. Disbrow, H. H. appellant	VanBuren	Larceny by bailee.
State v. Dunning, Day, appellant	Ringgold	Fraudulent banking.
State v. Gibson, Ralph, appellant	Polk	False pretenses.
State v. Harter, John C., appellant	Henry	Perjury.
State v. Hayden, John, appellant	Decatur	Murder.
State v. Harvey, Clyde and Hattie, appellants	Carroll	Arson.
State v. Harmon, Peter H., appellant	Dubuque	Adultery.
State v. Jackson, H. O., appellee (Rehearing)	Jasper	False pretenses.
State v. Johnson, Lee., appellant	Benton	Assault with intent to commit rape.
State v. Loser, Leon, appellant (Rehearing)	Pottawattamie	Conspiracy.
State v. Leuth, August, appellant (Rehearing)	Cedar	Kidnapping.
State v. Lomack, F. C. appellant	Polk	Libel.
State v. Matheson, George, appellant (Rehearing)	Potrawattamie	Assault with intent to commit murder.
State v. Metcalf, Chas., appellant	Woodbury	Incest.
State v. Moore, Wm. H., appellant	Muscatine	Murder.
State v. McFadden, Emma, appellant	Mahaska	Adultery.
State v. McKenney, Horace H., appellee.	Harrison	Embezzlement.
State v. McClain, Ed, appellant	Polk	Larceny from the person.
State v. Moore, Chas. W., appellant	Mahaska	Liquor nuisance.
State v. Mulhern, J. W., appellant	Madison	Liquor nuisance.
State v. Mitchell, George, appellant	Poweshiek	Murder.
State v. Porter, Cynthia A., appellant	Madison	Keeping a house of ill fame.

SCHEDULE "B"—CONTINUED.

Title of Case.	County.	Offense.
State v. Rehard, Leonard, appellant	Madison	Uttering a forged bank check.
State v. Riley, Oscar O., appellant	Mahaska	Adultery.
State v. Rocker, Chas., appellant	Lyon	Murder.
State v. Smith, Thomas, appellant	Monroe	Murder.
State v. Salyers, I. N., appellant	Emmet	Taking game fish.
State v. Seery, Francis E., appellant	Benton	Murder.
State v. Smith, John, appellant	Linn	Burglary.
State v. Shepherd, Dan, appellant	Jefferson	Murder.
State v. Spiker, F. W., appellant	Cass	Forgery.
State v. Steinecke, Herman appellant	Benton	Liquor nuisance.
State v. Speers, Andrew, appellant	Greene	Rape.
State v. Thomas, J. H., appellant	Warren	Uttering a forged instrument.
State v. Thomas, Chas., appellant	Polk	Murder.
State v. Wescott, Martin, appellant (Rehearing)	Cerro Gordo	Murder.
State v. Woodard, Chas., appellant	Decatur	Murder.
State v Wick, R. E , appellant	Butler	Illegal sale of books by a school director.

SCHEDULE "C."

The following civil cases which were pending at the time of my last report have since been disposed of:

State of Iowa v. Christopher T. Jones and H. Scofield. Polk County District Court.

Dismissed by the district judge.

Wilson L. Ogden v. Leslie M. Shaw, Governor. Polk County.

Dismissed.

Marshall Dental Mfg. Co. v. John Irving, State of Iowa, Intervenor. Greene County District Court.

Dismissed.

Iowa Telephone Co. v. John Herriott, et al. Polk County.

This was an action by the Iowa Telephone Company to recover from John Herriott, Treasurer of State, taxes which had been assessed against the Telephone Company under the provisions of section 1331 of the code, and which were by it paid under protest. During the pendency of the action section 1331 of the code was declared by the Supreme Court to be unconstitutional in the case of *Layman v. Telephone Company,* 123 Iowa, 591. After the decision of the Layman case the district court overruled the demurrer filed by the state in the case of *Telephone Company v. Herriott,* and entered a judgment against Herriott as Treasurer of State for the amount of the taxes paid by the Telephone Company, interest thereon and costs of suit, the entire amount being

$9,528.17. The right of the Telephone Company to recover this sum was clearly settled by the decision of the Layman case, and no appeal from such judgment was taken by the state. The judgment has since been paid and the case is disposed of.

American Home Investment Co. v. W. B. Martin, Secretary of State. Polk County.

This was an action brought in Polk county for a writ of mandamus to compel the secretary of state to file certain articles of incorporation. A motion and demurrer were filed to the petition. Both were sustained and the bill of complaint dismissed.

State v. Meek Bros. Co. Van Buren County.

This was an action brought by the state to condemn the right of way for a fishway over the dam across the Des Moines river at Bonaparte. A sheriff's jury was empaneled to assess the damages, and returned an award of $40,000. From the return of such award the state appealed to the district court. Pending the appeal the dam was washed out by a freshet of the Des Moines river, and no attempt has been since made to rebuild or repair the same. After the dam had been washed away the action in the district court was dismissed and the costs incurred paid by the state.

Fidelity & Deposit Co. of Maryland v. Dennis E. Ryan, et al. Monona County.

This was an action of foreclosure in which the state was a nominal party defendant and had no real interest. A foreclosure was granted and the land sold under the decree of the district court.

Stockdale v. Gilbertson. Polk County.

This was an action brought by Stockdale to recover money paid for a license issued to him as an itinerant physician. The case was dismissed at plaintiff's costs July 5, 1905.

Iowa Loan & Trust Co. v. Geo. Godfrey. Polk County.

This was a foreclosure of a mortgage against property owned by Godfrey. The state was a nominal party only. A decree of foreclosure was rendered by the court and the case has been finally disposed of.

E. H. O'Connor v. Northwestern Life & Saving Co., B. F. Carroll, Auditor of State. Polk County.

This was an action brought to recover money claimed to have been illegally paid by the plaintiff to the Northwestern Life & Savings Co. Carroll, Auditor of State, although made a party defendant, had no real interest in the action. The case was afterward transferred to the federal court.

In the Matter of John J. Thornton, Insane. Wm. C. Richardson, Guardian. St. Louis Circuit Court.

This was an action brought by the state against the guardian of Thornton to recover the cost of the support of Thornton in the hospital for the insane in this state. Judgment was obtained by the state against the guardian in the sum of $2683.16. In April, 1904, there was collected upon this judgment $2620.82, which amount, less $200 attorney fees retained by Mr. W. R. Gentry who prosecuted the case, was remitted to me, the net amount of the remittance being $2420.82. Afterward the further sum of $26.57 was remitted to me, being collected out of other property in the hands of the guardian. These sums were turned into the treasury at the time they were received and the case is practically disposed of.

State of Iowa v. John Callan, Admr. of the Est. of Edward Moran, Deceased. Dallas County.

This was an action brought by the state to recover of the estate of Edward Moran the cost of his support during the time he was an inmate of the Soldiers' Home at Marshalltown. In the case of the *State v. James Colligan*, 104 N. W. Rep., 905, the supreme court held that the

cost of support in cases of this character could not be recovered from the estate of the person to whom the support was furnished. This holding of the court prevented a recovery in the case and it was therefore dismissed.

Mason City & Ft. Dodge Ry. Co. v. A. F. Simpson and others. Webster County.

Action for injunction to restrain the collection of taxes assessed against the Railway Company. Action was dismissed by the plaintiffs and costs paid.

Chicago, Milwaukee & St. Paul Ry Co. v. Wapello County. Wapello County.

This was an action brought by the Railway Company to restrain the collection of taxes upon its proposed line of railway, which were assessed against it before it was in operation. The judge of the district court of Wapello county overruled a demurrer filed by the state and granted a perpetual injunction restraining the treasurer of Wapello county from collecting the tax assessed. In my opinion the judgment of the court was right, and no appeal was taken.

In the Matter of the Estate of Robert R. Oswald. Butler County.

This was a claim filed in the district court of Butler county against the estate of Robert Oswald for payment of cost of his support during the time he was in the state hospital for the insane. Under the holding in the Colligan case, the proceeding was dismissed.

State ex rel. Frank Davis v. Wm. A. Hunter, Warden. Jones County.

The judgment of the district court was affirmed by the supreme court upon appeal by the state.

Cedar Rapids & Marion City Ry. Co. v. Albert B. Cummins, et al. Linn County.

This was an action of certiorari brought by the Cedar Rapids and Marion City Ry. Co. against the Executive

Council to prevent the assessment of the property of the corporation by the council. The writ was granted by the court, from which order the state appealed. The order of the district court was reversed by the supreme court, which held that the executive council had full power to assess the property of the corporation as an interurban railway.

Gilbertson v. Ballard. Washington County.

This was an action brought by Gilbertson as Treasurer of State to recover collateral inheritance tax claimed to be due from the estate of A. W. Chilcote, deceased. The district court rendered a judgment adverse to the state, and the state appealed. The judgment of the district court was affirmed by the supreme court October 26, 1904.

Ohlrogg v. District Court of Worth County.

Petition for certiorari. Dismissed October 14, 1904.

Josephine Wilson v. District Court of Mahaska County.

Petition for certiorari. Dismissed February 10, 1904.

John W. Brady v. Geo. W. Mattern, Sheriff. Polk County.

This was an action of *habeas corpus* brought by Brady against Mattern, Sheriff, in which Brady claimed that he was illegally restrained of his liberty under an arrest for a violation of the provisions of section 9 of chapter 77 of the acts of the twenty-ninth general assembly. He was discharged from the custody of the defendant upon the ground that the act referred to is unconstitutional. The defendant appealed from the judgment of the district court and the supreme court held that the act is constitutional, and that the district court erred in discharging Brady from the custody of the sheriff.

Greenwich Insurance Co. of New York, et al, v. B. F. Carroll. United States Circuit Court.

This was an action brought in the United States circuit court for the southern district of Iowa, by the Green-

wich Insurance Company and other foreign insurance companies against the auditor of state, for the purpose of having section 1754 declared to be unconstitutional. It was argued and submitted in the supreme court of the United States in November, 1905. The judgment of the circuit court was reversed and the statute in question held to be valid.

American Express Co. v. State of Iowa, and *Adams Express Co. v. State of Iowa.*

These cases were both actions by indictment for the illegal sale of intoxicating liquors in the state. They were argued and submitted to the United States supreme court in December, 1904, and the decision of the supreme court of Iowa was reversed in both cases.

SCHEDULE "D."

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

State of Iowa ex rel. John Conlon v. Wm. A. Hunter, Warden Penitentiary at Anamosa. Jones County District Court.

Habeas corpus. Petitioner discharged by district judge.

Chas O. Nourse v. Alice V. Brown, et al. Polk County District Court.

Foreclosure of mortgage.

Mrs. M. J. Thorn v. Jno. T. Hambleton, State of Iowa, et al. Polk District Court.

Foreclosure of mortgage.

State of Iowa ex rel. Chas W. Mullan, Attorney General, v. Continental Life Insurance Co. Polk District Court.

This was an action for the appointment of a receiver to wind up the affairs of the Continental Life Insurance Company. The order granting an injunction and appointing a receiver was made January, 30, 1904. The affairs of the Company were wound up through the intervention of the receiver and the case is disposed of.

State of Iowa ex rel. Chas W. Mullan, Attorney General, v. The Fraternal Bond, et al. Polk District Court.

This was an action for an injunction restraining the Fraternal Bond Company from transacting business in the state of Iowa. A temporary injunction was issued February 17, 1904, and a permanent injunction February, 1, 1905.

State ex rel. B. F. Carroll, Auditor of State, v. The Corning Savings Bank. Adams District Court.

This was an action by the auditor of state for the appointment of a receiver to wind up the affairs of the bank. The order appointing the receiver was made February 22, 1904, and the affairs of the bank have since been closed by such receiver.

Herman L. Hildreth v. G. S. Gilbertson, Treasurer of State. Polk District Court.

This was an action brought by Hildreth against the treasurer of state to recover collateral inheritance taxes paid by the said Hildreth. An investigation of the facts in the case clearly showed that the taxes which had been collected of and paid by the said Hildreth were illegally exacted by the state, and a stipulation was entered into for the repayment of such taxes.

State of Iowa ex rel. J. A. Gregory v. N. M. Jones, Warden. United States District Court.

Action of *habeas corpus*. Demurrer to petition sustained March 19, 1904, and writ denied.

State of Iowa ex rel. Chas. W. Mullan, Attorney General, v. United Sons of America of Des Moines. Polk District Court.

This was an action for the appointment of a receiver. A demurrer to the petition was sustained and the application denied.

In the Matter of the Estate of Wm. R. Morley, Deceased. Fayette District Court.

This was an action brought to re-open the question of the liability of the estate of Wm. Morley to pay collateral inheritance tax. The application was afterward withdrawn and the case disposed of.

State of Iowa ex rel. Chas. W. Mullan, Attorney General, v. Church Federation of America. Marshall District Court.

This was an action for the appointment of a receiver to wind up the affairs of an assessment association. The application was sustained and a receiver appointed June 21, 1904, and the affairs of the association wound up by such receiver.

Matter of the Estate of Henry Runge. Grundy District Court.

Action for the payment of collateral inheritance tax. This was an appeal from the Grundy district court. After the appeal was perfected, I reached the conclusion that the decision of that court was right and dismissed the appeal.

Ackerman & Macy v. Hannah Sharp and Department of Agriculture. Polk District Court.

This was an action to enforce a mechanic's lien against property owned by the state. A demurrer to the plaintiff's petition was sustained and judgment for the Department of Agriculture rendered.

W. J. Chamberlain v. The Capitol Commission, et al. Polk District Court.

This was an action to restrain the Capitol Commission from making a contract for the decoration of the capitol without advertising for bids upon the work to be done. The case was tried in the district court and a judgment was entered therein November 5, 1904, dismissing plaintiff's bill.

State of Iowa v. James Colligan. Woodbury District Court.

This was an action brought by the state to recover from the guardian of James Colligan, who was an insane patient, the cost of his maintenance in the state hospital for the insane. Judgment of the district court was adverse to the state, and an appeal was taken to the supreme court. On October 17, 1905, the judgment of the court below was affirmed.

SCHEDULE "E."

The following civil cases are now pending in the state and federal courts:

DISTRICT COURTS.

Western Union Telegraph Company v. Carroll. Polk county.

In the Matter of the Estate of Richard Wilde, Deceased. Franklin county.

Sioux City Gas & Electric Company v. Wm. B. Martin, and G. S. Gilbertson. Polk county.

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

State of Iowa, *ex rel.* B. F. Carroll, Auditor of State, v. New Liberty Savings Bank. Scott County.

Frank L. McCoy *et al,* v. J. L. Paxton, *et al.* Potttawattamie county.

J. W. Murphy v. Louisiana Purchase Exposition Company. Polk county.

State of Iowa v. Fraternal Accident Society of Cedar Rapids. Linn county.

State of Iowa *ex rel.* Chas. W. Mullan, v. A. J. Fuhrmeister. Linn county.

L. W. Nichols, *et al,* v. National Masonic Accident Association, B. F. Carroll, Auditor of State, *et al.* Pottawattamie county.

City of Council Bluffs, *et al,* v. W. B. Martin, Secretary of State, *et al.* Pottawattamie county.

Rose Ann Canaran, *et al,* v. Martin Harkins and G. S. Gilbertson. Greene county.

State of Iowa *ex rel.* Chas. W. Mullan, Attorney General v. Syndicate Land Company. Polk county.

Fremont Benjamin, *et al,* v. B. F. Huff, A. B. Cummins, Governor, *et al.* Harrison county.

H. A. Merrill, *et al,* v. Board of Supervisors of Cerro Gordo county, *et al.* State of Iowa, Intervenor. Cerro Gordo county.

SUPREME COURT OF IOWA.

Mrs. F. M. Randolph v. Cottage Hospital and State of Iowa, Appellants.

G. S. Gilbertson, Appellant, v. Geo. A. Oliver.

State of Iowa, Appellant, v. Lafayette Young.

State of Iowa v. Ole Thompson, Appellant.

Isaac Hall, Appellant, v. Butler county, *et al.*

Silas Wilson, Appellant, v. Louisiana Purchase Exposition Commission.

Iowa Mutual Tornado Insurance Association, Appellant, v. G. S. Gilbertson.

Iowa Implement Mutual Insurance Association, Appellant, v. G. S. Gilbertson.

Iowa Plate Glass Mutual Insurance Association, Appellant, v. G. S. Gilbertson.

Town Mutual Dwelling House Insurance Association, Appellant, v. G. S. Gilbertson.

Eastern Iowa Mutual Hail Association, Appellant, v. G. S. Gilbertson.

Farmers Mutual Hail Insurance Association, Appellant, v. G. S. Gilbertson.

Mutual Hailstorm Insurance Association of Iowa, Appellant, v. G. S. Gilbertson.

Home Mutual Insurance Association, Appellant, v. G. S. Gilbertson.

Mutual Wind Storm Insurance Association, Appellant, v. G. S. Gilbertson.

Farm Property Mutual Insurance Association, Appellant, v. G. S. Gilbertson.

Iowa Mercantile Mutual Fire Insurance Association, Appellant, v. G. S. Gilbertson.

State Farmers Mutual Fire & Tornado Insurance Association, Appellant, v. G. S. Gilbertson.

Merchants Mutual Insurance Association, Appellant, v. G. S. Gilbertson.

Grain Growers Mutual Hail Insurance Association, Appellant, v. G. S. Gilbertson.

Iowa Assessment Mutual Fire Insurance Association, Appellant, v. G. S. Gilbertson.

Mutual Horticultural Insurance Association of Iowa, Appellant, v. G. S. Gilbertson.

Mutual Fire and Tornado Association, Appellant, v. G. S. Gilbertson.

Retail Merchants Mutual Fire Insurance Association, Appellant, v. G. S. Gilbertson.

State of Iowa v. Wm. G. Thompson, Judge. Certiorari.

State of Iowa, Appellant, v. S. A. Smithart.

Wm. H. Semonies, *et al,* v. Chas. W. Needles, Appellant.

Cora Honaker v. F. P. Fitzgerald, Appellant.

State of Iowa v. R. H. Stringfellow, *et al,* Appellants.

State of Iowa v. Wm. Greenway, *et al,* Appellants.

State of Iowa, *ex rel.* L. R. Bone v. Wm. A. Hunter, Appellant.

State of Iowa, Appellant, v. Amana Society.

Carpenter v. Jones County, *et al,* Appellants.

Wm. A. Montgomery, *et al,* Appellants, v. G. S. Gilbertson.

U. S. CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION.

Robert C. Rice v. Northwestern Life & Savings Company and B. F. Carroll, Auditor of State.

Samuel Carr, *et al,* v. Chas R. Hannan, *et al.*

John A. Creighton v. Chas. R. Hannan, *et al.*

Omaha Bridge & Terminal Company v. Chas R. Hannan, *et al.*

John I. Redick v. Chas. R. Hannan, *et al.*

Whitney Realty Company v. Chas. R. Hannan, *et al.*

James B. Ames, *et al,* v. Chas. R. Hannan, *et al.*

Geo. Baxter, *et al,* v. Chas. R. Hannan, W. M. Martin, *et al.*

INDEX.

Page

Accident:
See INSURANCE.
Andersonville Monument Commission:
Title to land selected as a site for Iowa monument..... 196
Appropriations:
Construction of chapter 177 of the acts of the Twenty-ninth General Assembly..... 92
Louisiana Purchase Exposition:
Construction of chapter 164 acts of the Thirtieth General Assembly..... 107
Payment of cost of publishing report of..... 230
Unexpended balance of the annual appropriation for state library commission carried over into succeeding year..... 115
Farmers' institute entitled to aid from state, when..... 309
Ballot:
See ELECTIONS.

Banks and Banking:
Shares of national banks are credits from which the owner's valid debts may be deducted..... 54
Savings banks; right to sell, discount and loan upon commercial paper..... 89
A loan and trust company may not conduct a banking business; exception..... 251
Biennial Election Amendment:
Provisions of construed; vacancy in office, how filled thereunder. 278
Extension of term of public officer thereunder..... 306
Necessity for all officers to requalify under terms thereof..... 315
Births and Deaths:
Local registrars of vital statistics; who are..... 170
Duty of local registrar of vital statistics to issue burial permits... 353
Duty of the registrar to make report of to clerk of court..... 445
Board of Control:
Payment of bills for demurrage charges; how paid..... 70
Power to designate and approve institutions which shall have control of children committed..... 165
Power of in relation to parole of insane patients..... 421
Board of Educational Examiners:
A teacher may be employed to give instruction on subjects in which he was not examined..... 42
State certificates and diplomas granted only upon examination 327

Page

Board of Health:
State:
May adopt regulations for the inspection of petroleum products.. 127
Vaccination may be required of pupils attending the public schools 393, 441
Local:
Expenses of quarantine to be paid by the public..... 320
Power of to establish quarantine against contagious diseases.... 338
Board of Medical Examiners:
Power to revoke certificates to practice..... 85
Power of with respect to issuing subpoenas for witnesses..... 167
Examinations by applicant for certificates to practice; number of 167
Power of with respect to granting examination to applicant who is blind or otherwise incapable mentally or physically..... 233
Board of Supervisors:
Construction of dike and fishway in the drainage of a lake; paid from the district drainage fund..... 248
Auditing and allowing claims for expenses of an insane patient at state hospital when legal settlement is in a county other than from which the patient is sent..... 236
Duty to furnish county attorney with office..... 329
Disposition of proceeds from sale of swamp lands by..... 335
Power of to authorize payment of fees of justices of the peace.... 366
Void resolution of confers no authority upon county auditor to draw warrants..... 385
Power of to grant a franchise 402
Reports of county recorder to..... 424
Settlement of county treasurer with..... 426
County road fund may not be used for paying members for committee services..... 438
Board of Trustees:
Iowa State College of Agriculture and Mechanic Arts:
Power of board to lease building sites to members of faculty..... 243
Investment of proceeds from sale of lands; kind of securities..... 372
Bonds:
Issued by the Sanitary District of Chicago..... 67
Debenture bonds may not be issued by savings banks..... 128
Validity of; executed by foreign corporation.....289, 371
Requirement of public officers to furnish new bonds under biennial election amendment..... 306
Issuance of by school district; conditions of..... 419
Administrators; conditions of fixed by statute,..... 435
Suit on bond of county official before expiration of term..... 439
Building and Loan Associations:
Voluntary liquidation of; limitation of expenses..... 284
Capital Punishment:
History of legislation in Iowa..... 375

Page

Capitol Decoration:

Captiol commission contract construed 211

Census:

Cost of transmitting census cards by county auditor 185
Enumeration of; powers of executive council therein 256

Cities and Towns:

Power of city council to construct bridges 191
Extension of corporate limits; effect on boundaries of school district 194, 395, 427
The indebtedness of an incorporated town does not affect the issuance of bonds by a school district within said limits 197
Liability of railway and acreage property for tax in support of public libraries 214
Improvements by a city creating a nuisance to state property may be abated 267
Park commissioner may not transfer park funds for other city purposes 322
Plat of; approval of by city council 346
Construction of water works by; limitation on indebtedness for ... 347
Duty of local registrar of vital statistics to issue burial permits .. 353
Fire limits; power of city council to establish 360
Township assessors; qualification as to residence 374
Power to levy and collect a tax on dogs 407
Constitutional limitation on indebtedness thereof 421
Vacancies in offices of; how filled 432

Civil Cases:

Pending:
In the district court of Iowa 32
In the supreme court of Iowa 33
In the United States circuit court Southern District of Iowa 34
Disposed of 23, 29

Clerk of Court:

Duty of in issuing mittimus 436
Report of births and deaths by registrar of vital statistics 445

Coal Mine:

Definition of; jurisdiction of the state over 285

Code:

Sections of construed:

337	439	643	401
360	289	732	215
443	436	757	191
457	407	860	323
468	262	916	346
495	425	1078	174
510	325	1081	356
511	403	1098	328
551	427	1169	398
615	396	1183	435

Page

1266..... 277
1272..... 432
1292..... 444
1297..... 386
1304..... 38, 383
1306-b..... 347
1311..... 56
1318..... 334
1331..... 220
1333..... 114
1339..... 215
1391..... 337
1393..... 367
1403..... 337
1413.....45, 53
1416..... 426
1458..... 426
1467..... 396
1477-d..... 182
1482..... 402
1530..... 438
1532..... 187
1533..... 44
1540-a..... 45, 235
1589..... 379
1637..... 370
1675..... 310
1694..... 240
1709.....161, 204
1736..... 39
1747..... 163
1749..... 36
1751..... 161
1765..... 326
1779..... 120
1782..... 37, 200
1806..... 67, 117
1808..... 121
1842..... 223
1843..... 252
1850..... 89, 271
1856..... 223
1889.....254,273, 431
2180..... 283
2184..... 218
2209..... 179
2212..... 219
2261..... 418
2266..... 236
2283..... 124
2292..... 238
2303..... 414
2309..... 422
2385.....379, 415
2394..... 411
2415..... 344
2448..... 35
2451..... 447
2539..... 46
2545..... 48
2548.....84, 369
2551..... 50
2559..... 428
2561..... 51
2568.....338, 355
2569..... 443
2570..... 320
2572..... 393
2576.....168, 233
2579.....85, 425
2583..... 233
2589..... 401
2629.....42, 327
2647..... 243
2656..... 243
2691..... 166
2708..... 321
2727..... 311
2749..... 408
2755..... 175
2757..... 357
2764..... 198
2791..... 225
2792..... 437
2802..... 194
2806..... 282
2807..... 261
2814..... 58
2816..... 228
2848..... 392
2855..... 388
2888-h..... 115
3144..... 331
3188..... 321
3482..... 443
4599..... 366
4868..... 329
5682..... 177

Page

Collateral Inheritance Tax:

Reporting of estates subject to, by county attorney; fees for same 181
Bequests to Home for the Aged of Des Moines exempt from payment of 326
Notice of appraisement; notes ordered paid considered assets, 332
Real estate located outside of the state not subject to when fee passes directly 396

Commissioners of Insanity:

Judicial functions of 417

Commissioner of Labor:

Inspection of factories and buildings; law construed 377

Commitment:

When term of imprisonment begins and ends 177
Term of imprisonment of escaped inebriate 304
Statute in force at time of commitment governs 321
Duty of clerk of court to issue mittimus 436

Common Carriers:

Demurrage charges of; rules of Western Car Service Association construed 70

Convicts:

Discharge of from state penitentiary; computation of term of commitment 177

Corporations:

Payment of subscription to capital stock 64
Articles of incorporation of savings banks; recitals of 222
Subscriptions to the capital stock of an insurance corporation, when valid 238
Voluntary liquidation of building and loan associations 284
Right of loan and trust companies to acquire and hold stock of other corporations 292
A foreign corporation may not act as executor, administrator or guardian 370
By-laws of may not restrict stockholder from assigning his stock 430
Statute does not prescribe the character of investments of the funds of a loan and trust company 431

County Attorney:

Compensation of for reporting estates subject to collateral inheritance tax 181
Liability of county for office rent, light, fuel, etc, 322,329
Compensation of; recovery of money paid illegally under a void resolution of board of supervisors 385
Suit on official bond may be instituted, when 439

County Coroner:

Inquest by; when necessary 414

Page

County Recorder:
Instruments filed for record; language of may not be changed by 381
Reports of to the board of supervisors..... 424
County Superintendent:
Teacher in a public school may be employed to teach subjects in which he has not been examined..... 42
Cost of supplies for the office of must be paid from county funds 261
County Treasurer:
Imposition of penalty on delinquent taxes..... 53
Certification as to taxes and assessments due on real estate..... 367
Compensation of..... 380
Reports of and settlement with board of supervisors..... 426
Crimes:
Prosecution instituted at instance of defendant himself; effect of.. 339
Capital punishment; history of legislation in Iowa..... 375
Assault with intent to murder; delivering a poisonous substance to be eaten..... 376
Effect of civil action on criminal prosecution..... 391
Escape of prisoner; time at large in relation to his sentence.....304,429
Criminal Cases:
Submitted in supreme court of Iowa in 1904-1906 12
Pending in supreme court of Iowa on January 1, 1906..... 21
Drainage:
Assessments of benefits to highways; how paid..... 416
Dams:
Maintenance of fishway therein..... 369
Dentistry:
Certificate to practice; power of board to restore forfeited certificate..... 420
Dipsomaniacs:
See INEBRIATES.
Elections:
Registration of voters in school districts having a population of five thousand or more..... 174
Notice for special election to fill vacancy..... 277
Vacancy in office in state legislature; biennial election amendment construed..... 278
Necessity for public officers to re-qualify under terms of biennial election amendment..... 315
Conditions for placing names of candidates on official ballots.... 328
Computation of time as to filing nomination papers..... 333
Women are qualified electors, when..... 343
Change of residence by incumbent in office is in effect a resignation 355
Registration of voters required in each year of presidential election..... 356
Canvass of ballots by board is directory only..... 397
Qualified elector; the term defined..... 401
Australian ballot system; statutory provisions of..... 434

Page

Escheat of Lands:

Liability of escheated lands for debts of decedent 323

Examination:

Dentistry:

Power of board to restore forfeited certificate 420

Medicine:

Number of examinations applicant is entitled to..... 167
Board may not grant examination to applicant who is blind.. 233
Exemption of physicians from; conditions of 422

Pharmacy:

Certificate to practice may not be granted without examination 399

Teachers:

State certificates may be granted upon examination only.... 327
May instruct in branches not examined in..... 42

Executive Council:

Power to drain and sell meandered lakes..... 59
Power to convey land belonging to state 125
Payment of cost of transmitting census cards..... 185
Powers of in census enumeration, ministerial and not judicial.... 256
Power of to condemn land for purpose of constructing dikes. 270
Power of to print reports of executive officers of state institutions 311

Exemption:

Statutory provisions relating to exempt property of soldiers, sailors and widows of such, apply to property without the county of their residence..... 38
Members of National Guard not liable to pay poll tax..... 178
Bequests to Home for the Aged of Des Moines exempt from collateral inheritance tax 326
Soldiers' and sailors' exemption applies only to residents of this state..... 382

Extradition:

See FUGITIVES FROM JUSTICE.

Factory Inspection:

Law governing; applies to cities organized under special charter 377

Farmers' Institute:

Requirements necessary to secure aid from state..... 309

Fees and Expenses:

Open accounts must be kept by auditor and treasurer of state of moneys received as fees from state boards and officers..... 172
Insurance agents' license fees paid to auditor of state; how held.. 180
Fees of county attorney for reporting estates subject to collateral inheritance tax..... 181
Mileage earned by sheriff in serving civil processes belongs to sheriff..... 325

Page

Payment of by board of supervisors to justices of the peace..... 366
Sheriff must account for fees for services in justice courts..... 403
Fees taxable to informant for violation of fish and game law..... 428
Of constable; entitled to be paid..... 444

Fire Limits:

See CITIES AND TOWNS.

Fish and Game Laws:

A gun may be seized and destroyed as a public nuisance, when.. 46
An artificial ditch connecting public with private waters comes within the purview of the game law..... 46
Jack snipe is not protected by..... 49
Venue of action in prosecution for illegal shipment of game..... 56
The term "Waters of the state" construed..... 340
The American coot or mud hen not a game bird..... 358
Fishways; maintenance of in dams.....84, 369
Fees taxable to informant for a violation of..... 428

Foreign Corporations:

Right of auditor of state to impose retaliatory measures upon insurance companies 39, 41
Foreign insurance companies are taxable at two and one-half per cent upon gross premiums..... 112
Power of attorney filed with auditor by foreign insurance company may not be revoked..... 117
Validity of bonds executed by foreign surety companies..... 289
Power of to act as executor, administrator or guardian in this state..... 370

Fugitives from Justice:

Power of governor to issue requisition for person charged with murder by sending poisoned candy through the mail..... 336
Law governing crime in state demanding requisition determines status of..... 384
An escaped inebriate is not subject to extradition..... 429

Hail Insurance:

Statute does not limit amount of assessments in such companies.. 325

Home for the Aged:

Institution is charitable and gifts and bequests to are exempt..... 326

Inebriates:

Escape of from asylum; period of imprisonment..... 304
Right of to demand trial by jury..... 368
Extradition will not lie for escaped inebriate..... 429

Insane Persons:

Correction of an erroneous charge to the county on the books of the auditor of state.....111, 312
Cost and expenses for the care, commitment and transportation of 122
Payment of expenses for care of; chargeable to county of his legal residence..... 236

Page

Payment of expenses for care and commitment of insane patient having no legal settlement in this state..... 302
Inquest upon the body of by coroner..... 414
Commission of insanity; judicial functions of..... 417
Parole of; power of commissioners of insanity therein..... 421
Right of one county to sue another for expenses of commitment, etc..... 442

Insurance:

Power of an insurance company to appoint agents and fix compensation thereof..... 36
The auditor of state may impose retaliatory measures upon foreign insurance companies doing business in this state..39, 41
Kinds of securities that insurance companies may deposit with auditor..... 67
Payment of taxes by foreign insurance company..... 112
Acceptance of securities of life insurance company by auditor.... 117
Power of attorney filed with auditor by foreign insurance company may not be revoked..... 117
Fees paid to auditor of state by insurance company; how held... 180
Discriminations between persons insured; law construed..... 199
Kinds of insurance risks; physicians' liability policy construed; the term "accident" defined 204
Subscription to capital stock of corporations; when binding..... 238

Interstate Commerce:

See INTOXICATING LIQUORS.

Intoxicating Liquors:

A saloon may not operate within three hundred feet of a church 35
Taxation of costs in proceeding to seize and condemn..... 344
Right of partner in drug business to sell.... 373
Right of druggist to sell, in compounding medicines, tinctures, etc..... 378
Wood alcohol not within the definition of..... 390
Sales of in relation to interstate commerce..... 394
Sale of by pharmacists; general principles of law applicable thereto..... 410
Pharmacists may not sell or dispense malt liquors..... 415

Joint Resolution:

See LEGISLATION.

Justice of the Peace:

Transcript; certification of to county auditor..... 366
Fees received by sheriff for services performed in a justice court.. 403
Power to appoint a guardian ad litem..... 443
Constable; fees to which he is entitled..... 444

Legal Settlement:

Payment of costs and expenses for care, commitment and transportation of insane person who has no legal settlement within state..... 122,302

Page

Legislation:

Essentials for valid law under the constitution 96

Library:

State:

Unexpended balance of annual appropriation must be carried over into the succeeding year..... 115

City:

Taxation of railway and acreage property in support of..... 214

Loan and Trust Companies:

Amount of capital stock of; examination by auditor of state; cannot conduct a banking business..... 251

Powers and privileges of; general statutory requirements governing same..... 271

Right of to acquire and hold stock of other corporations..... 292

Investment of funds by; liabilities for time deposits..... 431

Louisiana Purchase Exposition Commission:

Appropriations for; how apportioned and when available..... 107

Publication of report; cost to be paid from what fund..... 230

Marriage License:

Solemnization authorized in county of issuance..... 330

Meandered Lakes and Streams:

The executive council may determine when any meandered lake bed shall be drained and improved..... 59

Cost of building and maintaining dike and fishway in the drainage of; how paid..... 248

Injunction will lie against person or persons attempting to drain meandered lake..... 250

Land cannot be condemned for the purpose of constructing dikes 270

Meander lines follow ordinary high water mark in making survey of..... 280

Riparian owners own to the ordinary high water mark..... 288

Historical review of the subject..... 361

Title to lands bordering thereon defined..... 405

Medical Practice Act:

Board of medical examiners may revoke certificate to practice, when..... 85

Number of examinations of applicant for certificate not limited by statute..... 167

Board of medical examiners may not grant privilege of taking an examination to applicant who is blind..... 233

Exemption of physicians from examination; conditions of..... 422

Mines and Mining:

Definition of coal mine; jurisdiction of Iowa over mine workings. 285

Mulct Law:

A saloon must cease its business whenever a church is built within three hundred feet thereof..... 35

Page

Taxation of costs in proceedings to seize and condemn intoxicating liquors 344
Sale of intoxicating liquors by drug firm; rights of partner therein 373
Sales of intoxicating liquor in relation to interstate commerce 394
Sales of intoxicating liquors by pharmacists 410, 415
Petition of consent; withdrawal of name of signer therefrom 446

Municipal Corporations:

See CITIES AND TOWNS, ROADS AND HIGHWAYS AND SCHOOL DISTRICTS.

Mutual Reserve Life Insurance Company of New York:

Executive Agents' application thereof construed 36

Notary Public:

Seal of; what words shall appear thereon 433

Official Newspapers:

What constitute for purposes of publishing notices and processes 387
Legal definition of 404

Park Commissioner:

Power of to transfer park fund for other city purposes 322

Peddler:

License of; number required 324
Selling at wholesale to merchants does not constitute 352

Penalty:

See TAXATION.

Pharmacy:

Prescriptions; ownership of 364
Permit to sell intoxicating liquors; rights of partner thereunder .. 373
Druggists may dispense alcohol in compounding medicines, tinctures, etc 378
Sale of wood alcohol by druggists .. 390
Certificates to practice; forfeiture of 399
Sale of intoxicating liquors by druggists; conditions of 410
Malt liquors; sale of prohibited by law 415

Pharmacy Commission:

Power to grant certificate to practice without examination 399

Plats:

Approval of by a city council 346

Practice of Dentistry:

See DENTISTRY.

Practice of Medicine:

See MEDICAL PRACTICE ACT AND BOARD OF MEDICAL EXAMINERS.

Practice of Pharmacy:

See PHARMACY.

Page

Public Office:

Removal of member of state legislature to another district causes vacancy....277, 355
Biennial election amendment construed as to vacancy in office in state legislature.... 278
Extension of term of public officers under the biennial election amendment....306, 315
Incompatible offices; member of school board ineligible to the office of school treasurer.... 357
Vacancy in municipal offices, how filled.... 432

Quarantine:

Expenses of to be paid by public 330
Power of local board of health to establish.... 338

Registrar of Vital Statistics:

See VITAL STATISTICS.

Registration of Voters:

Required in the year of each presidential election.... 356
In school districts having a population of five thousand or more.. 174

Roads and Highways:

Consolidation of road district; how effected.... 186
Assessments of benefits to highways accruing by improvements under drainage act.... 416
County road fund; expenditure of.... 438

Road Tax:

The levying, collection and expenditure of 43, 186
Property within a city not subject to tax by township trustees.... 359

Sac and Fox Indians:

History of title to lands held by them.... 263

Saloon:

May not operate within three hundred feet of a church.... 35
Petition of consent for; withdrawal or name of signer.... 446

Savings Banks:

Right to sell, discount and make loans upon commercial paper 89
Right to issue debenture bonds.... 128
Articles of incorporation of, must contain what.... 222

Schools:

A teacher may be employed to give instruction in subjects in which he was not examined.... 41
A schoolhouse site must be located upon an established highway . 58
Inmates of state institutions not counted in school enumeration. . 198
Rents from unsold school lands; disposition of.... 203
Schoolhouse site reverts to owner by reason of non-user.... 228
Schoolhouse tax; how voted 281

Page
School building; use of for religious services..... 371
School lands; foreclosure of; payment of costs.....388, 391
Use of building by a sectarian school; determined by electors 408
School day; board has power to define..... 426

School Directors:

A schoolhouse site must be located upon an established highway 58
Limitation on powers of..... 229
Duty of in apportioning schoolhouse tax among subdistricts.... 281
Member of board may not be school treasurer..... 357
Power of to permit religious services in school building..... 371
Power of to permit a schoolhouse to be used for sectarian purposes..... 408
Power of to define a school day..... 426
Power of in restoring territory to district..... 437
Power of to compel vaccination of pupils..... 441

School Districts:

Registration of voters for school elections..... 174
Boundaries of changed by extension of the corporate limits of a city or town.....194, 427
An incorporated town and the school district within same are distinct corporations as to indebtedness..... 197
Change of boundaries; limit of extension under section 2791..... 225
Extension of corporate limits of city or town; effect on..... 395
Issuance of bonds by; conditions of..... 419
Restoration of territory; how same may be done..... 437

Sheriff:

Compensation of; mileage earned in serving civil processes belongs to..... 325
Fees in justice courts..... 403

Soldiers and Sailors:

See EXEMPTION.

State Board of Health:

See BOARD OF HEALTH.

State Board of Medical Examiners:

See BOARD OF MEDICAL EXAMINERS.

State Industrial School:

Commitment of children to, for what time..... 321

State Life Insurance Company of Indiana:

Policy of construed as to discriminations between persons insured 199

State Militia:

Members of not liable to pay poll tax..... 178
Compensation of members appointed by governor for special purposes..... 218
Legislative control of..... 283

Page

Surety Companies:

Validity of bonds executed by corporation organized in another state.....289, 371

Swamp Lands:

Sale of; disposition of proceeds..... 335

Taxation:

Statutory exemption of property of soldiers, sailors and widows of such, applies to property situated without the county of residence of the soldier, sailor or widow..... 38

Road taxes are collected by county treasurer in same manner as other taxes.....43,186

Penalty on delinquent taxes; when imposed..... 53,337

Shares of national banks are credits from which valid debts may be deducted..... 54

A foreign insurance company is taxable at two and one-half per cent on gross premiums..... 112

Payment of taxes under protest; duty of state treasurer in relation thereto..... 171

Members of national guard; liability of to pay poll tax..... 178

Liability of railway and acreage property within a city for public libraries..... 214

Assessments of telephone companies under section 1331 of code held unconstitutional..... 220

Duty of township assessor to furnish to clerk duplicate copy of assessor's book..... 235

Apportionment of schoolhouse tax among the several sub-districts 281

Lien for taxes in relation to land becoming property of the state 313

Property of merchants; what subject to..... 334

Telephone and telegraph lines; filing of map with county auditor showing taxing districts..... 350

Jurisdiction of township trustees to tax property within a city for highway purposes..... 359

County treasurer; certification of taxes and assessments due on real estate by..... 367

Township assessors; qualification of as to residence..... 374

Soldiers' and sailors' exemption applies only to residents of this state..... 382

Of dogs; code sections 457 and 458 construed..... 407

Assessments of benefits to highways under the drainage act..... 416

Telephone Companies:

Taxation of under code section 1331 unconstitutional..... 220

Taxation of; filing of map with county auditor showing taxing districts..... 350

Franchise for may not be granted by board of supervisors..... 402

Township Trustees:

No power to tax property within a city for road purposes..... 359

Page

Vaccination:

See BOARD OF HEALTH AND SCHOOL DIRECTORS.

Vacancy:

See ELECTIONS AND PUBLIC OFFICE.

Vital Statistics:

Registrars of, who are; compensation of..... 170
Local registrar; issuance of burial permit..... 353
Deputy registrar, compensation of..... 354
Report of registrar to clerk of court as to births and deaths..... 445

Woman's Suffrage:

See ELECTIONS.

FIFTH BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA

CHAS. W. MULLAN
ATTORNEY-GENERAL

TRANSMITTED TO THE GOVERNOR, JANUARY, 1906

Printed by Order of the General Assembly

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1906

FIFTH 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 in this office during the years 1904 and 1905.

Schedule A is a complete list of all appeals in criminal cases submitted to the supreme court during the years 1904 and 1905, and also of all rehearings asked in criminal cases during that period, and the schedule shows the final disposition of the cases.

Schedule B is a list of all criminal cases pending on the first day of January, 1906.

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 me during the years 1904 and 1905.

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 an opinion. They relate to matters of public interest as to which uniform action throughout the state is desirable, and it is therefore thought advisable to include such letters in this report.

APPEALS IN CRIMINAL CASES.

There has been a slight increase in the number of appeals in criminal cases during the last biennial period.

At the September term, 1905, there were seventy appeals in criminal cases upon the docket of the supreme court. Of this number eleven were in cases where the defendants had been indicted for the crime of murder.

Among the important criminal cases tried during the last biennial period are the *State of Iowa vs. American Express Company* and *State of Iowa vs. Adams Express Company.*

The question involved in these cases was the right of the state to prohibit the shipment into the state and the sale of intoxicating liquors to persons residing therein through the medium of express companies. In each of these cases an order was given to a liquor house in a foreign state for certain intoxicating liquors. The liquors so ordered were shipped by express C. O. D. to the consignee, and by the express company carried to the place of destination and delivered to the consignee upon payment by him to the express company of the purchase price thereof and the express charges thereon. The express companies so delivering such intoxicating liquors were indicted by the grand jury of the counties where the delivery was made, for selling intoxicating liquors in violation of law. They were tried upon such indictment

and, under the instructions given by the judge of the district court, were convicted and a fine was imposed for the violation of the Iowa statute. From the judgment of the district court the companies appealed to the supreme court, and the judgment of the court below was affirmed. The cases were then taken to the supreme court of the United States upon a writ of error, and that court held that the sale of the intoxicating liquors was made in the foreign state where the same were delivered to the common carrier, and therefore came within the interstate commerce clause of the federal constitution. That the fact that such liquors were shipped C. O. D. was not sufficient to change the rule that a delivery of goods to a common carrier is a delivery to the consignee.

The principle decided by the supreme court of the United States is an important one, as it permits a traffic in intoxicating liquors by liquor dealers in other states, which is contrary to the spirit of the laws of Iowa. Numerous dealers in other states have agents in this state soliciting orders for intoxicating liquors to be shipped by express C. O. D. The unfortunate result of the decision is that minors and persons addicted to the immoderate use of intoxicating liquors, who are unable to purchase from dealers operating saloons under the mulct law, are able to obtain such liquors through the medium of express companies transacting business in Iowa.

During the biennial period there have been thirty-four appeals in cases in which the defendants were convicted of the crime of murder. This number is substantially the same as the number of appeals in murder cases during the preceding biennial period.

CIVIL CASES.

Among the important civil cases which have been determined since the last report is the case of *Greenwich Insurance Company et al vs. Carroll.*

This was an action brought by a number of foreign fire insurance companies, transacting business in the state of Iowa, against Carroll as Auditor of State, for the purpose of having the provisions of section 1754 of the code declared to be unconstitutional and invalid. The action was brought in the United States Circuit Court, for the Southern District of Iowa, and the judge of that court held the statute to be unconstitutional and issued an injunction restraining the Auditor from enforcing its provisions in the manner provided by section 1755 of the Iowa code. From the judgment and order of the circuit court the state appealed to the supreme court of the United States, and that court reversed the judgment and order of the circuit court and held the statute to be constitutional and that it was within the power of the state legislature to regulate the business of fire insurance in the manner therein provided, and to prohibit agreements between insurance companies which might affect the cost of insurance.

In this connection I desire to express my appreciation of the services of the Hon. Charles A. Clarke, who was associated with me in the argument of the case.

LAKE BEDS.

The question of the title of the state to the lake beds is still in a somewhat unsettled condition, although the act of the thirtieth general assembly by which the legislature assumed the title of such lake beds to be in the state, and directed the manner in which they may be disposed of, is an important step in settlement of the question of the ownership of such lake beds. I think it must be held, whenever the question comes before the courts, that the state, by virtue of its sovereignty, is the absolute owner of all the lake beds in the state which were excluded from the government survey.

The act of the legislature referred to has I think, been very satisfactory in its operation.

LANDS OF ABANDONED RIVER CHANNELS.

The thirtieth general assembly passed an act by which the title to all of the lands within abandoned river channels in the state, and all bars or islands in the channels of navigable streams not before surveyed or platted by the United States or by the state of Iowa, was assumed to be in the state, and provided that such lands should be surveyed and sold in the manner set forth in the act.

Under this act a considerable amount of land within the abandoned channels of the Missouri river has been surveyed, appraised and sold by the state. The act also caused numerous actions to be commenced against the Secretary of State to restrain him from surveying and offering for sale other tracts of land which fall within the provisions of the statute. The most valuable and important tract, as to which the title is now in dispute, is a tract of about one thousand acres lying within the corporate limits of the city of Omaha. A large portion of this tract is claimed by the East Omaha Land Company, and smaller portions by other claimants. The land is very valuable because of its proximity to the city of Omaha.

Seven separate actions have been brought by claimants of this tract of land in the federal court against the secretary of state and are now pending therein.

The title to the land, as asserted by the state, is based upon the claim that almost all of the one thousand acres is an accretion to an island which existed in the Missouri river at the time of the original survey of the lands in Pottawattamie county. That about 1877 the channel of the Missouri river was suddenly changed by an evulsion, and the lands in question by reason of such evulsion and change of the channel of the river, became dry and arable lands.

It is claimed by the complainants that the lands in question are accretions to lands which were surveyed and

sold by the United States government and which abutted upon the Missouri river prior to the evulsion referred to.

The question of the ownership and title of the lands, therefore, must be determined by evidence as to the condition of the Missouri river at the point where these lands lie prior to the time of the evulsion. In order to obtain such evidence, it will be necessary for some one to find witnesses now living who knew the condition of the river, where its main channel existed prior to the evulsion, and the fact that the lands in question were an accretion to an island which existed in the bed of the river many years prior to the change of its channel. To do this will require a large amount of time and some expense. It is impossible for the attorney general or his assistant to take the time from the other business of the office which will be required to obtain the evidence necessary to the establishment of the title of the state to the lands in question. Special local counsel should, therefore, be employed by the state, who is familiar with the present conditions of the river and land in question, and who will be able, because of his local knowledge, to obtain the names and places of residence of witnesses who knew the condition of the river and land prior to the change of its channel.

If the state desires its title to the land in question defended, and to receive the benefit of the value thereof, it must employ local counsel for the purposes suggested, as its rights cannot in any other manner be fully protected.

A similar condition exists as to land in an abandoned channel of the Missouri river in the corporate limits of the city of Sioux City, which is estimated to be of the value of about $25,000. It is also necessary that local counsel be employed there to find the witnesses and obtain the testimony of the condition of the river and land prior to the time the old channel of the river was abandoned.

I suggest that the condition of these lands along the Missouri river, and of the state's title thereto, and the necessity of the employment of local counsel to protect

the interest of the state, be called to the attention of the legislature, that suitable appropriation may be made to pay such special counsel.

CORPORATIONS.

In my last report I suggested that a law should be enacted by the general assembly requiring that all articles of incorporation should be approved by the attorney general before the same are filed with the secretary of state and a permit issued thereon authorizing the corporation to transact business.

I am more firmly than ever convinced of the necessity of such a law. The acceptance of articles of incorporation and the issuance of a permit by the secretary of state constitute a contract between the state and the corporation, and no such contract should be entered into or agreed upon on the part of the state until its terms have had the approval of its legal department.

There are now many corporations transacting business in the state under articles which the promoters should never have been permitted to file with the secretary of state, and which certainly would never have had the approval of the attorney general.

The importance of corporations and the fact that a large portion of all of the business in the state is transacted by them, make it essential that all articles of incorporation offered for record should be carefully examined by the attorney general before a contract is entered into between the corporation and the state, and that all corporations should be strictly confined to the class of business which they are organized to carry on.

MONEYS RECEIVED.

I have received and paid over to the state treasurer during the last biennial period $2,449.49; $2,447.39 of which came from the collection of a judgment in favor of

the state and against the estate of John Thornton, an insane patient who came from Missouri to Iowa. The balance of the sum received by me consists of small items of costs advanced in cases in which the state was a party, which have been refunded.

NEEDS OF THE OFFICE.

The office is now fairly well equipped with law books and furniture, but the two rooms in which the attorney general, his assistant, and two stenographers are required to transact the business of the office, are wholly inadequate to its necessities. It is certainly a very unwise and unfortunate policy which permits societies which have no connection whatever with the administrative affairs of the state, to occupy commodious suites of rooms in the State House to the exclusion of a department through which so large a portion of the administrative business and affairs of the state must pass.

In my last report I urged the necessity of rooms adequate for the transaction of the business of this office, and have in other ways called the attention of members of the legislature to such necessity, but as yet no steps have been taken, either by the legislature or the executive council, to assign to the attorney general rooms adequate for the transaction of the business of the office.

The question is no longer a personal one with me, as my term of office will expire in a few months, but the necessity is so urgent that I cannot refrain from again calling your attention to it, and expressing the hope that something will be done at an early day toward the furnishing of suitable and adequate rooms for the transaction of the business of this office.

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 terms of office.

I also desire to acknowledge the valuable and faithful services of my assistant, Mr. Lawrence DeGraff, and

those of Mrs. Hunt and Miss Gilpin. Their work is deserving of high commendation, and whatever credit the work of this office is entitled to 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."

SALOON—OPERATION OF NEAR CHURCH.—Whenever a church is built within three hundred feet of a saloon, the saloon must cease to conduct its business.

Des Moines, January 13, 1904.

HON. JOSEPH MEKOTA,
County Attorney, Linn county,
Cedar Rapids, Iowa.

DEAR SIR—Replying to your favor of the 9th instant, requesting my opinion upon the question whether a saloon may continue to be operated under the mulct law of the state where a church is built within three hundred feet of the saloon at a time after the saloon has been in operation for several years, I submit the following:

Subdivision 2 of section 2448 of the code provides:

> "But in no case shall said business be conducted by any person holding any township, town, city or county office, or within three hundred feet of any church building or school house * * * ."

It was clearly the intention of the legislature in enacting this provision of the statute to prohibit the sale of intoxicating liquors within three hundred feet of a church or a school house. No exception is made in the statute which permits a saloon to continue the sale of intoxicating liquors within three hundred feet of a church when such church is built after the saloon is in operation. A construction of the statute which would permit a saloon to continue its business and sell intoxicating liquors within three hundred feet of a church because the church was erected after the establishment of the saloon, would be

a nullification of its letter and spirit. Nor can it be held to have been the intention of the legislature in effect to prohibit churches being erected upon any site within three hundred feet of a saloon. Whenever a church is built within that distance of an existing saloon, the saloon must cease to conduct its business.

The right to sell intoxicating liquors under the mulct law is a right limited and restricted by statute. One of the restrictions imposed upon this traffic is that it shall not be carried on within three hundred feet of a church, and the fact that the church was erected after the establishment of the saloon does not remove the restrictions imposed by the statute.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General.

INSURANCE—APPOINTMENT OF AGENTS--Executive Agent's Application and Contract Construed under Sections 1749 and 1750 of the Code.

SIR—Complying with your verbal request for an opinion as to the status of agents appointed by the Mutual Reserve Life Insurance Company of New York, under the "Executive agents application" and "Special renewal contract" submitted, I beg to submit the following:

The executive agents proposed to be appointed under the application and contract submitted, fall within the provisions of sections 1749 and 1750 of the code, which are made applicable to life insurance companies by section 1815, and must be treated as agents of the company authorized to transact its business in receiving and procuring applications for insurance and such other business as may be entrusted to them by the company.

It is undoubtedly within the power of an insurance company to appoint as many agents to transact its business

as it may see fit; and to fix such compensation for the work performed by them as may be agreed upon between the company and the agents. Every person, however, so appointed becomes, under our statute, an agent of the company with the right to solicit and receive applications and to transact such other business as may come within the scope of his employment. He must, therefore, receive from the auditor of state a certificate showing that such company has complied with the provisions of law, and that he is authorized to act as its agent, before transacting any business for the company.

The question is suggested as to whether an agent appointed under the application and contract submitted, receives any special benefit by reason of such appointment upon insurance on his own life if written by the company; and whether the company, in appointing such executive agents, makes any distinction or discrimination between them and other persons insured of the same class and expectancy of life, in the amount or payment of premiums or rates charged for life insurance policies, and for that reason the contract of appointment falls within the prohibitive provisions of section 1782 of the code.

A careful examination of the application and special renewal contract leads me to the conclusion that an agent appointed thereunder receives no special benefit because of such appointment as to any insurance he may take upon his own life; and that the application and contract entered into between him and the company make no distinction or discrimination between him and persons insured, of the same class and equal expectancy of life, in the amount or payment of premiums or rates charged for life insurance policies, or in any other of the terms and conditions of the contract of insurance made by the company.

In my opinion, therefore, no legal objection exists under the laws of this state to the appointment of such executive agents of an insurance company, so long as there is no

attempt at any distinction or discrimination between them and other persons of the same class insured by the company.

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

January 21, 1904.
HON. B. F. CARROLL,
Auditor of State.

TAXATION—EXEMPTION FROM—It is held that under the soldiers' exemption act, property, not to exceed eight hundred dollars in value of any honorably discharged soldier or sailor, is exempt from taxation, regardless whether said property is situate without the county of residence of the soldier, sailor or widow.

SIR—In response to your request of the 6th instant asking my opinion whether, under the soldiers' exemption act, a soldier who lives in one county and has more than eight hundred dollars in property in the county of his residence, and also has more than eight hundred dollars worth of property in another county, can divide his exemption, I beg to submit the following:

Subdivision 7 of section 1304 of the code 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.

This statute is broad in its terms and covers all of the taxable property of such soldier, sailor or widow without reference to its location; that is, such soldier, sailor or widow is entitled to an exemption of eight hundred dollars upon the assessed value of all his or her property, unless the value of the property owned by him or her amounts in value to five thousand dollars or more.

The section further provides that all soldiers, sailors or widows referred to therein shall receive a reduction of eight hundred dollars at the time the assessment is made by the assessor, unless waiver thereof is voluntarily made at the time of the assessment.

Under this provision the soldier, sailor or widow entitled to the exemption may waive all or any part thereof, and no good reason exists why such soldier, sailor or widow may not claim a part of such exemption upon the property in one county and a part upon property in another. The statute does not confine the exemption given by statute to property in the county where the soldier, sailor or widow resides; and as it applies generally to all property owned by the soldier, sailor or widow, he or she may, in my opinion, divide the exemption allowed by statute, and have it applied upon property taxed in different jurisdictions.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 11, 1904.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

INSURANCE—RETALIATORY MEASURES BY AUDITOR OF STATE—The Auditor of State is authorized to impose upon any insurance company incorporated in any other state, as a retaliatory measure, any burden, penalty or fee, which may be imposed on such companies of this state by the laws of the state under which such foreign insurance company is organized.

SIR—Complying with your request of January 30th for an opinion as to the construction of section 1736 of the code, and as to your right thereunder to impose a tax of two per cent upon the gross premiums received by insurance companies, organized under the laws of the state

of Wisconsin, in cities, towns and villages having or maintaining a regularly organized fire department, in this state, as a retaliatory measure for the protection of Iowa insurance companies transacting business in that state, I submit the following:

First. Under the provisions of section 1736, which are as broad as language can make them, the auditor of state is authorized to impose upon any insurance company organized under the laws of another state as a retaliatory measure any burden in the nature of taxes, fines, penalties, licenses, fees, deposits of money, securities or other obligations or prohibitions which are or would be imposed on insurance companies of this state by the laws of the state under which such foreign insurance company is organized.

If the laws of the state of Wisconsin impose upon Iowa insurance companies seeking to do business in that state a tax of two per cent upon the gross premiums collected in cities, towns and villages having or maintaining a regularly organized fire department, in addition to the ordinary state tax assessed against such companies, it is clearly within the power of the auditor of state of the state of Iowa to retaliate under the provisions of section 1736 of the code by imposing a like burden upon the Wisconsin companies transacting business in this state. The burden imposed by the auditor of state upon Wisconsin companies as a retaliatory measure should, as nearly as practicable, be of the same nature and character as the burden imposed by the state of Wisconsin upon the Iowa companies, and the imposition by the auditor of state of a two per cent tax upon the gross premiums collected by the Wisconsin companies in cities, towns and villages in this state, having or maintaining a regularly organized fire department, in addition to the ordinary taxes assessed against such companies, places upon such companies substantially the same burden which Iowa companies are

compelled to bear under the laws of the state of Wisconsin. The auditor of state is, therefore clearly authorized by section 1736 as a retaliatory measure, to compel insurance companies organized under the laws of the state of Wisconsin and doing business in this state, to pay a two per cent tax upon the gross premiums collected in cities, towns and villages having or maintaining a regularly organized fire department.

Second. Without reiterating what has been said, the auditor of state may, under the provision of the statute referred to, require Wisconsin companies doing business in this state to pay to the insurance department the difference between the uniform charge for the publication of the annual statements of such companies in this state, and the charge which Iowa companies doing business in the state of Wisconsin are compelled to pay; the intent of the statute clearly being that the auditor may, in all cases, impose the same burdens upon any foreign insurance company transacting business in this state which are imposed upon Iowa companies transacting business in the state or country where such foreign insurance company is organized.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

February 22, 1904.

HON. B. F. CARROLL,
Auditor of State.

INSURANCE—RETALIATORY MEASURES—Any rule or measure, retaliatory in its nature, made or adopted by the Auditor of State against any foreign insurance company doing business in this state, cannot be retroactive in its operation.

SIR—As supplemental to the opinion handed you today as to your right under section 1736 of the code to impose a two per cent tax upon the gross premiums collected by

insurance companies organized under the laws of the state of Wisconsin, in cities, towns and villages having or maintaining a regularly organized fire department, in this state, as a retaliatory measure for the protection of Iowa insurance companies transacting business in that state, I submit the following:

In my opinion it is not within the power of the auditor of this state to make any retaliatory measure, which he may adopt for the protection of Iowa insurance companies in other states, retroactive. Such a rule can only be enforced from and after the time of its adoption by the auditor, and must apply to the future actions of foreign insurance companies and not to those of the past.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

February 22, 1904.

HON. B. F. CARROLL,
Auditor of State.

SCHOOLS—SUBJECTS TO BE TAUGHT—A teacher may be employed to give instruction in branches in which he was not examined by the state board at the time his certificate was granted.

SIR—Complying with your request of the 19th ultimo as to whether a teacher in a public school may be employed to give instruction in branches as to which he has not been examined, either by the county superintendent or the board of educational examiners, I submit the following:

Section 2629 of the code provides certain subjects upon which the state board shall examine applicants for state certificates, and then adds, "and such other studies as the board may require". If the applicant was examined and passed in all of the branches named in the section referred to, and the school board desires to have instruction given

in other branches, as to which the state board has not examined the applicant, he could, in my opinion, be employed as a teacher to give instruction in such branches, although they were not included in the examination by the state board. The statute requires an examination upon certain subjects before a certificate can be given the applicant to teach in the public schools; but it does not provide either in terms or by implication that instruction may not be given by a teacher who has received a certificate upon branches not included in the examination.

It logically follows, therefore, that a teacher so employed is entitled to and may recover compensation for services.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

March 9, 1904.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

ROAD TAX—LEVYING, COLLECTION AND EXPENDITURE OF—Road taxes are levied by the township trustees, and collected by the county treasurer in the same manner and at the same times as other taxes.

SIR—Complying with your request for an opinion as to the construction of the law governing the levying, collection and expenditure of road taxes, I beg to submit the following:

What is commonly known as the present road law was enacted as chapter 53 of the acts of the twenty-ninth general assembly.

By that act the legislature undertook to make an entire change in the method of levying, collecting and expending the road taxes in this state. Certain of the provisions of the act are in conflict with the provisions of the code, and the law is undoubtedly in a somewhat confused condition; but taking it as a whole, and giving force as far

as possible to all of the provisions of the act and to those of the code, they can be so harmonized as to carry out the intent of the legislature.

Section 1533 of the code as amended by the acts of the twenty-ninth general assembly, in fixing the duty of the township trustees, provides:

> "They shall order the township road tax for the succeeding year paid in money and collected by the county treasurer as other taxes."

Section 1540-a of the code supplement provides:

> "He (the township clerk) shall, within four weeks after the trustees have levied the property road tax for the succeeding year, certify said levy to the county auditor who shall enter it upon the tax books for collection by the county treasurer as other taxes."

And section 1542-a of the code supplement provides:

> "He (the township clerk) shall, on or before the second Monday of November of each year, make out a certified list of all property, including lands, town lots, personal property and property otherwise assessed, including assessments by the executive council on which the road tax has not been paid in full, and the amount of the tax charged on each separate assessment or parcel of said property, designating the district in which the same is situated, and transmit the same to the county auditor, who shall enter the amount of tax on the lists the same as other taxes, and deliver the same to the county treasurer, charging him therewith, which shall be collected in the same manner as county taxes are collected."

Under these provisions the property road tax for each succeeding year must be levied by the township trustees and ordered to be paid in money and to be collected by the county treasurer as other taxes.

The township clerk must, within four weeks after such levy and order, certify the tax to the county auditor, who must enter it upon the tax books, and it must then be collected by the county treasurer the same as other taxes;

that is, one-half of such tax becomes due and payable on the first day of March following, and the other one-half due and payable on the first day of September thereafter, the first installment becoming delinquent on the first day of April and the second on the first day of October.

Under the statute in force prior to the enactment of chapter 53 of the acts of the twenty-ninth general assembly, all road taxes payable in money became due and payable with the first installment of other taxes, and in changing the time of collecting road taxes it was necessary to make a special provision for the levy and collection of the road tax of 1903 in order to provide funds available for road purposes between the time of the levy of the taxes of 1904 and the collection of the same.

Such provision is made by section 1540-a of the code supplement under which it became the duty of the township trustees at the April meeting in 1903 to levy the road taxes for the years 1903 and 1904 upon the assessment of 1903; the levy for the year 1903 being a special levy for the purpose of covering the time between the regular levy and the collection of the taxes of 1904, and to provide a road fund available during the year 1903. After the year 1903 the regular levy of the road tax shall be made by the township trustees at their April meeting and certified to the county treasurer and collected in the same manner as other taxes.

This, as has been suggested, is an entire change in the method of levying and collecting road taxes in this state, and the provision of section 1413 of the code that

> "All road taxes payable to the county treasurer shall be due with the first installment of other taxes and subject to the penalty for non-payment as other taxes,"

must be held to have been repealed by section 18 of chapter 53 of the acts of the twenty-ninth general assembly.

As the law now exists, the township trustees should levy the road tax at their April meeting in each year. It should then be certified to the auditor and placed upon the tax books and collected by the treasurer in precisely the same manner as he collects other taxes.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

March 31, 1904.

HON. B. F. CARROLL,
Auditor of State.

FISH AND GAME LAW—(1) A gun may be a contrivance within the meaning of the code section 2539 and may be seized and destroyed as a public nuisance. (2) An artificial ditch connecting public waters with private waters becomes public waters from which fish may not be taken during the closed season.

Des Moines, April 18, 1904.

HON. GEO. A. LINCOLN,
Fish and Game Warden,
Cedar Rapids, Iowa.

DEAR SIR—I am in receipt of your favor of the 9th instant, requesting my opinion as to whether a gun when used for the purpose of killing and taking fish in violation of law, is a public nuisance under the statute, which may be taken and destroyed under the provisions of section 2539 of the code, as amended by the acts of the twenty-ninth general assembly; and also whether a ditch which is excavated for the purpose of draining lands adjoining a lake, and which during ordinary high water is filled by the overflow of the lake, and into which fish go from the waters of the lake for the purpose of spawning, is private water from which the owner of the land through which the ditch is excavated may take fish during the closed season. These questions will be considered in the order stated.

First. Section 2539 of the code, as amended by the acts of the twenty-ninth general assembly, provides:

> "Any seine, net, trap and contrivance, matter and substance whatever while in use or had and maintained for the purpose of catching, taking, killing, trapping or deceiving any fish, birds or animals contrary to any of the provisions of this chapter, is hereby declared to be and is a public nuisance; and it shall be the duty of the fish and game warden, sheriffs, constables and police officers of the state, without warrant or process, to take or seize any and all of the same, and abate and destroy any and all of the same without warrant or process and no liability shall be incurred to the owner or any other person for such seizure and destruction, and said warden or his regularly constituted deputies or other peace officers as hereinbefore named, shall be released from all liability to any person or persons whomsoever for any act done or committed or property seized or destroyed under or by virtue of this act".

Under the provisions of this section, any contrivance which is used for the purpose of killing fish in violation of the provisions of chapter 15 of the code is declared to be a nuisance, and it is the duty of the fish and game warden, any sheriff, constable or police officer of the state, without warrant or process, to seize and destroy such contrivance and abate the nuisance.

The question therefore arises whether a gun may be fairly said to be a contrivance within the meaning of the statute. Webster defines a contrivance as: "A thing contrived, invented or planned". A gun is certainly a thing invented, planned and contrived, and if used in violation of the provisions of the chapter referred to, it comes within the provisions of section 2539 of the code, and is by that section declared to be a nuisance which may be taken by the game warden or peace officers of the state, condemned and destroyed.

Second. Section 2545 of the code provides:

> "Persons who raise or propagate fish upon their own premises, or who own premises on 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 question presented is whether a ditch which is constructed in such manner that it connects with the waters of a lake, and thus furnishes an opportunity for fish to enter such ditch from the lake and follow the same to the lands of the person claiming the right to take them during the closed season, falls within the definition of section 2545 of the code, defining private waters from which fish may be taken by the owner thereof.

The purpose of the statute quoted is to permit persons owning isolated waters which are in no wise connected with the public waters of the state to raise and propagate fish in such private waters, and to take them as they see fit. Whenever such waters are connected with the public waters of the state by a natural outlet through which fish go from the public waters into the waters which are claimed as private, such waters cannot be held to be private waters within the meaning of the statute.

In one sense an artificial ditch may not be a natural outlet or inlet connecting private and public waters; but under the provision of section 2545 above quoted such a ditch must be held to be a natural outlet as defined by said section, as the intent of the legislature clearly was to exclude only such private waters from the provisions of the fish and game law as may not be stocked or replenished with fish passing from the public waters into the same.

When, therefore, a ditch is constructed connecting what may have otherwise been private waters with the public waters of the state, a natural passage is created by which

fish may pass from the public waters to those claimed as private, and the private character of such waters is at once lost. They thereby become directly connected with the public waters of the state and an outlet or inlet is thus created through which fish may pass back and forth without artificial aid.

It can no longer be said that such water is an isolated body of water which may not be replenished or stocked with fish passing through such ditch from the public waters of the state. Such outlet or inlet for that reason must be held to be a natural outlet from the private waters through which fish may pass and repass between the public waters and those claimed by the owner of the land.

In other words, a natural outlet or inlet between private and public waters must be held under the statute to be such an outlet or inlet as permits fish to pass naturally and without artificial aid from the public waters of the state to those claimed to be private. If such an outlet or inlet exists, then the waters so connected with the public waters of the state are no longer private, and fish cannot be taken therefrom during the closed season by the owner of the land or by any other person.

I am, Yours respectfully,

CHAS. W. MULLAN,
Attorney-General of Iowa.

FISH AND GAME LAW—JACK SNIPE NOT PROTECTED BY THE GAME LAW—The bird commonly called Jack Snipe does not fall within the general class "Marsh or beach bird" and as it is not specifically mentioned in the statute, it is not protected by the game laws of this state.

Des Moines, April 26, 1904.

HON. GEO. A. LINCOLN,
Fish and Game Warden,
Cedar Rapids, Iowa.

DEAR SIR—I am in receipt of your favor of the 23d instant, asking my opinion whether "Jack Snipe" are now protected by the game law of the state.

I take it that the bird referred to by you is the Wilson snipe (gallinago Wilsoni), popularly known to sportsmen as "Jack Snipe".

An examination of the provisions of the game laws of the state fails to disclose any provision made for the protection of this bird. Section 2551 of the code, as amended, provides:

> "No person shall trap, shoot or kill any pinnated grouse or prairie chicken between the first day of December and the first day of September next following; any woodcock, between the first day of January and the tenth day of July, any ruffed grouse or pheasant, wild turkey or quail between the first day of January and the first day of November; any wild duck, goose or brant, rail, plover, sand piper and marsh or beach bird between the fifteenth day of April and the first day of September."

The question which arises under this section is, whether the words "marsh or beach bird" refer to and include Wilson snipe. The statute under consideration is penal in its character and must, therefore, be strictly construed; that is, it must be read without expansion beyond its letter and confined to such subjects as are obviously within its terms and purpose. That is, there must be a close and conservative adherence to the literal or textual

interpretation. It cannot be regarded as including anything which is not within the letter as well as within the spirit, or which is not clearly and intelligibly described in the very words of the statute as well as manifestly intended by the legislature. Its provisions cannot be extended by implication or made to embrace cases not within the letter, though within the reason and policy of the law.

Under this fundamental rule of interpretation the statute cannot be extended by mere implication to cover any act not expressly prohibited by the words of the statute, and to constitute an offense the act must be both within the letter and the spirit of the statute defining it.

Is the Wilson snipe included with the birds designated by the statute "marsh or beach birds"? A reference to the standard authorities on ornithology fails to disclose that the Wilson snipe is ever designated by such terms. Dr. Coues in his "Key to North American Birds" names a number of birds to which the word "marsh" is prefixed, namely: Marsh black bird, marsh hawk, marsh hen, marsh owl, marsh robin, marsh tern, marsh wren, and others, but no such appellation is anywhere given the Wilson snipe. It is a well known game bird and is described in the work referred to as frequenting open wet places throughout the North American Continent. It is a bird so well known that it would have been specifically named in the statute if the legislature had intended that it should be included with other game birds which are protected during the closed season. It does not fall within the general phrase "marsh or beach bird", nor is it specifically named in the statute.

It is suggested that the killing of Wilson snipe may be prohibited by section 2561 of the code, which provides:

> "No person shall destroy the nests or eggs of or catch, take, kill or have in possession or under control for any purpose whatever, except specimens for use of taxidermists, at any time, any whip-poor-will,

night hawk, blue bird, finch, thrush, linnet, lark, wren, martin, swallow, bobolink, robin, turtle dove, cat bird, snow bird, black bird, or any other harmless birds, except blue jays and English sparrows."

The suggestion is that the phrase "or any other harmless birds" includes Wilson snipe. For obvious reasons no such interpretation can be given this statute. The Wilson snipe, as has been suggested, is a well known game bird and is highly esteemed as an article of food. The phrase "or other harmless birds" under the rules of statutory construction must be held to apply to birds of the character previously named in the section; that is, the birds named and birds *ejusdem generis* are covered by the statute which prohibits their being killed at any time. Wilson snipe, for the reason named, do not fall within the class of birds named in the statute and therefore not included in the phrase "or other harmless birds".

The conclusion must, therefore, be reached that the Wilson snipe is not protected by the present game laws of the state.

In this connection it is not improper for me to say that in my opinion they should be protected and that the open season during which they may be killed should be from the first day of September to the first day of May following. It is migratory in its habits, breeding in the northern portion of the North American Continent, and going to the southern portion and to the South American Continent during the winter season.

I am, Yours respectfully,

CHAS. W. MULLAN,
Attorney-General of Iowa.

TAXATION—PENALTY ON DELINQUENT TAXES—The first installment of public taxes must be paid before April 1st in order to avoid the one per cent penalty provided by law. If the tax is not paid before the first day of May, an additional one per cent penalty may be collected, and on and after the first day of each month thereafter, so long as the taxes remain unpaid.

Des Moines, April 28, 1904.

HON. J. M. BLAKE,
Webster City, Iowa.

DEAR SIR—I am in receipt of your favor of the 26th instant asking my opinion as to the construction of section 1413 of the code relating to the penalty on delinquent taxes. The questions as to which my opinion is requested are—

"*First.* If one-half the taxes are not paid by April first, does the penalty attach from March first?

"*Second.* When does the penalty attach for April? Is it on the first day of the month or not till the first day of May?"

As the questions submitted refer to a matter of general interest throughout the state, I submit the following opinion as to the construction of the statute.

The provisions of the section referred to are:

> "If the first installment of taxes shall not be paid by April first, the whole shall become due and draw interest as a penalty of one per cent per month until paid, from the first of March following the levy; * *

The word "by" as used in the phrase "by April first" is a word of exclusion and requires the first installment of taxes to be paid before April first to avoid the penalty of one per cent which should be charged and collected if not paid by that date; that is, the one per cent penalty for March should be charged and collected if the taxes are paid at any time during the month of April. This penalty is imposed because of the failure of the taxpayer

to pay the first installment of his taxes during the month of March, and the failure to do so causes the whole of his tax to become delinquent. If the tax is not paid before the first day of May, an additional one per cent should be charged and collected on and after May first, as a penalty for the failure to pay during the month of April; and an additional penalty of one per cent should be charged and collected on and after the first day of each month thereafter as long as the taxes remain unpaid.

I may here add that the question has arisen in the office of the treasurer of state as to whether fractional parts of a month should be considered in computing the penalty for the non-payment of delinquent taxes, and I have reached the conclusion that it was not the intention of the legislature that any fractional part of a month should be considered in determining the amount of such penalty; that the one per cent penalty for each month should be charged and collected on the first day of each succeeding month as long as the taxes remain delinquent and unpaid.

Yours very truly,

CHAS. W. MULLAN,

Attorney-General of Iowa.

TAXATION—SHARES OF NATIONAL BANK STOCK—Shares of National Banks are credits, and the individual owner may deduct from the cash value thereof when assessed for taxation, the amount of his valid debts.

Des Moines, April 29, 1904.

HON. N. J. LEE,

Estherville, Iowa.

DEAR SIR—I am in receipt of your favor of the 26th instant, and while I somewhat doubt the propriety of my expressing an opinion upon the question of the right of a shareholder of a national bank to deduct his indebtedness

from the assessment made upon the shares of his stock, I will, as matter of courtesy to you, make the following suggestions:

In *Primghar State Bank v. Reárick*, 96 Iowa, 242, it is held (Subdivision II of the opinion), that the shares of national banks are credits within the meaning of section 814 of the code, from which the owner is entitled to deduct the debts which he is in good faith owing, following *First National Bank of Albia v. City of Albia*, 86 Iowa, 34.

The same rule is laid down in National Bank v. Hoffman, 93 Iowa, 122, in which it is said:

> "A stockholder in a national bank cannot be taxed upon his stock at a greater 'rate than is assessed on other moneyed capital in the hands of individuals.' Code, section 818. This authorizes the stockholder to deduct from the cash value of his stock the amount of his valid debts. Code, section 814, citing *First National Bank v. City Council of Albia*, 86 Iowa, 34; *People v. Weaver*, 100 U. S., 539."

Section 5219 of the Revised Statutes of the United States, under which authority is given to the states by act of Congress to tax the shares of national banks, provides:

> "But the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located and not elsewhere."

This fixes the character of shares of national banks for assessment and taxation as moneyed capital in the hands of individual citizens.

Section 814 of the code of 1873, under which the decisions of this state above referred to were rendered, is

in substance re-enacted in the present code as section 1311. That section provides:

> "In making up the amount of money or credits which any person is required to list or to have listed or assessed, * * * he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him * * * ."

The construction given the provisions of this statute by the federal courts is the same as that of the state court, and in the case of *Richards v. Incorporated Town of Rock Rapids,* 31 Fed. Rep., 512, Judge Shiras said:

> "It is ruled that where state laws permit the individual citizens to deduct their just debts from the valuation of their personal property and from the sum of their moneys and credits, this right of deduction exists in favor of the owners of shares of national banks, as a refusal to allow it would operate to tax the latter at a greater rate than other moneyed capital."

Under these decisions it would appear to be conclusively settled that shares of national banks are to be taxed as moneys and credits under our statute, and that the individual shareholder has the right to deduct from the value thereof any valid debt owing by him.

I am, Yours very truly,

CHAS. W. MULLAN,
Attorney-General of Iowa.

GAME LAW—Venue of Action in Prosecution for Illegal Shipment of Game.

Des Moines, May 2, 1904.

HON. GEO. A. LINCOLN,
Fish and Game Warden,
Cedar Rapids, Iowa.

DEAR SIR—I am in receipt of your favor of the 29th ultimo, in which you request my opinion upon two questions:

> "*First.* If a party in Clinton, Iowa, who is a dealer in game, should ship to a party in Des Moines,

Iowa, a number of ducks by express, does the delivery to the express company constitute a delivery to the purchaser, and could the party at Clinton so shipping be arrested under the jurisdiction of Polk county?

"*Second.* If the same party should ship game birds in the same manner, without a purchase from the party in Des Moines, but sent by express, and the price made after the birds were received by the party in Des Moines, can a suit be brought in Polk county against the shipper who lives in Clinton county?"

The first question is of very easy solution. It is a well settled rule of law that the delivery of goods or property by a vendor or a consignor to a common carrier, to be by it transported and delivered to the purchaser or consignee, is a delivery to such purchaser or consignee. In the case outlined by your question, the sale and delivery were made in Clinton county, as the entire transaction took place there, so far as the sale and delivery of the ducks are concerned, and the person making such sale and delivery to the common carrier must, in my opinion, be prosecuted in Clinton county, and not in Polk.

The second question is of less easy solution, as the right to maintain an action in Polk county against the vendor or consignor might depend upon other facts. If there was an understanding between the consignor and the consignee that game should be shipped from Clinton to Des Moines, and the consignee should pay for the same after it was received a price which was to be thereafter agreed upon between the consignor and the consignee, the sale would be consummated at the place where the birds were delivered to the common carrier, and a prosecution could only be maintained in that jurisdiction. If, however, the birds were delivered to a common carrier without any contract or understanding between the consignor and the consignee that the consignee should take the same or pay any price therefor, there would be an absence of any contract of purchase which would make the delivery of the birds

to the common carrier in Clinton county a delivery to the consignee. In such case the common carrier would be the agent of the consignor, and when the birds were delivered to the consignee in Polk county, such delivery would be a delivery by the consignor through his agent, and I think the courts of Polk county would have jurisdiction to try the offense.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

PUBLIC SCHOOLS—LOCATION OF SCHOOL HOUSE SITE—A school board may not purchase a school house site and locate a school house thereon if such site is not upon an established highway.

SIR—I am in receipt of your favor of the 3d instant, requesting my opinion as to whether a school board may purchase a school house site and locate a school house thereon, if such site is not upon an established public highway.

Section 2814 of the code provides:

> "Any school corporation may take and hold so much real estate as may be required for school house sites, for the location or construction thereon of school houses, and the convenient use thereof, but not to exceed one acre, except in a city or incorporated town it may include one block exclusive of the street or highway, as the case may be, for any one site, unless by the owner's consent, which site must be upon some public road already established or procured by the board of directors, * * * ."

This section confers upon the school corporation the right to purchase, acquire by condemnatory proceedings, and to take and hold real estate for schoolhouse sites. The express provision of the statute is that such sites must be upon some public road already established or procured by the board of directors. Under the provisions

of the statute quoted, a school corporation has no power to take by purchase, condemnatory proceedings or otherwise, real estate for a schoolhouse site unless such site is upon some public road already established or procured.

The following section, 2815, provides that if the owner of the real estate desired for schoolhouse site refuses or neglects to convey the same, it may be condemned and taken by the school corporation under the right of eminent domain; but the provisions of this section in no wise alter or change those of section 2814, and no schoolhouse site can be taken by a school corporation, either by purchase or by condemnatory proceedings, unless it is upon a public highway.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

MEANDERED LAKE BEDS—DRAINAGE AND SALE OF—ACT OF THIRTIETH GENERAL ASSEMBLY CONSTRUED—The executive council is authorized by statute to determine when any meander lake bed, shall, in the interest of the public be sold, drained and improved.

SIR—Complying with your request for a construction of the act of the thirtieth general assembly relating to the meander lake beds of the state, and as to the interpretation which must be given the proviso contained in section 7 of the act, I beg to submit the following opinion:

To determine how far the provisions of the entire act are modified by the proviso in section 7, it is necessary to first ascertain the purpose of the act. Such purpose is fairly stated in section 1 in these words:

> "The executive council of the state is hereby authorized and empowered to survey the meandered lakes and lake beds within this state, and to lease or

sell the same as hereinafter provided, and to determine what lakes shall be maintained as the property of the state and what meandered lake beds belonging to the state may be drained, improved, demised or sold."

The primary object of the act, therefore, is—

First. To authorize the executive council to determine what lakes shall be maintained and preserved as the property of the state for the benefit of the general public; and,

Second. To permit such lakes as are not to be maintained and preserved as inland bodies of water, to be drained, improved and sold.

Sections 2, 3 and 4 provide the manner in which the executive council shall proceed to ascertain and determine what lakes shall be maintained and preserved, and what lake beds may be drained and sold by the state.

The sale of any meandered lake bed which should not be preserved and maintained for the benefit of the public as an inland body of water, when such fact has been determined by the executive council under the provisions of the act, is authorized by section 5, and authority is given under that section to execute and deliver to the purchaser of the land composing such lake bed, a deed or patent therefor. The section further provides that no sale of any lands composing any of the lake beds of the state shall be made by the executive council until a complete survey thereof has been made and the same subdivided to correspond with the government subdivisions of public lands.

Section 6 provides for the appraisement of the lands composing the meandered lake beds, which may be sold by the executive council, and for the return of the report of such appraisement to the governor.

Under the provisions of these sections of the act, it is the duty of the executive council, whenever a statement is presented to it setting forth that any meandered lake or lake bed in any county in the state is detrimental to

the public health, or the general welfare of the citizens of the county, and that it is unwise to maintain such meandered lake or lake bed as a permanent body of water, and that the interest of the state will be subserved by draining and improving the same, to take the steps therein provided for the purpose of determining whether such lake shall be preserved, or drained and improved. When the council has determined that question, if it is of the opinion that the lake ought not to be preserved, and that the general welfare and interest of the people of the state will be subserved by draining and improving its bed, it must cause the same to be appraised by a commission appointed by the governor as provided in section 6, and after the report of the appraisers has been received and filed in the office of the secretary of state, such lake bed may be sold and conveyed in the manner provided by section 7 of the act.

The question whether any meandered lake bed in the state shall be sold and conveyed by the executive council, must be determined upon the facts disclosed by the examination, survey and report provided for in the act; and the executive council has no power thereunder to sell or otherwise dispose of any meandered lake bed until it shall find and determine that the interest and welfare of the general public and the state will be subserved by the selling, draining and improving of the particular lake bed under consideration; that is, each particular case involving the question of the preservation of a lake for the benefit of the public, or of the draining of a meandered lake bed and the selling of the land composing the same, must stand upon its own merits as disclosed in the proceedings by which the question is determined.

If upon the final hearing of the case it shall be determined by the executive council that the meandered lake bed involved in the proceedings is one which should be

sold and drained under the provisions of the act, the executive council is then authorized and empowered, under section 7, to sell and dispose of the same in the manner prescribed in that section.

The proviso referred to is a part of section 7, and is in these words:

> "Provided, however, that in any case where it is made to appear to the executive council by a duly certified copy of the deed, certified to by the recorder of deeds and the county auditor of the county in which the lake or lake bed is situated, and by the sworn statement of the present owner, that the board of supervisors of the county in which such lake or lake bed is situated has heretofore, in good faith, sold and conveyed by deed, any lake or lake bed in such deed named, specified and described, to a bona fide purchaser who has paid to the county the reasonable value of such lake or lake bed, and who has heretofore paid taxes or made valuable improvements in such lake bed; then and in such case the governor shall execute, or cause to be executed, to the county in which such lake or lake bed is situated, a deed or patent, under the seal of the state, conveying to said county all the right, title and interest of the state of Iowa in and to such lake or lake bed, and the title so conveyed shall enure to the grantee of such lake or lake bed holding the same under title derived from the county in which such lake or lake bed is situated, in the manner in this section provided."

The natural and appropriate office of a proviso is to restrain or qualify some preceding matter, and it is confined to what precedes it unless it clearly appears to have been intended to apply to some other matter. It is to be construed in connection with the section of which it forms a part, and as substantially an exception to the provisions of that particular section, and it does not apply to the provisions of other sections of the act, unless the intent that it should so apply clearly appears. And it has been held that it should be construed with reference to the immediately preceding parts of the clause to which it is attached.

Pearce v. Bank of Mobile, 33 Ala., 693;
Bank for Savings v. Collector, 3 Wall., 495;
Savings Bank v. United States, 19 Wall., 227;
Callaway v. Harding, 23 Gratt, 547;
Partington, Ex parte, 6 Q. B., 653;
Spring v. Collector, 78 Ill., 101;
Rex v. Newark-upon-Trent, 3 B. & C., 71;
Lehigh County v. Meyer, 102 Pa. St., 479.

These are well settled rules of statutory construction, and unless it appears from the provisions of the act that it was the intent of the legislature that the proviso contained in section 7 should apply to the provisions of the preceding sections, it must be held to qualify the provisions of that section only. Section 7 authorizes the sale of a meandered lake bed by the executive council, after it has been determined that such lake bed is of such character that the welfare of the public and the state will be subserved by its drainage and improvement.

The language of the proviso itself, as well as the context, clearly indicates that it was not the intention of the legislature to qualify the previous sections of the act by such proviso. The proviso itself declares that any conveyance of land thereunder shall be in the manner provided by section 7, and no sale or conveyance can be made under that section until all of the previous provisions of the act have been complied with.

The construction which must be placed upon the entire act is that, when in a case made before the executive council, it is found that the lake bed under consideration is one which, in the interest of the general public, should be sold, drained and improved, a bona fide purchaser thereof from the county in which such lake bed is situated, who has paid a valuable consideration therefor, and has paid taxes and made improvements thereon, upon the presentation of the proof of such facts in the manner provided by section 7, is entitled to have such lake bed conveyed by the state to the county in which it is situated, but is

not entitled to have the same so conveyed until the executive council has determined that such lake bed should, in the interest of the republic, be sold, drained and improved.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

May 11, 1904.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

CORPORATION STOCK—SUBSCRIPTION TO CAPITAL STOCK—A subscriber to the capital stock of a corporation may anticipate a "call" from the directors by paying the amount thereof to the proper officers.

SIR—Complying with your request of the 19th ultimo for an opinion as to the right of a stockholder of a corporation to pay any portion of his stock subscription to the corporation when no call has been made therefor by the directors, and whether if such stock subscription is paid by the stockholder, it is a part of the capital stock of the corporation, I beg to submit the following:

It is a general rule of law that a call must be made in order to render a subscription to the capital stock of a corporation, or any part thereof, due and payable to such corporation. A contract of subscription is a promise to pay at such times and in such amounts as may be designated by the corporate authorities in a formal declaration known as a "call". It is an agreement to pay money at a future time, which must be fixed by a call of the proper officers of the corporation.

There is no rule of law, however, which prevents a subscriber to the capital stock of a corporation from anticipating a call upon his subscription by paying the amount thereof to the proper officers of the corporation.

The purpose of a call for unpaid stock subscriptions is to fix the time when they become due, and to give to the

corporation a legal right to enforce payment. The liability of a subscriber to the capital stock of a corporation is the same as that of any other person who owes a debt which is payable in money and which has not yet become due. No legal or equitable reason exists why such a debtor may not pay his indebtedness before it matures, and relieve himself from the obligation, if the creditor is willing to receive such payment.

In *Marsh v. Burrows, I Woods,* 468, it is said:

> "It is contended that the unpaid subscriptions of capital stock are not assets for the payment of debts, either legal or equitable; that they exist merely as possibilities; that they are not a debt due, having never been called in; that no one can call them in but the directors; and in them it is a mere discretionary power which cannot be exercised either by the assignee, the receiver, or the court itself, and cannot be assigned; that said unpaid subscriptions are no part of the capital stock of the bank; and that the real capital stock is what has been called in, namely: $535,000, and not $2,000,000.
>
> "This position may be somewhat plausible, but is not sound. It is not a mere power vested in the bank to make further calls. It is a right; and where a debtor has such a right and does not choose to exercise it, equity, at the instance of creditors, will exercise it for him. When a stockholder subscribes stock and his subscription is accepted, it is not only the right of the bank to call in the money, but it is the right of the stockholder to pay it. The mode of calling it in, prescribed by the charter, is a mere form of remedy given to the bank to enforce the subscription, usually followed by forfeiture for non-payment, if the bank so chooses. But the stockholder is not obliged to wait until a call is made upon him. He may pay at any time; and if the business of the bank were very profitable, no doubt he would avail himself of the opportunity. Such a right cannot be described as a mere power on the part of the bank, to be exercised or not, as it chooses, and dependent for its existence on the personal discretion of the directors."

The doctrine announced in *Marsh v. Burrows* finds support in the following authorities:

Pool's Case, L. R., Ch. Div., 322 (1878);
Barge's Case, L. R., 5th Eq., 420;
Admondson's Case, L. R., 18th Eq. Cas., 670;
Lock v. Queensland, etc., Co., A. C., 461 (1896).

Unpaid subscriptions of the capital stock of a corporation are, at least after a call has been made, assets of the company and a part of its actual capital, which are available to carry on its business or meet its liabilities; and when actual payment has been made in anticipation of a call, the amount paid becomes at once a part of the paid up capital stock of the company, and the obligation of the subscriber is to that extent discharged.

The statute requiring notes given for the unpaid portion of a subscription to the capital stock of a life insurance company organized under chapter 6 of Title IX of the code, does not change the right of the corporation to call for a payment of such subscription at any time when the board of directors may deem it to the best interest of the company; nor does it change the right of the subscriber to the stock of such company to pay the amount of his subscription to the company before a call is made therefor; and when the amount of such subscription is so paid and accepted by the company, it becomes a part of the paid up capital stock, and the subscriber is released from any further liability upon his subscription.

It is therefore within the power of a subscriber to the capital stock of an insurance company organized under chapter 6 of Title IX of the code, to pay the amount of his subscription, although no call has been made by the corporation, and upon such payment he is entitled to have the same endorsed upon his note deposited with the audi-

tor, or the note surrendered to him if the payment is in full satisfaction of the amount thereof.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

June 7, 1904.

HON. B. F. CARROLL,
Auditor of State.

INSURANCE—KINDS OF SECURITIES THAT LIFE INSURANCE COMPANIES MAY DEPOSIT WITH AUDITOR OF STATE—It is held that the bonds issued by the Sanitary District of Chicago do not fall within either of the classes of securities designated by statute, which may be accepted by the Auditor of State to secure the fulfillment of any condition in the policies of any life insurance company offering the same.

SIRS—Complying with the request transmitted to me by your secretary, Mr. A. H. Davison, for an opinion whether bonds issued by the Sanitary District of Chicago, Cook county, Illinois, under the laws of that state, are such securities as the funds of a life insurance company transacting business in this state may be invested in, and which may be deposited with the auditor of state for the purpose of securing the fulfillment of its contracts, I beg to submit the following:

Section 1806 of the code provides:

> "The funds required by law to be deposited with the auditor of state by any company or association contemplated in the two chapters preceding, and the funds or accumulations of any such company or association organized under the laws of this state, held in trust for the purpose of fulfilling any contract in its policies or certificates, shall be invested in the following described securities and *no other.*"

Following this is a particular description of the character of securities in which insurance companies may invest their funds. Such securities are divided into six classes, viz.:

1.—The bonds of the United States.

2.—The bonds of the state or of any other state when such bonds are above par.

3.—Bonds and mortgages and other interest bearing securities being first liens upon real estate within the state or any other state in which such company or association is transacting an insurance business, worth at least double the amount loaned thereon, and secured thereby exclusive of improvements. * * *

4.—Bonds or other evidences of indebtedness of any county, city, town or school district within the state, or any other state in which such company is transacting an insurance business, where such bonds or other evidences of indebtedness are issued by authority of and according to law, and bearing interest, and are approved by the executive council.

5.—In the stock of solvent national banks organized under the laws of the United States. * * *

6.—Loans upon its own policies in an amount not exceeding the net terminal reserve. * * *

The question here presented for determination is whether bonds issued by the sanitary district of Chicago fall within either of the classes named in the statute. If they do, they may be approved by the executive council and accepted by the auditor of state; if they do not, they cannot be approved by the executive council or accepted by the auditor, no matter what their value as securities may be, for the reason that the statute has specifically defined the kind of securities in which the funds of insurance companies in this state may be invested, and declared that they shall be invested in no other.

An examination of the statutes of Illinois declares that in 1899 the state was divided into sanitary districts, and the city of Chicago was made one of such districts. Each of the districts was made a body corporate with power to sue and be sued, contract and be contracted with, acquire and hold real and personal property necessary for corporate purposes, to borrow money for corporate purposes and issue bonds therefor, and to perform such acts as are usually performed by municipal corporations.

The constitutionality of the act has been upheld by the supreme court of Illinois, and the bonds issued thereunder have been held to be valid. Such bonds are, however, the bonds of a sanitary district of the state of Illinois. They are not the bonds of the city of Chicago, or of any city or town within the state of Illinois. The business and affairs of the sanitary district are managed and controlled by trustees elected by the electors of the district, and the bonds are issued by such trustees and not by the municipal authorities of the city. They cannot in any sense be said to be city bonds, and do not therefore fall within the class of securities in which insurance companies doing business in this state may invest their funds.

An investigation of the nature and character of these bonds leads me to the conclusion that they are valid securities of a high class, and that they are now worth more than their par value; and if the statute did not strictly limit the kind and character of securities in which insurance companies may invest their funds, I would recommend that such bonds be approved by the executive council and accepted by the auditor of state; but as they do not fall within either of the classes of securities designated by statute, they cannot, in my opinion, be approved by the executive council or accepted by the auditor of state for the purpose of securing the fulfillment

of any contract in the policies or certificates of the insurance company offering the same.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

June 29, 1904.

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

COMMON CARRIERS—DEMURRAGE CHARGES UNDER RULES OF THE WESTERN CAR SERVICE ASSOCIATION—Legal Principles Applicable thereto.

SIRS—Complying with your request I beg to submit the following opinion upon the questions referred by you to me, viz.:

1. Can the Car Service Association or the railroad companies for which it assumes to act in any case legally charge and collect from the institutions under our control demurrage on account of cars that are not unloaded within forty-eight hours after notice is received by the consignee from the railroad company that the cars have been placed upon the unloading track?

2. Does the right to exact demurrage exist regardless of the condition of the highways over which the contents of unloaded cars must be hauled to the institution?

3. Section 1 of Rule 6 of the Western Car Service Association (under which the demurrage charges in controversy were made) provides in substance: (a) That the agent of the railroad company must collect demurrage daily as it accrues. (b) That the agent must hold the cars until payment is made. Are these provisions in conflict with the act creating this Board which provides the time and the manner in which debts of or claims against the institutions must be paid?

4. If the railroad company seeking to collect demurrage has not given the institution or its chief executive officer notice of the adoption by it of the rules of the Car Service Association, or of the adoption of any rule by it requiring the payment of demurrage, can said railroad company legally charge or collect demurrage from an institution?

5. When neither a consignee institution nor its chief executive officer has been notified of the adoption of a rule by the railroad company requiring the payment of demurrage on cars not unloaded until after the expiration of forty-eight hours, can said company legally make a demurrage charge?

6. Is a postal card notice, like that enclosed, which announces the arrival of a car at the station but does not indicate when the car will be placed upon the unloading track sufficient notice upon which to base a demurrage charge? And would it be so where, as in case of the Iowa School for the Deaf, the unloading track is a switch situated a considerable distance from the city of Council Bluffs and the freight is paid in advance for placing the cars on this unloading track?

7. Bearing in mind that the unloading track for the Iowa School for the Deaf is situated at a point a considerable distance from the city of Council Bluffs, and much nearer the institution than is the city, and noting that by Rule 2 of the Car Service Association, as amended, cars of coal are held in the city yards of the railroad companies for seventy-two hours before any demurrage charge can be made,—if a car of coal consigned to the Iowa School for the Deaf is at once on its arrival in the city yards switched out to and placed upon the unloading track for this institution, and demurrage charged if it is not unloaded within forty-eight hours, is such charge an unjust and illegal discrimination under the law, and in such a case is the institution entitled to the seventy-two

hours after the car is placed upon the unloading track in which to unload it before any demurrage charge can be legally made?

8. If an institution orders from a consignor a certain number of cars of coal a day, and if such number of cars and no more are delivered to the railroad company for shipment, and if the railroad company for its own convenience bunches the shipment for two or more days together, and delivers all on the unloading track of the consignee at one time, and any of these cars remain unloaded for more than forty-eight hours, can the railroad company make such act the basis for charging demurrage?

9. If demurrage is legally due on cars consigned to an institution, has the railroad company transporting such cars, or its agent, or agents, the legal right to exact that payment of such demurrage be made otherwise than as the law provides for the payment of claims against the institution generally, and upon failure of the consignee to comply has it the right to take away any such car or cars or in any way to prevent the proper officers of the institution from having the same unloaded for the use of the institution? And if it or its agents threaten so to do may it or they or both be enjoined from so doing?

10. Do the provisions of chapter 118, acts of the twenty-seventh general assembly, particularly section number 40, providing the time and method of paying for supplies for the several institutions, apply and control as to the payment of freight and demurrage charges, express, telegraph and telephone bills?

First. Under the laws of this state railroad companies are quasi-public corporations, and may be regarded as public agencies discharging duties in which the public is interested. Upon the payment or tender of the legal freight or fare, such companies are required to furnish cars and transport freight and passengers within a

reasonable time, and a failure to do so subjects them to liability for damages. They must receive and transport cars loaded and unloaded over their lines, and in doing so assume the liability of a common carrier, both as to such cars and freight. In the receipt, transportation and delivery of freight they bear two well recognized relations.

While the freight received by them is in transit, and until it is delivered at the place of destination in such a position that it can safely and with a reasonable degree of convenience be unloaded by the consignee, they owe the duties and are held to the liability of common carriers. When, however, a car containing freight is delivered to the consignee and is placed in such a position at the place of destination that it can be safely and with a reasonable degree of convenience unloaded, their liability as common carriers ceases and that of warehousemen attaches.

Ind. Mill Co. v. B., C. R. & N. R. Co., 72 Iowa, 535;
Merchants Dispatch Trans. Co. v. Halleck, 64 Ill., 284;
Gregg v. Ill. Cent. R. R. Co., 147 Ill., 550.

It is a well settled rule of law that the carrier, in addition to its compensation for the carriage of goods, has the right to charge for their storage and keeping as a warehouseman, for whatever time they remain in the custody of the carrier after reasonable opportunity has been afforded the consignee to remove them.

The carrier's duty ends with the transportation of the car and its delivery to the customer in such a position at the place of destination that it can be safely and with a reasonable degree of convenience unloaded. No further service is embraced in the contract between the consignor and the carrier, and no reason exists why the carrier is not entitled to charge for the use of its cars for storage purposes, as it would for the use of a warehouse if the goods were stored therein.

There is no law which inhibits the use of cars for storage purposes, or which requires the unloading and removal of goods to some other structure before any charge for storage can be made thereon. In many cases the storage of commodities in cars may serve the consignee's interest and convenience much better than to have the goods unloaded and stored in a warehouse. The car may be placed convenient to his own place of business where it may be unloaded, either by himself or by purchasers of the goods as the same are sold, thus saving drayage and other expenses.

If a consignee, whose duty it is to unload, and who, failing to do so within a reasonable time after the car is placed in such a position that it can safely and with a reasonable degree of convenience be unloaded, accepts the benefit of storage by requesting or permitting the carrier to continue holding the car unloaded in service and subject to his will and convenience as to time of unloading, he cannot be heard to complain of the method of storage, and to deny the right of any compensation for such service. He may insist that he have a reasonable time, after the car is placed in such a position that it can be safely and with a reasonable degree of convenience unloaded, within which to unload the same, and that the rate of charges fixed and required to be paid for the lapse of such reasonable time shall not be unreasonable or excessive; but he cannot dispute the right of the carrier to require the payment of reasonable storage charges.

In *Miller v. Mansfield,* 112 Mass., 260, it is said:

> "It is not material that the goods remained in the cars instead of being put into a storehouse."

In speaking of the right of railway companies to collect demurrage charges, Mr. Elliott in his work on Railways (sec. 1567), says:

> "But while it is probably true that this right is derived by analogy from the maritime law as administered in America, the more recent authorities have

almost unanimously upheld the right of railroad companies to make demurrage charges in proper cases. As said by one of the courts, 'We see no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles, as well as carriers by sea.' After a carrier has completed its services as such, it has a right to charge extra compensation for storing the goods in a warehouse and keeping them after the consignee has had a reasonable time in which to remove them. Why, then, when its duties as a carrier have been performed and a reasonable time has elapsed, is it not as much entitled to additional compensation for the use of its cars and tracks as for the use of its warehouse? Certainly a customer whose duty it is to unload, or who unreasonably delays the unloading of a car for his own benefit, ought not to complain if he is made to pay a reasonable sum for the unreasonable delay caused by his own act. But this is not all: The public interests also require that cars should not be unreasonably detained in this way."

The rule of law announced by Mr. Elliott has support in the following adjudicated cases:

Miller v. Georgia R. R. Co., 88 Ga., 563;
Norfolk & Western R. R. Co. v. Adams, 90 Va., 393;
Darlington v. Mo. Pac. R. R. Co., 72 S. W., 122;
Interstate Com. Com. v. D. G. H. & M. Ry. Co., 74 Fed. Rep., 803;
Am. Warehouse Ass'n v. Ill. Cent. R. R. Co., 7 Interstate Com. Report, 556.

In *Schumacher v. Chicago & NorthWestern Ry. Co.,* 207 Ill., 199, it is said:

"The correct rule must be that the consignee shall have a reasonable time after having knowledge of the arrival of his freight to get the necessary help and means to remove the same."

The Western Car Service Association, which seeks to collect demurrage in the case under consideration, is an agency of the railways, established to keep account of

claims so arising and to enforce the collection thereof. The objection that the establishment of such an agency and the enforcement of the collection of demurrage charges, would be invalid because in restraint of trade, has been suggested and urged in some of the courts where the right to collect such demurrage charges has been contested. Such action upon the part of the railway companies cannot, however, upon any theory, be said to be in restraint of trade or commerce.

The end sought by the enforcement of such demurrage charges is that the cars used for the transportation of freight may be unloaded within a reasonable time and returned to the railway companies to be used by them in transporting other commodities. The action, therefore, of the railway companies is in aid and not in restraint of commerce.

The question whether forty-eight hours is a reasonable time within which the consignee is required to unload a car of freight, and whether one dollar for each day thereafter is an unreasonable charge for the detention of the car, has been passed upon by a number of the state courts.

In *Norfolk & Western Ry. Co. v. Adams, Clement & Co.,* 90 Va., 393, (44 Am. St. Repts., 916) it is said:

> "It is well settled, in this and in other states, that a common carrier may make reasonable rules and regulations for the convenient transaction of business between itself and those dealing with it, either as passengers or shippers. * * * That this rule is reasonable and proper, and that the railroad company can make such charges, has been decided in a number of states. *Miller, et al, v. Ga. R. R. & Banking Co.,* 50 Am. & Eng. R. R. Cas., 70; *Miller v. Mansfield,* 112 Mass., 260; *Union Pac., D. & Gulf R. R. Co. v. Cook,* 50 Am. & Eng. R. R. Cases, 89; *Ky. Mfg. Co. v. Louisville & Nashville R. R. Co.,* 50 Am. & Eng. R. R. Cases, 90; *C., M. & St. P. Ry. Co. v. Pioneer Fuel Co.,* Beach Ry. Law, sec. 924 and cases there cited; Jones on Liens, sec. 284 and cases cited. * * *

"In addition to this long line of authorities holding the right of the railroad company to make such charge, and the reasonableness of such charge, there have been numerous investigations and rulings upon the point by the railroad commissioners of the various states. In Texas the railroad commissioner, Judge Reagan, after full investigation, made an order fixing three dollars per day per car as a reasonable charge for delay in unloading after forty-eight hours notice. The railroad commissioners of Illinois and those of other states, after full investigations, have decided in favor of the right and reasonableness of such a charge."

The railroad commissioners of the state of Missouri, in the matter of the complaint of *Darlington & Co. v. Central Car Service Association* of St. Louis, held that forty-eight hours was a reasonable time in which to unload cars after the same were placed upon the side tracks convenient for unloading, and that a charge of one dollar a day for demurrage after the expiration of forty-eight hours was a reasonable charge and could be collected by the Association.

In *Pa. R. R. Co. v. The Midvale Steel Co.,* 201 Pa. St., 624, it was held that the rule requiring consignees to unload cars within forty-eight hours after their being placed upon the side track, and to pay one dollar for each day which the same remained unloaded thereafter, was reasonable, both as to the time and the amount of the charge.

In *Swan v. Louisville & Nashville R. R. Co.,* 20 Am. & Eng. R. R. Cases, 446, the supreme court of Tennessee held that the rule requiring the payment of one dollar per day for the detention of cars beyond forty-eight hours was reasonable.

In no case which has been found has the regulation, either as to time or amount, been held to be unreasonable.

Under the principles of law laid down in these authorities, railway companies have the right to fix a time within which their cars shall be unloaded after they reach

their place of destination and are placed in such a position that they may be safely and with a reasonable degree of convenience, unloaded by the consignee; and to fix a reasonable charge for the detention of cars beyond the time allowed for unloading the same. Forty-eight hours is a reasonable time for a consignee to unload a car after it has reached its destination and been so placed that it may be safely and with a reasonable degree of convenience unloaded by the consignee, and one dollar per day is not an unreasonable charge for the detention of a car beyond forty-eight hours.

Second—The condition of the highway does not affect the right of a railway company to enforce the collection of demurrage charges. It may be an element which should be taken into consideration in determining the reasonableness of the regulation; but if the time within which cars are required by the railway company to be unloaded may fairly be said to be reasonable under all of the circumstances, the fact that at times the condition of the highway may prevent the cars from being unloaded within such time, would not, in my judgment, prevent the enforcement of the regulations as to the collection of demurrage charges.

It will hardly be claimed that if the goods or commodities were stored in a warehouse of the railway company, and the condition of the highway prevented the consignee from removing the same from the warehouse, such fact would relieve him from the payment of storage charges. In the application of the rule under which railway companies may charge for the storage of goods and commodities as warehousemen, it can make no difference whether such goods or commodities are stored in a warehouse or in a car, so far as the liability of the consignee to pay storage charges until they are removed, is concerned.

Third—The theory upon which a lien has been held to exist for demurrage charges made by railway companies, is that such charges partake of the nature of warehouse

or storage charges, and may be enforced as such against the property transported by the carrier. Our statute provides that such charges may be enforced by a sale of the property.

It is obvious that no carrier of property belonging to the state has the right to enforce a lien against the same by a sale thereof under the provisions of the statute; and any rule adopted by railway or car service associations for the collection of demurrage upon cars held by the state or by its public institutions beyond the time fixed by the rules of such railway or association, must necessarily be subject to the laws and the sovereignty of the state, and no lien can be enforced against the property of the state for the collection of any claim arising upon demurrage charges.

The weight of authority is that such a lien exists and may be enforced against the property of private individuals, but the property of the state stands upon a different footing and cannot be subjected to the payment of any lien for such charges, or sold in satisfaction of a claim against the state.

Any claim for demurrage charges, which may accrue under the rules and regulations of the railway company or the Car Service Association, should be audited and paid as other claims accruing in the public institutions under the management of the board of control.

It may, however, be suggested that the provisions of section 44 of the act creating the board of control are broad enough to permit such demurrage charges to be paid from the contingent fund in the hands of the managing officer of any institution to which shipments are made, if it should be necessary for the same to be paid at once to prevent loss or damage to the institution.

Fourth—The fourth and fifth questions may be considered together.

It is not necessary that actual notice of the adoption of a rule by a railway company to require the payment of

demurrage charges should be given to a consignee institution or its chief executive officer. It is sufficient if such rules have been given general publicity in the ordinary way. It would be unreasonable to say that every consignee of freight delivered by common carriers must be served with actual notice of the rules and regulations of such common carrier before they can be enforced. Every carrier of goods or passengers has the right to adopt and enforce such reasonable regulations as are necessary to protect and facilitate the transaction of its business, and every person dealing with such carrier is bound by such regulations.

In *Wabash Railroad Company v. Berry-Horn Coal Co.,* Judge Dillon, of the St. Louis Circuit Court, held that a common carrier has a right to impose a reasonable charge for the use and detention of its cars delivered to the consignee, and to be unloaded by him, when detained by the consignee beyond a reasonable time for the unloading, and that such reasonable regulations were enforcible against the consignee, although no specific notice thereof had been given him by the railway company.

This holding of Judge Dillon is undoubtedly a fair statement of the principle of law governing cases of this character. Every shipper of goods contracts with the carrier subject to such reasonable rules and regulations as are established to facilitate the business of the carrier.

Fifth—The notice given by the postal card which is enclosed announcing the arrival of the car at the station, but not indicating where it will be placed for unloading, is not the controlling element in fixing the time when the railway company is entitled to charge demurrage.

Where a commodity is shipped in bulk and by the car load, to be unloaded by the consignee upon its arrival at its destination, the duties and liabilities of a common carrier do not cease until the car is placed in such a position on the railway track that it can be safely, and with a reasonable degree of convenience, unloaded. When it is

so placed, the duties and liabilities of the railway company as a common carrier cease, and those of a warehouseman attach. The right to charge demurrage for the detention of the car begins within a reasonable time after the duties and liabilities of a common carrier have ceased and those of a warehouseman have attached.

It was the duty of the superintendent of the School for the Deaf, upon receipt of the postal card submitted, to at once ascertain whether the car described had been so placed upon the tracks of the railway company that it could be safely and with a reasonable degree of convenience, unloaded. If it was so placed, he would then be entitled to forty-eight hours under the rules of the Association to unload it, before any charge could be made for demurrage.

It is the duty of a consignee to be present at the time of the arrival of freight shipped to him, for the purpose of receiving the same. The consignee of freight cannot escape liability for demurrage charges because the notice he has received of the arrival of such freight does not state that it has been placed where it can be safely and with a reasonable degree of convenience, unloaded. It is a part of his duty to ascertain whether the car has been so placed.

The right of a railway company to charge for demurrage does not, therefore, depend upon the character of the notice received by the consignee; and the fact that the postal card submitted does not state that the car is placed in a position where it can be safely and with a reasonable degree of convenience unloaded, does not affect the right of the company to charge demurrage if the car is detained beyond the forty-eight hours after it is placed in a position where it can be so unloaded.

Sixth—Section 1 of Rule 2 of the rules of the Western Car Service Association provides:

> "Cars loaded with coal, coke, salt or lime in bulk, and ore and fluxing material for smelting purposes,

> may be held on the tracks of the road making final delivery to consignee seventy-two hours free of car service charges. For all time so held in excess of seventy-two hours a charge of one dollar per day or fraction thereof shall be made. Said storage time shall commence first 7 A. M. after arrival. Forty-eight hours free time will be allowed on unloading track in addition to the free storage time; in no case will more than forty-eight hours be allowed on the unloading track, said period of time to commence at 7 A. M. following placing."

No discrimination is made as to the consignees of cars loaded with the material named in Rule 2. All cars so loaded, when received at destination, are alike subject to the regulation provided by said rule; that is, they may remain seventy-two hours upon the tracks of the road before final delivery, and may thereafter remain forty-eight hours upon the unloading track, and after delivery, before any charge is made for detention.

Under this rule cars loaded with coal and consigned to the School for the Deaf at Council Bluffs may remain upon the tracks of the company which delivers them seventy-two hours without charge, and may then be placed upon the unloading track of the institution, where they may remain without charge for a period of forty-eight hours. The regulation makes no distinction between cars shipped to state institutions and those to other consignees, and cannot be held to be unreasonable and invalid because of unjust or illegal discrimination.

Seventh. It is the duty of a common carrier to receive the freight delivered to it and to transport it to its destination with a reasonable degree of diligence; and when it is loaded in bulk and by the car load, to set the car upon a side track with reasonable promptness that it may be unloaded by the consignee, and if for its own convenience the carrier holds the cars which have been delivered to it for transportation until it has several cars which should have been previously transported and delivered by it to the consignee, and then delivers all of

the cars at one time, its rule requiring such cars to be unloaded within forty-eight hours after their arrival and after they were placed upon a side track where they could be safely and conveniently unloaded, would be unreasonable, and demurrage charges for detention of the cars beyond that period of time could not be enforced.

Before a railway company can enforce its regulations as to the unloading of freight from its cars, it must itself have performed the duties imposed upon it by law relating to the transportation and delivery of the cars containing the freight; and if for its own convenience, or economy in transporting the same, it holds cars which are delivered to it for transportation until it has a number for the same consignee, and then delivers all at the same time, it has failed to perform the duty imposed upon it as a common carrier in the transportation and delivery of freight entrusted to it for carriage, and cannot be heard to complain if, because of its own act, such cars are not unloaded within the time fixed in its regulations. In other words, it cannot by the delivery of cars in that manner impose upon the consignee thereof a greater burden in the unloading of the same than could be imposed upon such consignee by the delivery of the cars at the time and in the manner in which they should have been delivered by the carrier.

Eighth—As to the ninth question submitted, it is only necessary to add to what is said in the third paragraph of this opinion, the further statement that, after cars consigned to a public institution have been placed upon a private track for unloading, the railway company has no right to remove such cars because the superintendent of the institution to which they were consigned, fails or refuses to pay demurrage charges. The account of such charges should be sent to the proper state authorities and be audited and paid in the same manner as other bills of like character.

If an attempt should be made upon the part of the railway company to retake possession of the cars before the same are unloaded, and remove them from the side track where they were placed for the convenience of the consignee, an injunction would lie to prevent such removal.

Ninth.—The tenth question submitted has been answered by what has been said in the previous divisions of this opinion. All bills for demurrage charges should be properly sworn to, endorsed by the officer in charge of the state institution, and passed upon by the board of control, before payment is made thereon.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

July 1, 1904.

TO THE HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

FISH WAYS—CONSTRUCTION OF—It is held that fishways over dams across streams in this state shall be constructed to afford a free passage for fish up and down the stream while the water is running over such dam.

HON. GEO. A. LINCOLN,

Cedar Rapids, Iowa.

DEAR SIR—I am in receipt of your favor of the 9th inst. calling my attention to your letter of May 20th asking whether in the construction of fishways over dams across streams in this state you can compel the owners of the dams to place the fishway so that the top of the fishway will be even with the top of the dam.

In reply will say that section 2548 of the code, with which you are familiar, provides that fishways shall be constructed in such way as to afford a free passage for fish up and down any stream in which there is a dam while the water is running over such dam. Under the provisions of this section it appears to have been the intent

of the legislature that the fishways over the dams across streams in the state may be so constructed that when the water flows over the top of the dam it shall afford facilities for the free passage of fish over the dam. This means that the bottom of the fishway may be placed on a level with the top of the dam so that the water running over the dam will enter the fishway and thus afford a facility for the passage of fish.

Under the present law you cannot, in my judgment, compel the construction of fishways which require the cutting down of any portion of the dam. The owner of the dam has the right to maintain it at its full height along its entire length, the only requirement of the statute being that he shall construct a fishway over such dam which shall permit the passage of fish whenever the water runs over the top of the dam. This means that the bottom of the fish way shall be brought on a level with the top of the dam so that the water will enter such fish way at any time when it is of sufficient height to flow over the dam.

I am, Yours very truly,

CHAS. W. MULLAN,
Attorney-General of Iowa.

July 12, 1904.

BOARD OF MEDICAL EXAMINERS—POWER TO REVOKE CERTIFICATES TO PRACTICE—Section 2579 of the code exempts from examination physicians who were in practice in this state for five consecutive years prior to the enactment of Chapter 104 of the laws of the Twenty-first General Assembly.

DR. F. W. POWERS,
President State Board of Medical Examiners,
Waterloo, Iowa.

DEAR SIR—I am in receipt of your favor of the 9th instant calling my attention to your request of May 26th for an opinion as to the power of the state board of

medical examiners to compel Dr. Fullian of Muscatine to appear before the board and submit to an examination as to his competency to practice medicine in the state. In response to such request I submit the following opinion:

The facts, as I gather them from the evidence before me, are in substance these: Dr. Fullian was a practicing physician and surgeon at Muscatine, Iowa, prior to the enactment of chapter 104 of the laws of the twenty-first general assembly, and had been in the practice of medicine at that place for more than five years prior to the passage of that act. After chapter 104 of the acts of the twenty-first general assembly became a law, Dr. Fullian presented evidence to the state board of medical examiners that he had been engaged in the practice of medicine and surgery at Muscatine, Iowa, for more than five years prior thereto, and upon the evidence so presented the state board of medical examiners issued him a certificate authorizing him to practice medicine within the state. Dr. Fullian was not required by the board to take an examination as to his qualifications, and the certificate was issued upon the ground that he came within the exception provided in section 2579 of the code, which exempts physicians who have been in practice in this state for five consecutive years, three of which shall have been in one locality, from the examination required by the act of the twenty-first general assembly.

Since the certificate was issued to Dr. Fullian, charges were preferred against him of immorality and incompetency. He was acquitted by the state board of medical examiners upon the charge of immorality, and the charge of incompetency was continued for further hearing.

The question which now arises is, whether Dr. Fullian can be compelled to appear before the state board of medical examiners and submit to an examination as to his competency to practice medicine within the state; and if he fails to appear and submit to such examination, has the board power to revoke his certificate because of such failure.

As has been suggested, Dr. Fullian was, at the time that he made his application to the state board of medical examiners for a certificate authorizing him to practice medicine within the state, exempted from examination by the provisions of section 2579 of the code, which was enacted as section 8 of chapter 104 of the laws of the twenty-first general assembly. If he was a man of good moral character, and had been engaged in the practice of medicine within the state for the time required by statute, and no question as to his competency was then raised, he was entitled to a certificate without examination. If at that time any question as to his competency had been raised before the board, it would undoubtedly have had the power to have inquired into his knowledge and qualifications, and to have subjected him to an examination before issuing to him a certificate authorizing him to practice medicine within the state.

Such course, however, was not pursued by the board, and the certificate appears to have been issued solely on the ground of his previous practice.

Section 2578 of the code, which was enacted as section 7 of chapter 104 of the laws of the twenty-first general assembly, provides:

> "The board of medical examiners may refuse to grant a certificate to any person otherwise qualified who is not of good moral character, and for like cause, or for incompetency or habitual intoxication or upon satisfactory evidence by affidavit or otherwise, that a certificate has been granted upon false and fraudulent statements as to the graduation or length of practice, may revoke a certificate by an affirmative vote of at least five members of the board * * * ."

This statute clearly gives the board power to revoke a certificate issued by it where the person to whom such certificate is issued is found to be incompetent, and this construction is sustained in the case of *State v. Mosher*, 78 Iowa, 321. But before any action can be taken by the board, the person whose certificate is sought to be revoked

must be notified to appear before the board at such reasonable time and place as shall be fixed, and to show cause why his certificate should not be revoked upon the ground of incompetency.

Upon his appearance before the board in obedience to such notice, an issue is made which must be tried and determined by the board. The issue so raised is, whether the person whose certificate is sought to be revoked is incompetent to practice medicine within the state, and it must be tried and determined in substantially the same manner as any other issue of fact which arises in the courts of the state; that is, the burden of proof to establish the charge of incompetency rests upon the person or persons making the same, and it must be established by a preponderance of the evidence. It is within the power of the board to determine how such issue shall be tried and the character of evidence which will be received in support or in defense of the charge; that is, it may accept evidence in the form of affidavits, or may require the attendance of witnesses and their oral testimony or written depositions. The person whose certificate is sought to be revoked is a competent witness for himself, and if present at the hearing may be called and examined either by the person who has preferred the charges or by the board as to his competency.

There is no provision of statute, however, which permits the board to require the person whose certificate is sought to be revoked to appear before it and submit to an examination, or have his certificate revoked in case of his failure to do so. Such certificate can only be revoked upon a hearing before the board, of which the physician has been given due notice, and upon trial of the issue as hereinbefore set forth.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

July 12, 1904.

SAVINGS BANKS—RIGHT TO SELL, DISCOUNT AND MAKE LOANS UPON COMMERCIAL PAPER—A savings bank may lawfully loan its funds to persons who are non-residents, and accept foreign securities on such loans. The only limitation is that such banks shall not discount paper or make loans upon the shares of their capital stock.

Sir—I beg to acknowledge the receipt of your favor of the 8th instant requesting my opinion upon the following questions:

1. Can a savings bank loan its funds to individuals on notes and accept as collateral security therefor the notes of a third party secured by mortgage on real estate in other states?

2. Can savings banks make loans to non-residents, secured by personal endorsement or by any collateral which the bank considers good?

3. The bank in question extends credit to the full limit, to-wit: twenty thousand dollars; the capital stock of said bank is one hundred thousand dollars; some of the concerns to which this credit has been extended frequently discount commercial paper with said bank. Should some of this discounted paper not be paid when due, can the bank extend the time of payment, with the consent of the endorser, without increasing the liability of said endorser who has already credit to the full limit? Or if such discounted notes should not be paid when due, can the bank accept new notes of the debtor, endorsed by the customer, and accept the collateral security of such customer and endorser without violating the provisions of section 1870 of the code?

These questions will be considered in the order stated:

First. Subdivision 5 of section 1850 provides that savings banks may discount, purchase, sell and make loans upon commercial paper, notes, bills of exchange,

drafts or other personal or public securities, but shall not purchase, hold or make loans upon shares of its capital stock.

A savings bank, organized under the laws of this state, undoubtedly has the power to loan money upon any security which its officers may see fit, except as restricted by statute. The only restriction placed upon such banks by the statute, as to their power to discount, purchase, sell and make loans upon commercial paper, notes, bills of exchange, drafts or other public securities, is that they shall not purchase, hold or make loans upon the shares of their capital stock. In all other respects the officers and agents of the bank are free to exercise their best judgment in discounting or purchasing commercial paper, or in making loans upon personal or public securities. There is no restriction preventing loans being made to persons who are non-residents of the state, nor is there any restriction as to the character of collateral security which may be taken for such loans. Where a loan is made to an individual, it is within the power of the bank to take notes secured by mortgages upon real estate as collateral to such loan, and there is no provision of the statute which prohibits the bank from accepting notes secured by a mortgage upon land which is not within the state of Iowa as collateral.

It therefore follows that a loan of the funds of savings banks, organized under the laws of this state, may be lawfully made to persons who are residents of other states, and that the bank may take and receive, as collateral security for such loans, notes and mortgages upon land situated in other states.

It is suggested in your communication that this method of making loans and of taking securities may be used for the purpose of evading the provisions of subdivision 4 of section 1850. The answer to such suggestion is, if the bank examiner of the state finds that loans have not been made in good faith under the provisions of subdivision 5

of section 1850 of the code, or that an attempt has been made to evade the provisions of subdivision 4 of that section, the auditor of the state should require such loans to be so adjusted as to comply with the provisions of the statute.

Second. The conclusion reached upon the first question submitted is an answer to the second, and it is sufficient to say that under the statute savings banks may make loans to non-residents, which are secured by personal endorsement or by collateral security which the officers of the bank consider good.

Third. In reaching a correct conclusion upon the third question, it is necessary to keep in mind the clear distinction between the liability of a borrower and that of an endorser. A borrower is absolutely and primarily liable for the amout which he borrows. He owes the debt directly to the bank making the loan, without condition, and is personally obligated to pay the same at its maturity.

The liability of an endorser is a secondary and conditional liability which can only become absolute in case of the default of the maker of the note, upon which the endorsement is made, to pay the same at its maturity, and upon notice to the endorser, within the time prescribed by law, of the failure of the maker to pay the note when due. In the one case an indebtedness is created by the loan made by the bank to the borrower, and at the time such loan is made; in the other, no indebtedness is created by the endorsement until the maker of the note has defaulted in its payment, and the notice required by law been given to the endorser. A borrower agrees that he will repay the loan at the time fixed in the contract; an endorser agrees that he will pay the amount of the note which he discounts if the maker thereof fails to pay the same and notice of such failure is given to the endorser within the time required by law. He is not a borrower and his contract is not a borrower's contract.

Although a borrower may have reached the full limit of his credit at a savings bank, that fact does not prevent him from entering into a contract as an endorser, and discounting or selling to the bank commercial paper upon which such endorsement is made; and the discount or purchase of commercial paper by the bank, with the endorsement of the borrower thereon, is not a violation of the statute which limits the amount which can be loaned to any one person by the bank.

No reason, therefore, exists why the bank may not extend the time of payment upon the paper which it discounts, with the consent of the endorser, as such extension does not increase the amount of his absolute liability to the bank. Nor does any reason exist why, if the discounted notes are not paid when due, the bank may not accept new notes from the makers thereof, endorsed by the customer who had discounted the former notes, with such other collateral security as the bank may see fit to take from its customer.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

July 14, 1904.

HON. B. F. CARROLL,

Auditor of State.

APPROPRIATIONS—Construction of Chapter 177 of the Acts of the Twenty-ninth General Assembly.

SIRS—In response to your inquiry as to how the annual appropriations made to the Iowa State College of Agriculture and Mechanic Arts and other educational institutions of the state by the Twenty-ninth General Assembly should be paid from the state treasury, I submit the following opinion:

The legislature, by an act which appears as chapter 177 of the Laws of the Twenty-ninth General Assembly, fixed

the beginning and ending of the fiscal year of the state upon July 1st and June 30th, and provided that when annual appropriations are made payable quarterly, the quarters shall end with September 30th, December 31st, March 31st and June 30th. The act also provides that annual appropriations thereafter made shall be disbursed, in accordance with the provisions of the acts granting such appropriations, pro rata from the time such acts take effect to the first day of the succeeding quarter.

The effect of this act of the legislature is to fix the times when annual appropriations made to state institutions, which are payable quarterly, can be drawn from the state treasury, and also to fix the amount of the first quarterly installment which can be paid at the end of the first quarter after the act granting the appropriation goes into effect.

The twenty-ninth general assembly, by the act which appears as section 1 of chapter 183, made an annual appropriation of $35,000 for additional support fund to the Iowa State College of Agriculture and Mechanic Arts, and also the further sum of $10,000 as an annual appropriation to the experiment station of such college. The act by which such appropriations were made became a law on the 15th day of April, 1902.

Under the provisions of chapter 177 of the laws of the twenty-ninth general assembly, the appropriations thus made to the College of Agriculture and Mechanic Arts, and to the experiment station, became effective on the 15th day of April, 1902. These appropriations are payable quarterly, and the first quarterly installment thereof became payable on the first day of July following the taking effect of the act granting the appropriations. The amount of the quarterly installment which that institution was then entitled to draw from the state treasury is fixed by the provisions of chapter 177 of the laws of the twenty-ninth general assembly, and is the proportion of the whole amount of the first quarterly installment

which the period of time from the 15th day of April to the first day of July bears to the entire quarter beginning on the first day of April and ending on the 30th day of June following. Thereafter one-fourth of the entire amount of such appropriations becomes payable at the end of each succeeding quarter; that is, one-fourth of such appropriations is payable on the 30th day of September, one-fourth upon the 31st day of December, one-fourth upon the 31st day of March, and one-fourth upon the 30th day of June following, and so on as long as the annual appropriation continues.

The same rule must be applied to the annual appropriation of $50,000 made to said College, and $15,000 made to the experiment station thereof, by the thirtieth general assembly; that is, the proportion of the first quarterly installment of such appropriations which the period of time from April 13th to July 1, 1904, bears to the entire quarter beginning April 1st and ending June 30th, may be drawn by the institution on the first day of July, 1904.

The construction placed upon these appropriation acts of the legislature is applicable to the annual appropriations made by the legislature to the other state educational institutions which are, by the terms of the act, payable in quarterly installments.

By section 2 of chapter 183 of the acts of the twenty-ninth general assembly, an annual appropriation of $35,000, is made to the State University for additional support, to be paid in quarterly installments on the order of the board of regents, the first installment to be payable on the first day of September, 1902. Under this provision of the act making the appropriation, and the law as enacted by chapter 177 of the acts of the twenty-ninth general assembly, the pro rata proportion of the first quarterly installment of the appropriation should be credited to the University on the first day of July following the act of the twenty-ninth general assembly. Such installment, however, is not payable, nor is the Univer-

sity entitled to draw the same from the state treasury, until the first day of September. The second quarterly installment of the appropriation should be credited to the University on the first day of October, but the same is not payable, nor is the University entitled to draw the same from the state treasury, until the first day of December following; and the other quarterly installments of such appropriation thereafter become payable on the first days of March and June.

The apparent purpose of the legislature in fixing the time when these appropriations may be drawn from the state treasury, was to make the respective quarterly installments payable at different dates, in order to prevent a depletion of the treasury by a large draft upon the same at the end of each quarter.

In the case of the annual appropriation made by the twenty-ninth general assembly to the State Normal School, the payment of the first quarterly installment is deferred until October 1st. Credit for the pro rata amount of such first quarterly installment should be given the institution on the first day of July following the appropriation act; but, for the reasons suggested, the legislature has seen fit to fix October 1st as the time when such institution can draw the amount from the state treasury. The result is that under the statute the pro rata proportion of the first quarterly installment, and the second quarterly installment of the appropriation, are payable at the same time and may be drawn from the state treasury by such institution on the first day of October.

I have procured a computation to be made upon the appropriation act of the twenty-ninth general assembly, which is based upon the construction given that act as governed by chapter 177 of the laws of that general assembly, and find that the State College of Agriculture and Mechanic Arts is entitled to draw from the state treasury under the annual appropriation granted by the twenty-

ninth general assembly for additional support from April 15, 1902, to July 1, 1904, $77,291.67; and for the experiment station for the same period of time, $22,083.33; that the State University is entitled under the appropriation act of the twenty-ninth general assembly to draw for additional support from April 1, 1902, to July 1, 1904, $77,291.67; and that the State Normal School, under the same act and for the same period of time, is entitled to draw for the payment of teachers the sum of $16,562.50, and for contingent expenses $11,041.67.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

July 15, 1904.

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

TO THE HONORABLE B. F. CARROLL,
Auditor of State.

LEGISLATION—ESSENTIALS FOR A VALID LAW UNDER THE CONSTITUTION OF THE STATE OF IOWA—A joint resolution passed by the legislature with all the formalities of a bill, is not a law under the Constitution of Iowa.

SIRS—In compliance with your request of the 7th instant for an opinion upon the questions therein submitted, viz.:

1. Is the joint resolution (joint resolution No. 9 of the 30th general assembly) specified merely advisory and without legal effect, or is it to be given effect as a law of the general assembly?

2. Are we required to fix the wages of employees in our office at the respective sums specified in the resolution so far as practicable, or do we have authority to fix wages either above or below the sum specified in the resolution, as shall seem right to us?

I beg to submit the following:

An examination of the journals of the senate and house of the thirtieth general assembly discloses that joint res-

olution No. 9 was introduced in the house by the committee on retrenchment and reform on the 8th day of April, and was then read the first and second times, ordered printed in the journal, and placed on the calendar without reference to a committee. It then bore the title, "House Joint Resolution No. 9 by Committee on Retrenchment and Reform, fixing the number and compensation of employees in the department of the state at the seat of government". It was called up on the 9th day of April, three amendments were then made to it, it was read a third time and placed upon its passage. On the question of its passage the yeas and nays were called, fifty-two members of the house voting in the affirmative and twenty-one in the negative. The entry in the house journal is, "So the joint resolution was adopted and the title was agreed to".

It was on the same day messaged to the senate, read a first and second time, and referred to the sifting committee. It was then taken up for consideration and substituted for joint resolution No. 8 of the senate. Several amendments were made to the resolution by the senate, it was read a third time, and upon its passage the yeas and nays were called, thirty-five members of the senate voting in the affirmative. The entry in the senate journal is, "So the joint resolution having received a constitutional majority was declared to have passed the senate and its title agreed to".

It was messaged back to the house on the 11th day of April with the senate amendments and on the question, "Shall the house concur in the senate amendments", the yeas and nays were called and sixty-five members of the house voted in the affirmative. The house journal recites, "So the house concurred in the senate amendments"; the resolution was enrolled on the 12th day of April, and signed by the president of the senate and speaker of the house and approved by the governor on the 13th day of April.

It will thus be seen that the resolution was enacted with all the formalities of a bill so far as the action of the house and senate was concerned, and the question arises: Is a joint resolution passed by the legislature with all the formalities of a bill, a law under the constitution of the state?

To determine this question, it is necessary to take up the provisions of the constitution of the state, and ascertain the exact power of the legislature under that instrument in enacting a valid and subsisting law.

Section 1 of article 3 of the constitution provides:

> "The legislative authority of this state shall be vested in a general assembly which shall consist of a senate and house of representatives, and the style of every law shall be, *'Be it enacted by the general assembly of the State of Iowa.'* "

Section 15, provides:

> "Bills may originate in either house, and may be amended, altered, or rejected by the other; and every bill having passed both houses shall be signed by the speaker and president of their respective houses."

Section 16 provides:

> "Every bill which shall have passed the general assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not he shall return it with his objections to the house in which it originated, which shall enter the same upon their journal and proceed to reconsider it * * * * * ."

Section 29 provides:

> "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title * * * * * * ."

These provisions of the constitution prescribing the form and mode by which, through the concurrent action of the legislative branch of the state valid and binding laws are enacted, are in the highest sense mandatory and

no act or will of the legislature can become a law unless expressed in the manner and form provided by the constitution.

It is said by Mr. Justice Cooley in his work on Constitutional Limitations, 6th edition, 93:

> "Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is a province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not therefore to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end."

Again it is said by Mr. Cooley on Constitutional Limitations, 6th edition, 155:

> "But when the legislative power of a state is to be exercised by a department composed of two branches, or, as in most of the American states, of three branches, and these branches have their several duties marked out and prescribed by the law to which

> they owe their origin, and which provides for the exercise of their powers in certain modes and under certain forms, there are other questions to arise than those of the mere intent of the law-makers, and sometimes forms become of the last importance. For in such case not only is it important that the will of the law-makers be clearly expressed, but it is also essential that it be expressed in due form of law; since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential."

In passing upon a question identical with the one under consideration, the supreme court of Illinois in *Burritt v. Commissioner of State Contracts,* 120 Illinois, 333, said:

> "If the various constitutional provisions respecting the form, component parts, elements and mode of procedure, in and by which the legislative will and executive consent ultimately become a valid and binding law, are mandatory in their character, and so connected and interwoven with the exercise of the legislative and executive power and authority as to be essential and indispensable parts thereof, as we hold they are, then it follows that this resolution cannot be held to be a law. It is not the will of the people, constitutionally expressed, in the only mode and manner by which that will can acquire the force and vitality, under the constitution of law, for this legislative act is without a title, has no enacting clause, is not signed by the speakers of both houses, or either house, has not the signature and approval of the executive, nor is there anything from which it can be seen that it falls within the cases where a legislative act, in other respects constitutional, may become a law without executive approval; and, although, in the passage and adoption of this resolution, every other constitutional requirement may have been observed, the absence of those enumerated is

sufficient to deprive this expression of the legislative will of the force and effect of law; and the same did not become, therefore, and is not, legally binding upon the respondents."

The language of the constitution of Illinois whereby it prescribes the manner and mode of the enactment of a law by the legislature, is identical with that of Iowa, and provides that the style of every law shall be, "Be it enacted by the general assembly of the State of Illinois"; and in the case cited, the supreme court of that state holds that no expressed will of the legislature can become a law of the state without the essential enacting clause prescribed by the constitution.

Every act of the legislature of this state must have the enacting clause provided by the constitution to make it a valid law, and no bill or resolution or other form of the expressed will of the legislature can become a valid and subsisting law of this state without such enacting clause.

It is undoubtedly within the power of a legislature to adopt joint or concurrent resolutions for the government of such body, or the expression of its will upon administrative matters, and such resolutions do not require either the signature of the president of the senate, the speaker of the house of representatives, or of the governor to make them valid for such purpose; such resolutions are not however laws of the state, and are not binding upon anyone except the members of the legislature and the administrative officers of the state.

It is true that an enactment in the form of a joint resolution is recognized in the congress of the United States, and in the legislatures of some of the states as a valid law; but the constitution of the United States and those of the states in which such form of enactment is so recognized, provide that a law may be enacted in the form of a joint resolution, and such resolution is there regarded as a bill under the constitutional provisions. No such provision is found in our constitution and it contains but

one reference to a resolution of any character, which occurs in section 10 of article 3 in the following connection:

> "Every member of the general assembly shall have the liberty to dissent from or protest against any act or resolution which he may think injurious to the public or to individuals, and have his dissent entered on the journals * * * ."

This recognition of the power of the legislature to adopt a resolution cannot he held to give it authority to enact a general law except in the form and mode fixed by the other provisions of the constitution.

As suggested, there is no provision of the constitution authorizing or requiring the governor to sign or veto any resolution passed by the legislature. It is not an act of the legislature which requires his signature under the constitution, or which he is required to return to the legislature with his reasons for not signing the same; if he desires to exercise his right of veto. If such a resolution should be presented to him for his signature and he should return the same to the house from which it originated, stating as his reason for not signing the same that he was not authorized to do so under the constitution, such a refusal on the part of the governor would have no effect on the validity of the resolution. It would still be the expression of the will of the legislature and binding upon that body and upon its administrative officers, but would not have the force or effect of a law; and the fact that the governor's signature was attached to the resolution under consideration adds nothing to its force or validity.

In the City of *San Antonio v. Micklejohn,* 89 Texas, 79, it is said:

> "A legislative body may in that form express an opinion. May govern its own procedure within the limitations imposed by the constitution, and in acts of ministerial function, may direct the departments; but it cannot adopt that form of procedure in making laws where the power which created it has commanded that it legislate in a different form."

The legislature of our state is a creature of and created by the constitution; and where that instrument provides the form and manner in which the creature of its creation shall enact valid and subsisting laws, such laws cannot be enacted in any different manner or form than that commanded by the constitution.

The resolution under consideration was reported to the thirtieth general assembly under section 182 of the code which provides:

> "It (the committee on retrenchment and reform) shall report to the general assembly a joint resolution fixing the number of employees and the salary of each for the several officers, boards, commissions, and departments for the ensuing biennial period, and recommend such appropriation and legislation as shall promote public interests and an efficient and economical administration of the affairs of the state."

The adoption of this resolution by the legislature without further enactment by that body did not fix the number of employees in the different departments of the state or the salaries to be paid to each. It was simply an expression of the will of the legislature that the number of employees named in the joint resolution should be employed in the departments of the state, and that each should receive the salary therein designated, and amounted to a recommendation to the legislature to enact a law so fixing the number of employees and the salaries thereof. That this was the view that was taken of the resolution by the general assembly is shown by the fact that after such resolution was adopted, that body enacted senate file 344, which appears as chapter 146 of the laws of the thirtieth general assembly by which the appropriations recommended by joint resolution No. 9 are made for the purposes specified in such resolution, except that the amounts recommended to be appropriated for the board of control are not included in the appropriation bill.

The resolution taken in connection with chapter 146 is undoubtedly binding upon all the officers and employees at the seat of government so far as the same are named or referred to in the joint resolution and in chapter 146 of the laws of the thirtieth general assembly, and the question which now presents itself for determination is: If such resolution and the law making the appropriations in conformity therewith are binding upon the departments of the state named therein, are not the same equally binding upon the board of control?

To answer this question it is necessary to refer to the acts of the twenty-seventh general assembly creating such board. Section 3 of chapter 118 of the acts of the twenty-seventh general assembly provides that

> "The board shall be provided by the proper authorities with suitably furnished offices at the seat of government, and shall employ a competent secretary who shall receive a salary not to exceed $2000.00 per annum, and may also hire a stenographer and such other employees as may be necessary * * ."

Section 4 provides:

> "There shall be appropriated from any funds in the state treasury, a sufficient amount to pay the salaries of such employees and the expenditures of the board authorized by the act."

This law went into effect on the 29th day of March, 1898, and was in force and effect at the time joint resolution No. 9 and chapter 146 of the laws of the thirtieth general assembly were enacted. There was no necessity for the Committee on Retrenchment and Reform to fix the number of employees and the salaries each should be paid in the office of the board of control, as the legislature had theretofore authorized the board to employ such clerks and employees as were required to perform the work of that office, and to pay to them such salaries as in the judgment of the board should be proper and adequate for the services performed. It will be observed that no appropria-

tion of money was made by the thirtieth general assembly to pay any of the salaries of the employees in the office of the board of control designated by joint resolution No. 9. Such an appropriation was unnecessary as the general appropriation for such expenses was made by section 4 of chapter 118 of the laws of the twenty-seventh general assembly.

It may be suggested that section 182 of the code was in force at the time of the enactment of chapter 118 of the laws of the twenty-seventh general assembly and has remained in force since that time; and that under its provisions it was the duty of the Committee on Retrenchment and Reform to report to the general assembly the number of employees and the salary to be paid to each, in the office of the board of control. It is, however, a well settled rule of legislation that where there is a specific act of the legislature covering a particular subject, general statutes relating to the same subject, if repugnant to the special act, must give way and the special statute will control. The provisions of section 182 are general. Chapter 118 of the acts of the twenty-seventh general assembly is a special law creating the board of control and specifically defining its duties and powers. If, therefore, any of the provisions of sections 3 and 4 of that act are repugnant to the provisions of section 182 of the code, the former general enactment of the legislature must give way to the later special act of that body and the provisions of section 3 and 4 of chapter 118 of the laws of the twenty-seventh general assembly will control.

These provisions, as has been suggested, authorize the employment by the board of control, of persons necessary to carry on the work of that board, and to fix the salary to be paid to each; and unless the provisions of these sections are amended or appealed by joint resolution No. 9, they will stand and control the action of the board in employing and fixing the compensation of persons required to carry on the work of that department.

No citation of authority is necessary to establish the proposition that it takes a law to repeal a law. The act which destroys should be on equal dignity with that which creates or establishes.

As we have seen, a joint resolution is not a law under the constitution of our state, and the statute of the state can neither be repealed nor amended by a joint resolution of the general assembly. It therefore follows that the joint resolution under consideration in no way alters, changes, or repeals the provisions of sections 3 and 4 of chapter 118 of the laws of the twenty-seventh general assembly; and that the provisions of that chapter being special in their nature, must control as against the provisions of any general law previously enacted by the legislature. That by chapter 118 of the laws of the twenty-seventh general assembly the board of control is authorized to employ the necessary employees to carry on the work of its office, and to pay them such compensation as shall be proper for the service performed by them, and that such authority is not revoked or abridged by joint resolution No. 9 of the thirtieth general assembly.

So far as the board of control is concerned the provisions of such resolution are advisory only and must be held simply to be an expression of the opinion of the Committee on Retrenchment and Reform and of the legislature as to the number of employees that should be employed and the salary which should be paid to each.

In the employment of persons necessary to carry on the work of the board, and in fixing the compensation which should be paid to such employees, it must be governed by the provisions of chapter 118 of the laws of the twenty-seventh general assembly, and not by joint resolution No. 9 of the thirtieth general assembly.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

July 26, 1904.

TO THE HON. BOARD OF CONTROL OF STATE INSTITUTIONS.

APPROPRIATIONS—LOUISIANA PURCHASE EXPOSITION—Construction of Chapter 164 of the laws of the Thirtieth General Assembly.

DEAR SIR—I am in receipt of your favor of the 14th instant requesting my opinion as to when the $20,000.00 appropriated by the thirtieth general assembly for the use of the Iowa commission of the Louisiana purchase exposition becomes available, and when the same can be drawn from the state treasury. In response to such request I submit the following opinion:

The twenty-ninth general assembly appropriated $125,000.00 in a gross sum for the purpose of making an exhibit and representation by the state of Iowa at the Louisiana purchase exposition. One-half of the sum so appropriated became available on the 16th day of April, 1902, and the other one-half on the 30th day of June, 1904.

Of this appropriation, the Louisiana purchase exposition commission designated and set apart for the different departments of exhibits, the following sums:

Agriculture	$ 7000.00
Horticulture	5000.00
Live stock	9000.00
Dairy and apiary	3000.00
Lights, fuel and insurance	2500.00
Contingent fund	3900.00
Minerals and geology	3000.00
Manufacturing and machinery	4000.00
Ice and water	500.00

Doubts appear to have arisen as to whether the appropriation made by the twenty-ninth general assembly would be sufficient to pay the expenses incurred in making the exhibits at the Louisiana purchase exposition, and the further sum of $20,000.00 was appropriated for that purpose by the thirtieth general assembly, and may be used by the commission upon certain conditions and contingencies. The act by which such appropriation is made

appears as chapter 164 of the laws of the thirtieth general assembly, and that portion of it upon which the question under consideration arises, is as follows:

"Section 1. Appropriation. The sum of Twenty Thousand Dollars ($20,000) or so much thereof as may be needed by the Louisiana purchase exposition commission for the purpose of making an exhibit and representation by the state of Iowa at St. Louis, as provided in chapter one hundred and ninety-five (195) of the laws of the twenty-ninth general assembly, in addition to the sum thereby appropriated, is hereby appropriated out of any money in the state treasury not otherwise appropriated, to be drawn, expended and reported as provided in said chapters except as hereinafter provided.

Sec. 2. How Apportioned—When available. The said Twenty Thousand Dollars ($20,000) shall be apportioned and set apart for the following departments and specific purposes:

For agriculture	$ 4000.00
For horticulture	4000.00
For live stock exhibit.....	3000.00
For dairy and apiary	1000.00
For lights and insurance	1200.00
For emergency contingent fund....	2500.00
For mineral and geology	1500.00
For manufacturing and machinery.	1500.00
For additional salaries for 1 mo...	800.00
For ice and water.....	500.00

And no part of this appropriation shall become available until the respective specific amounts heretofore set apart by the commissioners of the Louisiana purchase exposition from the appropriation made by the twenty-ninth general assembly, for the above purposes, shall have been exhausted."

The language of this statute is not as clear as could be desired, but under a fair interpretation of all of its provisions, it may be said there exist three distinct expressions of the legislative will:

1. An appropriation by the legislature of the sum of $20,000.00 for the purpose of meeting the expenses of the Iowa exhibit at the Louisiana purchase exposition.

2. A direction by the legislature as to how the sum appropriated should be apportioned among the different departments by the commission.

3. A provision that no part of the appropriation shall become available until the amounts of the $125,000.00 appropriated by the twenty-ninth general assembly set apart by the commissioners for the different departments are exhausted.

Any difference of opinion as to the construction to be given this statute arises from the meaning which attaches to the words "respective specific amounts" as used in section 2 of the act. The word "respective" is a synonym for "each" when used in the sense in which it is used by the legislature in this statute. Substituting the word "each" for that of "respective", the provision of the act under consideration would then read, "and no part of this appropriation shall become available until each of the specific amounts heretofore set apart by the commission of the Louisiana purchase exposition from the appropriation made by the twenty-ninth general assembly, shall have been exhausted".

If the restrictive provision of this statute were in these words, no question could arise as to the construction which should be given it.

It would be clear that the legislature did not intend to authorize the commission to use any portion of the $20,000.00 until each of the amounts set apart for respective departments was exhausted. As the word "respective" used by the legislature has exactly the same

meaning as the word "each" if used in the same connection, this provision of the statute must be held to restrict the right of the commission to withdraw from the state treasury, or use any portion of the $20,000.00 appropriated by the thirtieth general assembly until each of the amounts set apart by the commission for the different departments is exhausted.

It may be suggested that the recognition of the legislature of the act of the commission in setting apart for the different departments certain portions of the $125,000.00 appropriated by the twenty-ninth general assembly, gives to such departments the absolute right to the sums so set apart to them and prevents any re-adjustments of the appropriation made by the twenty-ninth general assembly. A careful reading of the act of the thirtieth general assembly will show that there is no such recognition by the legislature of the act of the commissioners in apportioning such appropriation as prevents a re-adjustment or re-apportionment thereof whenever it becomes necessary.

The language of section 2 of the act of the thirtieth general assembly is, "The said $20,000.00 shall be apportioned and set apart for the following departments and specific purposes".

No apportionment or setting apart is made by the legislature; that duty is imposed by the terms of the act upon the commissioners. The $20,000.00 is appropriated as a gross sum and it is the duty of the commissioners to divide and set apart the same in the sums and for the purposes specified in the act whenever necessity for such division arises. And such necessity can only arise when the former appropriation has been exhausted.

While the construction which I have placed upon this statute is not entirely free from doubt, my conclusion is that no part of the $20,000.00 appropriated by the thirtieth general assembly is available or can be used by the commissioners of the Louisiana

purchase exposition in defraying the expenses of the Iowa exhibit until all of the amounts apportioned and set apart by the commissioners from the $125,000.00 appropriated by the twenty-ninth general assembly are exhausted. And that it is within the power of the commission to make such re-adjustment of the appropriation of the twenty-ninth general assembly as may be found necessary to meet the expenses incurred by the different departments.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

July 29, 1904.

To THE HON. W. W. WITMER,
Chairman of the Executive Committee of the Iowa Commission of the Louisiana Purchase Exposition.

INSANE PERSONS—An erroneous charge to a county for the cost of support of a state insane patient may be corrected on the books of the Auditor of State without a formal order from the Board of Control.

SIR—I beg to acknowledge the receipt of your favor of the 23d instant relating to the account of Ruby Watson, an inmate of the Mt. Pleasant Hospital for the insane, and asking my opinion as to whether the amount of $640.80 charged to Henry county for her support can be properly credited to that county on your books, under the facts in the case.

The question of the liability of Henry county to pay for the support of Mrs. Watson at the hospital for the insane at Mr. Pleasant came to me some time ago from the board of control, and after a full investigation of the facts, I reached the conclusion that she was a state patient and that the cost of her support in the hospital should not be charged to Henry county.

The charge of $640.80 upon your books against the county for her support is, therefore, an erroneous charge and the county should receive credit by that amount to properly adjust and balance your books. It is not necessary that you should receive any formal order of the board of control to make this correction. It stands as any other erroneous entry upon your books, and is one which you have full power to correct.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

July 30, 1904.

HON. B. F. CARROLL,
Auditor of State.

INSURANCE—PAYMEMT OF TAXES—Any foreign insurance company is required to pay into the state treasury, as taxes two and one-half per cent upon the gross amount of premiums annually received by it on all business done in this state.

SIR—In response to your favor of the 19th of May asking my opinion upon the following questions:

1. Is the Conservative Life Insurance Company of Los Angeles, California, legally obliged to pay taxes upon the gross premiums received by it for business done in this state, including premiums received for insurance upon the lives of persons resident in this state during the year 1903?

2. Will said company be obliged to pay taxes upon subsequent premiums which may be collected in this state as long as it collects premiums and maintains a deposit in this office and is obliged by the contract of re-insurance referred to, to maintain permanent headquarters in this state?

I beg to submit the following:

First—It appears from the statement of facts in the request for an opinion, that the Conservative Life Insurance Company is what is termed an old line life insurance company organized under the laws of the state of California. In the year 1901, the company re-insured the risks of the Southwestern Mutual Life Association of Marshalltown, Iowa, and by such act of insurance came into possession of the business of that Association, took over its assets and assumed its liabilities.

In the transfer of the business and assets of the Southwestern Mutual Life Association to the Conservative Life Insurance Company, a contract was entered into whereby the Conservative Life Insurance Company obligated itself to establish and maintain a permanent central headquarters in the state of Iowa for the transaction of its Iowa business; and it also agreed to keep a permanent deposit of not less than $100,000.00 with the auditor of state in securities to be approved by him. The certificate of authority issued by the auditor of state to the company to transact business in this state was in force until the first day of April, 1903. On the second day of March of that year a request was filed by the company with the auditor for a license to be issued to Mr. Berryman of Marshalltown as agent of the company. Frequent transactions relating to insurance business were had between the insurance department of the office of the auditor of state and the agents of the company during the year 1903. During all of that time and up to the present time the deposit required by the contract between the Conservative Insurance Company and the Southwestern Mutual Life Association has been maintained with the auditor of state. A considerable number of the policies of the Southwestern Mutual Life Association are in force in this state, and the premiums upon such con-

tracts have been paid by the holders thereof to the Insurance Company under the contract between such company and the Association.

Under these facts it is clear that the Conservative Life Insurance Company of Los Angeles, California, was doing business in this state during the year 1903, and that under the provisions of section 1333 of the code it is required to pay into the state treasury as taxes, two and one-half per cent, upon the gross amount of premiums received by it on all business done in the state during that year.

Second—The second question is not of so easy solution. It involves the construction of the provision of section 1333 of the code and a determination of the power of the state to impose conditions and burdens upon foreign corporations transacting business in the state, and the application of the statute and principles of law to facts which exist at the time the collection of the tax is sought to be enforced.

A construction of the statute and an enunciation of the principles of law which govern the state in the admission of foreign corporations to its territory for the purpose of transacting business therein can of course be given, but such construction and rules of law cannot be applied to existing facts until such facts are known. It is impossible to know what facts may arise in the future bearing upon the relations of the insurance company and the state, and it is therefore not desirable at the present time that any opinion should be expressed as to the liability of the insurance company for taxes in the future when the facts upon which such liability must rest cannot now be known.

As long as the company is doing business in the state it is of course liable to pay the taxes imposed by section 1333 of the code. But it would be idle to attempt in advance to designate every fact or act of the company which would constitute doing business within the state under the statute.

When the time arrives for the collection of taxes under the provisions of the statute the question of the liability of the company must then be determined from all of the facts involved. And until that time arrives it is not, in my judgment, advisable that an opinion upon that subject be given.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

July 30, 1904.

To THE HON. B. F. CARROLL,
Auditor of State.

APPROPRIATIONS—STATE LIBRARY COMMISSION—It is held that any unexpended balance of the annual appropriation under the provisions of section 2888-h of the code supplement, must be carried over into the succeeding year and used by the Commission during that period.

SIR—In response to your request of August 3d, for a construction of the provisions of section 2888-h of the code supplement, I submit the following opinion:

While there is an apparent conflict in the language of the section referred to, I think a construction must be given its provisions which will permit any unexpended balance of the annual appropriation to be carried over into the succeeding year and used by the commission during that period. The words "and any balance not expended in any one year may be added by the commission to the expenditure for any ensuing year", which follow the clause by which an annual appropriation of six thousand dollars is made to the library commission, are in the nature of a proviso as to the amount of money which can be expended by the commission during any one year, and must be held to control the preceding provision of the section which limits the whole amount of expenses

which may be incurred and paid by the commission during any one year, to the sum of six thousand dollars.

It is a rule of construction laid down by Mr. Sutherland that where there is a conflict between two parts of an act, the provision which is latest in position controls as against a prior repugnant provision; and in support of the rule the following cases are cited:

Packer v. Sunbury R. R. Co., 19 Pa. St., 211;
Ryan v. State, 5 Neb., 276;
Gibbons v. Brittenum, 56 Miss., 232;
Harrington v. Rochester, 10 Wendall, 547;
Commercial Bank v. Chambers, 8 Sm. & M., 9;
Brown v. County Commissioners, 20 Pa. St., 37;
Quick v. Whitewater Township, 7 Ind., 570;
Albertson v. State, 9 Neb., 429;
Sams v. King, 18 Fla., 557;
Brannegan v. Dulaney, 8 Colo., 408;
Gee v. Thompson, 11 La. Ann., 657;
Peet v. Nalle, 30 Id., Pt. II, 949;
Hamilton v. Buxton, 6 Ark., 24;
Farmers Bank v. Hale, 59 N. Y., 53.

A proviso is an exception, and is usually intended to restrain the enacting clause or some provision of the act, and to except something which would otherwise be within its purview, or to in some manner modify its application; and the general intent of the act will be controlled by the particular intent subsequently expressed.

Ihmsen v. Monongahela Nav Co., 32 Pa. St., 152;
State v. Goetze, 22 Wis., 363;
Gregory's Case, 6 Co., 19 b;
Foster's Case, 11 Co., 56 b;
Rex v. Tauton, St. James 9 B. & C., 831;
Minis v. United States, 15 Pet., 445.

Under the rule laid down by these authorities the provision authorizing the commission to carry forward any unexpended balance of a previous year, and to expend the

same during any ensuing year, must be held to control the former provisions of the section, and to give the commission the right to carry forward and expend such balances, although the amount thereof added to the annual appropriation may exceed six thousand dollars in any one year.

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

August 4, 1904.
HON. G. S. GILBERTSON,
Treasurer of State.

INSURANCE—APPROVAL OF SECURITIES BY AUDITOR OF STATE—SERVICE OF PROCESS UPON FOREIGN COMPANIES—(1). An acceptance by the Auditor of State of the securities offered by any Life Insurance Company, as provided by section 1806 of the Code, is binding upon him, and upon every successor to the office. (2). The power of attorney required to be filed with the Auditor of State by a foreign insurance company may not be revoked by the company.

SIR—In response to your request for an opinion—

1. As to your right as auditor of state to review the act of your predecessor as to the approval of securities deposited with him by life insurance companies, and to reject the securities so deposited, and demand that others be deposited in lieu thereof;

2. As to the power of a non-resident life insurance company to revoke its power of attorney authorizing service of process to be made upon the auditor of state, while it has outstanding liabilities or contracts in the state;

3. As to what action, if any, should be taken by the auditor of state in relation to an attempt to revoke such power of attorney, if the same cannot be legally revoked by the insurance company—

I submit the following:

These questions will be considered in the order stated.

First—Section 1806 of the code defines the character of securities which may be accepted by the auditor from insurance companies which are required to deposit securities under the provisions of chapters 6 and 7 of Title IX of the code. When such securities are presented to the auditor by an insurance company seeking to transact business in this state, it is the duty of the auditor to ascertain whether the same comply with the requirements of section 1806. If the securities are found to comply with the provisions of that section, it is his duty to accept the same; and if they do not comply therewith, it is his duty to refuse to accept the same as a deposit made by the insurance company. This requirement of the statute imposes upon the auditor the duty of investigating the character of securities offered, and after such investigation of deciding and determining whether they comply with the provisions of the statute. Such investigation and decision upon the part of the auditor are judicial rather than ministerial acts.

If upon such investigation and determination he accepts the securities from the company offering the same, such acceptance is a decision by him that they are of the character required by section 1806, and is binding upon the auditor, and upon every successor to the office.

It is a general rule applicable to the decisions of all special officers to whom the determination of any particular matter is committed by law, that such determination, when regularly made, is conclusive and cannot be questioned or set aside except in some mode specially provided by law.

Belcher v. Linn, 65 U. S., 522;
Clinkenbeard v. United States, 88 U. S., 70;
United States v. Leng, 18 Fed. Rep., 15;
United States v. McDowell, 21 Fed. Rep., 563;
United States v. Doherty, 27 Fed. Rep., 730.

Sections 1779 and 1792 of the code provide that insurance companies and associations shall have the right at any time to change the securities on deposit by substituting a like amount of the character required in the first instance. Under the provisions of these sections it is the right of an insurance company or an insurance association to withdraw from its deposit made with the auditor of state any portion of the securities so deposited, and to substitute therefor other securities of the character required by section 1806. Such withdrawal and substitution imposes upon the auditor the duty to examine the securities sought to be substituted, and to determine whether they are of the character required by section 1806, and securities which may be deposited under the provisions of that section. The act of the auditor in determining such fact is quasi-judicial in its nature, and having been determined by him and acted upon by the insurance company or association, such question is not open to review by a successor in office.

Under the provisions of the contract entered into between the Southwestern Mutual Life Association and the Conservative Life Insurance Company of Los Angeles, California, the latter company is required to keep a permanent deposit of not less than one hundred thousand dollars with the auditor of state at Des Moines, Iowa, in such securities as shall be approved by him. The power of the auditor to approve securities deposited by insurance companies and associations is limited by the provisions of section 1806, and he has no power or authority to accept or approve any securities offered unless they fall within the class defined by that section.

The provisions of the contract, therefore, must be held to refer to the class of securities defined by section 1806 which the auditor has power under the statute to approve and accept.

Under the principles of law heretofore stated, it follows that the auditor, having approved and accepted the securities offered by the Conservative Life Insurance Company under its contract with the Southwestern Mutual Life Association, and afterwards having permitted such Insurance Company, under the provisions of sections 1779 and 1792 of the code, to withdraw the securities first deposited and to deposit others of the character defined in section 1806, his act in so doing cannot now be reviewed, nor can the Conservative Life Insurance Company be required to return the securities which were withdrawn with the consent of the auditor, or to deposit other securities in the place of those which were accepted by him upon such withdrawal.

Second—Section 1808 of the code provides:

> "Every life insurance company and organization organized under the laws of another state or country shall, before receiving a certificate to do business in this state, or any renewal thereof, file in the office of the auditor of state an agreement in writing that thereafter service of notice or process of any kind may be made on the auditor of state, and when so made shall be as valid, binding and effective for all purposes as if served upon the company according to the laws of this or any other state, and waiving all claim or right of error by reason of such acknowledgment of service. * * * ."

While this statute apparently contemplates that such agreement shall be filed by every foreign insurance company upon receiving a certificate to do business in this state, or upon any renewal thereof, I doubt the power of any such insurance company, upon a withdrawal from the state, to revoke such agreement so far as it relates to business transacted within the state during the time it was authorized to carry on its business therein.

The agreement required by section 1808 is in the nature of a power of attorney which is filed with the auditor of state authorizing service of process to be made upon him, so far as the business transacted by the insurance company in the state is concerned. That is, the statute in substance provides that every policy or contract holder of such insurance company shall have his remedy to enforce the provisions of such contract or policy within the state where it is made. The remedy thus provided by statute for the benefit of the policy holders becomes a part of the contract, and it is not within the power of the insurance company to rescind or cancel such part of the contract upon a withdrawal from the state.

That a remedy enters into and forms a material part of a contract or obligation is well settled.

Von Hoffman v. Quincy, 71 U. S., 735;
Collins v. E. Tenn., Va. & Ga. R. R., 9 Heis., 845;
Tennessee v. Sneed, 96 U. S., 69;
D'Arcy v. Mutual Life Insurance Company, 108 Tenn., 568.

In the D'Arcy case it was held under a statute similar to that of Iowa that the insurance company could not withdraw from the state and cancel or revoke a power of attorney filed with the secretary of state authorizing service of process to be made upon him, as to any business transacted by the company in the state during the time that it was authorized to do business therein. It is true that the Tennessee statute goes farther than that of Iowa, as it provides:

> "Any such company or corporation desiring to transact any such aforesaid business in this state by any agent or agents, shall file with the insurance commissioner a power of attorney authorizing the secretary of state aforesaid to acknowledge service of process for and in behalf of such company at any and all times after the company has once complied

with the laws of Tennessee and been regularly admitted, even though such company may subsequently have retired from the state or been excluded."

But I think it must be held under the Iowa statute that the agreement or power of attorney which is required by a foreign insurance company to be filed with the auditor of state relates to all business transacted by such company within the state, and cannot be revoked after a withdrawal.

Third—The purported revocation of the agreement filed in your office by the Conservative Life Insurance Company of Los Angeles, California, requires no action whatever by you. If the question of the power of the company to revoke such agreement ever arises in any action upon a policy, it must of course be determined by the court in which the question arises. So far as your department is concerned, the attempted revocation should be treated as a nullity.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

August 9, 1904.

HON. B. F. CARROLL,
Auditor of State.

INSANE—Costs and Expenses for the Care, Commitment and Transportation of an Insane Person who has no Legal Settlement within this State.

SIR—In compliance with your request of the 2d instant for an opinion as to the liability of the state to pay the cost of transporting a person who is insane to another state in which he has a legal settlement, and as to the form of vouchers and the manner in which the state shall make

payment under section 1 of chapter 78 of the acts of the thirtieth general assembly, I beg to submit the following:

First—Section 1 of chapter 78 of the acts of the thirtieth general assembly provides that the expenses of the arrest, care, investigation and commitment of an insane person who has no legal settlement within the state shall be first paid by the county in which such arrest and investigation are made. Such costs and expenses must then be duly certified by the county to the board of control for its approval, and when approved by the board the state must repay such expenses to the county.

Under the provisions of this statute no payment can be made to a county or to any officer thereof until the costs and expenses have been in fact paid by the county. When that is done the county is entitled to be re-imbursed for its expenditure. The certified vouchers should show that the county has paid the expenses incurred, and that it is simply seeking to be re-imbursed therefor. The auditor is not authorized to issue a warrant for such expenses unless it is shown that the county has actually paid the expenses and such payment has been approved by the board of control.

Second—Section 1 of chapter 78 of the laws of the thirtieth general assembly provides:

> "That in all cases where the commissioners of insanity of a county find to be insane a person who does not have a legal settlement within that county, the costs and expenses of the arrest, care, investigation and commitment of such person authorized by law, including the costs of appeal if an appeal be taken, and the person is found to be insane on appeal, shall be paid in the first instance by the county in which such person is found to be insane. * * * "

The section then further provides if the patient be found to have a legal settlement in another county in the state, the costs named shall be audited and paid by the

board of supervisors of the county in which he has such settlement; and if such person is found to have no legal settlement within the state, such costs and expenses shall be paid out of any money in the state treasury not otherwise appropriated. There is no provision made in the section for the transportation of the patient from this state to the state in which he has a legal settlement, nor is there any provision relating to the payment of the costs of such transportation. The specific naming of the costs which shall be paid by the state in case the patient is found to have no legal settlement therein, must he held to exclude all costs which are not so specified. The cost of transportation is not specifically named, and must therefore be held to be excluded.

Section 2283 of the code provides for the payment of the cost of transporting an insane person to another state in which he has a legal settlement, as follows:

> "If a patient has a legal settlement in 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 shall be itemized, sworn to and filed with the county auditor, and the same paid as other claims against the county."

It is the duty of the commissioners of insanity in each county, under this section of the statute, to cause an insane patient who has a legal settlement in another state to be removed to the place of his settlement by the sheriff, and the cost of such removal must be paid by the county as therein provided:

Chapter 78 of the acts of the thirtieth general assembly does not amend or repeal section 2283 of the

code, and the cost of transporting an insane person to the state in which he has a legal settlement must be paid by the county as therein provided.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

August 10, 1904.

HON. B. F. CARROLL,
Auditor of State.

EXECUTIVE COUNCIL—POWER TO CONVEY LAND BELONGING TO THE STATE—The Executive Council has no authority to sell or dispose of any property belonging to the state, except under the conditions and provisions of an act of the legislature.

SIRS—I am in receipt of a communication from your secretary informing me that you desire my opinion in writing as to whether the executive council has authority to convey to a city, county or other grantee, land belonging to the state, and which is a part of a lake bed within the state, or to grant an easement therein, and in response to such request I submit the following:

The title to all lake beds within the boundaries of the state is held by the state as a body politic, and no officer of the state has the power to sell or dispose of any part of such lands unless that authority is directly given by the state legislature. The powers of the executive council are defined by chapter 7 of the code, as they existed at the time the provisions of the code became a law. Since that time other powers have been conferred, but no act of the legislature has given that body power to sell or dispose of any part of the property belonging to the state, except under the conditions and provisions of certain specific acts of the general assembly. Chapter 186 of the acts of the thirtieth general assembly provides that lake beds of the state may be sold by the

executive council under the conditions prescribed therein, and upon such sale being made a deed or patent shall be executed by the governor in behalf of the state. Section 5 of that act contains this provision:

> "But no sale of any of the lands composing any of the lake beds of the state shall be made by the executive council until a complete survey thereof has been made, and the same subdivided to correspond with the government subdivisions of public lands."

Chapter 187 of the acts of the thirtieth general assembly authorizes the executive council to sell islands belonging to the state which are within the meandered banks of rivers within the state, under the conditions prescribed by the provisions of that chapter; and by chapters 188 and 189 of the acts of the thirtieth general assembly the executive council is authorized to sell certain specific property belonging to the state and to execute conveyances therefor.

By chapters 190, 191 and 192 of the acts of the thirtieth general assembly, the executive council is authorized to grant a right of way and easement to certain railways over lands belonging to the state, but no general power or authority is anywhere given the council to sell or convey any lands belonging to the state, or to grant an easement therein.

The general supervisory powers which the executive council has over the property of the state, undoubtedly give that body authority to protect and preserve such property wherever located; and if any of the lakes within the state which should be preserved for the benefit of the general public were likely to be drained or otherwise destroyed, the executive council undoubtedly has power to prevent such destruction thereof, and it may at all times exercise such power as is necessary to preserve and maintain such lakes in their natural condition, so far as the height of water therein and other general physical conditions are concerned. Beyond this, however, it has

no authority under the statute to go. The power to sell or to grant an easement in lands belonging to the state rests wholly with the legislature, and as that body has not seen fit to authorize the executive council to act for it in making a sale of or granting an easement in such lands, no such sale can be made or easement granted by the executive council.

It is therefore clear in the case under consideration that the executive council has no power to sell to the county of Buena Vista or to the city of Storm Lake any portion of the bed of Storm Lake for highway or other purposes, or to grant an easement therein. Such sale or grant can only be made by the legislature under the present statute.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

September 15, 1904.

TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

BOARD OF HEALTH—RULES FOR THE INSPECTION OF PETROLEUM PRODUCTS—The powers of the Board are confined to the adoption of regulations for the inspection of petroleum products, and for the government of oil inspectors, and the designation of the apparatus to be used by them.

Des Moines, October 17, 1904.

DR. A. M. LINN,

Chairman Committee on Oil Inspection.

DEAR SIR—Section 2 of chapter 87 of the acts of the thirtieth general assembly provides that the state board of health shall make rules and regulations for the inspection of petroleum products for the government of inspectors, and prescribe the instruments and apparatus to

be used, which rules and regulations shall be approved by the governor, and when so approved shall be binding upon oil inspectors.

This appears to be the extent of the power conferred upon the board by statute as to the inspection and sale of inflammable products of petroleum. The rules submitted to me are of a legislative character, and prescribe duties which are to be performed by citizens of the state, and not by oil inspectors. Such rules do not, in my opinion, come within the powers conferred upon the board by the section above quoted. The powers of the board are confined by the statute to the adoption of regulations for the inspection of petroleum products, and for the government of oil inspectors, and the designation of the instruments and character of apparatus to be used by such inspectors. Beyond this it has no power to go.

While I believe the rules submitted are desirable, such regulation must come from the legislature rather than the state board of health.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

SAVINGS BANKS—ISSUANCE OF DEBENTURE BONDS—It is held that a savings bank under the laws of this state may not issue debenture bonds as a part of the business it may transact.

SIR—Complying with your request for an opinion as to whether savings banks organized under the laws of Iowa may issue debenture bonds as a part of the business of such banks, I submit the following:

Without going into the question at great length, attention is called to the provisions of section 1844 of the code, the fifth division of which provides that such banks have power "to loan and invest the funds of the corporation, to receive deposits of money, to loan and invest the

same as provided in this chapter, and to repay such deposits without interest, or with such interest as the by-laws or articles may provide".

The manner in which the funds or capital of a savings bank may be invested is provided by section 1850, as follows:

> "1. In bonds or interest bearing notes or certificates of the United States.
>
> 2. In bonds or evidences of debt of this state bearing interest.
>
> 3. In bonds or warrants of any city, town, county or school district of this state issued pursuant to the authority of law; but not exceeding twenty-five per cent of the assets of the bank shall consist of such bonds or warrants.
>
> 4. In notes or bonds secured by mortgage or deed of trust upon unencumbered real estate in this state, worth at least twice the amount loaned thereon.
>
> 5. It may discount, purchase, sell and make loans upon commercial paper, notes, bills of exchange, drafts or other personal or public security, but shall not purchase, hold or make loans upon the shares of its capital stock."

Section 1855 provides:

> "No savings bank, its directors or trustees, shall contract any debt or liability against the bank for any purpose whatever, except for deposits and the necessary expenses of managing and transacting its business, and to pay obligations incurred for the purpose of obtaining money with which to pay deposits."

These provisions of the statute clearly contemplate that a savings bank, organized under the laws of this state, shall conduct strictly a banking business, which shall be carried on by means of the capital and deposits of the bank, and shall not borrow money for the purpose of increasing the funds of the bank or for other purposes, except to meet its liabilities incurred by the receipt of deposits.

The issuance of debenture bonds is in effect the borrowing of money by a corporation and the giving of a negotiable instrument as evidence of the indebtedness so incurred. A debenture bond always imports the acknowledgment of a debt which has been created and an obligation to pay the same, and is usually issued in series which recite upon the face that they are secured by bonds, mortgages or other securities deposited with trustees for that purpose.

While it is possible that a bank may, under certain circumstances, set apart a portion of its assets, place the same in the hands of a trustee, and issue debenture bonds thereon for the purpose of meeting liabilities which it has incurred in the regular course of its business, such transaction is not a part of the ordinary business of a bank, and a savings bank organized under the laws of this state is not authorized to issue such bonds as a part of the ordinary business it is empowered to transact.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

October 18, 1904.

HON. B. F. CARROLL,
Auditor of State.

SCHOOLS—PRIVATE AND PAROCHIAL—The duty of determining whether a private or parochial school in any particular district is complying with the law in respect to teaching the common school branches required by law, rests upon the president of the school board.

SIR—Complying with your request of November 26th for an opinion upon the questions contained therein, viz:

1. Who may determine whether such private or parochial school is complying with the law with respect to the teaching of the common school branches of reading, writing, spelling, arithmetic, grammar, geography, physiology and United States history?

2. What is the proper course for such officer to pursue in order to determine whether such school (or schools) is complying with the law with respect to the teaching of these common school banches?

3. What is a compliance with the section quoted as to the teaching of the common school branches named in said section?

4. Where parents or guardians place their children or wards under private instruction, who may determine that instruction is by a competent teacher, and by what process may it be determined?

I beg to submit the following:

Section 6 of chapter 128 of the acts of the twenty-ninth general assembly provides:

> "It shall be the duty of the director or president of any board of directors, or any truant officer appointed by such board of directors, to enforce the provisions of this act, to sue for and recover the penalties herein provided, and to institute criminal prosecution against the person violating the provisions of this act; and any such officer neglecting so to do within thirty days after a written notice has been served upon him by any citizen of said district within which the offending person shall reside, shall himself be liable to a fine of not less than ten dollars nor more than twenty dollars for each offense."

Section 7 of the same act provides:

> "All teachers of the public schools of the state and county superintendents, and school officers and employees, shall promptly report to the secretary of the school corporation any violation of the provisions of this act of which they have knowledge or information, and he shall promptly inform the president of the board of directors thereof, and such president shall, if necessary, call a meeting of the board of directors to take such action thereon as the facts shall justify * * * ."

These sections of the statute are a part of what is known as the "Compulsory Educational Act" passed by

the twenty-ninth general assembly, and have direct reference to the method of enforcing the provisions of that act.

Recurring to the questions contained in your communication in the order in which they are there stated, I submit:

First—That the duty of determining whether a private or parochial school is complying with the law in respect to the teaching of the common school branches required by the statute, rests upon the president of the school board of the district in which such parochial or private school exists. The law requires all teachers of public schools in the state and county superintendents, school officers and employees, to report any violation of the act referred to, to the secretary of the school corporation in which such violation occurs, and the secretary is thereupon required to transmit such information promptly to the president of the board of directors. The president may then make an investigation and determine whether the information which he has received is true or not, and may, if necessary, call a meeting of the board of directors of the district to take such action in relation to such investigation and determination of the truth of the information as such board may deem advisable

That the duty of enforcing the provisions of the act was intended by the legislature to be imposed upon the school boards of the state is clearly shown by the provisions of section 6 of the act referred to, which subjects the president and members of the board of directors of the school districts to a penalty if they fail to enforce the provisions of the act after having received notice of its violation.

Whether a private or parochial school is complying with the law in respect to the branches which it teaches, must be determined upon an investigation, and such investigation must be conducted in such manner as the facts of each particular case demand. It is impossible, in an opinion of this character, to designate in advance every-

thing which may be required to be done upon such an investigation, and it is sufficient to say that the board of directors of the district has full power under the act to make such investigation as is necessary to determine whether the law is being complied with or not.

Second—What has been said with reference to the first question contained in your communication is an answer to the second. It does not appear to me to be a matter of serious difficulty for the president of a school board or a committee appointed by the board of directors to make an investigation and determine whether a private or parochial school is teaching the branches required by statute. It cannot be assumed in advance that any such school is or will be willfully violating the law, and ordinarily the principal of such school will undoubtedly on request furnish the board of directors the desired information. If such information is refused upon a request therefor being made, other methods of ascertaining the facts will be readily suggested to the board, and should be pursued as the facts in each particular case may demand.

Third—The branches named in section 1 of chapter 128 of the acts of the twenty-ninth general assembly should be taught in good faith and for the purpose of having the pupils of the school become proficient therein; and if instruction in such branches is given in that manner and for that purpose, it is a sufficient compliance with the provisions of the section referred to.

Fourth—What has been said with reference to private and parochial schools applies with full force to children or wards under private instruction; and whether such private instruction is given in compliance with the provisions of the statute is a matter which may be investigated by the board of directors of the district to the same extent and effect as such question may be investigated when it relates to private or parochial schools. No provision

is made in the statute for an examination of a private instructor for the purpose of determining his or her competency but the competency of such instructor is involved in the teaching of the branches required by statute, and in making an investigation for the purpose of determining whether the statute is being complied with, the question of the competency of the private instructor should be inquired into by the board as one of the facts involved.

The branches of study which are required by statute to be taught in the public, private and parochial schools, or by a private instructor, can only be taught by a person competent to teach the same; and it necessarily follows that if the person attempting to teach such branches in either case is incompetent and unable to teach the same, it cannot be said that the pupils of the school, or those under private instruction, are taught the branches required by statute.

If, therefore, information should be brought to the president of a school board that any private instructor was incompetent to teach the branches required, it would be his duty, either to make an investigation as to the competency of such instructor, or to call a meeting of the school board to take action in relation thereto, and if upon investigation it was found that the private instructor was incompetent and unable to teach the branches required, steps should at once be taken to enforce the provisions of the law in relation to having such branches taught to the pupils under private instruction.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

November 28, 1904.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

MEANDERED LAKE BEDS—SMALLEST GOVERNMENTAL SUBDIVISION CONSTRUED—An abutting land owner on a meandered lake bed is entitled upon a sale thereof to an amount of land sufficient to give him a square forty acre tract. Where more than one person owns land abutting the forty acre tract, each is entitled to purchase from the state sufficient land to complete his boundary lines of the smaller subdivision of the forty.

SIRS—In compliance with your verbal request for an opinion as to the construction of certain provisions of chapter 186 of the acts of the thirtieth general assembly, relating to the meandered lake beds of the state and authorizing the executive council to survey and sell the same, I beg to submit the following:

The particular provisions of said act as to which my opinion is asked are contained in section 7, and relate to the sale of the lands which compose the lake beds to the abutting land owners, and are in these words:

> "After the report of the appraisers has been received and filed in the office of the secretary of state, the executive council shall offer the land belonging to the state and composing such lake bed, and included in such survey and appraisement, for sale, and the persons owning lands abutting upon such lake or lake bed and contiguous to the lands owned by the state therein, shall have the first right to purchase the lands offered for sale by the state, in an amount sufficient to make the lands owned by them which abut upon the lake or lake bed, and are contiguous to the lands of the state, conform to the smallest government subdivision of public lands, at the price fixed by the appraisers."

The question involved in the construction of this statute is as to the rights of the owners of lands abutting upon the lands owned by the state and composing a meandered

lake bed, where two or more persons own land within the smallest governmental subdivision which abuts upon and is contiguous to the land owned by the state in the meandered lake bed.

The first step in ascertaining the rights of the parties is to determine what is meant by the phrase, "smallest governmental subdivision of public lands," as used in the statute.

The construction which has been placed upon section 2397 of the Revised Statutes of the United States is that the smallest governmental subdivision of a section is a quarter quarter section, or forty acres; and *Corbin v. DeWolf,* 25 Iowa, 124; *Stewart v. Corbin,* 25 Iowa, 144; *Eldridge v. Kuehl,* 27 Iowa, 160; *Bulkley v. Callanan,* 32 Iowa, 461, and *Smith v. Easton,* 37 Iowa, 584, recognize that construction of the United States statute referred to. It may, therefore, be taken as definitely settled that the smallest governmental subdivision of public lands is a quarter quarter section, or a forty acre tract.

The intention of the legislature was, therefore, to permit the owner of a tract of land of less than forty acres in extent which is contiguous to the lake bed owned by the state, to purchase of the state an amount of land sufficient to make the entire tract conform to the lines of the forty; in other words, he has the right under the statute to buy an amount of the state which, added to that he already owns, is sufficient to give him a square forty acre tract.

Where there is but one owner within the limits of the forty acre tract, there is no difficulty in giving a clear and unambiguous construction to the statute. Such difficulty only arises where there are two or more such owners within a single forty acre tract, each having an equal right to extend his land by purchase from the state so as to give him a full forty.

In the survey of the meandered lake beds of the state under the provisions of the act referred to, all lines

necessarily conform to the lines of the original government survey, and the land must be subdivided into forty acre tracts, as are public lands when surveyed by the government. It may be fairly said that the intent of the legislature, as indicated by the act referred to, was that all divisions of land and subdivisions thereof should be made by north and south and east and west lines, and that the survey by the state should conform in all respects, so far as the course of its lines is concerned, to the government survey.

It was also the intent of the legislature that the abutting property owners should have the first right to purchase lands of the state so as to make the boundary lines of the lands owned by them conform to those of the government and state survey; but the language of the act does not indicate the intention of the legislature to give any priority of right to one abutting owner over another, or to permit such abutting owners to purchase lands of the state bounded by irregular lines which do not conform either to the government or state survey.

Keeping in mind the intent of the legislature and the purpose of the provisions of the act giving the abutting property owners the right to "square out" their lands, the determination of the rights of abutting property owners, where more than one owns land in the forty acre tract abutting the land of the state, is not difficult. Each owner of lands abutting the lands owned by the state, where two or more such tracts in a single forty acre subdivision are owned by different persons, has the first right to purchase from the state only sufficient land to extend the tract owned by him to the boundary lines of the smaller subdivision of the forty; that is, if there are two such owners the forty acre tract must be subdivided by a line running north and south or east and west through the center which conforms to the lines of the government and state survey, and each owner is then entitled to purchase of the state land sufficient in amount to make the

tract owned by him equal to one-half of the forty. If there are more than two such owners in a single forty acre tract, it must again be subdivided by north and south and east and west lines running through the center which divide it into ten acre tracts, and each of the owners of the abutting land will be entitled to extend his land by purchase from the state to such subdivision lines and no farther.

The construction given this statute may be to some degree arbitrary, but it appears to me to be in conformity with the clear intent of the legislature, and it is a construction which is certainly equitable and just to all persons owning lands abutting upon the meandered lake beds owned by the state.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

November 28, 1904.

TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

EXECUTIVE COUNCIL—AUDITING OF EXPENSE ACCOUNTS IN SERVICE OF STATE UNDER CHAPTER 7 ACTS OF THE THIRTIETH GENERAL ASSEMBLY—The expense accounts of state officers in the performance of their duties which must be audited by the executive council do not apply to claims for extra clerical help, additional assistance and payments from contingent funds.

SIRS—In response to the request of your secretary, Mr. A. H. Davison, for a construction of the provisions of section 2 of chapter 7 of the acts of the thirtieth general assembly, I beg to submit the following opinion:

The section referred to provides:

> "That all members of boards, commissions or departments of state, and all state officers who are authorized to contract expense accounts in the service

> of the state, and all who are allowed a per diem for services instead of a fixed compensation, shall, on or before the end of each month, file with the secretary of the executive council an itemized and sworn statement of all expenses and days services, with dates and amounts for the preceding calendar month."

The question which arises under this statute is whether claims for extra clerical assistance, additional assistance and payments from contingent funds, etc., which are provided for in joint resolution number 9 and chapter 146 of the acts of the thirtieth general assembly, are required to be audited by the executive council.

The construction of the statute turns upon the meaning of the phrase "expense accounts in the service of the state," as used by the legislature in the section quoted. In a broad sense all expenses incurred by state officers, boards and commissions in conducting the various departments of the govenment of the state, are expenses incurred in the service of the state, but it is apparent that the legislature in requiring sworn accounts to be filed each month with the secretary of the executive council, and such accounts to be audited by that body, did not intend to include the general expenditures of the state government.

It was certainly not intended by the legislature to take away from the heads of departments of the state the power and authority to control and manage the business and affairs of such departments, and such control and management necessarily includes the right to employ and pay for such clerical assistance or additional assistance as may be required for the dispatch of the business of the department, and which is provided for by the legislature by an appropriation in the form of a contingent fund or otherwise.

A construction of the statute which would take from the head of a department the control of the employees

therein would be extremely detrimental to the efficiency of the service and the interests of the state, and such a construction clearly was not contemplated by the legislature. The language of the act must therefore be limited to a more restricted sense, and it must be held to apply to and include only the personal and individual expenses of state officers, members of boards and commissions who are entitled to incur such expenses in the performance of the duties of their offices, and in the service of the state. All accounts for expenses so incurred must be sworn to as provided by the statute and audited by the executive council, but the act does not apply to claims for extra clerical assistance, additional assistance and payment from contingent funds which are provided for in joint resolution number 9.

This construction of the statute finds support in *Reg. v. Kingston upon Hull,* 2 El. & Bl., 182; *Jones v. Carmarthen,* 8 M. & W., 605; and in Sutherland on Statutory Construction, section 246.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

December 14, 1904.

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

PUBLIC OFFICERS—THE TERM "SALARIED OFFICER" CONSTRUED—It is held that professors of the State University, the State Normal School, and the State College of Agriculture are "officers" within the meaning of the statute, but the term does not include public school superintendents, principals and teachers in the public schools.

SIR—I am in receipt of your favor of the 16th instant requesting my opinion upon the following questions:

1. Are professors in the State University, the State Normal School and the State College of Agriculture and

Mechanic Arts, salaried officers within the meaning of section 2634 of the code?

2. Are public school superintendents, principals and teachers salaried officers within the meaning of this statute?

These questions will be considered in the order stated.

First—Is a professor in the State University, the State Normal School or the State College of Agriculture and Mechanic Arts a salaried officer within the meaning of section 2634 of the code?

It may be fairly said that, aside from any statutory provision, a professor or instructor in the State University or an institution of learning supported by the state, is not an officer within the ordinary acceptation of that term. Such is the general holding of the courts where the question has arisen.

> *Seymour v. Over-River Sch. Dist.,* 53 Conn., 509;
> *Butler v. Regents,* 32 Wis., 124.

Our statute, however, has recognized persons so employed as officers, and has given to the word an interpretation different from that announced by the decisions referred to, which are based upon the rules of the common law.

Section 2635 of the code, by which the board of regents of the State University is given power to manage the affairs of that institution and to elect and employ its officers and instructors, provides:

> "It shall elect a secretary and treasurer who shall hold their office at the pleasure of the board. It shall have power to appoint a president and the requisite number of professors and tutors with such other officers as it may deem expedient, and fix the compensation to be paid to them. * * * "

Section 2647, which defines the powers of the board of trustees of the State College of Agriculture and Mechanic Arts, provides:

> "The board of trustees shall have power:
>
> 1. To elect a chairman from their number, a president of the college, secretary, treasurer, professors and other teachers, superintendents of departments, steward, librarian, and such other officers as may be required for the transaction of its business, fix the salaries of officers, prescribe their duties, and appoint substitutes who shall discharge the duties of such officers in their absence."

There is a clear recognition by the legislature in both of these sections that the professors and tutors of the colleges named are regarded as officers and not as employees.

In the section of the code defining the powers of the board of trustees of the State Normal School, there is no direct recognition that the professors of that institution are officers, but it is clear that they must stand upon exactly the same footing as the professors of the State University and those of the College of Agriculture and Mechanic Arts. The recognition and designation by the legislature of the professors and tutors of the educational institutions of the state as officers must be held conclusive so far as the meaning of that word is concerned, as used in section 2634 of the code.

Under these statutes professors of the State University, the State Normal School and the State College of Agriculture and Mechanic Arts, fall within the meaning of the word "officers," as recognized by the legislature, and if they are employed to assist in conducting examinations held by the state board of educational examiners, they are only entitled to their actual expenses and not to the per diem provided for by said section.

Second—Are public school superintendents, principals and teachers salaried officers within the meaning of section 2634?

Nowhere in the code are public school superintendents, principals or teachers recognized as officers. They, therefore, fall within the definition of the word as it is ordinarily used outside of any special meaning given to it by statute. The definition of the word "officer," as it is ordinarily understood, is a person who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law. An officer is usually required to take an oath, and frequently to give bond. The term also embraces the idea of tenure and duration or continuance. Generally speaking one of the requisites of an office is that it must be created by a constitutional provision or authorized by some statute.

In *Seymour v. Over-River Sch. Dist.,* 53 Conn., 509, it is said:

> " A teacher is not an officer in the ordinary sense of the word. He is not usually elected or appointed, but is employed—contracted with. He has duties to perform incident to his employment, but they are not official duties and he is not under oath."

In *Butler v. The Regents of the University,* 32 Wis., 124, it is said:

> "We do not think that a professor in the university is a public officer in any sense that excludes the existence of a contract relation between himself and the board of regents that employed him in respect to such employment. It seems to us that he stands in the same relation to the board that a teacher in a public school occupies with respect to a school district by which such teacher is employed, and that is purely a contract relation."

While our statute has recognized professors of state educational institutions as public officers, the status of teachers in public schools has not been changed by any statutory enactment or by any implied recognition of a different status than that which exists at common law;

and it therefore follows that a superintendent, principal or teacher of public schools is not a salaried officer within the meaning of section 2634 of the code. If such person is called to assist in an examination conducted by the state board of educational examiners, he or she is entitled to the per diem provided for in that section.

There is another distinction which may be made as between teachers in the public schools of the state and those in the state educational institutions; that is, the professors and instructors in the state institutions are paid directly from the state treasury, whilst the superintendents, principals and teachers in the public schools are paid from the funds of the district in which their services are performed, and the legislature might well refer to persons who are receiving salaries from the state treasury as salaried officers who are not entitled to the per diem provided for in the section referred to, and not include those who are being paid from the funds of the school district in which they are teaching.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

December 20, 1904.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

FISH AND GAME—POWERS AND JURISDICTION OF STATE FISH AND GAME WARDEN TO SEIZE AND EXAMINE WITHOUT SEARCH WARRANT—The game warden of the state may enter any freight or express car, without search warrant, and seize and examine any package which he has reason to believe contains game which is being unlawfully transported.

SIR—I beg to acknowledge the receipt of your favor of the 21st instant in which you ask my opinion upon the following questions:

1. Does section 2539 of the code empower me to enter express or freight cars, seize and examine, without search warrant, packages which I have reason to believe contain game birds unlawfully shipped?

2. Does it empower me to stop shipments while in transit and seize and examine them without search warrant?

3. Does it empower me to open packages at terminal or division points where they are awaiting transfer?

4. What authority have I to take birds unlawfully shipped after they have been delivered to the transportation companies?

The fundamental doctrine upon which all laws for the protection of game rest, is well stated in *Ex parte* Maier, 103 Cal., 476, in these words:

> "The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good."

The same principle is announced by the supreme court of Minnesota as follows:

> "We take it to be the correct doctrine in this country, that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as

> a proprietor but in its sovereign capacity as the representative and for the benefit of all its people in common."
>
> *State v. Rodman,* 58 Minn., 393.

The right of an individual to acquire a qualified ownership in game rests upon the principles announced in these cases, and the power of the state, as deduced from such principles, to control the ownership of game for the common benefit of the people of the state, clearly demonstrates the validity of a law prohibiting its shipment beyond the borders of the state. The result of such a provision of law is to confine the use of game to the people of the state who are its owners in their sovereign right.

In *Geer v. Connecticut,* 161 U. S., 530, it is said:

> "In view of the authority of the state to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the state, it may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. The qualification which forbids its removal from the state necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce."

In the same case it is further said:

> "The power of the state to control the killing of and ownership in game being admitted, the commerce in game, which the state law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was a part of

it. All ownership in game killed within the state came under this condition, which the state had the lawful authority to impose, and no contracts made in relation to such property were exempt from the law of the state consenting that such contracts be made, provided only they were confined to internal and did not extend to external commerce."

Again it is said:

"The argument of the plaintiff in error substantially asserts that the state statute gives an unqualified right to kill game, when in fact it is only given upon the condition that the game killed be not transported beyond the state limits".

In *State v. Rodman, supra,* it is said:

"Such limitations deprive no person of his property, because he who takes or kills game had no previous right of property in it, and when he acquires such right by reducing it to possession he does so subject to such conditions and limitations as the legislature has seen fit to impose."

The case of *Territory v. Evans,* 2 Idaho, 634, is criticised in *Geer v. Connecticut,* supra, in which case it is said:

"But the reasoning which controlled the decision of these cases is, we think, inconclusive, from the fact that it did not consider the fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property, and thus overlooked the authority of the state over property in game killed within its confines, and the consequent power of the state to follow such property into whatever hands it might pass with the conditions and restrictions deemed necessary for the public interest."

The principle which must be deduced from the adjudicated cases is that the control of the state over the game killed within its territory is absolute, and that every person who reduces such game to possession, or to whom it is delivered for the purpose of carriage or otherwise, acquires such possession subject to the right of the state

to enforce all laws and regulations relating to the killing and transportation of the game within the state.

One of the regulations which the state of Iowa has imposed as a condition to the killing of game by any person within the state, is that it shall be the duty of the fish and game warden, sheriffs, constables and police officers of the state, to seize and take possession of any fish, birds or animals which have been caught, taken or killed, at any time in any manner or for any purpose, or had in the possession or under the control, or have been shipped, contrary to the provisions of the law regulating the killing of game within the state.

Power is vested in the officers named to make such seizures without warrant.

It therefore follows that the fish and game warden of the state may, under the law giving the right to kill game within the state, enter any express or freight car and, without a search warrant, seize and examine any package which he has reason to believe contains game which is unlawfully shipped.

Every common carrier to whom game is delivered for transportation, holds possession of the same subject to all the conditions imposed by the state. If the fish and game warden has reason to believe that game is unlawfully in the possession of such carrier for the purpose of being transported beyond the boundaries of the state, he has power under the statute, without a warrant, to stop the shipment in transit, and to seize and examine the packages shipped.

This right obtains at terminal or division points as well as elsewhere, and when game is found to be unlawfully in the possession of a common carrier, it may be

taken possession of by the fish and game warden without further process and disposed of in the manner provided by law.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

December 23, 1904.

HON. GEO. A. LINCOLN,
Fish and Game Warden.

INSANE — COST OF TRANSPORTATION OF AN INSANE PATIENT WHO HAS NO LEGAL SETTLEMENT WITHIN THIS STATE— No special appropriation is required if the language of a statute warrants the construction that an amount of money is set aside by the legislature for the purpose of meeting the expenses which it is intended to pay.

SIRS—In compliance with your request of August 6th for an opinion upon the following questions:

1. Section 2283 of the code as amended empowers the board of control of state institutions to authorize the superintendent of a state hospital to remove therefrom any patient who has no legal settlement within this state and provides that the cost of removal shall be paid directly from the state treasury. Does this authorize the payment from any money in the state treasury not otherwise appropriated for the purpose stated on the statement of the superintendent approved by the board of control, or is a further appropriation by the general assembly necessary?

2. Section 2287 of the code, as amended by chapter 79 of the acts of the thirtieth general assembly provides for the capture and return to the state hospital of escaped patients. Does the section as amended authorize a superintendent to capture or take and return to the

hospital in his charge any patient who has escaped therefrom, and is not discharged, and if it does, may the necessary expense incurred in such capture and return be paid from the state treasury as provided in said section as amended, without further appropriation by the general assembly, or is such payment limited to escaped patients captured and returned by order of the commissioners of insanity of the respective counties in which they belong?

I respectfully submit:

First—Section 4 of chapter 118 of the acts of the twenty-seventh general assembly 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."

This is an appropriation of money from the state treasury made by the legislature for the purpose of covering all expenditures authorized by chapter 118 of the acts of the twenty-seventh general assembly, except such as the legislature has specifically provided shall be paid from other appropriations. The language of section 4 is broad enough to cover every expenditure authorized by the act of the twenty-seventh general assembly.

Section 26 of that act 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 directly authorizes the expenditure of the money necessary to make such transfers, and provides that it shall be paid by the state. It therefore falls with-

in the appropriation made by section 4 of the act, and may be paid from the state treasury without a further appropriation by the general assembly.

Second—Section 2287 of the code, as amended by the acts of the thirtieth general assembly, provides:

> "If any patient shall escape from a hospital, the superintendent shall cause immediate search to be made for him, and if he cannot be soon found, shall cause notice of such escape to be forthwith given to the commissioners of the county where he belongs, and if found in their county the commissioners shall cause him to be returned and shall issue their warrant therefor as in other cases, unless the patient shall be discharged, or unless for good reasons they shall provide for his care otherwise, of which they shall notify the superintendent; and all necessary expenses incurred in the capture and return of such insane patient, shall be paid directly from the state treasury upon a sworn statement of expenses by said commissioners, and the approval of the superintendent of the hospital and of the board of control appended to such expense bill."

This section clearly authorizes the superintendent of the hospital for the insane from which a patient has escaped to retake such patient and return him to the hospital. If the superintendent is unable to do so within a short time he must then notify the commissioners of insanity of the county from which the patient was sent, and if he is found within the county, the commissioners shall cause him to be returned, unless he shall be otherwise disposed of as provided in said section.

The amendment of the thirtieth general assembly provides that all necessary expenses incurred in the capture and return of such insane patient shall be paid from the state treasury. This includes the necessary expenses made by the superintendent of the hospital in his search for such escaped patient, and in his capture and return, as well as the necessary expenses incurred by the commissioners of the county where such insane patient belongs.

It was clearly the intent of the legislature that all necessary expenses, whether incurred by the superintendent of the hospital or by the commissioners of the county in the capture and return of an escaped insane patient, should be paid from the state treasury.

Third—The next question which arises under your communication is whether the language of the act of the thirtieth general assembly is sufficiently broad to make an appropriation of money from the state treasury which may be used for the purpose of paying the expenses incurred in the capture and return of an insane patient under the provisions of section 2287 of the code.

In reaching a conclusion as to whether the statute under consideration is sufficiently broad to appropriate money from the state treasury, it is important to examine the language of the various provisions of the statute which have been construed as making such an appropriation.

Section 121 of the code provides:

> "The auditor of state, upon presentation to him of the foregoing certificate, shall draw his warrant upon the treasurer of state for the amount therein stated to be due".

Section 211 provides that the attorney general shall receive his actual expenses when engaged in the transaction of business elsewhere than at the seat of government.

Section 1904 provides for the payment of the per diem and expenses of an examiner of building and loan associations from the state treasury.

Section 2115 of the code provides that the cost of the examination of the books, papers and documents of any railway corporation by the board of railroad commissioners shall be paid by the state upon the certificate of the board.

Section 2283 of the code provides that patients in a hospital having no legal settlements in the state, or whose legal settlement cannot be ascertained, shall be supported at the expense of the state.

Section 2386 provides that the expenses incurred by the commission of pharmacy shall be audited by the executive council and the amount thereof shall be drawn from time to time upon the warrants of the state auditor.

Section 2480 of the code provides that the members of the board of mine examiners shall receive as compensation for their services the sum of five dollars per day for the time actually employed, with necessary traveling expenses, which shall be audited and paid in the manner provided for the payment of the salaries of other state officers.

Section 2483 provides that mine inspectors shall receive for their services the sum of $1200 per annum, and actual traveling expenses, not exceeding $500 yearly, the traveling expenses to be paid quarterly upon an itemized statement duly verified and audited by the state auditor.

Section 2502 provides that the members of the board of geological survey shall be allowed actual expenses incurred in attending to the duties assigned to them, which shall be paid out on warrant of the state auditor on the presentation of bills duly audited and allowed.

Section 2538 provides that the state veterinary, when engaged in the discharge of his duties, shall receive the sum of five dollars per day and his actual expenses, the claim therefor to be itemized, verified, accompanied with written vouchers and filed with the state auditor, who shall allow the same and draw his warrant upon the treasurer therefor.

Section 2618 provides for the payment of the per diem and expenses of the regents and trustees of state institutions, and that the auditor shall draw his warrant upon the treasurer of state for the amount thereof upon the filing of the itemized bills showing the date of such services and the amount of the expenses incurred.

Section 5181 provides for the payment of expenses incurred in the arrest of fugitives from justice, and that the same shall be paid out of the general revenue of the

state when an itemized and sworn statement thereof is approved by the governor and at least two other members of the executive council.

Chapter 73 of the acts of the twenty-seventh general assembly provides that the expenditures incurred by the superintendent of public instruction in conducting examinations shall be paid by the state treasurer upon a warrant drawn by the state auditor therefor.

Section 3 of chapter 82 of the acts of the twenty-eighth general assembly provides that the board of mine examiners shall receive the sum of five dollars per day for every day actually employed in the discharge of their duties, with their actual expenses incurred, which expense shall be itemized, verified as provided by section 2880 of the code, and paid from the state treasury.

Section 4 of chapter 144 of the acts of the twenty-eighth general assembly provides that a person appointed by the board of control to inspect certain state institutions, shall be allowed such sum as the board may in its discretion deem proper, not to exceed five dollars per day, and actual expenses incurred, which shall be paid in the manner provided by chapter 118 of the acts of the twenty-seventh general assembly, regulating the expenses of the board of control.

In none of the provisions of the statutes quoted has the legislature in direct terms declared that an appropriation is made from the state treasury, but the language therein used has been held by the executive and legal departments of the state to make an appropriation of money from the state treasury in compliance with the provisions of the constitution. This construction of these statutes has been acted upon for many years in the transaction of the business of the state, and any other holding at this time would be extremely detrimental to the business of the different state departments. The construction given these statutes finds support in the decisions of the courts of the different states.

In *Proll v. Dun,* 80 Cal., 226, it was held that a similar provision of a state constitution did not require that in making an appropriation the legislature should designate any particular fund or state specifically that the money is appropriated out of any moneys in the treasury not otherwise appropriated.

In *State v. Bordelon,* 6 La. Ann., 68, it was held that it was not necessary that the legislature should use the word "appropriated" in making an appropriation. In that case it is said:

> "It is contended that this is not a specific appropriation, nor indeed any appropriation at all. The first thing that impresses itself upon the mind is that the general assembly intended the act to be an appropriation act. This is evident from its title. Has the legislature in the body of the law failed to accomplish its intention? What is the meaning of the word 'appropriate'? It is to allot, assign, set apart, apply, anything to the use of a particular person or thing, or for a particular purpose. This may be done without using the word 'appropriate' itself. And this act certainly does assign, allot and set apart a certain portion of the public money not otherwise appropriated, and direct said portion to be paid to particular persons for a given purpose. There are no formal words required to be used in an appropriation bill. The constitution has not undertaken to direct what technical language shall be employed. This has been wisely and safely left to the legislative power and they seem to have used their right in this instance in such manner as to leave no doubt what they meant to do or of what they did".

There can be no doubt of the intention of the legislature in enacting the provisions of chapter 79 of the acts of the thirtieth general assembly. By that act the amount of money required to pay the expenses incurred by the superintendent of the hospital for the insane, or by the commissioners of insanity of a county, in capturing and returning an escaped patient to the hospital, was intended to be appropriated from any money in the state treasury

not otherwise appropriated. The statute falls directly within the class of those which have been cited, and which have been held for many years to constitute an appropriation from the treasury of the state. The word "appropriate" is not used, nor is it necessary in making an appropritaion of money by the state legislature. It is sufficient if the language warrants the construction that an amount of money is set apart by the legislature for the purpose of meeting the expenses which it is intended to pay. This has been done in the statute referred to, and it must be held to be a sufficient appropriation by the legislature to warrant the payment of the expenses incurred when the sworn statements thereof are approved by the superintendent of the hospital and the board of control.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

December 29, 1904.

TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

EDUCATIONAL BOARD OF EXAMINERS—PAYMENT OF EXPENSES INCURRED BY—The individual members of the educational board of examiners must file with the executive council an itemized sworn statement of all expenses incurred and days' service for the preceding month, but the certificate of the state superintendent of public instruction need not be attached thereto.

SIR—I am in receipt of your communication of the 4th instant requesting my opinion upon the following questions:

1. Does chapter 7 of the laws of the thirtieth general assembly repeal the law quoted, (a) as to members of the educational board of examiners; (b) as to persons employed by said board?

2. If repealed in whole or in part, is the superintendent of public instruction in any of his official capacities required to certify as to anything concerning claims for work done or expenses incurred under said section? If so, (a) in what official capacity; (b) to whom, and (c) to what shall he certify?

In reply thereto I beg to say:

First—Chapter 7 of the laws of the thirtieth general assembly does amend and so far repeal the provisions of section 3634-a of the supplement to the code as to require the members of the educational board of examiners to file with the secretary of the executive council an itemized and sworn statement of all expenses and days' service with dates and amounts for the month preceding the time of filing such statement.

Second—It does not alter or change the provisions of the section of the supplement to the code referred to so far as that section relates to the employment of persons by the board of educational examiners to assist in conducting examinations. Such assistants are to be paid under the provisions of the section referred to and upon the certificate of the superintendent of public instruction to the auditor of state as therein required.

Third—The sworn itemized accounts required by the provisions of chapter 7 of the laws of the thirtieth general assembly must be made by the individual members of the state board of examiners, and no certificate of the superintendent of public instruction is required to be attached thereto.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

January 11, 1905.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

BOARD OF SUPERVISORS—SALARY OF ASSESSORS AS CENSUS ENUMERATORS—PERFORMANCE OF DUTIES BY AN OFFICER —(1) It is the official duty of each assessor to take the census within his assessment district at the time specified by law, and the board of supervisors fixes his compensation which shall not exceed two dollars per day. (2) No person elected to office has the legal right to refuse to perform the duties of such office.

Des Moines, January 13, 1905.

HON. A. H. DAVISON,
Secretary Executive Council.

DEAR SIR—I herewith submit the following answers to the questions referred to me, relating to the powers of the boards of supervisors of the respective counties in the state, and the duties of assessors of the different assessment districts, to perform the work required in taking the state census of 1905.

First—Has the board of supervisors a legal right to fix the amount of pay the assessors shall receive for taking the census?

Section 592 of the code provides:

> "Each township assessor shall receive in full for all services required of him by law, a sum to be paid out of the county treasury and fixed annually by the board of supervisors of the county at the January session; said compensation shall be for the succeeding year, and shall not exceed the sum of two dollars for each day of eight hours which said board determines may necessarily be required in the discharge of the official duties of such assessor".

Section 2 of chapter 8 of the laws of the thirtieth general assembly makes it the duty of the assessor at the time of assessing property in the year 1905, and every ten years thereafter, to take the census in his township, municipality or division thereof, and make entry upon such blanks of all matters therein required to be enumerated or returned, and return the same to the county audi-

tor on or before the first day of June of the census year. Under this provision of the statute it becomes a part of the official duty of each assessor to take the census within his assessment district in the year 1905. The taking of such census is a part of the services required of him by law in his official capacity; and the board of supervisors of his county is authorized and empowered under the provisions of section 592, to fix his compensation which shall not exceed two dollars for each day of eight hours for the time which the board determines may necessarily be required in the discharge of the official duties of the assessor.

Second—In case they do so fix their salaries, and the assessors consider it too low, have they a right to refuse to do the work?

This question admits of but one answer: No person who is elected to an office has the legal right to refuse to perform the duties of that office because he considers the compensation inadequate to the work to be performed. It is clearly the duty of each assessor in his assessment district to take the census as required by law and for the compensation which is fixed under the statute by the board of supervisors. Such compensation should be reasonable and adequate for the amount of work required in taking such census, but no assessor has the right to refuse to take such census because he considers the compensation insufficient. If any assessor who has been elected to that office for any reason does not wish to perform the duties of the office so far as the same relate to the taking of the census, he should resign and some one should be appointed to perform the work required.

Third—Section 3 of chapter 8 of the laws of the thirtieth general assembly provides:

> "When any assessor fails to perform the duties required in this chapter, such auditor shall appoint some suitable person to take the census as provided herein at as early a day as practicable, at the expense of the county".

Under the provisions of this section, if an assessor neglects or refuses to take the census in his assessment district as required by law, it is the duty of the county auditor to at once appoint some suitable person to take such census, which shall be done at the expense of the county. Under such appointment, the county would be liable for a reasonable compensation to be paid to the person appointed by the auditor.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

INSURANCE—CHARACTER OF RISKS DEFINED BY STATUTE—POWER OF LEGISLATURE TO REGULATE INSURANCE BUSINESS—(1) The death of live-stock by disease is not a contingent event which may be made the subject of legal insurance. (2) Unincorporated associations, partnerships and individuals must in every particular comply with the law regulating insurance in order to lawfully conduct such business.

SIR—Complying with your request for an opinion as to the construction of sections 1709 and 1751 of the code, I beg to submit the following:

The questions propounded under these sections and upon which I am asked to pass are as follows:

1. Do the provisions of subdivision 4 of section 1709 contemplate that an insurance company may be formed or authorized for the purpose of insuring live stock against loss resulting from death by disease? Is death by disease an unknown or contingent event which may be the subject of legal insurance within the meaning of subdivision 4 of said section?

2. Is it not the intent and policy of the law that all insurance business which may be safely and legally transacted in this state must be expressly authorized, and

under the supervision of the state; and that the kinds of insurance not authorized cannot be written either by corporations or individuals?

3. Do not the provisions of section 1751 of the code require all companies, partnerships, associations and individuals who desire to engage in the insurance business under the provisions of chapter 4 of title IX of the code, to comply with the requirements of all of the sections of said chapter from section 1684 to section 1750 inclusive, including the requirement to incorporate?

4. In other words, Was it not the legislative intent in the enactment of section 1751 that, while the individuals or unincorporated associations then in the insurance business might continue therein by complying with the legal requirements as to the nature and conduct of their business, all individuals and partnerships or unincorporated associations which might thereafter engage in the insurance business, must comply with all of the requirements of said chapter 4?

These questions will be considered substantially in the order stated.

First—Section 1709 of the code, as amended by the acts of the twenty-eighth and twenty-ninth general assemblies, specifically names and describes all of the casualties, contingent events and risks against which incorporated companies may insure. The legislature, having thus specifically defined the character of risks against which companies may write insurance, has thereby, under the well known maxim of law: "*Expressio unius est exclusio alterius,*" withheld from such company the right to insure against casualties, contingent events and risks not specified in the section referred to. That is, insurance companies organized under the laws of this state are permitted to insure only against the casualties, contingent events and risks named in section 1709 of the code.

Subdivision 4 of the section referred to provides that such companies may insure horses, cattle and other live stock against loss or damage by accident, theft or any unknown or contingent event which may be the subject of legal insurance. The question, therefore, arises as to whether the death of live stock by disease is an unknown or contingent event which may be made the subject of legal insurance by companies organized under the laws of this state.

The death of animals by disease is not an unknown or contingent event. Eliminating the question of death by accident, against which companies are specifically given the right to insure, death by some form of disease is certain to occur, and it cannot fairly be said to be a contingent event which may be the subject of legal insurance by companies organized under the laws of Iowa.

Webster defines "Contingent":

"1. Possible or liable but not certain to occur; incidental; casual.

3. (Law) Dependent for effect on something that may or may not occur".

The synonyms of the word are given as "Accidental; incidental; casual; fortuitous".

It therefore appears to be clear that the legislature has not authorized companies organized under the laws of this state to insure live stock against death by disease.

Second—The conclusion reached in the first division of this opinion is an answer to the second question upon which my opinion is asked. No company organized under the laws of Iowa can legally insure against any casualty, contingent event, or assume any risk, which is not expressly authorized by statute.

Third—While I am not prepared to say that the provisions of section 1751 of the code permit only incorporated companies to carry on the business of insurance in this state, I am clear that all unincorporated associations,

partnerships or individuals must, in every particular, fully comply with the law regulating insurance other than life before they are entitled to issue policies of insurance upon any of the risks permitted by section 1709 of the code.

Such unincorporated associations, partnerships or individuals must have the amount of capital required of incorporated companies, and are subject to examination by the auditor as are corporations organized for the purpose of carrying on an insurance business, and have no right to issue policies for any purpose until they have received the certificate of the auditor authorizing them to do business within the state. Such associations, partnerships or individuals are limited to the class of risks which incorporated companies are permitted to insure against, and must make their annual statements to the auditor as is required of such incorporated companies.

Under the provisions of section 1747 of the code, any person, association or partnership which issues policies of insurance without having fully complied with the provisions of chapter 4 of title IX of the code, is guilty of a misdemeanor and liable to a fine of one thousand dollars and to imprisonment in the county jail for one year. Every such association, partnership or individual stands upon the same footing as an incorporated insurance company, so far as the compliance with all of the provisions of chapter 4 of title IX, relating to the manner of carrying on insurance business in the state, is concerned.

It may be suggested, as has been urged before the insurance department of the state, that it is the right of every individual within the state to enter into a contract of insurance with another, and that any statute which attempts to prohibit such contract is unconstitutional because it abridges the liberty of contract; and that it follows, therefore, that an unincorporated association, partnership or individual has the right to enter into contracts of insurance and to insure against risks, casualties and contingent events without complying with the provisions of the statute referred to.

With this contention I cannot agree, as it is clearly the right of the legislature to regulate the business of insurance and to provide the manner in which it shall be conducted within the state. The recent case of *Brady v. Mattern,* which is reported in 100 Northwestern Reporter, at page 358, is directly in point upon this question, and Mr. Justice McClain, speaking for the court, after a careful review of all of the cases bearing on the question involved, said:

> "It is hardly necessary to now enter into any discussion of the right and duty of the legislature to regulate the various businesses conducted by banking, insurance and building and loan associations. Such right and duty have been recognized by legislation in practically all of the states of the Union; and conceding, as we must, that such legislation is valid, that is, that these various forms of business may properly be regulated by the legislature in the exercise of the police power, we reach the conclusion that it is within the power of the legislature, if, in the exercise of its discretion, it sees fit to so enact, to limit such business to incorporated associations".

The legislature of Iowa has undertaken to regulate the business of insurance within this state, and, by the provisions of section 1751, has declared that such regulation applies equally to partnerships, individuals and unincorporated associations. The provision of the legislature does not prohibit the business of insurance; it regulates it. It in substance says to all persons, partnerships, associations and corporations: If you wish to carry on the business of insurance you must provide the capital required by statute, submit your affairs to the examination of the auditor of state, and obtain his permit to transact an insurance business under the laws of the state. That such power exists in the legislature cannot at this time be questioned.

The conclusion which must therefore be reached is that no individual, partnership or unincorporated association is authorized under the laws of Iowa to insure live stock

against death by disease; nor can any such individual, partnership or unincorporated association transact or carry on the business of insurance within this state unless such individual, partnership or association has complied with the provisions of the statute regulating insurance other than life.

The conclusion reached under this division of the opinion fully answers the fourth question submitted, and it is not necessary to give further specific answer thereto.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

January 23, 1905.

HON. B. F. CARROLL,
Auditor of State.

BOARD OF CONTROL—Power to Designate and Approve the Institutions which Shall Have Charge and Control of Children Committed under Chapter II, Acts of Thirtieth General Assembly.

SIRS—In response to your request contained in your communication of August 4th, in which you ask my opinion upon the following questions:

1. Is the board of control of state institutions of Iowa authorized to designate and approve the Soldiers' Orphans' Home to receive normal neglected and dependent children under the act specified, the Institution for Feeble-minded Children to receive feeble-minded children of those classes, the Industrial School for Boys to receive delinquent boys and the Industrial School for Girls to receive delinquent girls?

2. If you answer the foregoing question in the affirmative in whole or in part, from what fund or source can the institution or institutions which may receive such

children on our designation and approval obtain the money necessary for the support of children committed thereto?

3. Since the board of control of state institutions believes the institutions named are proper ones to receive the classes of children as specified, is it the duty of the board to designate and approve them for that purpose, or has it the lawful right to elect whether to do so or not?

I respectfully submit:

First—Section 14 of chapter 11 of the acts of the thirtieth general assembly lodges in the board of control of state institutions the power to designate and approve the institutions and associations which shall have charge and control of the children committed under the provisions of said act; and it is clearly within the power of such board to designate the Soldiers' Orphans' Home at Davenport as a proper institution to which normal dependent children may be sent by the courts. It is equally within the power of the board to designate the Institution for Feeble-minded Children, and the Industrial School at Eldora for delinquent boys, and the Industrial School at Mitchellville for delinquent girls.

Second—The cost of the support of the children sent to the institutions designated by the board of control of state institutions must be paid in the same manner as the cost of the support of other inmates of such institutions.

Section 2691 of the code appropriates, out of any money in the state treasury not otherwise appropriated, or so much thereof as may be needed, twelve dollars monthly for each child actually supported in the orphans' home and home for destitute children at Davenport. Similar appropriations are made for the support of the children in the institution for the feeble-minded and in the industrial schools of the state. These appropriations provide a fund for the payment of the cost of the support of the children committed under the provisions of chapter 11 of the acts of the thirtieth general assembly.

Third—Section 14 of the act provides that the board of control shall designate and approve the institutions and associations to have charge of the juveniles committed under the act. The language of the provision is mandatory and must, in my opinion, be construed as requiring the board to designate and approve the institutions to which such children may be committed. That is, the board must act according to its best judgment and discretion.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

January 24, 1905.

TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

BOARD OF MEDICAL EXAMINERS—AUTHORITY TO SUBPOENA WITNESSES—NUMBER OF EXAMINATIONS BY APPLICANT FOR CERTIFICATE TO PRACTICE—(1) The State Board of Medical Examiners has no power to compel the attendance of witnesses in any investigation before it. (2) The statute does not limit the number of examinations which may be taken by an applicant for license to practice medicine.

SIR—Complying with your request of the 20th instant for my opinion upon the following questions:

1. Has the state board of medical examiners authority to subpoena witnesses before it in the investigation of charges against physicians, or in determining the standing of medical colleges; and if such authority exists, is a constable or other peace officer compelled to serve a subpoena requiring attendance of such witnesses?

2. How often can an applicant for a certificate to practice medicine or osteopathy be admitted to examination?

3. Has the board a right under the statute to admit applicants for certificates to more than two examinations, and if so can the board prescribe what the limit shall be?

I respectfully submit:

First—State boards and commissions of the character of the state board of medical examiners are clothed only with the authority which is expressly given by statute, and with such incidental powers as are necessary to the performance of the duty imposed upon them by law. The power to subpoena witnesses and compel their attendance exists as a part of the sovereign power of the state, and such power can only be conferred upon inferior bodies or tribunals by express statutory enactment.

There is no provision in the statute authorizing or empowering the state board of medical examiners to issue subpoenas for witnesses and to compel their attendance in obedience thereto. In the absence of such statutory enactment, the power does not exist. The board therefore has no power to compel the attendance of witnesses in any investigation which it desires to make.

This being true, a constable or other peace officer of the state is under no legal obligation to serve a subpoena issued by the board.

Second—I find no provision of the statute that limits the number of examinations which may be taken by an applicant for license to practice medicine. Section 2576 of the code provides:

> "Any one failing in his examination shall be entitled to a second one within three months thereafter, without further fee. If any person shall by notice in writing apply to the secretary of the board for an examination or a re-examination, and it fails or neglects for three months thereafter to give him the same, he may, notwithstanding any provision of this chapter, practice medicine until the next regular meeting of the board, without the required certificate."

The first clause of the provision quoted does not attempt to limit the number of examinations which may be taken by an applicant. It simply provides that if he fails in his first examination, he is entitled to a second within three months thereafter, without paying any additional fee. The applicant must pay the fee required by statute for any examination taken by him after the second examination.

Nor do I find any authority conferred upon the board to limit, by resolution or otherwise, the number of examinations which may be taken by an applicant, if he pays the fee required by statute therefor. Such power must be conferred by statute before it can be exercised by the board.

The last clause of the statute above quoted simply gives an applicant the right, after he has applied in writing to the secretary of the board for an examination or a re-examination, and the board neglects for three months thereafter to give him the same, to practice medicine until the next regular meeting of the board, without the required certificate. Under this provision I think it is clear that he must appear at the next regular meeting and take the examination if he wishes a certificate. If such examination is his first, he is, within three months thereafter, entitled to a second examination without paying an additional fee. If he fails in his second examination, he loses his right to practice medicine under the notice provided for by statute, and is not entitled to take another examination except upon the payment of the statutory fee.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

January 24, 1905.

DR. J. F. KENNEDY,

Secretary State Board of Health.

REGISTRAR OF VITAL STATISTICS—COMPENSATION OF—The registrar of vital statistics in cities is the health officer thereof, and is not entitled to receive any other salary or compensation than that fixed by the local authorities.

SIR—Replying to your favor, enclosing letter of Strong and Whitney of Sioux City, in which my opinion is asked as to the compensation to which the registrar of vital statistics in cities exceeding ten thousand in population, is entitled, I beg to say:

Section 2 of chapter 100 of the acts of the thirtieth general assembly provides:

> "Local registrars of vital statistics shall be the health officers of cities and the clerks of townships".

Under this provision of the statute the health officer of every city in the state is made the local registrar of vital statistics.

Section 6 of the act, which provides for the compensation which such local registrars are entitled to receive, contains this provision:

> "Provided further, that city registrars of cities having ten thousand population or more by the last United States census, shall receive no special compensation other than that included in their salaries for acting as registrars under this act."

The thought which appears to have been in the minds of the legislators in enacting this provision is that the health officers in cities having a population exceeding ten thousand, would receive, from the cities in which they are appointed, a salary sufficient to compensate them for the duties imposed by chapter 100 of the acts of the thirtieth general assembly; and that they should receive no other compensation for that work than the salary so fixed by the local authorities.

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

January 24, 1905.
DR. J. F. KENNEDY,
Secretary State Board of Health.

TAXATION—PAYMENT OF TAXES UNDER PROTEST–The Treasurer of State may receive taxes paid under protest, but he is under no obligation to receive or file such protest, or embody in the receipt given the fact that protest was made.

SIR—I beg to acknowledge the receipt of your favor of the 24th instant in which you request the advice of the law department of the state as to the following questions relating to the payment of taxes to the state treasurer and the issuance of receipt therefor:

1. Where payment is tendered under protest, the protest being written and accompanied by a request that we file the same in the office.

2. Where the protest is written but without request to file.

3. Where the protest is verbal—

and respectfully submit the following opinion thereon:

First—Any person who is required to pay taxes to the treasurer of state may, if he believes that such taxes are illegally exacted from him, pay the same under protest, and it is the duty of the treasurer of state to receive the taxes so tendered, although paid under protest by the person from whom the same are collected.

Second—There is no obligation resting upon the state treasurer to receive and file any written protest which may accompany a payment of taxes.

Third—Where the protest is in writing and no request is made to file the same, the treasurer of state is under no obligation to receive such written protest or to retain the same.

Fourth—Where the protest is verbal, it is the duty of the treasurer to receive the taxes offered by the taxpayer, and in either case to issue his receipt therefor. It is no part of the duty of the treasurer to embody or write

in the receipt given, the statement that the taxes for which it is issued were paid by the taxpayer under protest.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

January 25, 1905.

HON. G. S. GILBERTSON,

Treasurer of State.

FEES AND EXPENSES OF STATE BOARDS AND DEPARTMENTS OF STATE—CHAPTER 7, ACTS OF THE THIRTIETH GENERAL ASSEMBLY CONSTRUED—It is held that the auditor of state and the treasurer of state must keep open accounts of such funds that arise from moneys received as fees from state boards and officers, and any unexpended balance thereof cannot be covered into the general funds of the state treasury.

SIRS—I beg to acknowledge the receipt of a communication from your Secretary, Mr. A. H. Davison, informing me that you desire my opinion as to the date at which any balance of funds or fees deposited in the state treasury under the provisions of section 1 of chapter 7 of the acts of the thirtieth general assembly, or other funds which are subject to the payment of the expenses and per diem of members of boards, commissions or departments of state and state officers, which the executive council is required to audit under section 3 of the act, shall be covered into the general funds of the state treasury.

In response to such request I beg to submit the following opinion:

The question is not without difficulty. Chapter 7 of the acts of the thirtieth general assembly provides an entirely new method for the payment of expenses and per diem of members of boards, commissions and departments of state, and requires that all money received by such boards, commissions and departments shall be paid

into the state treasury, and the expenses and compensation of the members of the boards and commissions shall be paid by the treasurer of state out of the funds paid into the treasury by such boards and commissions, after all items of per diem and expense are approved by the executive council.

Section 3 of the act further provides:

> "The treasurer of state and auditor of state shall each keep an account of the moneys paid in under the provisions of this act, where the law now provides or may hereafter provide that the amounts allowed for per diem and expenses shall be limited to or paid from fees collected. The auditor's warwant shall be drawn against the funds realized from such fees, and shall not exceed the amount thereof."

Under this provision, the treasurer of state and auditor of state are required to keep an account of all the moneys paid in to the state treasury under the provisions of chapter 7 of the acts of the thirtieth general assembly, and to pay from such accounts the expenses and per diem to which members of boards and commissions are entitled, after the accounts thereof have been audited by the executive council.

All provisions of the code, which are in conflict with chapter 7 of the acts of the thirtieth general assembly, relating to the disposition of the moneys received by state boards and commissions, and the manner in which the members thereof were paid their per diem and expenses, are repealed by chapter 7 of the acts aforesaid. The provisions of that chapter must be held to control the disposition of all money received by such boards and commissions and the manner of payment of the per diem and expenses of their members.

The treasurer of state and auditor of state are directed to keep accounts of such funds received by them, and there is no provision in the act referred to for covering such funds, or any unexpended balance thereof, into

the general funds of the state treasury. In the absence of such a provision, I think that chapter 7 of the acts of the thirtieth general assembly must be construed to require the treasurer of state and the auditor of state to keep open accounts of such funds for the payment of the per diem and expenses provided for in the act, and that such funds or any unexpended balance thereof cannot, under the existing law, be covered into the general funds of the state treasury.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

January 27, 1905.

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

SCHOOL ELECTIONS—REGISTRATION OF VOTERS—The statute requires a registration of electors at all elections in school districts having a population of five thousand or more.

SIR—I am in receipt of your communication of the 31st instant, enclosing a letter of Mr. A. J. Edwards of Waterloo, Iowa, in which you ask for an opinion as to whether in school districts having a population of five thousand or more a registration of the electors is required at an election of such district. In compliance with such request I beg to submit the following opinion:

Section 1078 of the general law, providing for the registration of voters at general and special elections, contains the provision that no registration of voters for school elections shall be required, and such provision will be effective, unless it has been repealed, either directly or by implication, or is controlled by other special provisions of the statute.

Section 2755 of the code provides:

> "Each school corporation having five thousand or more inhabitants, may be divided into not more than five precincts, in each of which a poll shall be held at a convenient place fixed by the board of directors, for the reception of the ballots of the voters residing in such precinct. 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 corporation, and for that purpose a copy of such register of electors shall be furnished by the clerk of the city to the board of directors. Before each annual meeting, these registers shall be revised and corrected by comparison with the last register of elections of such city, and shall have the same force and effect at school meetings held under this seection in respect to the reception of votes thereat, as the register of election has by law at general elections * * * ."

This section of the code was amended by the enactment of chapter 105 of the acts of the twenty-eighth general assembly, by striking out the words "not more than five precincts" in the third line, and inserting in lieu thereof; "Such number of precincts as the board of directors shall determine".

It was again amended by chapter 125 of the acts of the twenty-ninth general assembly, by substituting a period for the semi-colon after the word "elections" at the end of the thirteenth line, and inserting after such period the following provision:

> "The board of directors of such school corporation, on or before the last Monday preceding such election, shall appoint two suitable persons to be registrars in each of the election precincts of such school corporation for the registration of voters therein, who shall have the same qualifications as registrars appointed for general elections, and shall qualify in the same manner and receive the same compensation, to be paid by the school corporation. The registrars shall meet on the day of election at the voting place in the precinct in which they have been

> appointed, and shall hold continuous session from nine o'clock in the forenoon until seven o'clock in the afternoon. Any person claiming to be a voter and who is not already registered in the proper precinct, may appear before them in the election precinct where he claims he is entitled to vote, and make and subscribe under oath a statement in the registry book; which oath and statement shall be of the same general character as that prescribed by section 1077 of the code, and shall thereupon be granted a certificate of registration."

Were it not for the provision of section 1078 quoted, it would be at once conceded that section 2755, as amended, requires the registration of voters at school elections in districts having a population of five thousand or more. The legislature has specifically provided the method and manner in which such registration shall be made, and has, by two amendments made since the adoption of the code, recognized that the provisions of that section require the registration of voters in such school districts.

It is a well settled rule of statutory construction that where there is a specific act of the legislature covering a particular subject, general statutes relating to the same subject, if repugnant to the special act, must give way and the special statute will control.

Section 1078 is a part of the general election law of the state, and will control, except where the legislature has, by specific enactment, declared a different rule to exist.

Section 2755, as amended by the acts of the twenty-eighth and twenty-ninth general assemblies, is a part of chapter 14 of the code, which relates to the system of common schools in the state. The chapter is a specific act relating to the particular subject of common schools, and in that sense is special in its character.

The provisions of section 2755, which relate to the registration of voters in school districts having a population of five thousand or more, must therefore be held

to control the question of such registration, and to require a registration of electors at all elections in school districts having a population of five thousand or more, as therein provided.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

January 31, 1905.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

CONVICTS—DISCHARGE OF FROM STATE PENITENTIARY—A prisoner in a state penitentiary must serve the full term for which he was sentenced, which term shall be computed from and including the day on which he was received, and exclusive of time spent in solitary confinement.

Des Moines, February 2, 1905.

HON. N. N. JONES,
Warden of Penitentiary,
Fort Madison, Iowa.

DEAR SIR—I am in receipt of your favor of the 1st instant in which you request my opinion as to the construction which should be given section 5682 of the code relating to the discharge of convicts from the penitentiaries of the state.

This section provides:

> "No convict shall be discharged from the penitentiary until he has remained the full term for which he was sentenced, to be computed from and including the day on which he was received into the same, exclusive of the time he may have been in solitary confinement for any violation of the rules and regulations of the prison, unless he be pardoned or otherwise released by legal authority."

The language of this section is clear, explicit and susceptible of but one construction, and that is, in computing the time which a prisoner must serve in the peni-

tentiary under a sentence imposed upon him, the time during which he has been in solitary confinement for any violation of the rules and regulations of the prison, must be excluded from the computation; that is, the prisoner must serve the full term for which he was sentenced and such term shall be computed from and including the day on which he was received into the penitentiary, exclusive of the time he may have been in solitary confinement.

The provisions of this section must be read in and as a part of every judgment by which a prisoner is sentenced to serve a term in the penitentiary, and such judgment must be construed as fixing the term of the sentence which the prisoner shall serve, exclusive of the time he is in solitary confinement for any violation of the rules or regulations of the prison.

This construction does not add anything to the term for which the prisoner is sentenced; it simply excludes from the computation of such term the time he is in solitary confinement.

This question was submitted to my predecessor, Mr. Remley, and his opinion given thereon is in accordance with the conclusion which I have reached.

Under our statute it is clear that the time during which a prisoner is in solitary confinement is no part of the sentence which he is required to serve under the judgment of the court.

I am,

Yours very truly,
CHAS. W. MULLAN,
Attorney-General.

TAXATION—LIABILITY OF MEMBERS OF THE NATIONAL GUARD TO PAY POLL TAX—Members of the National Guard during their term of service cannot be required to pay a poll or capitation tax.

SIR—In compliance with your request for an opinion as to whether the members of the Iowa National Guard

are exempt from the payment of the capitation tax required by subdivision 2 of section 1303 of the code to be levied on each male resident over twenty-one years of age, I beg to submit the following:

Section 2209 of the code provides:

> "Every officer and soldier of the guard shall be exempt from jury duty and poll tax during his term of service * * * ."

The question which then arises is whether the capitation tax, required to be levied on each male resident over the age of twenty-one years under the provisions of section 1303, is a poll tax within the meaning of the provisions of section 2209.

Poll tax is defined by Bouvier as—

> "Capitation tax; a tax assessed on every head, i. e., on every male of a certain age, etc., according to statute."

The definition given in the American and English Encyclopedia of Law is:

> "A poll tax or capitation tax is a tax for a specific sum laid upon the individual simply, without reference to his property, business, or employment."

This definition is supported by the following cases:

Hylton v. United States, 3 Dall., 171;
Head-Money Cases, 18 Fed. Rep., 135;
Glasgow v. Rowse, 43 Mo., 480;
Gardner v. Hall, 61 N. C., 21.

In *Hylton v. United States, supra,* it is said by Mr. Justice Chase:

> "I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the constitution, are only two, to-wit, a capitation or poll tax, simply, without regard to property, profession or any other circumstance; and a tax on land".

These definitions are logically correct and, under the authorities cited, the tax provided for in subdivision 2 of section 1303 must be held to be a poll tax and to fall within the provisions of section 2209 which exempt every officer and soldier of the National Guard from the payment of poll tax during his term of service.

I am therefore of the opinion that the members of the National Guard during their terms of service cannot lawfully be required to pay the capitation tax required to be levied by the provisions of section 1303.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

February 6, 1905.

HON. W. H. THRIFT,
Adjutant General of Iowa.

INSURANCE—AGENTS' LICENSE FEES—Fees paid to the auditor of state by an insurance company are held by him as trustee until the license is issued.

SIR—I am in receipt of your favor of the 2d instant, in which you request my opinion as to when the money received by you from insurance companies for the purpose of paying for licenses to be issued to the agents of such companies, is required to be paid into the state treasury under the provisions of chapter 7 of the acts of the thirtieth general assembly. In compliance with your request I beg to submit the following:

The money received by you from insurance companies to be applied in payment of the licenses which you are required under the statute to issue to its agents, must be held by you as trustee of such insurance companies until you have made the proper investigation for the purpose of determining whether the licenses requested by the insurance companies should issue or not. Such money does not become the property of the state until the

licenses requested by the insurance companies have been issued by you and the money applied in payment thereof. After you have investigated the condition of an insurance company applying for licenses to its agents, and have issued such licenses as requested, and applied the money received by you from the company in payment of such licenses, the money then becomes the property of the state and should be paid over to the treasurer of state by the fifteenth day of the following month.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

February 6, 1905.

HON. B. F. CARROLL,
Auditor of State.

COLLATERAL INHERITANCE TAX—REPORT OF COUNTY ATTORNEY TO TREASURER OF STATE—COMPENSATION—(1) A county attorney is not entitled to a reporting fee upon any estate other than that in the county in which he holds office. (2) The maximum reporting fee of the county attorney is twenty dollars. (3) The county attorney who discovers and reports an estate subject to tax is entitled to the fee.

SIR—I am in receipt of your favor of the 7th instant in which you request an opinion upon the following questions:

1. Is a county attorney authorized to report an estate or property which is in a county other than that in which he holds office and which is liable to pay collateral inheritance tax, and to receive the statutory fee for reporting the same?

2. If an estate is reported of sufficient value to entitle the attorney reporting the same to the maximum fee of twenty dollars, and afterward he or his successor in office discovers additional property belonging to the

estate subject to collateral inheritance tax, may a reporting fee be legally paid based on the tax collected on the value of the property subsequently discovered?

3. If the tax collected from an estate on the value of the property as originally reported is not sufficient to entitle the attorney reporting the same to the maximum fee, can a reporting fee be legally paid to his successor, based on the tax collected on the value of the property subsequently discovered, provided the total reporting fee does not exceed twenty dollars?

These questions will be considered in the order stated.

First—Section 1477-d of the supplement to the code provides:

> "It shall be the duty of the county attorney of each county to report to the treasurer of state the death of all persons whose estates are liable to payment of the collateral inheritance tax, and the description of any property located in the county liable to such tax, and to perform such further legal services in the enforcement of said tax as he may be directed to do by the treasurer of state * * * ."

Rule 6 of the rules adopted in accordance with the provisions of section 6 of chapter 37 of the acts of the twenty-seventh general assembly provides:

> "It shall be the duty of each county attorney to make examination from time to time of all reports filed with the clerk by administrators, executors and trustees, pursuant to law or the provisions of these rules; also to make examination of all foreign wills offered for probate or recorded within his county, as well as of the records of deeds and conveyances in the recorder's office of said county, and if from such examination, or from information or knowledge coming to him from any other source, he finds or believes that any property within his county, or within the jurisdiction of the district court of said county, has since July 4, 1896, passed by will or by the intestate laws of this or any other state, or by deed, grant, sale or gift, made or intended to take effect, in

possession or enjoyment after the death of the testator, donor or grantor, to any person 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, he shall make report thereof in writing to the clerk of the district court, embodying in such report, so far as he is able, all the facts mentioned in rule 2 of these rules, and cause the notice required by rule 3 hereof to be properly given and returned."

Rule 7 provides:

"The county attorney shall also attend and make report to the court concerning the progress of all cases pending for the collection of such tax, together with any other facts which, in his judgment, may aid the court in enforcing the general observance of the collateral inheritance tax law."

The statute and rules referred to require each county attorney within the state to act in his official capacity in reporting estates which are liable to pay a collateral inheritance tax. That is, by such statute and rules it is made a part of the official duty of each county attorney to report to the treasurer of state estates and property which should pay the collateral inheritance tax fixed by law. For the performance of such duty each county attorney is entitled to a compensation of ten per cent of the tax payable to the state, but such compensation shall not exceed the sum of twenty dollars in any one estate. The reporting of such estates and property to the treasurer of state being a part of the official duty of each county attorney, it can only be required of him in the county in which he holds office.

It follows as a corollary that a county attorney has no authority to make report of any estate which may be liable to pay collateral inheritance tax which is located in, and must be administered upon and settled in, any

county other than that in which he holds office and in which he is entitled to act in his official capacity.

The language of section 1477-d hereinbefore quoted, as well as that of rule 6, clearly indicates that it was the intention of the legislature to confine the acts of each county attorney to the estates and property which are within the jurisdiction of the courts of his county, which are liable to pay collateral inheritance tax, and not to confer jurisdiction beyond the county in which he holds office, nor to give him authority to report estates and property in other counties and receive the compensation fixed by law therefor.

No other construction can, in my opinion, be placed upon section 1477-d or upon rule 6. If county attorneys were permitted to go outside of their respective jurisdictions and report estates in counties other than those in which they hold office, the tendency would be to create confusion and uncertainty as to their duties, and as to whom the fee for reporting estates should be paid.

Under the view which I have taken of the proper construction and interpretation of the statute and rules governing the reporting of estates to the treasurer of state by county attorneys, I am of the opinion that a county attorney is not entitled to a reporting fee upon any estate in a county other than that in which he holds office, as such estate is beyond the jurisdiction of the courts of his county.

Second—The maximum fee fixed by statute to which a county attorney is entitled for reporting an estate liable to the payment of the collateral inheritance tax, is twenty dollars; and although property of more or less value may be discovered after his report is made, the discovery of such property cannot increase the amount of compensation to which such county attorney is entitled for making his report, if he has received the maximum sum provided by law. He would, of course, be entitled to the three per cent provided by statute on the amount of taxes collected

for his services in relation thereto, but under no construction of the statute would he be entitled to have the amount of his reporting fee increased in any estate beyond the maximum fee of twenty dollars.

Third—If, after a county attorney has reported an estate as liable to pay collateral inheritance tax, and received his fee for reporting the same, his successor in office discovers other property which was not discovered or reported by his predecessor, and reports the same to the treasurer of state as property liable to pay collateral inheritance tax, I think the county attorney who discovers and reports such property is entitled to a fee for reporting the same; but the entire fee paid both attorneys cannot exceed twenty dollars in any one estate.

The rule suggested is in accordance with the statute, and its adoption will, in my opinion, subserve the public interest.

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

February 9, 1905.
HON. G. S. GILBERTSON,
Treasurer of State.

EXECUTIVE COUNCIL—Cost of transmitting census cards by county auditors to be paid by the state.

Des Moines, February 14, 1905.

MR. A. H. DAVISON,
Secretary Executive Council.

DEAR SIR—I am in receipt of your favor of the 10th instant, requesting my opinion whether the county or the state should pay the charges of transmitting the census cards to the executive council, where such cards

are requested by the council to be sent by express at frequent intervals for its convenience in expediting the compilation of the census. In reply, I submit that the language of section 4 of chapter 8 of the acts of the thirtieth general assembly indicates that the legislature intended that all of the census cards should be transmitted by the county auditor to the secretary of state at one time, and not later than the fifteenth day of July.

If, for the purpose of expediting the work of compiling the census returns, the executive council desires the census cards to be transmitted to the secretary of state at frequent intervals, the state will, in my opinion, be compelled to pay the cost of such transmission, as the act under which the state census is taken makes no provision for such transmission or for the payment of the cost thereof by the counties.

I am, Very respectfully yours,

CHAS. W. MULLAN,
Attorney-General.

ROADS AND ROAD TAX—CONSOLIDATION OF ROAD DISTRICTS—PAYMENT OF ROAD TAXES—Chapter 53 of the acts of the twenty-ninth general assembly requires that all road districts in each township in the state be consolidated into one district, and that all road taxes payable in money shall be collected by the county treasurer as other taxes.

Des Moines, February 16, 1905.

MR. A. H. DAVISON,
Secretary Executive Council.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 9th instant, in which you request my opinion as to the time when road taxes are payable under the statute. In reply to such inquiry I submit the following:

The general law relating to the payment of road taxes,

in force prior to the enactment of chapter 53 of the acts of the twenty-ninth general assembly, is found in section 1413 of the code, and provides that all road taxes payable to the county treasurer shall be due with the first installment of other taxes and subject to the penalty for nonpayment as other taxes. This statute controlled the payment and collection of road taxes, except as provided by sections 1532 and 1533 of the code. The provisions of these sections, relating to the time of the payment of road taxes, are as follows:

Section 1532.

> "The board of township trustees, at its regular meeting in April, may consolidate the road districts thereof into one road district, and it may at such meeting subdivide, returning to the former plan of road work, after a three years' trial of the single district system. If this system shall be adopted, the road fund belonging to the several road districts shall at once become a general township road fund, out of which all claims for work done or material furnished for road purposes prior to the change, and unsettled, shall be paid."

Section 1533.

> "Where the one road district plan is adopted, the board of township trustees shall order and direct the expenditure of the road funds and labor belonging or owing to the township; may let, by contract, to the lowest responsible, competent bidder, any part or all of the work on the roads for the current year, or may appoint a township superintendent of roads, with one or more assistants, to oversee, subject to the direction of the board, all or any part of the work, but it shall not incur an indebtedness for such purposes unless the same has been or shall at the time be provided for by an authorized levy; and may order the township road tax for the succeeding year paid in money and collected by the county treasurer as other taxes * *."

These sections vested in the board of township trustees discretionary power to consolidate the road districts of the township, and, when such consolidation was made, to

order and direct the expenditure of the road funds of the township, to let by contract to the lowest responsible bidder all or any part of the work on the roads, and to require the township road tax to be paid in money and collected by the county treasurer as other taxes. The power conferred upon the board of township trustees by the legislature was wholly discretionary. No obligation rested upon it to consolidate the road districts of the township or to require the road tax to be paid in money and collected by the county treasurer as other taxes.

If the board exercised the discretion given it by the legislature, and consolidated the road districts of the township and required that the township road tax be paid in money and collected by the treasurer as other taxes, the payment and collection of the taxes of the township in which the consolidation was made were governed by the provisions of the sections quoted, and not by the general law relating to the payment of road taxes. The road taxes of the township in which such consolidation was made, under the provisions of the sections referred to, became due and payable in two equal semi-annual installments as county and state taxes.

Under the law as it then existed, all road taxes in townships where there was no consolidation of the road districts, were payable with the first installment of county and state taxes, while the road taxes in townships where such consolidation had been effected were payable in two installments the same as other taxes.

By the enactment of chapter 53 of the acts of the twenty-ninth general assembly, section 1532 of the code was repealed. The discretion conferred upon the board of township trustees by that section, to consolidate the road districts of a township into one district and to require the tax to be paid in cash and collected as other taxes, was taken from such board, and every board of township trustees within the state was required at its regular meeting in April, 1903, to consolidate all of the road districts in the township into one road district.

By the same act, section 1533 of the code was amended by striking out the words "with one or more assistants" in the sixth line, and by striking out the word "may" in the ninth line of the section, and inserting the word "shall" in lieu thereof; and by striking out and inserting other words the effect of which is not material in this inquiry.

By striking out the word "may" in the ninth line of section 1533 of the code, and inserting the word "shall" in lieu thereof, the legislature made it mandatory upon the board of township trustees to require all road taxes to be paid in money and collected by the county treasurer as other taxes.

Section 1540 of the code, as amended by the acts of the twenty-ninth general assembly, is in harmony with the provisions of section 1533 as amended, and provides:

> "He (the township clerk) shall, within four weeks after the trustees have levied the property road tax for the succeeding year, certify said levy to the county auditor, who shall enter it upon the tax books for collection by the county treasurer as other taxes."

Section 18 of the act of the twenty-ninth general assembly repeals all acts and parts of acts in conflict with the provisions of chapter 53.

The effect of the enactment of chapter 53 was to require that all road districts in each township in the state be consolidated into one district, and that all road taxes payable in money should be collected by the county treasurer in the same manner as other taxes. The provisions of section 1413, by which road taxes were made payable with the first installment of state and county taxes, and those of sections 1532 and 1533, by which a discretion was vested in the board of township trustees of each township, were repealed by section 18 of the act of the twenty-ninth general assembly.

This was the condition of the law relating to the payment of road taxes in this state as it existed at the time

of the convening of the thirtieth general assembly. That body attempted to make a further change in the law governing the collection of road taxes, by amending section 1533 of the code by striking out the words "as other taxes" in the eleventh line of that section. It will be observed that the words "as other taxes" are in the tenth line of section 1533, as it appears in the supplement to the code with the amendments made by the twenty-ninth general assembly incorporated therein, and that the words "as other taxes", to which the amendment of the thirtieth general assembly is directed, are in the eleventh line of section 1533 as it appears in the code before it was amended by the twenty-ninth general assembly.

The amendment attempted to be made by the thirtieth general assembly must be held to apply to section 1533 of the code as the same existed before it was amended by the twenty-ninth general assembly, and not to that section as it appears in the code supplement after such amendment.

It is clear from the language of section 2 of chapter 50 of the acts of the thirtieth general assembly, that the legislature had in mind, at the time that chapter was enacted, section 1533 as it appears in the original code, and not as it appears in the code supplement.

That section as it appears in the code gave to the board of township trustees the discretion to require the payment of road taxes in cash, to be collected as other taxes, and that power was entirely abrogated and taken away from such board by chapter 53 of the acts of the twenty-ninth general assembly. So that at the time the thirtieth general assembly undertook to amend section 1533 by striking out the words "as other taxes" in the eleventh line thereof, the provisions of that section, as well as the words stricken out, had been in effect repealed by the twenty-ninth general assembly, and were not then in force as a statutory law of the state.

The striking out of the words "as other taxes" in the eleventh line of section 1533 of the code had no effect whatever upon the provisions of that section or of section 1540, as they appear in the supplement, with the amendments made by the twenty-ninth general assembly incorporated therein. Both of these sections as so amended require the road taxes to be paid in cash and collected by the county treasurer as other taxes.

Taking all of these different sections and the amendments thereto together, and giving each the force to which it is entitled, it is impossible to reach any other conclusion than that the provisions of sections 1533 and 1540, as they appear in the supplement to the code, control the payment of road taxes and the collection thereof by the county treasurer, and that such taxes are due and payable in two equal semi-annual installments at the same time that state and county taxes become due and payable, and are to be collected in the same manner.

Yours very respectfully,

CHAS. W. MULLAN,

Attorney-General of Iowa.

CITY COUNCIL—POWER TO CONSTRUCT BRIDGES—A city council has the power, without consulting the river front improvement commission, to locate, erect and maintain bridges over a river as the public necessities may require.

SIR—In response to your request of the 15th instant for my opinion whether the city council of Cedar Rapids has power to locate and erect new bridges across the Cedar river where no bridges have heretofore existed, without the approval by the river front improvement commission of the plans and specifications locating such bridges, abutments and piers, I submit the following:

Section 757 of the code imposes upon cities the care, supervision and control of all public bridges within their corporate limits.

Section 758 provides:

> "Cities of the first class shall have full control of the bridge fund levied and collected as provided by law, and shall have the right to use the same for the construction of bridges, culverts and approaches thereto, repairing the same, and paying bridge bonds and interest thereon, issued by such city, and shall be liable for defective construction thereof, and failure to maintain the same in safe condition, as counties now are with reference to county bridges, and no county shall be liable for any such bridge or injuries caused thereby."

Section 958 makes the provisions of sections 757 and 758 applicable to cities acting under special charter.

The bridges erected upon or connecting streets in a municipal corporation are a part of the public highways and are under the control of the officers of the corporation whose duty it is to so construct the same that they shall afford reasonable and safe facilities for public travel.

The power to construct and maintain bridges upon the public highways of a city of the first class, rests within the discretion of the municipal authorities, subject to the restriction that such bridges must be so constructed as to afford reasonable, safe and convenient facilities for public travel.

By section 758 a city is made liable for any damages which may be sustained because of the defective construction of any bridge erected by it.

The legislature has given to cities of the first class the power to erect such bridges upon its streets and highways as the public necessities may reasonably demand, and to so locate and construct the same as shall afford safe and convenient means of travel.

I find nothing in the act of the twenty-ninth general assembly, by which the river front improvement commission is created, that takes from or abridges the power of the council of cities of the first class to locate

and construct highway bridges at such places upon the streets and highways of the cities, or across streams, for the purpose of connecting such streets and highways, as the convenience of the traveling public demands.

The location and erection of abutments and piers are incidental to the construction of a bridge, and the duty rests upon the city council to so locate and construct the same that the safety of the inhabitants of the city shall not be endangered thereby, and that the superstructure thereon shall be safe and commodious for public travel.

The control of the highways and bridges within a municipal corporation falls within the recognized and legitimate acts of municipal government, and no act of the legislature should be held to abridge or take away such control, unless its express language is susceptible of no other construction; and even then it may be well doubted whether it is within the power of the legislature to take the control of the highways and bridges within a municipal corporation from the corporate authorities. That question does not, however, arise here.

Under the provisions of the statute cited, and of the act creating the river front improvement commission, I am of the opinion that the city council may locate bridges wherever public necessities require, without submitting its plans and specifications to the river front improvement commission for its approval.

It is of course desirable that the city authorities and the river front improvement commission act in harmony, and to that end the plans of the one body should be submitted to the other, and an agreement which is satisfactory to both bodies be reached; but as a matter of law the city council, in the exercise of its discretion, has the

power, without consulting the river front improvement commission, to locate, erect and maintain such bridges as the public necessities may require.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

February 17, 1905.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

SCHOOL DISTRICTS—EXTENSION OF CORPORATE LIMITS OF A CITY OR TOWN—If the corporate limits of a city or town are extended so as to include territory which was not within the independent school district thereof, such extension, by operation of law, changes the boundaries of said district.

SIR—I am in receipt of your favor of the 21st instant asking my opinion upon the following questions:

> "When the corporate limits of a city or town are extended beyond the boundaries of the existing independent district in which such city or town is located, thereby causing a change in the boundary of the school corporation, as provided in chapter 89 of the acts of the twenty-seventh general assembly, we desire your opinion upon the following questions:
>
> *First*—Is it necessary that the districts affected by this change elect an entire new board as provided in section 2802?
>
> *Second*—When does the change in said school corporation become operative?"

In response to your request I submit the following opinion:

Section 2802 of the code provides:

> "When any changes are made in the boundaries of any school corporations, the boards of directors in office at the time shall continue to act until the next regular school election, when the new corporation

> shall organize by the election of directors in accordance with the new boundaries, whereupon the new board shall make an equitable division of all assets and liabilities of the corporations affected * * * ".

The provisions of this section are mandatory, and if any changes are made in the boundaries of any school district in the state, the directors in office at the time that such change is made can continue to act only until the next regular school election. At that time an entire new board must be elected.

Section 1 of chapter 89 of the acts of the twenty-seventh general assembly provides:

> "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 also be correspondingly extended".

Under the provisions of this section, if the corporate limits of a city or town are extended so as to include territory which was not within the independent school district of such city or town prior to the extension of the lines of the corporation, such extension, by operation of law, changes the boundaries of the independent school district and of the district into which such corporate lines are extended.

The boards of directors of the respective districts where the boundaries of the school districts are changed by the extension of the lines of the corporation, can act in their official capacity only until the next regular election in the respective districts. At such regular election, each of the districts, the corporate boundaries of which have been changed, must organize by the election of an entire new board of directors in accordance with the new boundaries, and make such an equitable division of all assets and liabilities of the two school corporations as may be agreed upon by the respective boards.

Section 2802 of the code is applicable to cases where the change of boundaries of school districts is made by the

extension of corporate lines, as well as to cases where such change is made by an agreement of the respective boards of the school districts.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

February 23, 1905.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

IOWA MONUMENT—It is held that the title to the land selected as a site by the Andersonville Monument Commission is such as to secure the rights of the state therein in perpetuity.

Des Moines, February 28, 1905.

MR. D. C. BISHARD,
Secretary, Andersonville Monument Commission,
Altoona, Iowa.

DEAR SIR—As to whether the title to the land selected as a site upon which to erect the Iowa monument at Andersonville, Georgia, is such as to fully protect the rights of the state therein in perpetuity, and insure its freedom from taxes or other liens of any character, I beg to say:

The site selected is, as I am informed by the commission, in the Andersonville, Georgia, national cemetery, directly south of the New Jersey monument erected therein.

The title to the national cemetery at Andersonville, Georgia, was acquired under an act of congress February 22, 1867, and is in the United States, the same having been ceded to the United States by an act of the legislature of Georgia, approved October 25, 1870.

I am informed that a copy of the design of the Iowa monument, with its dimensions and inscriptions thereon, has been submitted to the quartermaster general of the

United States for approval, and that the same has been approved by him and permission granted to erect such monument at the place selected by the Iowa Andersonville monument commission. The title to the site upon which it is proposed to erect the monument, acquired through the government in the manner suggested, will, in my opinion, fully protect the rights of the state therein in perpetuity, and will insure freedom from taxes and other liens.

It appears to me that the selection of the site by the Iowa Andersonville monument commission is an eminently proper one for the erection of the monument, and that such selection in all respects complies with the statute making the appropriation therefor.

I am, Very respectfully,

CHAS. W. MULLAN,
Attorney-General of Iowa.

SCHOOL CORPORATION—LIMIT OF INDEBTEDNESS—An incorporated town and a school district which is within the territorial limits thereof, are distinct corporations and the indebtedness of one in no wise affects the other, so far as the constitutional limitation thereon is concerned.

Des Moines, March 1, 1905.

HON. E. C. SPAULDING,
Marble Rock, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your esteemed favor of the 27th ultimo, in which you ask my opinion as to the legality of bonds proposed to be issued by the school district of Union township, which depends upon the following facts:

The corporation of Marble Rock, which is bonded to its constitutional limit, is within the school district of Union township, and the district wishes to issue bonds for the purpose of procuring funds to the amount of fifteen thousand dollars for schoolhouse purposes.

In reply I beg to say that, if the school district of Union township has not exceeded the constitutional limit which may be incurred by municipal corporations, it may legally issue bonds to the amount of such limit for schoolhouse or other purposes. The fact that the corporation of Marble Rock is within the school district referred to, and that such corporation is indebted to the limit fixed by the constitution, does not affect the right of the school district to incur an indebtedness within such limit. The corporation of the town of Marble Rock and that of the school district of Union township are separate and distinct corporations, and each has the legal right to incur an indebtedness, independent of the other, to the extent of the constitutional limitation.

The proposed issue of bonds for fifteen thousand dollars by the school district, if the amount does not exceed the limit fixed by the constitution, will be a valid issue.

I am, Yours very truly,

CHAS. W. MULLAN,
Attorney-General of Iowa.

SCHOOL ENUMERATION—LEGAL RESIDENCE OF IMMATES OF STATE INSTITUTIONS—The inmates of a state institution do not acquire a residence which entitles the school district in which such institution is located, to enumerate them.

SIR—In response to your favor of the 28th ultimo, in which you request my opinion as to whether the inmates of the institution for feeble-minded children, located at Glenwood, should be enumerated as residents of the school corporation in which the institution is located, I beg to submit the following:

The inmates of a state institution do not acquire a residence which entitles the school district in which such institution is located, to enumerate them, under the provisions of section 2764. They are not residents of the

school corporation within the meaning of that section. The section is applicable only to actual residents of school corporations, and not to persons who are inmates of a state institution, and who do not acquire a residence within such school corporation.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa:

March 1, 1905.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

INSURANCE—DISCRIMINATIONS BETWEEN PERSONS INSURED—Policy of the State Life Insurance Company of Indiana Construed.

SIR—In compliance with your request for an opinion as to whether the policy proposed to be issued by The State Life Insurance Company of Indiana, is a contract which may be legally issued by an insurance company under the laws of this state, and upon the plan adopted by the insurance company named, I beg leave to say:

After having carefully read the large amount of written and printed matter bearing upon the question submitted with the request and policy under consideration, and after having obtained the opinions of two competent actuaries who have given the policy careful examination as to the insurance provisions thereof, as determined from an actuary's standpoint, I have reached the conclusion that the policy and the manner of issuing the same, adopted by the insurance company, are not permissible under the laws of this state. The reasons for my conclusion may be briefly stated as follows:

The policy is a twenty year payment life plan, and is dated back seven years for the purpose, as is claimed, of placing the insured in the class of those who took insurance in the company seven years prior to the issuance

of the policy under consideration; that is, if the policy is issued upon the life of a person at the age of thirty-six, it is claimed by the insurance company that the person so insured is placed in the class with those to whom policies of the same character were issued at the age of twenty-nine.

Section 1782 of the code prohibits any life insurance company from making or permitting any distinction or discrimination between persons insured in the same class and of equal expectancy of life, in the amount or payment of premium, or rates charged for policy of life or endowment insurance, or in dividends or other benefits payable thereon, or in any other of the terms or conditions of the contract it makes.

The same section prohibits any insurance company or agent thereof from making any contract of insurance or agreement other than as plainly expressed in the policy issued, and prohibits any such company or agent from paying or allowing, directly or indirectly, as an inducement to insurance, any rebate of premium payable on a policy, or any special favor or advantage in the dividends or other benefits accruing thereon, or any valuable consideration or inducement whatever, not specified in the policy or contract of insurance.

Under the provisions of this statute, it becomes important to inquire whether a person who takes the policy proposed to be issued by the company, is placed upon the same footing in all respects as a person to whom a twenty year payment life plan policy was issued by the company seven years prior to the issuance of the one under consideration.

The claim of the insurance company is that, under the plan adopted, and under which the policy is issued, the person who is insured thereby pays to the company the same amount paid by the holder of a like policy issued seven years before, less the amount of premium required

for losses and expenses, and that there is no discrimination between the persons to whom the policy under consideration is issued and those to whom a policy of like character was issued seven years before.

Assuming the policy under consideration to have been issued in the year 1903, the question to be determined is, Does the person who takes such policy stand upon an equal footing with those who took policies of the same character in the same company in the year 1896?

To place the entrant of 1903 in the class of 1896, and on an exact equality with those who took insurance in 1896, he should contribute in cash, or its equivalent, an amount equal to the value of a policy issued on the same plan for the same amount at the age of twenty-nine in 1896. The value of such policy is the reserve value, plus its share of the dividends earned by the class. The value of a ten thousand dollar twenty year payment life plan policy issued at twenty-nine years of age, and in 1896, is, in 1903, the sum of $1355.70. The entrant of 1903 is not interested in the losses or profits prior to the time that he takes his insurance, and the reserve value and its share of dividends earned by the class fix the amount which it is necessary for him to pay to be put upon an equal footing with those who, at the age of twenty-nine, took policies of the same character in the company in the year 1896. Any sum, either charged by the company or made a lien upon the policy issued in 1903, in excess of or less than the sum of $1355.70, is a discrimination in favor of or against the person who takes the policy in the year 1903.

The plan upon which the policy under consideration is proposed to be issued is that it shall be antedated seven years, that a lien of $1600, upon a ten thousand dollar policy, shall be charged against the policy, and that the insured shall pay interest upon such lien; it being claimed that the lien so charged against the policy places the insured upon an equality with policies issued seven years prior thereto.

The charging of the lien of $1600 against the policy in the manner proposed by the company, is a discrimination against the person who takes the policy in the year 1903, as the lien so charged is $244.30 in excess of the amount which the entrant should be required to pay to place him upon an equality with the class who took insurance seven years prior thereto, at the age of twenty-nine years. By this method the company receives $244.30 in excess of the sum which it is entitled to receive for the insurance written, and it is enabled to take out of the cash premium paid and the increase of the reserve by interest, that sum and apply it to whatever purpose it may desire.

The person to whom the policy is issued receives no advantage whatever in consenting to have it antedated in the manner proposed, and the issuance of such a policy is open to the most serious objection that it is almost certain that the character of the contract will be misrepresented by insurance solicitors, and that it will be issued under a misunderstanding on the part of the person who accepts it, as to its character and value.

It appears to be an attractive and alluring dodge adopted by an insurance company for the purpose of inducing persons to take insurance under a misrepresentation as to the value of what they obtain. It is possible that the officers and managers of the company adopted this manner of obtaining insurance in good faith and without any intention of misrepresenting the value of the policy which they issue under the plan proposed; but in placing this policy upon the market by means of insurance solicitors, who are employed by the company for the purpose of inducing persons to accept it, under the plan adopted misrepresentations on the part of such solicitors, and misunderstandings on the part of the persons who are induced to accept the policy, are certain to follow its use. While the insurance company may not be chargeable with willful fraud or misrepresentation, I am unable to see how it is possible for its officers and managers to adopt a policy of this character and employ

solicitors to sell it to persons wishing insurance under the plan adopted, without knowing that the persons who are induced to accept the policy will take it under a misrepresentation as to the character and value of the contract which they obtain from the company.

The issuance of the policy in the manner proposed, and the charging of a lien against it in the sum of $1600, or the requiring of the payment of that sum in cash by the person who accepts the policy, is clearly a violation of the section of the statute referred to, as it is a discrimination between persons insured of the same class in the amount or payment of premium or rates charged for life policies.

In my opinion the policy submitted, and the method of issuing the same adopted by The State Life Insurance Company of Indiana, should be prohibited by the insurance department of your office, and the insurance company should be required to take up and cancel all of the policies of the character named which have been issued upon the plan outlined herein, and to return to the persons to whom such policies were issued, the full amount of the premium paid by them thereon.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

March 8, 1905.

HON. B. F. CARROLL,
Auditor of State.

RENTS FROM UNSOLD SCHOOL LANDS—DISPOSITION OF—Rents accruing from unsold school lands should be credited to the interest account of the permanent school fund.

SIR—In response to your request for my opinion as to what disposition shall be made of rents received from unsold school lands belonging to the state, I beg leave to say that I find no statute which in terms provides for the disposition of rents received from such lands. Such rents, however, are a profit or income in the nature of

interest derived from the permanent school fund, and must be regarded as money paid for the use of a portion of the permanent school fund of the state and credited to the interest account thereof.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

March 8, 1905.

HON. B .F. CARROLL,
Auditor of State.

INSURANCE—CHARACTER OF RISKS INSURED AGAINST—THE TERM ACCIDENT DEFINED—It is held that under the insurance laws of this state a "physician's liability policy" may not be issued.

SIR—I beg leave to acknowledge the receipt of your communication in which you request my opinion upon the question of the authority of the Travelers Insurance Company of Hartford, Connecticut, to issue a so called "physicians' liability policy" in this state, a copy of such policy being submitted with the request.

In compliance with your request I submit the following opinion:

Section 1709 of the code, as amended by the twenty-eighth and twenty-ninth general assemblies, designates the kind of insurance and character of risks which may be insured against in this state by insurance companies other than life. The fifth subdivision of the section provides that insurance companies other than life may "insure the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water, and insure employers against loss in consequence of accidents or casualties of any kind to employees or other persons, or to property resulting from any act of an employee, or any accident or casualty to persons or to property or death occurring in

or connected with the transaction of their business, or from the operation of any machinery connected therewith, except such insurance as is provided for in the next paragraph".

Subdivision 6 of the section, which is the next paragraph referred to, authorizes insurance against loss or injury to person or property, or both, growing out of explosion or rupture of steam boilers.

There are eight subdivisions of the section referred to, and each designates a kind or class of insurance which may be written by an insurance company in this state. By the provisions of section 1710, as amended by the twenty-eighth and twenty-ninth general assemblies, insurance companies are prohibited from issuing policies of insurance for more than one of the classes named in section 1709.

If the Travelers Insurance Company of Hartford, Connecticut, is entitled to write what is termed "physicians' liability policies" in this state, the authority to write such policies must be found in subdivision 5 of section 1709, or it does not exist, as the legal maxim, "Expressio unius est exclusio alterius" is applicable to the statute authorizing the writing of insurance in this state, and the writing of a so called physicians' liability policy must be held to be excluded unless express authority is given for writing the same. It therefore is important to analyze the provisions of that subdivision, and ascertain whether its terms are sufficiently broad to permit that class of insurance to be written within the state.

The character of insurance authorized by subdivision 5 may properly be divided into two classes:

(1). Any company organized under chapter 4 of title IX of the code, or authorized to do business in this state, may insure the health of persons and against personal injuries, disablement or death, resulting from traveling or general accidents by land or water.

(2). Any such company may insure employers against loss in consequence of accidents or casualty of any kind to employees or other persons, or to property resulting from any act of an employee, or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith.

Unless the so called "physicians' liability policy" falls within one of the classes of insurance designated by subdivision 5 of the section referred to, no authority can be found in the statute for writing such insurance by any insurance company.

Again taking up the subdivisions of subdivision 5 of section 1709, the question is presented, What are the kinds of insurance authorized by such subdivisions?

First—The statute authorizes insurance companies to insure the health of persons.

Second—It authorizes insurance companies to insure persons against personal injuries, disablement or death, resulting from traveling or general accidents by land or water.

Third—To insure employers against loss in consequence of accidents or casualties of any kind to employees or other persons, or to property, resulting from any act of an employee, or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith.

Is the power given by either of the clauses of the statute referred to broad enough to authorize the issuance of physicians' liability policies by insurance companies?

Such insurance is clearly not an insurance of the health of persons.

Is it insurance against personal injuries, disablement or death resulting from traveling or general accidents by land or water? The policy proposed to be issued by

the Travelers Insurance Company by its terms insures the physician or surgeon therein named against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, suffered by any person by reason of any error or mistake made by the assured in the practice of his profession.

It has been forcibly urged on the part of the Insurance Company that indemnity against loss from common law or statutory liability for damages on account of bodily injuries suffered by any person by reason of an error or mistake made by the assured, is valid, and that insurance against one's own negligence is not void as against public policy. It is also urged that the insurance created by the policy referred to is insurance against personal injuries, or what is commonly known as accident insurance, and therefore authorized by the provisions of subdivision 5 of section 1709 of the code.

The cases cited by counsel for the Insurance Company, upon the proposition that insurance against common law or statutory liability for damages on account of bodily injury suffered by any person, by reason of an error or mistake made by the assured, is valid, are all cases of insurance of property against loss or damage by fire; and nearly all of them relate to the question of the adjustment of the liabilities of insurance companies where there was a re-insurance or a double insurance of the property damaged or destroyed. None of them bears upon the question under consideration.

The cases cited in support of the proposition that the physicians' liability policy proposed to be issued is a species of accident insurance, are not authority for the position taken by counsel. In all of the cases the person who was injured was insured as against personal injury by an accident, and the question which arose in each case was whether the injury which had been received by the insured was caused by an accident.

In *Lovelace v. Travelers Protective Association,* 126 Mo., 104, and in *Supreme Council, etc., v. Garigus,* 104 Ind., 140, it was held that a gun shot wound inflicted

under circumstances where the insured was not at fault, was an accident within the meaning of the policy held by the person injured; and substantially the same rule is held in *Snyder v. Insurance Company,* 24 Wis., 28. These cases throw no light upon the question of the right of an insurance company to issue a policy, whereby it undertakes to indemnify a physician or surgeon against liability for damages arising from an injury to a patient, caused by the failure of such physician or surgeon to bring to his assistance the ordinary knowledge, learning and skill which the law requires, or by reason of negligence upon his part in the treatment of such patient.

The Travelers Insurance Company, by the policy under consideration, does not undertake to insure the person therein named against personal injuries, disablement or death resulting from traveling or general accidents by land or water, but against any legal liability which he may incur by reason of his want of proper skill or knowledge in his profession, or by reason of any negligence or carelessness upon the part of the insured in the treatment of a patient.

There is a very wide distinction between the kind of insurance sought to be effected under the policy named, and that which is permitted under subdivision 5 of section 1709 of the code. That subdivision permits insurance of the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water.

The definition of the word "accident" as given in the Century Dictionary is as follows:

> "In general, anything that happens or begins to be without design, or as an unforeseen effect; that which falls out by chance; a fortuitous event or circumstance".

The same authority further defines "accident" as—

> "In legal use, an accident is: An event happening without the concurrence of the will of the person by whose agency it was caused. It differs from a

mistake, in that the latter always supposes the operation of the will of the agent in producing the event, although that will is caused by erroneous impressions on the mind."

In *Paul v. Travelers Insurance Company,* 112 N. Y., 472, an accident is defined as follows:

"An accident is the happening of an event without the aid and design of a person, and which is unforeseen."

"If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means."

Mutual Accident Association v. Barry, 131 U. S. 121.

In *Richards v. Travelers Insurance Company,* 89 Cal., 170, it is said:

" 'Accident' must be given its popular meaning; that is, a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured."

It is "accident" as thus defined by the courts that the legislature has authorized insurance companies to insure against. The liability of a physician or surgeon, either at common law or under the statute, for damages caused by his lack of skill, or a mistake made by him in the treatment of a patient, is not an accident within the meaning of the statute, or as defined by the courts.

Malpractice is the "bad professional treatment of disease, pregnancy, or bodily injury, from reprehensible ignorance or carelessness, or with criminal intent". Century Dictionary. *Shummer v. Dayton,* 8 Ohio Cir. Dec.

A physician is not an insurer. All that he is required to do is to bring to his assistance the ordinary knowledge, learning and skill which physicians possess in the vicinity in which he practices his profession. A physician possessing the requisite qualifications, and applying his skill and judgment with ordinary care and diligence to the diagnosis and treatment of a patient, is not liable for an honest mistake or error of judgment. *Ewing v. Goode,* 78 Fed. Rep., 442.

The policy under consideration attempts to indemnify a physician or surgeon for the failure to bring to his assistance in the treatment of a patient, or in the performance of an operation, the ordinary skill, learning and ability possessed by physicians in the community where he practices his profession, and for the failure of such physician or surgeon to use ordinary care and diligence in the diagnosis and treatment of a patient, or in the performance of an operation which he is called upon to perform.

As suggested, such insurance cannot, under any interpretation of the meaning of the word "accident", be classed as insurance against personal injuries, disablement or death, resulting from traveling or general accidents by land or water.

The third division of subdivision 5 of section 1709, relates solely to insurance which may be taken by employers to indemnify them against damages to persons or property arising from accidents; and it is not necessary to discuss at length the question whether such division of subdivision 5 of the section referred to authorizes insurance of the character under consideration, as it is clear that the insurance proposed to be effected by the policy under consideration does not fall within the classes of insurance authorized by the division of subdivision 5 referred to.

The conclusion must therefore be reached that such insurance is not authorized by the statutes of Iowa, and that no insurance company has the right to issue policies of the character under consideration in this state.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

March 13, 1905.

HON. B. F. CARROLL,
Auditor of State.

CAPITOL DECORATION—Contract between the Capitol Commission and Artist Elmer E. Garnsey Construed.

SIR—In compliance with your request as to the correct interpretation which should be given that portion of the contract for the mural decoration of the statehouse, executed on the 11th day of November, 1904, by the capitol commission and Mr. Elmer E. Garnsey, which relates to the decoration of the dome and rotunda, I respectfully submit the following:

The provision of the contract referred to, and as to which an interpretation is requested, is as follows:

> "DOME AND ROTUNDA: Second Floor and up to and including the Cap of Dome:
>
> The surfaces of dome and walls to be painted in oil-color. The cap of dome to be in deep blue. The bell of dome, now paneled, is to be rendered in dull gold, down to and including cornice above the scagliola columns. The capitals of these columns to be gilded. The pedestals of columns to be in stone color. The main drum of dome, immediately beneath windows, to be in a warm stony color, with golden sheaves or similar ornamental motives. The entablature beneath the main drum to be in gold and color, uniting the tones above and beneath it. The frieze immediately below this entablature to be in grey green or other sober color, to serve as an appropriate background for the statues now in place

there. The statues are to be rendered in dull gold, with possibly a green 'patina'. And the moldings around the eight lunettes and the supporting brackets are to be treated in the same manner. The lunettes are to be painted in oil-color, without further ornamentation. The capitals of the polished granite columns are to be gilded, and the entablature supported by them to be picked out in color and gold. The walls of Rotunda on second floor are to be paneled with lines and ornament, about twelve inches or more wide, in color and gold. The general effect being intended to solidify the construction of the dome and its supporting piers."

1. The first question as to the correct interpretation of this provision of the contract, arises from the use of the phrase "rendered in dull gold", which appears in the following sentence:

> "The bell of dome now paneled is to be rendered in dull gold down to and including cornice above the scagliola columns."

The same phrase again appears in the following sentence:

> "The statues are to be rendered in dull gold, with possibly a green patina."

The question presented is, Does the phrase "to be rendered in dull gold", refer to the color effect to be produced in the decoration of the dome and the statues, or to the material to be used by the decorator?

After a careful consideration of this phrase as used in the provision of the contract referred to, I have reached the conclusion that it must be interpreted to mean the color effect which is to be produced by the artist, rather than the material to be used by him in producing such effect. If in producing the color effect of dull gold the artist uses materials which are recognized as proper for that purpose under the highest rules and canons of decorative art, the conditions of the contract are complied with, and he is not required to use gold or gold leaf as a material in producing the effect.

2. The second question arises by reason of the use of the words "gilded" and "gold" in the provision of the contract referred to, and in other parts thereof. The word "gilded" appears in the following sentences which are in the provision of the contract referred to:

> "The capitals of these columns (scagliola) are to be gilded."
>
> "The capitals of the polished granite columns are to be gilded."

The word "gold" is used in the provision of the contract in the following sentences, and appears frequently throughout the entire contract:

> "The entablature beneath the main drum to be in gold and color."
>
> "The end of the entablature supported by them (granite columns) to be picked out in color and gold."
>
> "The walls and rotunda on second floor are to be paneled with lines and ornament, about twelve inches or more wide, in color and gold."

In determining the interpretation which should be given the words "gilded" and "gold", I have made an examination of all accessible memoranda made by the capitol commission and by Mr. Elmer E. Garnsey which led up to the making of the contract in question. There is an ambiguity as to the meaning of these words as used in the contract which permits the examination of evidence aliunde for the purpose of determining the sense in which these words were used by the parties to the contract at the time it was executed.

In the original memorandum of the work to be performed by Mr. Garnsey, which, as I am informed, was prepared by him as the foundation of the contract afterward elaborated and executed, I find the following provision:

"All of the work to be done in oil color, except basement walls which are to be in water color. Gilding is to be done in gold leaf."

Taking this memorandum in connection with the sentences and phrases in which the words referred to are used, and giving the words of such sentences and phrases their ordinary meaning, I am led to the conclusion that the words "gilded" and "gold", as they appear in the contract were intended by the parties to refer to and describe gold leaf as a material to be used by the artist in making the decorations provided for, and not to refer to or describe an effect to be produced with other materials.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

March 17, 1905.

HON. ALBERT B. CUMMINS,

Governor of Iowa.

TAXATION—PUBLIC LIBRARIES—LIABILITY OF RAILWAY AND ACREAGE PROPERTY WITHIN A CITY FOR—(1) The property of railway companies within a city or town where a library tax is levied is subject to taxation for that purpose. (2) Tracts of land of ten acres or more which are used for agricultural purposes are exempt from taxes levied for the maintenance of a city library.

Des Moines, March 21, 1905.

MR. JOHNSON BRIGHAM,

State Librarian.

DEAR SIR—I beg to acknowledge the receipt of the letter of Mr. H. W. Albrecht, president of the Tama Public Library board, referred by you to me for my opinion upon the questions therein presented, which may be stated as follows:

(1). Is railway property in a city of the second class taxable for city library purposes?

(2). Is acreage property within the city limits subject to taxation for city library purposes?

These questions will be considered in the order stated.

First. Section 732, as amended by the acts of the twenty-eighth general assembly, and which appears upon page 67 of the supplement to the code, provides:

> "The board of trustees shall, before the first day of August in each year, determine and fix the amount or rate, not exceeding two mills on the dollar in all cities and in towns, of the taxable valuation of such city or town, to be levied, collected and appropriated for the ensuing year for the maintenance of such library; and in cities and towns also the amount or rate, not exceeding three mills on the dollar of the taxable valuation of such city, to be levied, collected and appropriated for the purchase of real estate and the erection of a building or buildings thereon for a public library, or for the payment of interest on any indebtedness incurred for that purpose, and for the creation of a sinking fund for the extinguishment of such indebtedness; and shall cause the same to be certified to the city council, which shall levy such tax or so much thereof as it may deem necessary to promote library interests for each of said purposes so determined and fixed, and certify the per cent thereof to the county auditor, with the other taxes for said year."

Under the provisions of this section the levy of the library tax must be made upon all of the taxable property within the municipal corporation.

Section 1339 of the code provides:

> "All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purpose as the property of individuals within such counties, cities, towns, townships and lesser taxing districts."

The assessment referred to in the section quoted is the assessment made by the executive council and transmitted to the county auditor of each county. Upon the

valuation thus made and certified by the executive council, the board of supervisors of each county is required, by section 1338 of the code, to determine the assessed value of all railways in each city, town, township or lesser taxing district in the county through or into which such railways extend. The assessed value of each railway within the taxing district, as so determined by the board of supervisors, becomes the basis for the levy of taxes upon the railway property within such assessing district, and such property thereupon becomes subject to taxation for all purposes for which taxes may be levied within such city, town or taxing district.

A city library tax is a tax which is certified by the city council to the board of supervisors, and levied as other municipal taxes upon the taxable property of the city; and the property of railway companies within the city or town where such library tax is levied, is subject to taxation for that purpose.

Second. The liability of acreage lands to taxation for city library purposes presents a different question.

Section 616 of the code is as follows:

> "No lands included within said extended limits which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city or town purpose, except that they may be subjected to a road tax to the same extent as though they were outside of the city or town limits, which tax shall be paid into the city or town treasury."

Under this section the question presented is, whether taxes levied for the maintenance of a public city library are for city purposes.

An examination of the adjudicated cases throws little light upon the question.

The supreme court of Indiana in City of *South Bend v. University of Notre Dame,* 69 Ind., 344, held under a similar statute that school taxes, levied by the school district of the city of South Bend, were not city taxes within the meaning of the Indiana statute.

The court of appeals of New York has held that taxes levied for the purpose of erecting bridges within the limits of a city, and taxes levied for the purpose of purchasing ground for city parks, and taxes levied for the purpose of erecting and maintaining a system of water works within a city, are taxes levied for city purposes under the constitutional provision of that state.

There is a wide distinction between taxes levied for school purposes in a municipal corporation, and those levied for the maintenance of a public city library. A school district is a separate and distinct corporation, the directors of which are elected by the voters of the district at the annual school election. The management of the schools is in no wise connected with the city government. The city council has nothing to do with the levying of school taxes or with their expenditure. All of the details of the levy, the transaction of the business of the district, and the expenditure of the money raised by taxes levied upon the property of the district, are performed by the officers of the school corporation, and the city government has no voice in or control over the same.

While the powers of a library board are defined by statute, the board itself is created through the appointment of its members by the mayor of a city. The members hold office under the municipal government. A public city library must be established by action of the city council, and when so established it is the property of the municipal corporation, and is controlled by the city through the library board. Taxes which are levied for the maintenance of such library are levied, collected and expended in carrying on an institution which belongs to the city, and which is maintained for the benefit of the

inhabitants of such city, as distinguished from those residing outside of its limits. Such taxes must, therefore, be held to be levied for city purposes.

Under the provisions of section 616 it follows that tracts of land of ten acres or more, which are in good faith occupied and used for agricultural or horticultural purposes within the city limits, are exempt from taxes levied for the maintenance of a city library, as that section exempts such lands from taxes levied for any city purpose.

I am, Yours very truly,

CHAS. W. MULLAN,
Attorney-General of Iowa.

STATE MILITIA—TARGET PRACTICE—Compensation of Members of Guard Appointed by Governor for Special Purposes.

SIR—I beg leave to acknowledge the receipt of your communication in which you ask my opinion upon the following question:

> "Should the governor of Iowa order out for competitive shooting teams of five men from each company, and fix their per diem equally as between the men composing said teams, regardless of the rank of officers or length of service of enlisted men, would this be in violation of section 2212 of the code?"

In compliance therewith I respectfully submit the following opinion:

Section 2184 of the code, as amended by the thirtieth general assembly, designates the purposes for which the guard or members thereof may be called out by the commander-in-chief. They are for encampment, drill, target practice, school of instruction, or such other practice or instruction as the commander-in-chief may order.

Section 2212, as amended by the thirtieth general assembly, provides:

> "The military forces when in active service of this state upon the call of the governor or sheriff of any county, and the guard when paraded for drill, encampment, target practice, school of instruction, or other duty under orders of the commander-in chief, shall be paid the following compensation for time actually on duty: * * * "

The section then fixes the compensation which each officer and private shall receive during the time he is actually on duty under the call of the commander-in-chief.

The provision of section 2184 of the code, as amended by the thirtieth general assembly, gives the governor power to call out or detail for target practice, school of instruction or such other practice or instruction as he may deem advisable, members of the guard for a period of not exceeding ten days in any one year. The officers and enlisted men when called out for such service by the commander-in-chief are entitled to the compensation fixed by section 2212 of the code as amended, and there is no power given by statute to the commander-in-chief or other officer of the guard to alter the compensation so fixed or to pay either to the officers or enlisted men any other or different compensation than that fixed by statute.

It is a well settled rule of law that, where compensation is fixed by statute for the performance of any duty, the person performing such duty is entitled to the compensation fixed, and that no increase or diminution of such compensation can be made. Under this rule it is not, in my opinion, within the power of the commander-in-chief or any other officer or person, to fix a different compensation for the officers and men who are called out to engage in competitive target practice, than that fixed by the statute, or to take the gross sum of money which

the officers and enlisted men so called out are entitled to, and divide it equally among the men composing the teams in such competitive target practice.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

May 4, 1905.

W. H. THRIFT,
Adjutant General of Iowa.

TAXATION—TELEPHONE COMPANIES—Section 1331 of the code providing for the assessment of telephone companies by the executive council is unconstitutional.

SIRS—In 1901 the Iowa Telephone Company began an action against John Herriott, then treasurer of state of the state of Iowa, and against his bondsmen, to recover of the state treasurer the sum of $7,383.33, that being the sum collected by the state of Iowa as taxes upon the Telephone Company under the provisions of section 1331 of the code.

The ground upon which the taxes paid by such Telephone Company were sought to be recovered is that the statute under which they were collected by the state was unconstitutional, and that the treasurer of state had no authority of law for collecting such taxes of the Telephone Company.

A demurrer was filed to the petition and the case rested without a trial upon the demurrer until the decision of the case of *Layman. v. Telephone Company,* which is reported in 123 Iowa at page 591. The constitutionality of the section of the statute named was involved in the case of *Layman v. Telephone Company,* and Judge Deemer, speaking for the court in that case, said:

> "If these statutes, in so far as they relieve telephone companies from the payment of local taxes, are unconstitutional, we think that the entire

scheme is invalid, for it is manifest that this provision was one of the inducements for the passage of the act, and that there can be no taxation thereunder for any purpose—state or local. This is not a case where a part of the statute may be held invalid and another part good. The two provisions are so closely associated and allied—so materially dependent—that one cannot be severed from the other without destroying the entire scheme. *Pollock v. Farmers Loan and Trust Co.*, 157 U. S., 429, 158 U. S., 601; *State v. Land Co.*, 71 Minn., 288; *State v. Poynter*, 59 Neb., 417; *Barron v. Burnside*, 121 U. S. 186. This being true, if the law is found unconstitutional in part, it cannot be used as the basis for local assessment."

The taxes collected by the defendant Herriott as treasurer of state of the state of Iowa were for the year 1899, and prior to the amendment of the statute providing for the assessment of telephone companies by the executive council as contained in the code of 1897, and prior to the repeal of section 1331 by the twenty-eighth general assembly.

Section 1331 is held in *Layman v. Telephone Company, supra,* to be unconstitutional and void for all purposes, and the legislature in the year 1900, recognizing the invalidity of such section, repealed the same.

The law being wholly invalid under which the treasurer of state exacted the payment of taxes from the Iowa Telephone Company, that Company is entitled to have such taxes repaid to it by the state.

On the 31st day of December, 1904, this case coming on for hearing in the district court of Polk county, the court overruled the demurrer of the defendant and the defendant electing to stand upon such demurrer, judgment was rendered against the defendant John Herriott and the other defendants, who were his bondsmen, for the sum demanded, with six per cent interest thereon from the time the same was paid to the treasurer of state. That I have not appealed said action for the reason that I am

satisfied that the taxes collected by the treasurer of state of the Iowa Telephone Company for the year 1899 were wrongfully collected, and under an unconstitutional and invalid statute, and that an appeal from the judgment of the district court of Polk county to the supreme court of Iowa would be a useless proceeding. In my opinion there is nothing to be done in the matter except to refund the taxes collected from the Iowa Telephone Company by the defendant Herriott with interest thereon.

I hereto attach a certified copy of the judgment entry in the case.

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

May 13, 1905.

TO THE HONORABLE EXECUTIVE COUNCIL.
of the State of Iowa.

SAVINGS BANKS—RECITALS OF THE ARTICLES OF INCORPORATION—(1) The entire amount of the capital of a savings bank must be fully paid, before the bank can be authorized to do business. (2) The articles must fix the number of directors, state the name and post office address of each, but the names of the officers, as distinguished from directors need not be given.

SIR—I am in receipt of your favor of the 5th instant in which you ask my opinion upon the following questions:

1. Should the articles of incorporation of savings banks recite specifically the amount of capital stock of said banks, and must the amount so specified be fully paid up before the beginning of business; or is it permissible for the articles to designate an amount as the authorized capital and provide for a less amount as the paid up capital of the bank?

2. If you hold that the latter provisions of the preceding question are permissible, is it also permissible that the amount of stock, over and above that paid in at the beginning of business, may be issued by resolution of the board of directors; or must it be by order of the stockholders and by amendment to the articles of incorporation?

3. Should the articles of incorporation give the names of the first officers of the bank, as well as of the directors; or only the names of the directors?

First. Section 1842 of the code provides:

> "The articles of incorporation of a savings bank shall be signed and acknowledged by the corporators before some officer authorized to take acknowledgment of deeds, and give the corporate name, the object for which it is formed, the amount of capital, the time of its existence, which shall not exceed fifty years, the number of its directors, the name and post office address of each person or officer who shall manage its affairs until the first election. * * * "

This section provides that the articles of incorporation must fix the capital of the bank.

Section 1856 provides the manner in which the capital of savings banks may be increased, which is by an affirmative vote of two-thirds of the shares thereof at a stockholders' meeting. There is no provision in chapter 10 of title IX or in chapter 12 of the same title, which permits savings banks to begin the transaction of business until the entire amount of the capital of such bank is fully paid.

Section 1843 requires the paid up capital of any savings bank to be not less than ten thousand dollars in cities and towns or villages having a population of ten thousand or less; nor less than fifty thousand dollars in cities having a greater population.

It further provides that the corporation may commence business when its first directors or officers named in its recorded articles shall have furnished to the auditor of state proof under oath that the required capital has been paid in and is held in good faith by the bank, and when the auditor has satisfied himself of such fact, for which purpose he may make a personal examination or cause it to be made at the expense of the bank.

Under these provisions of the statute I think the entire amount of the capital of a savings bank must be fully paid before the bank can be authorized to begin the transaction of business.

Second. The opinion given upon the preceding question answers the second. The whole amount of the capital of a savings bank must be subscribed and paid in before the certificates therefor can be issued to the stockholders and before a bank is entitled to begin the transaction of its business.

Third. The provisions of section 1842 require that the articles of incorporation shall fix the number of directors and give the name and post office address of each, who shall manage the affairs of the bank until the first annual election. It does not require that the president, vice-presidents, treasurer or cashier, or other officers, as distinguished from the directors, shall be named in the articles of incorporation.

Under the provisions of section 1845 the board of directors at its first meeting may elect from its number a president, one or more vice-presidents for the ensuing year, and appoint a treasurer or cashier and such other officers and employees as are required for the transaction of the business of the bank, all of whom shall hold office

during the pleasure of the board, and shall give such security for the faithful performance of their duties as may be required.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

May 19, 1905.

HON. B. F. CARROLL,
Auditor of State.

SCHOOL DISTRICTS--CHANGE OF BOUNDARIES—The boundary lines of a school corporation cannot be extended under the provision of code section 2791 beyond the boundary lines of a civil township, except by reason of natural obstacles a portion of the inhabitants of a school corporation are denied school privileges within their own district.

SIR—In answer to your request of the 9th ultimo for an opinion upon the following questions:

1. Acting under the provisions of chapter 89, acts of the twenty-seventh general assembly (section 2793-a, supplement to the code), may the boundary lines between an independent district and a school township be so changed as to leave the school township consisting of detached portions?

2. Have the boards authority under this law to so change the boundary as to include a portion of the school township lying in another civil township but that has been attached to the school township for school purposes under provision of section 2791?

I submit the following opinion:

Section 2791 of the code provides:

> "In any case where, by reason of natural obstacles, any portion of the inhabitants of any school corporation in the opinion of the county superintendent cannot with reasonable facility attend school in their

> own corporation, he shall, by a written order, in duplicate, attach the part thus affected to an adjoining school corporation, the board of the same consenting thereto, one copy of which order shall be at once transmitted to the secretary of each corporation affected thereby, who shall record the same and make the proper designation on the plat of the corporation. Township or county lines shall not be a bar to the operation of this section."

In *Independent District of Union v. Independent District of Cedar Rapids,* 62 Iowa, 616, it is held that in the absence of any streams or other natural obstacles, as contemplated in section 1797 of the code of 1873, the county superintendent was, under the provisions of that section, without jurisdiction to change the boundaries of school districts.

Section 2791 of the code differs from the former statute only in dispensing with the consent of the board of directors of the district from which the territory is taken; and the rule laid down by the supreme court in the case cited is followed in School Township of *Newton v. Independent District of Newton,* 110 Iowa, 30.

Natural obstacles which prevent a portion of the inhabitants of a school district from attending school in their own corporation with reasonable facility, are necessary to confer jurisdiction upon the county superintendent. The boundary lines of a school corporation cannot be extended under the provisions of section 2791 beyond the boundary lines of a civil township, except where the existence of natural obstacles prevents a portion of the inhabitants of a school corporation from attending school within their own district, and gives to the county superintendent jurisdiction to extend the boundary lines of the district beyond those of the civil township.

Section 2793 of the code provides:

> "The boundary lines of contiguous independent districts within the same civil township may be changed by the concurrent action of the respective boards of directors at their regular meeting in September * * * ."

No power is given under this section to extend the lines of a school corporation beyond those of the civil township.

Section 2793-a of the code supplement provides:

> "When the boundary line between a school township and an independent city or town district is not also the line between civil townships, such boundary may be changed at any time by the concurrence of the boards of directors * * * . The boundaries of the civil township or the independent district may in the same manner be extended to the line between civil townships, even though by such change one of the districts shall be included within and consolidated with the other as a civil district."

This section confers upon the board of an independent city or town district power, with the concurrence of the board of directors of a school district, a portion of which is included within the municipal limits of a city or town, to extend the boundary lines of such independent city or town district so as to make such boundaries co-extensive with those of the municipal corporation. The section does not, however, confer upon school districts other than those designated, the power to extend their boundaries beyond the lines of a civil township, or to take and include within their limits any territory lying beyond the boundary of the civil township in which the school district exists.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

June 5, 1905.

HON. JOHN F. RIGGS,

Superintendent of Public Instruction.

SCHOOL HOUSE SITE—REVERSION OF LAND TO OWNER—A schoolhouse site reverts to the owner of the tract of land from which it was taken, upon repayment of the purchase price, by reason of non-user for two years.

SIR—I am in receipt of your favor of the 29th ultimo, in which you ask my opinion upon the following question:

> "A schoolhouse site was purchased and title transferred by warranty deed containing the following clause: 'For schoolhouse purposes only, the land to revert back to the former when they cease to use it for school purposes, with the usual time allowed by law to remove their buildings'. Does this entitle the owner of the tract of land from which the site was taken to recover title without payment of the purchase price as provided in section 2816, when the district ceases to use it for school purposes, or does section 2816 still hold in the case?"

In response to your request I submit the following: Section 2816 of the code provides:

> "In the case of non-user for school purposes for two years continuously of any real estate acquired for a schoolhouse site it shall revert, with improvements thereon, to the owner of the tract from which it was taken, upon repayment of the purchase price without interest, together with the value of the improvements, to be determined by arbitration, but during its use the owner of the right of reversion shall have no interest in or control over the premises."

The language of this section is broad in its terms and applies to any real estate acquired for a schoolhouse site. No distinction is made between a site acquired by purchase and one acquired by condemnatory proceedings. In either case, under the provisions of the section, real estate acquired for a schoolhouse site reverts to the owner of the tract of land from which it was taken, upon repayment of the purchase price, without interest, when it has ceased to be used for schoolhouse purposes for a period of two years. The provision in the deed that the land

conveyed thereby is for schoolhouse purposes only, and shall revert to the grantor when it ceases to be used for such purpose, is simply declaratory of the statute and does not change the rights of the parties.

A board of school directors can exercise no other powers than those expressly granted by statute or necessarily implied. *Beers v. School Dist.* No. 3, 72 Ill., 508; *School Directors v. Fogleman,* 76 Ill., 189.

A person contracting with a school board is bound to know the limitation of its powers, and can acquire no rights under a contract which the board is not authorized to make. *State v. Freed,* 3 Ohio Dec., 314.

In *Roland v. Reading Sch. Dist.,* 161 Pa., 102, it is held that persons contracting with the president of a school board are bound to know what contract he is authorized to make.

If, by the clause inserted in the deed, the board undertook to make a contract by which the schoolhouse site should revert to the owner of the tract of land from which it was taken, when it ceased to be used for school purposes, without the repayment of the purchase price thereof by such owner, it exceeded its powers, as the statute provides that the owner of the tract of land from which the site was taken can acquire the title to such site by reversion upon repayment of the purchase price only. The person from whom the site was purchased contracted with knowledge of the limitation of the powers of the board, and can acquire no greater right under such contract than that given by statute.

Under the facts as stated, the owner of the tract of land from which the schoolhouse site was taken cannot acquire a title to such site except upon repayment of the price paid by the school district therefor.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

June 7, 1905.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

LOUISIANA PURCHASE COMMISSION—PUBLICATION OF REPORT—COST OF—It is held that the Commission is authorized by law to print a report of all its doings, the cost of which is to be paid from its contingent fund.

SIR—I am in receipt of your favor of the 31st ultimo in which you request my opinion upon the following questions:

1. Does section 2, chapter 195 of the acts of the twenty-ninth general assembly, contemplate that the commission shall make a published report of its doings?

2. If the commission has authority to make a published report, does the law authorize me to draw a warrant against the appropriation made by the thirtieth general assembly for the purpose of meeting the expense thereof?

3. If I am authorized to draw a warrant as above contemplated, has the executive committee of the said Louisiana purchase commission authority, through the president and secretary of the commission, to direct the expenditure or must it be by action of the full commission?

In compliance with such request I respectfully submit the following opinion:

First. Section 2 of chapter 195 of the act of the twenty-ninth general assembly provides:

> "At the close of its services, the commission shall make to the governor a statement of all of its doings, which shall include a showing of all exhibits made by the state of Iowa or the citizens thereof, and the awards made on such exhibits, and such other matter as the commission may deem valuable to the people of the state of Iowa, together with a list of all receipts and disbursements, with complete vouchers therefor".

This provision of the act clearly indicates that it was the intent of the legislature that the report required to be made by the Louisiana purchase exposition commission to the governor should be a printed report published for distribution to the people of Iowa.

Second. It follows that the cost of publishing such report shall be paid for by the commision out of the appropriations made by the legislature, as no other appropriation is made therefor.

In the opinion given by me to the Hon. W. W. Witmer, chairman of the executive committee of the Louisiana purchase exposition commission, I held that no part of the $20,000 appropriated by the thirtieth general assembly could be used to pay the expenses incurred by the commission until the entire $125,000 which was appropriated by the twenty-ninth general assembly was expended, and that the $20,000 became available and could be used by the commission to defray expenses incurred by it when the $125,000 was exhausted.

The appropriation made by the thirtieth general assembly contains an item of $2,500 for emergency and contingency fund, and the commission is entitled to draw from the state treasury and use so much of the contingent fund as may be necessary to pay the expense of publishing the report required by the act of the twenty-ninth general assembly.

Third. The provision of section 2 of the act of the twenty-ninth general assembly by which $125,000 is appropriated to defray the expense of making an exhibit at the Louisiana purchase exposition, reads as follows:

> "The sum of $125,000, or so much thereof as may be needed by the commission for the purpose of making an exhibit and representation by the state of Iowa, provided for in section 1 hereof, is hereby appropriated out of any money in the state treasury not otherwise appropriated, and warrants therefor shall be issued, on the order of the president and secretary of said commission, by the auditor of state on the treasurer of state from time to time, but no such warrant shall be issued until said commission, through its duly chosen officers, shall certify to the auditor of state that the same is actually necessary for disbursement."

Section 1 of the act of the thirtieth general assembly provides that the $20,000 appropriated by such act shall be drawn, expended and reported as provided by chapter 195 of the laws of the twenty-ninth general assembly.

Under the provisions of these acts the president and secretary of the commission are authorized to issue an order upon the auditor of state for such an amount of the appropriation made by the legislature as is necessary to meet the expenses incurred by the commission; and it is the duty of the auditor of state upon receiving such order, together with a certificate from such officers that the amount of money sought to be drawn from the state treasury under the order made by them is actually necessary for disbursement, to issue a warrant upon the treasurer of state for the amount so ordered and certified by the officers of the commission.

The cost of publishing the report required by the act of the twenty-ninth general assembly is a part of the expense for which the appropriations were made, and the money necessary to pay the cost thereof may be drawn from the state treasury upon warrants issued by the auditor of state in the same manner as those issued for the payment of other expenses; that is, upon the order and certificate of the president and secretary of the commission, as provided in the act of the twenty-ninth general assembly.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

June 7, 1905.

HON. B. F. CARROLL,
Auditor of State.

PRACTICE OF MEDICINE OR OSTEOPATHY—POWER OF BOARD OF MEDICAL EXAMINERS TO ISSUE CERTIFICATE TO APPLICANT WHO IS BLIND—The Board is without authority to grant to an applicant who is incapable, mentally or physically, the privilege of taking an examination for admission to practice medicine.

SIRS—In response to the request of your secretary for an opinion as to whether an applicant for a certificate to practice osteopathy in the state, who is blind, can be admitted to the examination required of all applicants who desire to practice medicine or osteopathy in the state, I submit the following:

Section 2576 of the code provides:

> "All examinations shall be in writing, each candidate for examination in any school of medicine being given the same set of questions covering anatomy, physiology, general chemistry, pathology, surgery and obstetrics. In materia medica, therapeutics, and the principles and practice of medicine, a set of questions shall be used corresponding to the school of medicine which the applicant desires to practice. The examination papers when concluded shall be marked upon a scale of one hundred. * * * Each applicant shall, upon obtaining an order for examination, receive from the secretary a confidential number which he shall place upon his work when completed, so that the board in passing thereon shall not know by whom it was prepared."

This statute is, in my opinion, mandatory, so far as it relates to the manner in which the state board of medical examiners shall conduct the examination of applicants for certificates to practice medicine, and the board has no authority in the conducting of such examination to depart from the method prescribed by statute.

Section 2583 of the supplement to the code, which relates to the manner in which certificates to practice

osteopathy may be issued by the state board of medical examiners, provides:

> "Any person holding a diploma from a legally incorporated school of osteopathy, recognized as of good standing by the Iowa Osteopathic Association, and wherein the course of study comprises a term of at least twenty months or four terms of five months each in actual attendance at such school, and which shall include instruction in the following branches, to-wit: 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, shall, upon the presentation of such diploma to the state board of medical examiners and satisfying such board that he is the legal holder thereof, be granted by such board an examination on the branches herein named (except upon the theory and practice of osteopathy until such time as there may be appointed an osteopathic physician on the state board of health and of medical examiners). 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."

This section makes the provisions of section 2576 of the code relating to the manner of the examination of physicians who apply for a license to practice their profession in the state, apply to applicants for a certificate to practice osteopathy that is, the examination of osteopaths who apply to the state board of medical examiners must be conducted in the manner provided by section 2576 of the code, and the state board of medical examiners is not authorized to change the method or form of such examination.

Every person who appears before the state board of medical examiners as an applicant for a certificate authorizing him to practice medicine or osteopathy in this state, must be mentally and physically qualified to take the

examination prescribed by statute. The board is without power or authority to give to an applicant who is incapable, either mentally or physically, of taking the examination so prescribed, an examination of another and different character than that required by law to be given. The ability of an applicant to successfully pass the examination required by law, is made the test of his right to practice either medicine or osteopathy in this state; and no one who is unable, either because of any mental or physical defect, to take and successfully pass such examination, is entitled, under the present law, to receive from the state board of medical examiners a certificate authorizing him to practice either medicine or osteopathy in this state.

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

June 16, 1905.
TO THE STATE BOARD OF MEDICAL EXAMINERS.

POLL TAX—Duty of Township Assessor to Furnish Township Clerk Duplicate Copy of the Assessor's Book.

SIR—In compliance with your request of the 27th ultimo for my opinion as to whether, under the new road law, the township assessor shall furnish to the township clerk a duplicate copy of the assessor's book, I respectfully submit the following:

Section 1540, as amended by the acts of the twenty-ninth general assembly, provides:

> "To enable him (the clerk) to make out such list (a list of persons required to pay road poll tax), the assessor shall furnish the clerk of said township, before the first day of April of each year, a complete copy of the assessment lists of said township for that year, which shall be the basis of such poll tax list."

This provision is so plain that comment upon it is hardly necessary. Under this provision it is the duty of the

assessor of each township to make and furnish the township clerk a duplicate copy of the assessment book of the township, from which the township clerk can make the list for the superintendent of roads, as provided in the section referred to. I am,

Yours very truly,
CHAS. W. MULLAN,
Attorney-General of Iowa.

June 22, 1905.
HON. B. F. CARROLL,
Auditor of State.

INSANE—EXPENSES FOR CARE OF INSANE PATIENT—(1) The expenses of an insane patient at a state hospital are chargeable to the county in which he has a legal settlement, and not to the county from which such patient is sent. (2) It is not necessary for the Board of Supervisors to audit or allow such claims.

SIR—I am in receipt of your favor of the 27th ultimo, in which you request my opinoin upon the questions:

1. To what county should a superintendent of an insane hospital charge the expenses of a patient whose residence is found by the county commissioners of insanity to be other than that from which he is sent; that is, the county from which he is sent or the county named as his residence in the warrant of admission?

2. Is it necessary that bills for the support of county patients in the several state institutions be allowed by the board of supervisors, before payment?

3. After these bills have been certified to the county auditors by the state auditor, when and how should remittance be made to the treasurer of state?

These questions will be considered in the order stated.

First. Under the provisions of section 2266 of the code, the expenses of keeping an insane patient at a state hospit-

al should be charged to the county from which the patient is sent, unless the commissioners of insanity have found that such patient has, or probably has, a legal settlement in some other county, and the auditor of the county in which the legal settlement is found to exist has, after inquiry, ascertained that the patient has a legal settlement in that county, and has given notice thereof to the superintendent of the hospital to which the patient has been committed, and to the commissioners of the county from which he was sent, of the result of such inquiry.

If the superintendent is, by the auditor of the county in which the settlement of the patient is found to exist, informed that such patient has a legal settlement therein, then the expenses shall be charged to the county in which such legal settlement is found to exist, and not to the county from which the patient was sent.

The superintendent of the hospital has no authority to charge the expenses of a patient to any county other than that from which the patient is sent, until the inquiry provided for by section 2270 of the code has been made and notice thereof given as required by said section. When such notice has been given, the superintendent shall thereafter charge the expenses of the support of the patient to the county in which the legal settlement exists.

Second. Under the provisions of sections 2291 and 2292, the cost of supporting an insane patient at a state hospital should be certified to the auditor of state by each superintendent on the first day of January, April, July and October of each year, and the amount so certified should, by the auditor, be passed to the credit of the hospital from which the certificate is received.

The auditor of state should thereupon notify the county auditor of each county owing an amount so certified, and charge such amount to the county owing the same. The board of supervisors of the county owing such amount is required to levy a tax therefor and pay the amount due

the state for the support of the insane patient chargeable to such county into the state treasury; and it is not necessary that bills for the support of county patients be allowed by the board of supervisors or passed upon by them before such payment is made.

Third. Section 2292 provides that taxes levied and collected for the purpose of paying the cost of supporting insane patients in the state hospitals shall not be used for any other purpose, and the amount of the indebtedness for which such tax is required to be levied shall be paid over to the treasurer of state at the same time and in the same manner as is prescribed by statute for the payment of state taxes by the county treasurer.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

June 23, 1905.

HON. B. F. CARROLL,
Auditor of State.

INSURANCE—SUBSCRIPTIONS TO CAPITAL STOCK OF CORPORATION—Subscriptions to the capital stock of a corporation made before the corporation is organized, are valid and binding upon the subscribers, if such corporation is afterwards organized and the subscriptions are accepted by it.

SIR—After a careful investigation of the question of the validity of the subscriptions made to the capital stock of the Atlas Insurance Company, I have reached the conclusion that the same are valid and can be enforced against the subscribers thereto. The grounds upon which such conclusion is based are in brief these:

First. It is at this time a well settled principle of law that subscriptions made to the capital stock of a corporation before the corporation is organized, are valid and binding upon the subscribers if such corporation is afterward organized and accepts such subscriptions.

In Morawetz on Private Corporations (2d ed.), section 48, it is said:

> "Subscriptions for shares in a corporation thereafter to be formed under a general law, may be accepted by the board of directors of the company after the organization."

In *McClure v. Peoples Freight Ry. Co.*, 90 Pa. St., 268, that court, in passing upon the question of the validity of such subscriptions, said:

> "The subscription was at least a valid proposition to the plaintiff, which became irrevocable the instant of its acceptance."

The rule laid down by Morawetz is recognized in—

Penobscot R. Co. v. Drummer, 40 Me., 172 (63 Am. Dec., 654);
Lackey v. Richmon & L. Turnpike Co., 56 Ky., 43;
Whitsett v. Pre-emption etc. Church, 110 Ill., 125;
Peninsular R. Co. v. Duncan, 28 Mich., 130;
Minneapolis Threshing Machine Co. v. Davis, 3 L. R. A., 796;
Hughes v. Antietam Mfg. Co., 34 Md., 316.

Mr. Thompson in his work on Corporations, after a thorough examination and review of all of the cases upon the question, states his conclusion in these words:

> "We then take the true view to be that the engagement created by a subscription to the stock of a projected corporation is binding in the absence of fraud inducing it, provided the corporation is formed according to the scheme, within a reasonable time; and that the subscriber cannot in the interim, any more than after the corporation is formed, retreat from it without unanimous consent."

The principle is affirmed in the comparatively recent case of *Minneapolis Threshing Machine Co. v. Davis,* in which it is said:

> "A subscription by a number of persons to the stock of a corporation to be thereafter formed by them, has in law a double character:
>
> 1. It is a contract between the subscribers themselves to become stockholders without further act on their part, immediately upon the formation of the corporation. And such contract is binding and irrevocable from the date of the subscription, at least in the absence of fraud or mistake, unless canceled by consent of all the subscribers before acceptance by the corporation.
> 2. It is also in the nature of a continuing offer to the proposed corporation which, upon acceptance by it, after its formation, becomes as to each subscriber a contract between him and the corporation."

This is a clear and concise statement of the modern rule, and under it subscriptions to the capital stock of a corporation thereafter to be organized are valid contracts and enforcible by the corporation when such subscriptions are accepted by it after its organization.

Second. The subscriptions made to the capital stock of the Atlas Insurance Company are therefore valid and binding upon each of the subscribers and enforcible by the corporation, unless our statute has changed the common law rule.

Section 1694 of the code, which relates to insurance other than life, provides:

> "Having published the notice of incorporation contemplated by chapter 1 of this title, and filed the publisher's affidavit thereof with the auditor of state, together with the articles of incorporation, as required in this chapter, the persons named in such articles as incorporators, or a majority of them, shall be authorized to open books for the subscription of stock to the company, if a stock company, or to take applications and premiums or premium notes

for insurance, if a mutual company, to the extent hereinbefore required, at such times and places as to them may seem convenient, and keep them open until the full amount required is subscribed or taken."

The purpose of the enactment of this statute is not apparent, as it gives to the corporation no power which it could not exercise under the common law in the absence of the statute. It is one of the inherent powers of a corporation after its organization to open its books for subscriptions to its capital stock, and to keep them open until the amount of its capital is fully subscribed. The statute is, therefore, simply declaratory of the common law and adds nothing thereto.

Where a statute provides that books may be opened by a corporation for subscriptions to its capital stock, subscriptions made upon slips of paper or in memorandum books are valid subscriptions within the meaning of the statute.

Mexican Gulf Co. v. Veavant, 6 Rob., 305;
Hamilton & D. Plank Road Co. v. Rice, 7 Barber, 157;
Ashtabula & N. L. R. Co. v. Smith, 15 Ohio St., 328;
Buffalo & Jamestown R. Co. v. Gifford, 87 N. Y., 294.

The subscriptions to the capital stock of the Atlas Insurance Company are sufficient in form. They were delivered to Mr. Wilkinson, the promoter of the company, to be held by him until the company was organized, and were then to be turned over to the corporation without any further act of delivery on the part of the subscribers. Each subscription is a continuing agreement on the part of the subscriber to take and pay for the number of shares of the stock of the corporation designated therein.

It follows that such subscriptions are contracts between the subscribers, and that a delivery thereof to Mr. Wilkinson is a complete and valid delivery of such subscriptions, and the same become thereby binding upon each of the subscribers.

If, when the corporation is formed and its books opened for the purpose of receiving subscriptions to its capital stock, the subscriptions delivered to Mr. Wilkinson are by him delivered to the corporation, entered upon its books and accepted by it, the provisions of the statute are fully complied with. The corporation thereby becomes a party to the contract, and each of the subscribers is obligated to pay the amount of his subscription according to its terms.

This construction of the statute is in harmony with the rules of the common law. Subscriptions to the capital stock of a corporation, made prior to the organization of the corporation, and prior to the opening of its books for stock subscriptions, if delivered by the subscribers to a third person with the understanding that the same shall be delivered to the corporation when it is organized and when its books are open for stock subscriptions, become valid and binding subscriptions if delivered to and accepted by the corporation. After such delivery no one of the subscribers can retreat from his contract, and each subscription is valid and binding as against the person who made the same.

Under these principles of law, the subscriptions to the capital stock of the Atlas Insurance Company which were made prior to the organization of the corporation and delivered to Mr. Wilkinson, are valid and binding upon the subscribers after acceptance thereof by the corporation in the manner stated.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

June 27, 1905.

HON. B. F. CARROLL,
Auditor of State.

STATE PROPERTY—POWER OF THE TRUSTEES OF THE IOWA STATE COLLEGE OF AGRICULTURE TO LEASE BUILDING SITES TO MEMBERS OF THE COLLEGE FACULTY—It is held that the statute does not confer upon the Board of Trustees the power to lease lands belonging to the state to members of the faculty for residence purposes.

SIR—I am in receipt of your favor of the 24th instant advising me that the board of trustees of the Iowa State College of Agriculture and Mechanic Arts desires my opinion as to whether it is empowered to make and execute, to members of the faculty of the college, leases of building sites upon the land used and occupied as a part of the grounds of said college. In compliance with the request I submit the following opinion:

The powers of the board are defined by sections 2647, 2656 and 2657 of the code.

By section 2647 it is given power to manage and control the property of the college and farm, whether real or personal. Section 2656 provides that it may sell the lands granted to the state by act of congress, and any lands acquired by purchase or otherwise, for cash, or upon partial credit not exceeding ten years, at such price as shall be fixed by the board. Section 2657 authorizes it to lease such lands as it is authorized to sell under the provisions of section 2656, for a term not exceeding ten years, at an annual rental equal to eight per cent per annum upon the appraised value of the tract, payable annually in advance.

The provisions of sections 2656 and 2657 clearly relate to the lands belonging to the state and known as the Agricultural College lands, which were granted by congress for the endowment and support of the college, or were acquired by the state in some other way for that purpose. All, or nearly all, of the lands referred to by these sections were granted to the state of Iowa by the act of congress of July 2, 1862, and in the act making the grant it is provided that lands so granted are to be sold by the

states to which the grant is made, and the money received therefrom invested in stocks and bonds of the United States or other safe securities, yielding not less than five per centum upon the par value thereof, which money so invested shall constitute a perpetual endowment fund, the interest of which shall be used to support and maintain a college where the leading object shall be the teaching of such branches of learning as relate to agriculture and mechanic arts.

The legislature of the state of Iowa, by an act approved September 25, 1862, accepted the grant of lands from the government, subject to all the conditions and restrictions contained in the act of congress.

It was and is necessary that the endowment lands of the college be sold and leased, and the proceeds thereof invested in the manner directed by the act of congress. It was these lands and lands of like character which the legislators had in mind at the time of the enactment of the sections of the statute referred to.

By the provisions of sections 2656 and 2657, the board of trustees of the college is authorized to sell and lease the lands referred to, and to invest the funds which are derived therefrom. The provisions of these sections do not refer to the lands which are devoted to the uses of the college, as distinguished from those by which it is endowed, and it cannot be successfully maintained that under the provisions of these sections the board has the power to alienate the lands belonging to the state which are used and occupied for college purposes.

If the power to lease lands belonging to the state and which are devoted to the uses of the college exists in the board, it must therefore be found in subdivision 2 of section 2647 of the code, which is in these words:

> "The board of * * * trustees shall have power—
> 2. To manage and control the property of the college and farm, whether real or personal".

The question which arises is: Does this provision of the statute confer upon the board power to lease any part of the lands belonging to the state which have been dedicated and devoted to the uses of the college? That is, does the phrase "to manage and control" empower the board to lease any portion of such grounds for residence purposes?

The words "manage" and "control" have frequently been defined by courts of last resort to be synonymous, and to mean to direct, govern, administer, oversee.

Youngworth v. Jewell, 15 Nevada, 48;
Ure v. Ure, 185 Ill., 216;
Cook County v. McCrea, 93 Ill., 238.

Neither word, therefore, extends the power and authority of the board of trustees beyond that which is given by the other. If the legislature had said that the board of trustees shall have power to manage the property of the college and farm, such enactment would have the same force as the provision that the board shall have power to manage and control such property. The use of the word "control" by the legislature in conferring the power granted to the board of trustees adds nothing to its power which would not have been granted by the use of the word "manage" alone.

In *Cook County v. McCrea, supra,* it is held that the term "manage" means to control according to law, and that the statute therefore can not be understood to give to county boards an unlimited power of management of county funds, where there is an absence of any specific provision of the law to the contrary, and means nothing more than that they shall have power to manage the county funds and county business according to law.

Management is defined as government, superintendence, physical or manual handling or guidance, the act of managing by direction or regulation or administration.

In re Sanders, 53 Kansas, 191;
Lewis v. Lewelling, 53 Kansas, 201.

In *Randall v. Josselyn,* 59 Vt., 557, it is held that the words "control and management", as used in a will devising property to the testator's son, mean that the son should have the use, possession, superintendence and direction of the property and the power of exercising a general restraint over the same during the continuance of his estate, but does not include the power of disposal.

In *Baltimore County Commissioners v. Board of Managers of the Baltimore Hospital for the Insane,* 62 Md., 132, it was held that the word "managers", as used in a statute providing that the governor, by and with the advice and consent of the senate, shall appoint a board of managers of the hospital for the insane, means what the term imports—managers simply of the property, with no power to pledge, alienate or encumber it, charged with the duty of its protection and faithful operation on behalf of the state, but invested with no absolute ownership of the property.

The clear intent of the statute is that the board of trustees of the college shall govern, manage and control the property of the college and farm in the administration of the affairs of the college. It has no authority to make any disposition of such property or any part thereof which shall place it beyond the control of the board. The execution and delivery of a lease of the character of that authorized by the resolution of the board would be such a disposition of the land, belonging to the state, included in the lease, as would place the same, to a degree at least, beyond the immediate control of the board. The execution of the lease would be a relinquishment to some extent of the possession of the board and its right to the absolute management and control of the property leased. The land would be diverted from the use to which it was devoted by the state to another use and purpose, which clearly was not contemplated by the legislature at the time of the enactment of the statute referred to.

The execution and delivery of the lease authorized by the resolution of the board is in the nature of a grant of an easement in the college grounds; such easement being subject to termination by the board after ten years upon one year's notice of its intention to do so, and upon payment, to the person to whom the right is granted, of the value of the improvements made by him under the grant.

It is not a lease within the strict meaning of the term. No rent is reserved by the board under the contract, the sum of one dollar a year being simply a nominal amount. The person to whom the lease is made has the right to extend it indefinitely, and it can only be terminated by the board, except in case of the destruction of the dwelling house by fire, upon payment of the value of the improvements.

The statute does not give the board authority to use the funds of the college for the payment of the value of improvements made upon lands covered by leases of this character, and such use would, in my opinion, be an unauthorized diversion of the funds of the college from the purposes for which they were created.

The board of trustees of the College of Agriculture and Mechanic Arts is an agent of the state to which the management of the property of the state is confided. Its powers are such only as are expressly conferred by statute, or impliedly conferred because necessary to carry out those which are expressly given. It must hold the possession of and manage the property of the state for the purposes to which such property is devoted, and for no other.

The provisions of the statute quoted do not in my opinion confer upon the board of trustees power to divert the use of the property from the purpose to which it was devoted by the state, and to lease the same for residence purposes to any member of the faculty of the college or to any other person. The property must be

held and possession thereof retained by the board exclusively for school purposes, and any disposition, or attempt at a disposition thereof, for other purposes, is in excess of the powers conferred upon the board by the legislature.

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

June 29, 1905.

MR. E. W. STANTON,
Secretary Iowa State College of Agriculture and Mechanic Arts.

DRAINAGE OF LAKES—CONSTRUCTION OF DIKE AND FISHWAY—COST OF—The cost of building and maintaining a dike and fishway in the drainage of a lake under order of the executive council should be paid from the drainage fund of the district.

SIRS—I am in receipt of a letter from your secretary, Mr. A. H. Davison, informing me that you desire my opinion as to the right of the board of supervisors of Emmet county to use any part of the county fund of that county for the purpose of constructing a dike or dam, with proper fishway and spillway, as required by the executive council, made necessary by the draining of Swan Lake. In compliance with such request I submit the following opinion:

The construction of a dike, spillway and fishway for the purpose of retaining the waters of the upper lake is an expense incidental to the draining of the lower lake, and must be included in any plan of drainage agreed upon by the board of supervisors in which the lower lake is drained and the upper lake retained. The cost of such dike, spillway and fishway, therefore, should be paid from the drainage fund of the district.

Section 1 of chapter 68 of the acts of the thirtieth general assembly gives to the board of supervisors of any county jurisdiction, power and authority to establish

a drainage district or districts, and to locate and establish levees, and cause to be constructed any levee, ditch, drain or water course as provided therein.

Sections 12, 13 and 28 of the same act provide for the raising of funds with which to pay the cost of constructing such ditches, drains and levees.

The dike required to retain the waters of the upper lake is a levee within the meaning of section 1, and the cost thereof should, therefore, be paid from the drainage fund created as provided by sections 12, 13 and 28 of the act. The spillway and fishway are a part of the dike. Their construction and maintenance become necessary by reason of the draining of the lower lake, and the cost thereof should be paid from the same fund as that of the dike.

The provisions of sections 12, 13 and 28 of the act referred to, as to the manner of the payment of the cost of constructing dikes and ditches for the drainage of lakes and swamp lands, are exclusive so far as the county is concerned, and the board of supervisors has no power to pay such cost from the funds of the county, as distinguished from the drainage fund provided for by the sections of the act referred to.

In holding that the cost of building such dike, spillway and fishway should be paid from the drainage fund of the district, I do not wish to be understood as saying that it is not within the power of the executive council to pay any part or all of the cost thereof out of the proceeds of the sale of the lake bed which is drained. It is, in my opinion, within the power of the executive council to pay all or any part of the cost of such dike, spillway and fishway from the money derived from the sale of the lake bed, as a part of the expenses incurred in the drainage of

such lake, before turning such fund over to the county as provided by section 9 of chapter 186 of the acts of the thirtieth general assembly.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

June 30, 1905.

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

MEANDER LAKES—ACT OF INDIVIDUAL IN DRAINING—When an attempt has been made by any person or persons to drain a meandered lake so that it will have an artificial outlet, the state may restore such lake to its natural condition, and an injunction will lie to prevent further trespass.

SIR—I beg leave to acknowledge the receipt of your communication of the 12th ultimo enclosing a letter of Mr. A. B. Lauritz Styve, and requesting my views as to what action should be taken by the state as to the acts of the persons who have partially drained Rice lake in Winnebago county, and lowered the water therein by excavating a ditch into the lake and which forms an outlet through which the water flows out of the lake.

The communication has been on my desk several days but pressure of other business has prevented me from taking it up before. In compliance with your request I respectfully submit the following opinion:

The state by its executive should, in my opinion, exercise such control over the lake in question, as well as other meandered lakes in the state of like character, as will maintain them as nearly as is possible in their normal condition. Where an attempt has been made by any person or persons to drain any of such lakes without authority of law, the banks and shores of such lake should by

executive action be restored as nearly as is possible to their natural condition and the height of water in the lake raised and kept as nearly as may be to the ordinary high water mark.

An action for injunction will lie and can be successfully prosecuted against any person or persons who attempt to illegally drain or lower the water in any of such lakes, and such action should, in my opinion, be instituted by the state against any person or persons attempting, without authority of law, to cut a ditch or drain by which an artificial outlet of any of the meandered lakes in the state, will be created and the water drained therefrom or lowered therein.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

July 19, 1905.

HON. A. B. CUMMINS,
Governor of Iowa.

LOAN AND TRUST COMPANIES—AMOUNT OF CAPITAL STOCK—EXAMINATION BY AUDITOR OF STATE—NATURE OF BUSINESS—(1) The capital stock of any loan and trust company must be fully paid up before it can commence business, and must not be less than that required of savings banks. (2) Such companies are subject to examination by the auditor of state. (3) No loan or trust company can conduct a banking business, except it may receive time deposits and issue drafts upon its depositories.

SIR—I am in receipt of your favor of the 18th instant in which you request my opinion upon the following questions:

(1). Do the articles of incorporation of the Waterloo Loan and Trust Company which are submitted to me, conform to the laws of Iowa? If not, what changes or alterations should be made therein?

(2). Should a certificate of the character issued to state and savings banks be issued by the auditor of state to loan and trust companies, authorizing them to begin the transaction of their business when they have complied with all of the provisions of the statute relating to their organization?

(3). Can loan and trust companies organized under the laws of Iowa legally receive current deposits subject to check?

These questions will be taken up in the order in which they are stated.

First. Aritcle 3 of the articles of incorporation of the Waterloo Loan and Trust Company provides that the capital stock of the corporation shall be $250,000; that it shall be divided into shares of $100 each, and paid in at such times and upon such conditions as may be prescribed by the board of directors, and that the corporation may begin business when $100,000 of its capital shall have been subscribed.

The provisions of this article which relate to the amount of the capital stock, when the same shall be paid into the treasury of the company, and which provide that the corporation may begin the transaction of its business when $100,000 of its capital stock shall have been subscribed, are not in accordance with the provisions of chapter 65 of the acts of the thirtieth general assembly, which became a law on the 4th day of July, 1904.

That chapter in effect provides that all loan and trust companies whose articles of incorporation authorize the acceptance and execution of trusts, and all corporations in whose name the word "trust" is incorporated and forms a part, shall have a full paid capital of not less than the amount of capital of savings banks, as provided in section 1843 of chapter 10 of title 9 of the code.

Section 1843 provides:

> "The paid up capital of any savings bank shall not be less than ten thousand dollars in cities, towns

> or villages having a population of ten thousand or less, nor less than fifty thousand dollars in cities having a greater population. The corporation may commence business when its first directors or officers named in its recorded articles of incorporation shall have furnished the auditor of state proof, under oath, that the required capital has been paid in and is held in good faith by said bank, and he has satisfied himself of such fact, for which purpose he may make a personal examination, or cause it to be made, at the expense of such bank, and he is also satisfied that the preceding sections of this chapter have been complied with and has issued a certificate to that effect, naming therein its first board of directors, notice of which certificate shall be given by the publication thereof for four consecutive weeks in some newspaper printed in the county wherein its articles are recorded * * * * ."

On the 19th day of May of the present year in a written opinion furnished the auditor of state by the attorney general, it was held that a savings bank organized under chapter 10 of title 9 of the code, must have the entire amount of its capital, as provided in that chapter, paid in before it is entitled to receive a certificate from the auditor of state authorizing it to commence the transaction of its business. The conclusion which was reached at that time by the attorney general is stated as follows:

> "Under this provision of the statute, I think the entire amount of the capital of a savings bank must be fully paid before the bank can be authorized to begin the transaction of business."

The provisions of chapter 65 of the acts of the thirtieth general assembly apply with equal force to loan and trust companies. They are required by the provisions of that chapter to have a capital of not less than the amount of capital required of savings banks by section 1843 of the code, and such capital must be fully paid before they are entitled to commence the transaction of their business.

Article 3 of the articles of incorporation referred to

must be changed so as to make the capital of the Waterloo Loan and Trust Company $100,000, or the entire authorized capital of $250,000 should be fully paid.

Second. The provisions of section 1889 of the code which relate to the organization and business of loan and trust companies as amended by the act of the thirtieth general assembly read as follows:

> "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 provisions of this title, or of the banking laws of the state heretofore existing, except that loan and trust companies may receive time deposits, subject to the same limitations as are now or may hereafter be prescribed for the receiving of deposits by state banks, and issue drafts on their depositories. All such companies and all corporations now existing or hereafter organized under the provisions of chapter 1, title 9 of the code, whose articles of incorporation authorize the acceptance and execution of trusts and all corporations in whose name the word 'trust' is incorporated and forms a part, shall have a full paid capital of not less than the amount of capital of savings banks, as provided by section 1843 of chapter 10, and shall be subject to examination, regulation and control of the auditor of state, 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 state and savings banks. Any corporation violating this section shall forfeit its charter, at the suit of the attorney general, and said corporation, its officers, directors and agents shall be punished by a fine of not less than five hundred dollars or imprisonment of not less than two years in the penitentiary, or by both such fine and imprisonment at the discretion of the court, * * * ."

The effect of the amendment made by the thirtieth general assembly is to place all loan and trust companies under the control and regulation of, and make the same

subject to examination by the auditor of state in the same manner as savings and state banks are controlled, regulated and examined by him.

Section 1843 of the code provides for the examination of savings banks by the auditor of state and that when he has satisfied himself that all of the provisions of the statute relating to such banks have been complied with, he shall issue a certificate to that effect.

Section 1864 contains substantially the same provision with reference to state banks.

The examination of savings and state banks and the issuance of a certificate permitting them to begin the transaction of their business when the auditor has found that all of the provisions of the statute have been complied with, are important factors in the regulation and control thereof. It therefore follows that when the legislature made all loan and trust companies subject to examination, regulation and control of the auditor of state in like manner as savings and state banks are subject to his examination, control and regulation, it became his duty to make an examination of all loan and trust companies in the same manner as an examination of savings and state banks is now made by him under the provisions of sections 1843 and 1864 of the code; and if upon such examination he finds that all of the provisions of the law relating to the organization of loan and trust companies have been faithfully complied with, it is his duty to issue a certificate authorizing them to begin the transaction of their business in the same manner as such certificate is issued to savings and state banks.

Third. Under the provisions of section 1889 before quoted, no loan and trust company is authorized to engage in the banking business, to receive deposits or to transact the business generally done by banks, except it may receive time deposits subject to the same limitations as are now or may hereafter be prescribd for the receiving of deposits of state banks, and issue drafts on its depositories.

It is not entitled to open or carry current accounts against which checks may be drawn, nor to transact any other business which is generally done by banks, except that it may receive time deposits and issue drafts upon its depositories. The transaction of any other character of business ordinarily done by banks is a violation of the statute for which the officers of the loan and trust company may be held liable.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

July 20, 1905.

HON. B. F. CARROLL,
Auditor of State.

CENSUS—ENUMERATION OF—POWERS OF EXECUTIVE COUNCIL THEREIN—It is held that the powers of the executive council over the enumeration and compilation of the state census are ministerial and not judicial in character. It may not inquire into the correctness of the returns, or order a re-enumeration of the census of any district.

SIRS—In response to your request for an opinion as to the power of the executive council to determine the correctness of the returns of a census enumerator upon extrinsic evidence, and to set aside such returns if found incorrect and order a new enumeration of the district from which such returns are received, I respectfully submit the following opinion:

Section 1 of chapter 8 of the thirtieth general assembly makes it the duty of the executive council to cause to be prepared and printed blank forms suitable for the purpose of taking the census and to enable the assessors to make uniform returns of population and agriculture. That section provides that the schedules relating to the population shall comprehend for each inhabitant the

name, age, color, sex, conjugal condition, place of birth, and place of birth of parents, whether alien or naturalized, number of years in the United States, occupation, months unemployed, literacy, school attendance, and ownership of farms and homes. It also provides that the executive council may use its discretion in the construction, form and number of inquiries necessary to secure the information sought.

The blanks required to be prepared by the executive council are to be furnished to the county auditors and by them to the township assessors on or before the first Monday in January of the year in which the census is to be taken.

In addition to such matters the section further provides that there shall be blanks for the ex-soldiers of the United States living in Iowa which shall contain the name, company and regiment to which the soldier belonged, and his present place of residence.

Section 2 of the act relates wholly to the duty of the assessor in each assessing district to make the proper entries upon the blanks furnished, and to return the same to the county auditor on or before the first day of June of the census year.

Section 3 provides that when any assessor fails to perform any of the duties required by the act, the auditor of the county shall appoint some suitable person to take the census as provided therein at as early a day as practicable, at the expense of the county.

Section 4 provides for the forwarding of the census returns to the secretary of state by the county auditor, and that such return shall be filed and preserved by the secretary of state.

Section 5 makes it the duty of the executive council to cause abstracts or compilations of the census to be prepared, which shall be recorded by the secretary of state in a book to be kept by him for that purpose, and gives

to the executive council power to add to such compilation such other statistics in reference to banking, railroads, insurance, manufactures, education and other matters of public interest as it may be able to procure from the heads of the various departments of the state and other sources.

Section 6 relates to the character of employees which may be employed by the executive council in making the compilation of the census.

Section 7 makes it the duty of the executive council when the census has been compiled to cause the same to be published in book form, to be known as the census of Iowa.

The other sections of the act relate to such publication being evidence of the population of Iowa, to the co-operation with the United States census bureau by the executive council, and to the appropriation of money to defray the expenses of taking such census.

The duties to be performed by the executive council under the provisions of this act are ministerial and not judicial.

It is urged in a brief which I have received upon the question, that the executive council has implied power to inquire into and determine the correctness of the census returns made by the enumerators.

Many authorities are cited in support of the proposition that public officers have the powers which are expressly granted to them, and also such implied powers as are necessary to the exercise of those expressly granted.

The rule of law as stated is unquestionably correct, and is so well established that the citation of authorities in its support is unnecessary; but it falls far short of establishing the proposition that the executive council may act as a judicial body and determine upon evidence aliunde whether the statements contained in the census returns which are forwarded from the various assessing districts of the state are true or untrue. Its powers are

specifically named in the act of the thirtieth general assembly, and it is clothed with such additional implied powers only as are necessary to carry out and perform those expressly given.

The powers expressly given the executive council are (1) to cause to be prepared and printed blank forms for the census returns; (2) to cause abstracts or compilations of the census returns to be prepared; (3) to add to such compilation such other statistics in relation to banking, railroads, insurance, manufactures, education and other matters of public interest as they may be able to procure, and which they consider of sufficient value to be included in the census report; (4) to employ only skilled persons fully qualified by their education and skill to rapidly and accurately perform the duties of stenographers and accountants; (5) to cause the compiled census to be published in a book to be known as the census of Iowa; (6) to co-operate so far as practicable with the census bureau of the United States in gathering, compiling and publishing census statistics.

Whatever power or authority is necessary to the exercise of the duties imposed upon the executive council by the act referred to, is implied by the provisions of the act, but beyond the power necessary to carry into effect the express provisions of the statute it has no authority.

To determine whether the returns of a census enumerator are in accordance with the facts which exist in the district from which the returns come, the executive council must assume the functions and powers of a trial court. It must receive evidence for and against the correctness of such returns, and then judicially determine whether the statement of facts shown by the return of the enumerator is true or untrue. No such power is expressly given, nor is it necessary to the complete exercise of all powers and duties expressly given or imposed by the statute.

It cannot be said that the executive council, sitting as a court and exercising judicial functions, should determine any question presented to it relating to the correctness of the returns of a census enumerator upon ex parte affidavits and evidence, and the statute nowhere directly or impliedly confers upon it the power to subpoena or compel the attendance of witnesses, or to procure evidence in any other form. Without such power it cannot perform the duties of a judicial tribunal.

The council may, under the implied powers conferred by the provisions of the act, correct any errors or mistakes which are apparent upon the face of the census returns, as the correction of such errors and mistakes is necessary to the compilation of such returns; but, in my opinion, it cannot go beyond the returns themselves and receive extrinsic evidence for the purpose of determining the correctness thereof.

Whenever the question of the verity of a return made by any census enumerator arises, such question can, in my opinion, be determined only by a court having jurisdiction thereof, and if upon a trial by such court it is found that the statements contained in the return are incorrect, the return may be set aside and a new enumeration of the district made under the order of the court in conformity with the provisions of the statute. The power to set aside such return and to order a new enumeration in the district for which such return is made, is vested in the courts of the state and not in the executive council.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

July 29, 1905.

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

COUNTY SUPERINTENDENT OF SCHOOLS—SUPPLIES FOR THE OFFICE—PAYABLE FROM COUNTY FUNDS—No part of the county school tax may be used for the purpose of purchasing supplies for the county superintendent, but the same must be paid from the funds of the county.

SIR—In compliance with your request for an opinion whether the tax levied for the support of schools within the county upon all of the taxable property therein may legally be used by the board of supervisors in the purchase of supplies for county superintendents, I submit the following:

Section 2807 provides:

> "The board of supervisors shall at the time of levying taxes for county purposes, levy the taxes necessary to raise the various funds authorized by law and certified to it under this chapter; but if the amount certified for any such fund is in excess of the amount authorized by law, it shall levy only so much thereof as is authorized by law. * * * * It shall also levy a tax for the support of the schools within the county of not less than one nor more than three mills on the dollar on the assessed value of all the taxable property within the county."

Section 2808 provides:

> "The county auditor shall, on the first Monday in April and the fourth Monday in September of each year, apportion the school tax together with the interest upon the permanent school fund to which the county is entitled, and all other money in the hands of the county treasurer belonging in common to the schools of the county and not included in any previous apportionment, among the several corporations therein in proportion to the number of persons of school age, as shown by the report of the county superintendent filed with him for the year immediately preceding * * * ."

Under the provisions of section 2808 the school tax levied upon all of the taxable property in the county under the provisions of the preceding section must be apportioned, with the interest upon the permanent school fund and all other money set apart for the support of the

public schools, and distributed to the school corporations of the county in proportion to the number of persons of school age in each school district.

Section 468 of the code provides:

> "The board of supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney and county superintendent with offices at the county seat, together with fuel, lights, blanks, books and stationery necessary and proper to enable them to discharge the duties of their respective offices * * * ."

Section 2742 of the code provides:

> "He (the county superintendent) shall receive a salary of twelve hundred and fifty dollars a year and the expenses of necessary office stationery and postage, and those incurred in attendance upon meetings called by the superintendent of public instruction; claims therefor to be made by verified statements filed with the county auditor, who shall draw his warrant upon the county treasurer therefor * * * ."

The board of supervisors of the county is required by section 468 to furnish the county superintendent with fuel, lights, blanks, books, stationery and office supplies necessary to enable him to properly discharge the duties of his office. Such supplies must be furnished in the same manner as they are furnished to other county officers, and paid for from the funds of the county.

Under the provisions of section 2742 the claims of the county superintendent for postage, etc., must be verified, filed with the county auditor and paid for by a warrant drawn by the auditor upon the county treasurer.

The statute nowhere authorizes the appropriation or use of any part of the county school tax for the purpose of purchasing supplies for the county superintendent. The entire amount of such tax must be apportioned to the

school corporations of the county, and the board of supervisors should furnish all supplies necessary to enable the county superintendent to discharge the duties of his office and pay for the same from the funds of the county.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

August 3, 1905.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

SAC AND FOX INDIANS—TITLE TO LANDS HELD BY THEM—HISTORY OF—The only duty devolving upon the Governor of the state in relation to the Sac and Fox Indians residing in Tama county is to act as trustee in holding title to such lands as have been conveyed to him.

SIR—In response to your request for a statement as to the authority and relation of the governor of the state as to the lands and affairs of the Sac and Fox Indians residing in Tama county, I beg to submit the following:

The history of the settlement of these Indians in Tama county is in brief this:

In 1842, a treaty was made between the tribes of Sacs and Foxes and the United States, by which all lands west of the Mississippi river to which they then had any claim or title, were ceded to the United States, the Indians reserving the right to occupy that portion of the land ceded which lies west of a line running due north and south from the Painted or Red Rocks on the White Breast Fork of the Des Moines river. The consideration to be paid the Indians for their lands ceded to the United States was five per cent on the sum of eight hundred thousand dollars, and the payment of all of the debts then owing by such Indians, and in addition thereto the assignment of a

tract of land suitable and convenient for the residence of the Indians upon the Missouri river or some of its waters.

Soon after the execution and ratification of the treaty referred to, a tract of land was set apart by the president of the United States under the terms of such treaty in eastern Kansas, to which the Sac and Fox Indians were removed about 1846. After their removal to the tract so selected by the president, several of the Indian families returned to Iowa and erected their wickie-ups along the Iowa river in Tama county. These were joined by others who came from the Kansas reservation, and in 1857 they purchased an eighty acre tract of land lying along the Iowa river in Tama county. The title to this tract of land was taken in the name of James W. Grimes, then governor of Iowa, to be held by him and his successors in trust for the Indians.

In 1866, another tract of forty acres was purchased, the title to which was also taken in the name of the governor as trustee.

About 1867, Major Leander Clark was appointed United States Indian agent for these Indians, and during his administration of their affairs he purchased other tracts of land the title to which was conveyed to him as United States Indian agent and his successors in office, in trust for the Indians.

Subsequent purchases of lands were made, the title to part of which was taken in the name of the governor of the state and part in the name of the Indian agent as trustees respectively for the Indians.

From 1846 to 1856 these Indians remained in Iowa, and a part of the time upon lands owned by them, without any official recognition by the United States government or the state of Iowa.

The fifth general assembly of the state of Iowa, at its extra session in 1856, passed an act by which the consent of the state was given to the Indians then residing in

Tama county, and known as a portion of the Sacs and Foxes, to remain and reside in the state, and requesting the governor to inform the secretary of war of such residence, and to urge upon the department the propriety of paying the Indians their portion of the annuities due or to become due the tribe under the treaty of 1842. This act was the first official recognition on the part of either the state or the government of the right of the Indians to reside in Iowa.

From 1856 to 1896 the Indians continued to reside upon their Tama county lands under the authority of the act of the general assembly, and the government annuities were paid to them by an Indian agent appointed by the interior department of the government.

In 1896 the general assembly passed an act by which exclusive jurisdiction of the Sac and Fox Indians residing in Iowa and retaining tribal relations, and of all other Indians dwelling with them, and of all lands then or thereafter owned or held in trust for them as a tribe, was ceded to the United States, and by which authority was granted to the United States government to purchase any land in Tama county to be used for and in connection with any school or schools to be established and managed by federal authority for the education of such Indians. This cession was subject to the following conditions:

(1). The state reserved the right to serve any judicial process issued or returned to any court in this state or the judge thereof, and reserved to the state jurisdiction of crimes against the laws of Iowa committed upon said lands by the Indians or others, and of such crimes committed by Indians in any part of the state; (2) the right to establish and maintain highways; (3) the exercise of eminent domain under the laws of the state; (4) the power to levy taxes upon the lands for state, county, bridge, county road and district road purposes, and for such other purposes as the general assembly may from time to time by special statute provide.

The act became a law on the 20th day of February, 1896.

In 1896 and soon after the passage of the act of the twenty-sixth general assembly, an act was passed by congress by which the jurisdiction of the Sac and Fox Indians in Tama county in the state of Iowa and of their lands, as tendered to the United States by the state of Iowa, was accepted, subject to the limitations and conditions imposed by the act of the Iowa legislature. The closing paragraph of the act of congress is as follows:

> "And the United States Indian agent of the Sac and Fox Agency, Iowa, and the governor of the state of Iowa, respectively, are hereby authorized to transfer by deed of conveyance for the use and benefit of such Indians, the legal title, held by them in trust respectively, and the trusteeship of the lands of the Sac and Fox Indians of Tama county, Iowa, to the secretary of the interior and to his successors in office."

Since the passage of the act of congress referred to, these Indians have been under the direct care, jurisdiction and control of the interior department of the United States.

The provision of the act of congress of 1896, authorizing the governor of the state and the United States Indian agent of the Sac and Fox Indian agency in Iowa, to convey the lands belonging to the Indians to the secretary of the interior, and to his successors in office, in trust, has never been carried out, and the title to such lands is now held in part by the governor and in part by the Indian agent in trust for these Indians.

Under these facts the only duty which appears to devolve upon the governor in relation to the Sac and Fox Indians residing in Tama county, is to act as trustee in holding the title to such of the lands as have been conveyed to him, until the conveyance authorized by the act of congress of 1896 is made to the secretary of the interior, and to enforce the execution of the laws of the state

as to the Indians and their property as provided by the act of the Iowa legislature passed on the 20th day of February, 1896.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

August 9, 1905.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

SOLDIERS' ORPHANS' HOME—IMPROVEMENTS BY CITY CREATING A NUISANCE TO STATE PROPERTY—A municipal corporation may not construct an embankment which stops the natural flow of a stream of water. If a nuisance results, it may be abated.

SIRS—I am in receipt of your favor of the 8th instant, requesting my opinion upon the facts therein stated, the letter and request being as follows:

"A portion of the land owned by the state for the use of the Soldiers' Orphans' Home lies within the corporate limits of the city of Davenport. Prior to the year 1902, Duck Creek, a stream of considerable size which at all times contains running water, flowed through this land within a short distance of some of the buildings of the Home, passing from the Home grounds at Eastern Avenue in which the city maintained a bridge over the creek. In the year 1902 the general assembly appropriated money to change the course of the portions of Duck Creek described, a cut off was excavated in the year 1903, and the water of the creek has since that time passed through the cut off outside the city limits.

"The old bed of Duck Creek next the Home buildings was filled to the nearest line of Eastern Avenue, but before the filling was done a line of sewer pipe for the sewage of the institution was laid in the bottom of the bed and through this flows the effluent of the sewage disposal plant.

"The borders of the cut off are higher than the ground between it and the old creek bed and the result is that the surface water from that area and from a large tract of ground which drains into it, flows to the old bed of the creek, and over the filling into the old channel under the bridge and thence to the main body of water in the creek. The quantity of water which thus seeks an outlet at the bridge in wet seasons is large, and if the flow be obstructed at the bridge, it would accumulate to a depth of several feet near several cottages of the Home and would cover an area of several acres. The result would be stagnant water dangerous to the health of the inmates of the Home and the public. The area which would be covered as stated, is largely owned by the state, but includes a public highway which passes through the tract and part of another, along the side of the creek.

"The city of Davenport has commenced to make a fill in the bed of Duck Creek under the bridge in Eastern Avenue, and as we are advised, does not intend to leave or construct any way for the passage of the water which will flow over the fill in the old creek bed in time of high water, but intends to construct a solid bank or dam notwithstanding our objections and protest in behalf of the state. This will result in the accumulation of stagnant water, as stated, and the state has no adequate means of preventing it.

We desire your opinion as follows:

1. Has the city a right under facts as stated, to construct a solid bank across the old bed of Duck Creek in Eastern Avenue, making no provision for the escape of surface water?

2. If it has not, but persists in constructing this bank what is the remedy of the state before, and what after, the fill is completed?

3. In case the state has a right to an unobstructed flow of the surface water in question, and can maintain that right in court, what authority should direct the bringing of the action and what official should conduct it?"

These questions will be considered in the order in which they appear in the request.

First. It may be fairly assumed that stagnant water, likely to become foul or offensive and a menace to the public health, is a nuisance, and any act of a municipal corporation by which the natural channel or drainage of surface waters is destroyed by the construction of an embankment or dam across such natural drainage course, is an act on the part of the municipal corporation by which a nuisance is created, and for which the corporation is liable.

In *McClure v. Red Wing,* 28 Minn., 186, it is said:

> "When in the judgment of a municipal corporation it becomes necessary, in making a public improvement, to obstruct the natural channel of a stream formed by surface water made up of rains and melted snow which has fallen upon the sides of the ravine in which the water flows, or on the sides of those ravines tributary thereto, and where the water often flows with the rapidity of a torrent and the volume of a small river, the city is bound to provide artificial channels to carry off the water without injury to the property of others, and to exercise reasonable care, skill and diligence in doing the work."

In the present case the old channel of Duck creek is an existing natural water course by which the waters coming from rains or melted snows upon the sides of the hills are carried off, and the city of Davenport has no right to dam up such water course by filling one of its streets across the same, and thereby prevent such surface waters from flowing along the natural channel.

If, by the erection of a dam or fill in the street by the city across such water course, a pond of stagnant water is created above such dam or fill, the city would be liable for the creation of a nuisance, and an action in damages would lie, or the nuisance could be abated by an action in equity.

Second. An action for injunction will lie on the part of the state to prevent the city of Davenport from erecting and maintaining a dam across the old channel of Duck creek,

if the erection and maintenance of such dam will create a nuisance by causing the accumulation of stagnant water in such channel above the dam or fill, which will be detrimental to the public health.

If the fill has been made by the city, and as a result thereof a nuisance is created upon the lands of the state by stagnant water accumulating thereon because of the damming of the old channel of Duck creek, an action for a mandatory injunction will lie in behalf of the state against the municipal corporation to compel it to construct a culvert in the dam or fill of sufficient capacity to carry away the water which naturally flows along the channel.

Third. In my opinion the state has a right to an unobstructed flow of the surface water along the old channel of Duck creek, and can maintain that right in the courts of the state. An action seeking to maintain such right should, in my opinion, be authorized by the executive council of the state and brought in the name of the state upon the relation of the attorney general.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

August 9, 1905.

TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

LAKE BEDS—SALE OF BY EXECUTIVE COUNCIL—Land cannot be condemned for the purpose of constructing dikes.

SIR—In answer to the inquiries contained in the letter of Mr. E. W. Burgitt of date August 4th, referred by you to me, I beg leave to say:

I herewith enclose you a copy of an opinion given the executive council upon the question of the construction of levees of the character of those indicated by Mr. Burgitt, and as to the funds from which the cost of such dikes should be paid.

I will briefly answer the questions asked by Mr. Burgitt in the order in which they are stated in his communication.

(1). The proceeds of the sale of the lake beds can only be used to pay the cost of constructing dikes by an order of the executive council. The council may order the sale of such lake beds either before or after the same are drained.

(2). There is no provision of the statute which authorizes the state to condemn land for the purpose of constructing dikes of the character of those indicated in Mr. Burgitt's communication. Some arrangement will have to be effected with the owner of convenient lands to obtain a sufficient amount of earth to construct such dikes.

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

August 9, 1905.
HON. G. S. GILBERTSON,
Treasurer of State.

LOAN AND TRUST COMPANIES—GENERAL STATUTORY REGULATIONS GOVERNING SAME—POWERS AND PRIVILEGES OF.

SIR—I am in receipt of your favor of the 24th ultimo, in which you ask my opinion upon the following questions:

1. Must loan and trust companies incorporate under the laws of this state?

2. In what may loan and trust companies of this state invest their funds? Are they restricted to the class of investments set out in section 1850 of the code?

3. Can loan and trust companies own and hold stocks of banks and other corporations?

4. Are loan and trust companies subject to annual examinations the same as banks?

5. Must loan and trust companies pay an annual fee to this department the same as banks, the amount of fee being determined by the amount of capital stock of the company?

6. Must loan and trust companies make quarterly reports to this department and have the same published as do banks?

7. Does the law apply alike to companies which receive deposits and those which do not? If not, wherein does it discriminate?

8. Is the liability of a stockholder in a loan and trust company the same as that of the stockholder in a bank, or is his liability determined according to chapter 1, title IX, of the code?

9. Can loan and trust companies become trustees, receivers and guardians?

and in answer thereto, I beg leave to submit the following:

These questions will be taken up and answered briefly in the order in which they are stated.

First. There is nothing in our statute which prevents a partnership or an individual from transacting the business of a loan and trust company, and such business is not confined to incorporated companies.

Second. The statute does not restrict the investment of the funds of loan and trust companies, nor does it in any manner designate the character of securities in which the funds of such companies may be invested. The provisions of section 1850 regulating the investment of the funds of savings banks, do not apply to loan and trust companies.

Third. The authorities are somewhat conflicting upon the question whether corporations of the character of loan

and trust companies can purchase, own and hold the stock of other corporations. The better rule is that such corporations cannot purchase or hold the stock of other corporations. Loan and trust companies, like banks, may take and hold the stock of other corporations as security for loans made, or may take and hold the same in payment of debts due such companies; but they cannot deal or traffic in the stock of other companies by buying and selling the same. Nor can they subscribe for the stock of other corporations.

In Cook on Corporations (4th ed.), section 64, it is said:

> "It is not equally clear that one private corporation may subscribe for the stock of another corporation. On the contrary, such subscriptions are *ultra vires* and void, unless clearly within the ordinary objects and business of the subscribing corporation. A bank cannot lawfully subscribe for stock in a railroad corporation, nor can a railroad corporation subscribe for the shares of stock of another railroad corporation, unless expressly permitted by statute."

Nassau Bank v. Jones, 95 N. Y., 115;
Maunsell v. Midland etc. Ry. Co., 1 Hem. & M., 130.

Many other instances could be given where courts have held that one corporation may not purchase and hold, or subscribe for and take, the stock of another corporation, and in almost every case where the purchase of the stock of another corporation or the subscription thereto has been held valid, there was a direct connection between the business carried on by the two corporations.

As suggested, the weight of authority and the better rule is that a loan and trust company cannot subscribe for or purchase and hold the stock of an independent corporation.

Fourth. Under the provisions of section 1889, as amended by chapter 65 of the acts of the thirtieth general assembly, loan and trust companies are subject to annual examination by the auditor of state in the same manner as banks

are examined by him. The amendment of the section referred to, by the thirtieth general assembly, places all loan and trust companies under the control and regulation of the auditor of state, and requires that all such companies now be examined in the same manner as state and savings banks.

Fifth. Chapter 64 of the acts of the thirtieth general assembly provides that banks organized under the laws of the state shall pay to the auditor of state annually before the first day of March, certain fees which are graduated according to the capital of such banks. There is no provision in the chapter referred to or elsewhere in the statute for the payment of fees to the auditor of state by loan and trust companies.

It may be fairly argued that loan and trust companies should bear their proportion of the cost of examinations and should therefore pay to the auditor of state the same fees as are required to be paid by state banks. Such argument, however, should be addressed to the legislature rather than to a department of the state, as that body has failed to provide for the payment of such fees by loan and trust companies, and it is a well settled principle of law that no person or corporation can be required to pay fees to a state officer, except where such payment is expressly provided by statute.

Section 1889, as amended by chapter 65 of the acts of the thirtieth general assembly, requires that loan and trust companies shall be examined by the auditor of state in the same manner as banks are now examined by him, and under the provisions of that section such companies are required to pay the actual expenses of the persons making such examination. The expense incurred in making an examination of banks is a burden incidental to such examination, and the statute requiring loan and trust companies to be examined in the same manner as banks, carries with it and imposes upon such companies

the incidental burden of the expenses incurred in the examination, in the same manner as such burden is imposed upon banks.

Sixth. There is no provision of the statute requiring loan and trust companies to make quarterly reports to the auditor of state. In the absence of such provision, they cannot be required to do so.

Seventh. The law relating to the examination of loan and trust companies, to the amount of capital which they are required to have, and to the examination thereof by the auditor of state, applies alike to all such companies, and is not limited to those which receive deposits.

Eighth. Section 1889, as amended by chapter 65 of the acts of the thirtieth general assembly, makes each stockholder of a loan and trust company individually liable to the creditors of such company over and above the amount of stock held by him therein, and any amount paid thereon, to an amount equal to the face value of the shares held by him in such loan and trust company; that is, each stockholder of a loan and trust company incurs under the statute the same liability upon the stock held by him as exists in the case of stockholders in savings and state banks.

Ninth. There is no statute or principle of public policy in this state which forbids a corporation acting as trustee, receiver, executor or guardian. It was formerly thought that a corporation could not act in a fiduciary capacity, and the reason given by Blackstone why a corporation aggregate could not act as executor, administrator or trustee is that it cannot take the necessary oath. It has also been suggested that a corporation cannot act as trustee for the reason that a court of equity is often called upon to enforce a trust by laying hold of the conscience of the trustee, and that inasmuch as a corporation has no conscience it is not qualified to act as trustee. The reason most commonly urged why a corporation cannot act as

trustee, executor, guardian, or in any other fiduciary capacity is that such an appointment involves a personal trust, and therefore a corporation lacks one of the essential requisites of a trustee, namely: personal confidence.

But all of these doctrines were long ago exploded, even at common law, as being too technical and artificial, and it is now well settled by the modern authorities that a corporation may act as guardian, executor, trustee, receiver, or in any other fiduciary capacity, if such power is given by its charter or articles of incorporation.

It has never been held by any court that such power on the part of a corporation is forbidden or against the policy of the common law, and the weight of authority is in favor of such ability.

Williams on Executors, 198;
Vidall v. Girard's Executors, 2 How., 187;
2d Kent's Commentaries, 279;
Angell & Ames on Corporations, 168;
Perry on Trusts, 42;
Minn. Loan & Trust Co. v. Beebe, 40 Minn., 9;
Fidelity Insurance, etc., Co. v. Niven, 5 Houst., 416.

Chapter 65 of the acts of the thirtieth general assembly provides:

> "All such companies and corporations now existing or hereafter organized under the provisions of chapter 1, title IX of the code, whose articles of incorporation authorize the acceptance and execution of trusts, and all corporations in whose name the word 'trust' is incorporated and forms a part, shall have a full paid capital," etc.

The common law power of corporations to act in a fiduciary capacity is clearly recognized by the legislature in the enactment of this statute, and under its provisions and the common law rule governing corporations of the

character of loan and trust companies, there is no doubt as to their right to be appointed and to act as trustees, executors, administrators, guardians and receivers.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

September 6, 1905.

HON. B. F. CARROLL,
Auditor of State.

VACANCY IN OFFICE—REMOVAL OF A MEMBER OF THE STATE LEGISLATURE TO ANOTHER DISTRICT—If a member of the general assembly removes from the district from which he was elected, and ceases to be a resident thereof, such removal creates a vacancy in that office. The governor is required to call a special election to fill such vacancy.

SIR—In compliance with your verbal request for my views as to whether (1) the removal of a representative elected to the state legislature from the district in which he was elected, creates a vacancy in such district which should be filled by a special election, and (2), if such removal creates a vacancy, when does it become the duty of the governor to call a special election for the purpose of filling such vacancy, I beg leave to submit the following:

Subdivision 3 of section 1266 of the code declares that if the incumbent ceases to be a resident of the district for which he was elected, it creates a vacancy in the office. This subdivision clearly applies to persons elected to the legislature, and if a member so elected removes from the district for which he was elected and ceases to be a resident thereof, such removal creates a vacancy in the office of representative for that district.

Section 1269 of the code provides:

> "When a vacancy shall occur in the office of senator or representative in the general assembly, except by resignation, the auditor of the county of his residence shall notify the governor of such fact and the cause."

The notice required by section 1269 to be given to the governor by the auditor of the county in which the representative resided, that a vacancy exists in the office of representative for that district because of the removal of the incumbent from the district in which he was elected, is an official notification to the governor of the existence of such vacancy; and in the absence of fraud or mistake the governor is required, by the provisions of section 1279 of the code, to call a special election of the voters of the district where the vacancy exists for the purpose of filling the same, if the legislature will convene prior to the next general election.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

September 11, 1905.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

BIENNIAL ELECTION AMENDMENT—VACANCY IN OFFICE IN THE STATE LEGISLATURE—HOW FILLED—THE AMENDMENT CONSTRUED.

SIR—In compliance with your request for my opinion whether the call for a special election to fill a vacancy existing in a representative district should also include the election of a member of the general assembly from each county in the district, (if composed of more than one county), under the amendment to the constitution adopted at the last general election, which provides that each county shall constitute one representative district and be entitled to one representative, I submit the following:

By the provisions of the amendment to the constitution, known as the biennial election amendments, adopted at the last general election, the terms of office of the members of the general assembly, whose successors would otherwise be chosen at the general election in the year 1905, are extended one year and until their successors are elected and qualified.

The same amendment provides that the general assembly shall meet in regular session on the second Monday in January in the year 1906, and that no general election shall be held in the year 1905.

Under this amendment the general assembly which will convene in the year 1906 will be composed of the same members as the general assembly which convened in 1904.

If, for any reason, a vacancy occurs in the office of a member of the general assembly before the meeting of that body in 1906, it is undoubtedly the duty of the governor, upon reciving notice of the existence of such vacancy, to call a special election to fill the same. Such special election must, in my opinion, be called for the purpose of filling an existing vacancy, and not for the purpose of electing a new member to the general assembly, under the provisions of the amendment to the constitution known as Joint Resolution No. 2. That amendment to the constitution, among other things, provides:

> "The general assembly shall, at the first regular session held following the adoption of this amendment, and at each succeeding regular session held next after the taking of such census, fix the ratio of representation and apportion the additional representatives as hereinbefore required."

This provision clearly indicates that it was not the intention of the framers of the amendment, or of the legislature which adopted it, that it should become operative until after the first regular session of the general assembly following its adoption.

The general assembly which will convene on the second Monday of January in 1906 will be the first rgular session of that body following the adoption of the amendment referred to. That legislature must, under the provisions of the amendment, fix the ratio of representation and apportion the additional representatives required by the amendment so as to make the entire number of representatives one hundred and eight.

Construing the provisions of these amendments to the constitution together, it is clear that, in calling a special election to fill a vacancy existing in a representative district prior to the meeting of the general assembly in 1906, such call should be for the purpose of filling the vacancy only, and should not include the election of a new member to the general assembly.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

September 28, 1905.

HON. ALBERT B. CUMMINS,

Governor of Iowa.

LAKE BEDS—MEANDER LINES—It is held that in the survey of a lake, if the meander lines define the ordinary high-water mark of the lake, such lines are the boundary lines of the riparian owners.

Des Moines, September 29, 1905.

HON. A. H. DAVISON,

Secretary Executive Council.

DEAR SIR—Your letter of August 7th, transmitting the letter of Mr. Louis E. Ashbaugh and plats of his survey of Sand Hill Lake, was received sometime ago. In compliance with your request for my opinion whether the executive council has authority to sell the land which lies between the original meander lines of the government survey and the meander lines of the survey made by Mr. Ashbaugh, I submit the following:

The rule is well settled in this state that the land of a riparian owner extends to the ordinary high-water mark of the lake or stream along which the land of such owner lies.

It is equally well settled that meander lines are not boundary lines, and that if such lines do not correspond with the ordinary high-water mark of the stream or lake along which such lines are surveyed, the land of the riparian owner may extend beyond such lines and to the ordinary high-water mark.

If the meander lines of Sand Hill Lake, as surveyed by Mr. Ashbaugh, define the ordinary high-water mark of the lake, as indicated by its bed and shores, such lines are the boundary lines of the riparian owners. The ownership of the state and its right to sell are limited to the bed of the lake lying within the ordinary high-water mark; and if the meander lines surveyed by Mr. Ashbaugh correctly define such mark, the rights of the state are limited to the land lying within such lines.

I am, Yours very truly,

CHAS. W. MULLAN,
Attorney-General of Iowa.

TAXATION—SCHOOL HOUSE TAX—DUTY OF THE BOARD OF DIRECTORS—APPORTIONMENT AMONG THE SEVERAL SUBDISTRICTS.

Des Moines, September 29, 1905.

HON. JOHN F. RIGGS,
Superintendent of Public Instruction.

DEAR SIR—I am in receipt of your favor of the 16th instant, which is as follows:

> "We respectfully request your opinion on the following:
>
> 1. Under the provision of paragraph 7, section 2749, (a) Is it necessary that a specific amount or number of mills be voted? (b) If not, how is a proposition that does not designate the amount so voted

to be construed? (c) Who determines the amount in such case? (d) When the electors vote school building bonds as provided in section 2812, does that imply the voting of a schoolhouse tax, no separate proposition to that effect having been submitted?

2. Section 2806 provides that the board shall apportion any school tax voted by the annual meeting for schoolhouse fund among the several subdistricts. (a) Does this authorize the board to certify a larger part of such tax against one subdistrict than against another? (b) Does this provision also authorize the board when acting under section 2813 to certify more against one district than against another? (c) If so, can it certify more than five mills against a subdistrict, even though the average for the corporation be not more than five mills?''

I will briefly answer these questions in the order in which they are stated in the letter.

First. A tax voted by the electors of a school district for schoolhouse purposes should designate the number of mills on the dollar of the assessed value of the property of the district.

Second. It is not possible for me to say how a proposition which does not designate the amount voted at the annual meeting of the electors of a school district for schoolhouse purposes, is to be construed, unless I am informed as to all of the facts connected with the voting of such tax.

Third. Nor is it possible for me to say who determines the amount in such case, unless I am advised as to the facts involved.

Fourth. A vote of the electors of the school district, authorizing the board to issue bonds for schoolhouse purposes, under the provisions of section 2812, will authorize the board, under the provisions of section 2813, to certify to the board of supervisors of the county a tax sufficient to meet the interest and principal of such bonds, not exceeding five mills upon the dollar of the assessed valuation of the property of the district.

Fifth. Section 2806 provides that the tax which is voted at the annual meeting of the electors of the school district for schoolhouse purposes shall be apportioned among the several subdistricts in such a manner as justice and equity may require, taking as the basis of such apportionment the respective amounts previously levied upon the subdistricts for the use of the schoolhouse fund. This provision clearly authorizes the board to certify a larger portion of the schoolhouse tax against one subdistrict than is certified against another where such a discrimination is required to equalize the amount of such tax paid by the subdistricts.

Sixth. I find no provision of statute limiting the tax which may be apportioned and certified by the board under the provisions of section 2806 to five mills on the dollar. Subdivision 7 of section 2749 authorizes the electors of the district to vote a tax for schoolhouse purposes not exceeding ten mills on the dollar, and the tax so voted may be apportioned among the subdistricts as provided by section 2806, but in no case should the amount apportioned to any subdistrict exceed the limit fixed by subdivision 7 of section 2749.

I am, Yours very truly,

CHAS. W. MULLAN,

Attorney-General of Iowa.

STATE MILITIA—LEGISLATIVE CONTROL.

SIR—In compliance with your request of the 29th instant for my opinion whether it would be lawful to change section 2180 of the code so as to provide for the election of field officers of the Iowa National Guard by the line officers of a regiment, I submit the following:

The legislature of the state undoubtedly has full power to make such change, if it is deemed wise to do so, as the legislative power of that body is omnipotent within the constitutional limitations.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

September 29, 1905.

HON. W. H. THRIFT,

Adjutant General of Iowa.

BUILDING AND LOAN ASSOCIATIONS—VOLUNTARY LIQUIDATION OF—When a building and loan association voluntarily elects to wind up its affairs, the provisions of chapter 69, acts of the twenty-ninth general assembly apply, and it is limited in expense to the amounts provided for therein.

SIR—In response to your request of the 21st ultimo for my opinion whether a building and loan association which has voted to go into voluntary liquidation, is limited in expenses to the amounts provided for in section 2 of chapter 69 of the acts of the twenty-eighth general assembly, I submit the following:

Section 2 of chapter 69 of the acts of the twenty-eighth general assembly, among other things, provides:

> "All expenditures and expenses for management and conducting the affairs of said association, not including membership fees and charges for closing loans, shall be paid from the receipts of interest, premiums and other sources of profit. Said associations may thus use for expenses in any one year a sum not in excess of the following percentages on their assets, as shown by the last actual report, to-wit:" (Then follows a scale of expenses allowed, graduated upon the assets of the association).

The provision of the section quoted is broad in its terms, and includes all expenses for the management and conducting the affairs of the association. When such an association voluntarily elects to go into liquidation and wind up its affairs, the closing of its business is a part of the management of its affairs.

The provisions of the statute, in my opinion, apply equally to an association which is winding up its affairs by voluntary liquidation as to one which is conducting its business in the ordinary manner. In either case the legislature has limited the expenses which can be lawfully incurred by the association in the management of its affairs.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

October 4, 1905.

HON. B. F. CARROLL,
Auditor of State.

COAL MINE—DEFINITION UNDER THE IOWA LAW—All coal mines which are worked within the boundaries of the state of Iowa are within its jurisdiction and subject to its laws, regardless of the fact that the shaft and openings of the mine are in another state.

Des Moines, October 11, 1905.

MR. JOHN VERNER,
Chariton, Iowa.

DEAR SIR—In response to your request for my opinion upon the questions:

1. What is the definition of the term "coal mine", as the term appears in the Iowa laws?

2. Does the location of the mine openings determine the responsibility of the state, in which said openings are located, to care for the safety and health of the persons employed in the mine, and does such location establish jurisdiction of the state over all the underground workings of the mine, irrespective of state boundary lines?

3. Assuming that the location of the mine openings determines responsibility and confers jurisdiction over all the mine workings, how will that affect the rights of Iowa and its citizens as set forth in section 2485 of the code?

4. If the location of the mine openings does not determine responsibility for and jurisdiction over the mine workings extending into Iowa, how is the state mine inspector of Iowa to acquire jurisdiction over such workings, how is such jurisdiction to be exercised, and what is its extent?

5. In the absence of laws on the subject, would it be advisable that the mine inspectors of Missouri and Iowa assume joint jurisdiction in a case like the above?

6. In case a person, employed in the mine workings extending into Iowa, is killed in that part of the mine, should the coroner of Appanoose county, Iowa, or the coroner of Putnam county, Missouri, hold the inquest?

I submit the following:

First. While the word "coal mine", as used in the statutes of the state, may properly be held to include shafts, adits, drifts and other excavations penetrating the earth, yet any excavation, adit, drift or inclined plane used for the purpose of taking coal from the earth, and any stratum of coal which has been reached by excavations, and from which coal is being mined, would properly fall within the meaning of the word. The fact that the shaft by which a coal mine is entered is in another state, would not make a portion of the mine which was being worked and from which coal is taken in this state, any less a coal mine within the meaning of the word as used by the legislature of this state.

In the case under consideration, the part of the mine of the Coke & Coal Company of Connellsville, Missouri, known as Mine No. 10, which extends beyond the Missouri line and into the state of Iowa, is a coal mine in this state.

Second. Questions 2, 3 and 4 may be very properly considered together.

All coal mines which are worked within the boundaries of the state of Iowa are within its jurisdiction and subject to its laws. The fact that the shaft and openings of the mine are in another state do not take away from the jurisdiction of Iowa the control of any portion of such mine which is within the state boundary. The jurisdiction of the state is co-extensive with its boundaries, and the fact that its territory is entered through a mine adit or gallery beneath the surface of the soil does not affect such jurisdiction.

It is the duty of the mine inspectors of the state of Iowa to see that the mining laws are enforced in all mines operated within the territorial jurisdiction of the state, and the fact that the mine is entered and the coal removed therefrom through a shaft located beyond the boundary line of the state, does not relieve them of the duty of enforcing the Iowa laws. They should, so far as possible, co-operate with the mine inspectors of Missouri in the case under consideration, make an examination of that portion of the mine within the state of Iowa, and see that the Iowa laws are enforced in relation thereto.

Third. The jurisdiction of the state of Iowa extends to the center of the earth. It therefore follows that any one who is killed in that part of the mine which lies within the territorial boundaries of the state, is killed within the state of Iowa, and the coroner of the county in which such mine exists has jurisdiction over all matters pertaining to an inquiry as to the manner by which such person came to his death. The inquest for the purpose of prosecuting such inquiry should be held by the coroner of the county in which the mine exists, and in the case under consideration by the coroner of Appanoose county in the state of Iowa.

I am,

Yours very truly,

CHAS. W. MULLAN,

Attorney-General of Iowa.

MEANDER LAKES—Riparian owners own the land to the ordinary high water mark, and in the survey of such lakes by the state, the meander lines should conform to the ordinary high water mark.

Des Moines, October 12, 1905.

HON. A. H. DAVISON,
Secretary Executive Council.

DEAR SIR—I am in receipt of your letter of the 7th instant enclosing a letter of Mr. Louis E. Ashbaugh, asking that my opinion relating to the boundary lines of the lands of riparian owners upon the inland meandered lakes of the state be enlarged so as to more completely cover the questions submitted. In answer to your request I will say that I think my opinion fully covers all of the questions submitted to me.

I may, however, enlarge the same by saying that the state has no title to any lands outside of the meander lines surveyed by the engineer under the act of the thirtieth general assembly relating to the survey and sale of meandered lake beds, if such lines follow the ordinary high-water mark of the lake as indicated by its shores and bed.

The riparian owners own the land to the ordinary high-water mark; the state owns the land lying within such high-water mark; and the engineer who is commissioned by the state to make a survey of a lake bed under the provisions of the statute, should conform his meander lines to the ordinary high-water mark of the lake.

The meander lines of the government survey do not control as to the boundaries of the lands of the riparian owners or those of the lands owned by the state, except where such meander lines define and extend along the ordinary high-water mark of the lake.

I am, Yours very respectfully,

CHAS. W. MULLAN,
Attorney-General of Iowa.

SURETY COMPANIES—VALIDITY OF BONDS EXECUTED BY CORPORATION ORGANIZED IN ANOTHER STATE—The clerk of the district court is required to approve and accept a bond which has been duly executed by a foreign surety company authorized to do business in this state.

SIR—I am in receipt of your favor of the 14th instant, in which you request my opinion upon the following questions:

1. Are the provisions of section 360 of the code, so far as the same relate to the duty of any officer or body having the approval of bonds, mandatory? In other words, if a person presents to the clerk of the district court of the county a bond duly executed by a corporation organized under the laws of another state and engaged in the business of becoming surety upon bonds, which has complied with the laws of this state, and is duly authorized to transact the business of fidelity and surety insurance therein, and that fact has been duly certified to such clerk, in the manner provided by law, is such clerk legally authorized or justified in refusing to approve such bond?

2. Is the fact that a surety company organized under the laws of another state is not required to maintain a deposit of securities with any officer of this state or have and hold property in this state subject to execution a legal ground for refusing the approval of a bond executed by such corporation?

3. Does the same rule apply to all kinds of bonds requiring the approval of the clerk of the district court? In other words, might the clerk of the district court refuse to approve bonds of administrators, guardians or trustees executed by bonding or surety companies, and still be required to approve other forms of bonds signed by such companies?

These questions will be answered in the order stated.

First—The provisions of section 360 of the code, which relate to the acceptance and approval of a bond signed by a guarantee company authorized to transact business in the state as surety, are, in my opinion, mandatory. Under the provisions of that section it is the duty of the person, officer or body who is required to approve the sufficiency of a bond, to accept and approve a bond in a sufficient amount, which is properly executed, whenever its conditions are guaranteed by a company or corporation duly organized and incorporated under the laws of this state, or authorized to do business therein, and to guarantee the fidelity of persons holding positions of public or private trust, which shall have the certificate of the auditor of state authorizing it to do business in this state as provided in chapter 4 of title IX of the code, if the amount of such bond is not in excess of ten per cent of the paid up cash capital of such company or corporation.

If a bond is presented to the clerk of the district court in any matter wherein he is required to approve and accept a bond, which has been duly executed and guaranteed by a surety company authorized to do business in the state, he cannot, in my opinion, legally refuse to approve and accept such bond because a guarantee company, and not an individual, has signed it as surety.

Second—Our statute has provided that a surety company organized under the laws of another state, must comply with the provisions of chapter 4 of title IX of the code, before it is entitled to transact business in this state. It is not required to maintain a deposit of securities with any officer in this state, or to have property in the state subject to execution on legal process.

If the conditions of chapter 4 of title IX have been fully complied with by a surety company organized under the laws of another state, it is the duty of the auditor of state to issue to such company a permit to transact business in the state; and when so authorized by the auditor of state, no other conditions are required.

Third—The same rule, in my opinion, applies to the bonds of administrators, executors, guardians or trustees, and a clerk of the district court, under the present statute, cannot refuse to approve and accept a bond guaranteed by a surety company, when presented by an administrator, guardian or trustee, on the ground that the surety thereon is a guarantee company and has no property in this state liable to execution.

Section 358 of the code, which provides that the surety in every bond provided for or authorized by law, must be a resident of this state and worth double the sum to be secured, beyond the amount of his debts, and have property liable to execution in this state equal to the sum to be secured, except as otherwise provided by law, does not apply to bonds upon which guarantee companies are sureties, as section 360 specifically provides that foreign surety companies which have complied with the provisions of the statute may become sureties on bonds authorized or required by law in this state. It also further provides that it is the duty of the officer or body who is required to approve the sufficiency of any such bond, to accept and approve the same whenever its conditions are guaranteed by a surety company authorized to do business in this state.

This section is a special provision of the statute relating to bonds of surety companies, and is not controlled or modified by the provisions of section 358.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

October 18, 1905.

HON. B. F. CARROLL,
Auditor of State.

LOAN AND TRUST COMPANIES—RIGHT TO ACQUIRE AND HOLD STOCK OF OTHER CORPORATIONS—GENERAL LAW APPLICABLE THERETO.

SIR—In answer to your verbal request for an enlargement of my opinion given on the 6th of September last, in relation to the power of loan and trust companies to acquire and hold, either by subscription or purchase, the stock of other corporations, I submit the following:

First. As to the right of a corporation to subscribe to the stock of another corporation.

The general rule is laid down in Thompson on Corporations, as follows:

> "It may perhaps be laid down as a general rule that a corporation, unless expressly empowered to do so by its governing statute, cannot subscribe for shares of stock in another corporation."

Thompson on Corporations, Vol. 1, sec. 1102.

The rule is stated by Morawetz on Private Corporations in the following words:

> "A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation; nor can it do this indirectly through persons acting as its agents or tools. The right of forming a corporation is conferred by the incorporation laws only upon persons acting individually, and not upon associations; moreover, it would, under ordinary circumstances, be in violation of the charter of an existing company to subscribe for shares in a new company, and assume the resulting liabilities."

Section 434.

The doctrine announced by Morawetz has been affirmed in many adjudicated cases.

In *Knowles v. Sandercock*, 107 Cal., 642, the section referred to is quoted with approval, and in the same case it is further said in a quotation from Spelling on Corporations:

> "A private corporation has no implied authority to invest in shares of another private corporation. If this were so, it might, by an easy process, transfer its resources to another."

A large number of cases are cited in support of the text taken from Spelling.

In *Peshtigo Co. v. Great Western Telegraph Co.*, 50 Ill. App., 624, it is said:

> "The appellant is a corporation under a Wisconsin charter to conduct a lumber business. We need not go into particulars as to its character further than to say there is in it nothing having the remotest allusion to doing a telegraph business, or buying or subscribing to shares in a telegraph company. Unless *ultra vires* has ceased to be a defense under any and all circumstances, it is a good defense here for the Peshtigo Company, sued upon an assessment upon shares subscribed for by it."

So, in *Cent. R. R. Co. of N. J. v. Pa. R. R. Co.*, 31 N. J. Eq., 475, it was held that a corporation cannot in its own name subscribe for stock or be a corporator under the general railroad law; nor can it do so by a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock.

In *Denny Hotel Co. v. Schram*, 6 Wash., 136, the principle announced by Morawetz is quoted with approval, and it is there said:

> "A corporation can only be formed in the manner provided by law, and has only such powers as the law specifically confers upon it. We do not think that a corporation was within the contemplation of the legislature when they used the expression 'two or more persons' in section 1498, Gen. Stat. It is true that section 1709, Code Proc., provides that the term 'person' may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual. But it does not follow, by any means, that the term 'person' is always to be construed as a private corporation, any more than it is always to be construed as the United States."

In *Railway Co. v. Iron Co.*, 46 Ohio St., 49, it is said:

> "We think it well settled as a result of the decisions of this state, as well as elsewhere, that an incorporated company cannot, unless authorized by statute, make a valid subscription to the capital stock of another; that such subscription is *ultra vires* and void. Mr. Morawetz, in stating this to be the law, observes: 'The right of forming a corporation is conferred by the incorporation laws only upon persons acting individually, and not upon associations; moreover, it would under ordinary circumstances, be a violation of the charter of an existing company to subscribe for shares in a new company and assume the resulting liabilities.' "

Numerous cases are cited in support of the principle announced, and in reference to such cases it is further said by the Ohio court:

> "These cases all proceed upon the principle that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer, or that may be fairly implied therefrom."

The same principle is announced in the following cases:

Commercial Fire Insurance Co. v. Board of Revenue, 99 Ala., 10;

Mutual Savings Bank, etc., Association v. Meridan Agency Co., 24 Conn., 164;

N. O. Fla., etc. Steamship Co. v. Ocean Dry Dock Co., 28 La. Ann., 174.

Second. It is also settled by numerous decisions that a corporation may not purchase and hold the stock of another corporation, except under certain peculiar conditions which are an exception to the general rule.

In Thompson on Corporations, sec. 5719, it is said:

> "One corporation cannot, unless authorized thereto by its governing statute, make a valid subscription to the stock of another corporation, or otherwise become a stockholder, unless for the purpose of receiving payment of or security for a debt owing to it; and even then it seems that, while it may receive

dividends, it will not be allowed to exercise the power of controlling the corporation whose shares it has acquired, by voting them as a stockholder, but that its attempt so to vote may be enjoined by the other stockholders. Moreover, if a corporation purchases the shares of stock of another corporation on a credit, and gives its promissory note therefor, it will not be allowed to defend an action upon the note on the ground that it had no power so to acquire the shares, on principles elsewhere considered. And the holder of such a judgment, when recovered, has the same remedy against the stockholders of the corporation thus unlawfully purchasing the shares of another corporation, which he would have on any other valid judgment. Such purchases are the subject of special disfavor where one corporation purchases the shares of another corporation engaged in a similar business, for the express purpose of absorbing and controlling it, with a view of defeating competition; and the more so where the purchasing corporation is a foreign, and the absorbed corporation a domestic one. The reasons which operate to exclude an implied power in one corporation to become the owner of shares in another, are stronger in the case of an unlimited company, or in the case where the shares are not fully paid up; since in either case, if the company whose shares are thus purchased becomes insolvent, the company which becomes a shareholder therein will be liable to be put on the list of its contributories, as it is called in England,—that is to say, in the case of an unlimited company where the shares are not paid up, to contribute its ratable share; or in the case of a limited company, where the shares are not paid up, to contribute its ratable share to the extent of their par value, toward liquidating the debts of the company. This, it has been clearly and strongly pointed out, has the effect of making one company a partner in another company. It is too plain for argument that unless an express power to that end has been conferred, the directors of one corporation or company cannot involve their shareholders, or the trust funds in their hands, in the liability created

by entering into a partnership with another corporation or company. Moreover, persons who deal with corporations on the faith of the individual liability of their stockholders, have the right to proceed on the assumption that those stockholders are at least natural persons, and not mere hollow shells, made up in the same way as the corporation with which they are dealing,—mere partnerships, it may be, composed of insolvent corporations. It is scarcely necessary to add that the legislature may authorize one corporation to subscribe to the capital stock of another, and that such a statute is not unconstitutional."

Again it is said by Mr. Thompson in his work on Corporations, section 8353:

"The general rule is that one corporation cannot, for the purpose of controlling or managing the business of another corporation, or of participating in the control or management thereof, become a stockholder in such other corporation, without the consent of the state expressed in its constitution or in its legislature. The view has been recently taken that an attempted subscription or contract of subscription by one corporation for shares in another, without statutory authority, is not voidable merely, but utterly void. A purchase of shares of a domestic corporation by a foreign corporation engaged in a similar business for the express purpose of controlling and managing the domestic corporation, is *ultra vires* and void. So, a solvent corporation conducting a prosperous business cannot, in the absence of any exigency, sell its whole assets, taking in part payment the stock of a new corporation organized to carry on the business. An incorporated insurance company cannot invest its capital in the capital stock of a proposed corporation, under a statute authorizing such companies to invest their money in 'stock or choses in action, and to sell the same'. A corporation organized to acquire and improve lands, and to acquire and exercise street railroad, telegraph, lighting and similar franchises over the property, and to maintain every right, privilege and interest in and over the property that a private owner could, has no power to subscribe for shares in another

corporation organized to manufacture woodwork. A purchase by one railroad company, of stock in another, is not within charter authority to subscribe to stock in the other company and hold shares therein. Shares of a savings bank, not taken as security, or acquired in the course of the business of banking, cannot be held at a national bank. In California, corporations are forbidden to engage in any business not authorized by their charters or by the laws under which they are organized. It follows that a corporation organized for the purpose of manufacturing, buying or selling furniture and upholstery, cannot hold stock in a hotel corporation, and that its subscription to such stock is *ultra vires* and void, and cannot be enforced while it remains executory. The subscribing corporation cannot, therefore, be charged with liability to the creditors of the hotel corporation. A corporation whose charter contains no provision allowing it to subscribe for shares in another company is not liable for an assessment upon shares subscribed for by it, although the assessment is made upon all stockholders as a class, for the reason that it is not a stockholder."

The reason for the rule is clearly stated by Mr. Thompson in section 1103 of his work on Corporations, as follows:

"The reason of the rule is that if a corporation could, by buying up the majority of the stock of another corporation, be admitted to vote as a shareholder in the meetings of such other corporation, the purchasing corporation could take the entire management of the business of the latter, however foreign such business might be to that which the purchasing corporation was created to carry on. A banking corporation could thus become the operator of a railroad or of a manufacturing business, and any other corporation could engage in banking by obtaining the control of the stock of an incorporated bank. 'Nor would this result follow any the less certainly, if the shares of stock were received in pledge only to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee'. The reason of the rule was

well stated by Mr. Justice Walton: 'If a corporation can purchase any portion of the capital stock of another corporation, it can purchase the whole, and invest all its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. A banking corporation could become a manufacturing corporation, and a manufacturing company could become a banking corporation. This the law will not allow'. "

The principle laid down by Mr. Thompson is recognized and followed in the following cases:

Easun v. Buckeye Brewing Co., 51 Fed., 156;
The People, ex rel., v. Chi. Gas Trust Co., 130 Ill. 284;
Franklin Co. v. Lewiston Saving Bank, 68 Me., 46;
Franklin Bank v. Commercial Bank, 36 Ohio St., 354;
Marble Co. v. Harvey, 92 Tenn., 118.

In *Franklin Bank v. Commercial Bank, supra,* it is said:

"There would seem to be little doubt, either upon principle or authority, and independently of express statutory prohibition of the same, that one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute."

In *People v. Chicago Gas Trust Co., supra,* it is said:

"Boone on the Law of Corporations says: 'Without a power specifically granted, or necessarily implied, a corporation cannot become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter'. In Green's Brice's Ultra Vires (p. 91., note b) it is said: 'In the United States a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it'. So, also, Morawetz on Private Corporations (Secs. 431, 433) says: 'A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. * * * A corporation cannot, in the

absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly through persons acting as its agents or tools'. The authorities referred to by these text writers sustain the conclusions announced by them. It has been held in many cases, that, 'in the United States, corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law', and that 'one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute'."

It has been suggested that the Iowa court has held a doctrine contrary to that announced by the foregoing authorities, and a hasty reading of the Iowa cases might lead to that conclusion.

In *Iowa Lumber Co. v. Foster, et al,* 49 Iowa, 25, the question arose as to the right of a corporation to repurchase its own stock, which was sold under an agreement that it would be repurchased by the corporation under certain conditions. The question seems to have been decided upon the authority of a note of the American editor of Green's Brice's *ultra vires,* in which it is said:

"American authorities hold there is at common law nothing to prevent a corporation from taking its own stock in payment or satisfaction of debts, and some even hold that at common law a corporation may purchase its own stock, provided the transaction is *bona fide* and not in fraud of creditors."

In the case which the court then had under consideration, the promise of the corporation to repurchase the stock of the person to whom it was sold, if certain conditions existed, was established, and in determining the case it is said by Mr. Justice Seevers:

"That is to say, the contract was made in good faith, but the power to do so did not exist. This objection cannot be permitted to prevail. After assuming the powers above specified, it does not lie in the mouths of these corporators to raise or insist upon this objection."

The decision reached in this case is, therefore, clearly an exception to the general rule.

In the case of *Calumet Paper Co. v. Investment Co.*, 96 Iowa, 147, the defendant received certain stock of the Olson-Welch Printing Company as collateral security for a debt owing by that company to the defendant, and it was held that the defendant company had the power to take and hold such stock for that purpose.

In *Latimer & Inglis v. Citizens State Bank, et al*, 102 Iowa, 162, it was held that a state band had power to receive the certificates of stock of a corporation as collateral security for a debt, and that as holder of such stock it was liable to assessments for the unpaid portion of the face value thereof. In that case the state bank received fifty shares of the stock of the Brule County Bank as collateral security for a debt owing to the Citizens State Bank. But fifty per cent of the face value of these shares had been paid. The bank surrendered the certificates which were originally pledged with it, caused a transfer thereof to be made upon the books of the Brule County Bank; and new certificates issued to the State Bank in lieu thereof. Under these circumstances it was held by the Iowa Court that the state bank was liable for the unpaid portion of the face value of the stock so held by it.

In *Rollins v. Shaver Wagon Co.*, 80 Iowa, 380, a transaction whereby the defendant received a number of shares of its own stock in exchange for certain coal bonds, was held to be valid, and that the defendant corporation had the power to acquire its own stock by such exchange. The power of corporations to purchase stock of other corporations is not discussed or passed upon, and the decision is based upon the authority of *Iowa Lumber Co. v. Foster, supra.*

In *West v. Averill Grocery Co.*, 109 Iowa, 488, 492, a contract, whereby the Averill Grocery Company agreed to repurchase of West shares of stock sold by the corporation to

him, was held, under the circumstances of that case, to be a valid and enforcible contract. The question of the power of a corporation to acquire the stock of another corporation by purchase, was not involved in the case.

In the recent case of *Traer v. Prospecting Co.*, 124 Iowa, 107, it was held that the Prospecting Company had power to sell its entire property and purchase the stock of the Inland Coal Company. The transaction appears to have been a consolidation of two corporations prosecuting the same character of business, namely, that of coal mining, and under the facts as developed in the case, the court held that it was competent for the Prospecting Company to dispose of its property to the Coal Company, and receive in return therefor the stock of the latter named company.

While the Iowa court has gone as far, perhaps, as that of any other state toward holding that one corporation may acquire and hold the stock of another, these cases cannot be construed as announcing an entirely different rule in this state than that established by the great weight of authorities throughout the country. The facts involved in the Iowa cases are exceptional, and they must be held to state the exception to the general rule, rather than the rule itself. They certainly do not establish the doctrine that a bank or a loan and trust company may engage in the business of buying, selling, owning or holding the stocks of other corporations.

While, as said in my former opinion, banks, loan and trust companies and other corporations may receive corporate stocks as collateral security for a debt created at the time of the receipt thereof, or for an antecedent debt, and may in that manner become the owners thereof, yet it is against the general public policy to permit one corporation to purchase the stock of another, and to own and control its business.

Under the authorities cited, I find no occasion to change the conclusion which I reached in my former opinion.

Third. In the fifth division of my former opinion I stated that banks were required to pay the actual expenses of the persons making an examination, and that the expenses so incurred were incidental to such examination; that the statute requiring loan and trust companies to be examined in the same manner as banks, carries with it and imposes upon such companies the incidental burden of the expenses incurred in the examination.

In making this statement I overlooked the fact that the provisions of section 1876 of the code, requiring the payment of such expenses, were repealed by chapter 64 of the acts of the thirtieth general assembly.

The statute as it now exists requires loan and trust companies to be examined by the auditor in the same manner as he is required to make an examination of banks, but makes no provision for the expenses of such examination, and such companies cannot, under the existing statute, be required to pay such expenses.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

November, 2, 1905.

HON. B. F. CARROLL,
Auditor of State.

INSANE—PAYMENT OF EXPENSE FOR CARE AND COMMITMENT OF AN INSANE PATIENT WHO HAS NO LEGAL SETTLEMENT IN THIS STATE—A county is not entitled to be reimbursed by the state for expenses incurred in the care and treatment of an insane person having no legal residence in the state before proceedings were commenced to have such person declared insane.

SIRS—In compliance with your request for my opinion as to the liability of the state upon the items of expense incurred by Ringgold county for medical attendance and other care of Joseph Kosnor, who is now an insane patient in the Clarinda hospital, I submit the following:

Section 1 of chapter 78 of the acts of the thirtieth general assembly, provides:

> "In all cases where the commissioners of insanity of a county find to be insane a person who does not have a legal settlement within that county, the cost and expenses of the arrest, care, investigation and commitment of such person, authorized by law, including the cost of appeal, if an appeal be taken, and the person is found to be insane on appeal, shall be paid in the first instance by the county in which such person is found to be insane. * * * If such person be found to have no legal settlement within this state, such cost and expenses shall be paid out of any money in the state treasury not otherwise appropriated, on vouchers executed by the auditor of the county which has paid them, and approved by the board of control of state institutions * * *."

The expenses incurred by a county in the arrest, care, investigation and commitment of an insane person who has no legal residence in any county in the state, for which the county making such expenditure may be re-imbursed by the state, are such costs only as are legally incurred in the arrest, care, investigation and commitment of such insane person, after proceedings are instituted against him.

The language of the statute is not susceptible of a construction which authorizes the state to re-imburse a county for expenses incurred for medical or surgical treatment, or other necessary care, of a person not having a legal residence in any county in the state, before proceedings have been commenced for the purpose of having such person declared insane.

In the case under consideration all expenses which were incurred by the county of Ringgold for medical or surgical treatment of Joseph Kosnor, and for his care prior to the time proceedings were instituted against him, are not chargeable to the state. There is no authority for the payment of such expenses from the state treasury. The county

can be re-imbursed only for expenses incurred in the care of the said Kosnor after proceedings were begun to have him declared insane, and for the cost and expenses of such proceedings.

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

November 17, 1905.
TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

INEBRIATES—ESCAPE OF FROM ASYLUM—If an inebriate escape from his confinement, the time during which he is at large cannot be reckoned as a part of the term of his commitment.

SIRS—I am in receipt of your communication of the 31st ultimo, in which you request my opinion upon the following question:

> Under chapter 93, acts of the twenty-ninth general assembly, if one committed as an inebriate to a state hospital, makes his escape therefrom, does the term for which he was committed continue to run regardless of the time he is out on escape, or could he be returned and kept for the time for which he was committed not including the time he was out on escape?

In compliance with your request I submit the following:

It is a well settled rule of law that, where one who is sentenced to serve a term of imprisonment, by his own misconduct prevents the execution of the sentence in whole or in part, the period during which he prevents the execution of such sentence, or during which he is at large by reason of escape, cannot be deducted from the term of his sentence. This doctrine is laid down in the following authorities:

Corporate Authorities v. Johnson, 121 Ala., 397;
Dolan's Case, 101 Mass., 219;
Cleek v. Com., 21 Gratt., 777.

One who escapes from confinement during the term for which he is sentenced may be retaken, even after the time at which his term of imprisonment would have expired, had he remained in confinement, and be compelled to serve out his term, or the remainder thereof, after deducting the time he was actually confined under his sentence.

McCoy v. New Castle County, 9 Houst. (Del.), 433;
Ex parte Clifford, 29 Ind., 106;
Hollon v. Hopkins, 21 Kan., 638;
Matter of Edwards, 43 N. J. L., 555;
Ex parte Wyatt, 29 Tex. App., 398.

This rule has been universally upheld by the authorities in the United States, and must, I think, be applied to the restraint of dipsomaniacs who have been restrained of their liberty under an order of court.

If an inebriate escape from his confinement, the time during which he is at large cannot be reckoned as any part of the term of his commitment, and he may be retaken and compelled to serve the entire term fixed by the court. Any other rule would practically make a commitment of an inebriate a farce. If the period during which he is at large can be deducted from the term of his commitment, he may successfully set at defiance the power of the court by escaping from the place of his confinement and avoiding arrest until the term of his commitment shall have expired.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

November 20, 1905.

TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

BIENNIAL ELECTION AMENDMENT—EXTENSION OF TERM OF OFFICE OF PUBLIC OFFICERS—SURETY BONDS—It is held that all officers whose terms are extended by the constitutional amendment, known as the Biennial Election Law, must execute and file new bonds with approved sureties for the new term so created.

SIR—I am in receipt of your communication in which you request my opinion upon the question whether the public officers in the state, whose terms of office have been extended by the amendment to the constitution commonly known as the Biennial Election Amendment, are required to furnish new bonds for the extension of the term of office made by such amendment. In response to your request I submit the following:

It is familiar law that, in cases where the term of office for which a public officer is elected or appointed is fixed by law, the liability of sureties upon his bond will be limited to the term for which he is elected or appointed, unless they expressly agree to continue liable after its expiration.

United States v. Irving, 42 U. S., 250, 259;
United States v. Kirkpatrick, 22 U. S., 9;
Savings Bank v. Hunt, 72 Mo., 597;
Wapello County v. Bingham, 10 Iowa, 39 (74 Am. Dec., 370);
Dover v. Twombly, 42 N. H., 59;
Welch v. Seymour, 28 Conn., 387;
Scott County v. Ring, 29 Minn., 398;
Tresno Enterprise Co. v. Allen, 67 Cal., 505;
Bigelow v. Bridge, 8 Mass., 274;
State Treasurer v. Mann, 34 Vt., 371 (80 Am. Dec., 688).

The weight of authority is that the liability of a surety upon an official bond, given under a statute which provides that the officer shall continue in office until his successor is

elected and qualified, continues only for a reasonable period after the expiration of the term of office, during which, with due diligence, the successor of such officer could be appointed and qualified.

Montgomery v. Hughes, 65 Ala., 201;
Hewes v. People, 18 Ill., App., 439;
Wapello County v. Bingham, 10 Iowa, 39;
State v. Powell, 40 La. Ann., 241;
Hewitt v. State, 6 Har. & J. (Md.), 95;
Chelmsford Co. v. Demorest, 7 Gray, 1;.
Scott County v. Ring, 29 Minn., 398;
Rahway v. Crowell, 40 N. J. L., 207 (29 Am. Rep., 224);
Dover v. Twombly, 42 N. H., 59;
State v. Crooks, 7 Ohio (Part ii), 221;
Kings County v. Ferry, 5 Wash., 536 (34 Am. St. Rep., 880);
Omro v. Kaine, 39 Wis., 468.

In *Wapello County v. Bingham, Supra,* it is said:

"Whatever may be the law in relation to Pomeroy's holding over, it is a well settled principle that sureties are holden only for the term for which their bond is given, and it is not essential that a bond does not express the time or term; the law determines this and requires the bond for this, and it is the same as though the officer be elected to the same office. * * * The words 'until his successor is elected and qualified', are intended to cover the time between the election and qualification. The time prescribed for a successor to prepare himself to enter upon his office is the limit of the sureties' responsibilities, and if the former does not perform his duty, there is a vacancy, and there should be an appointment. That liability cannot be extended over another term by the omission of these requirements. The law gives the office a term of two years. The surety knows this and takes the responsibility with a view to it."

In *Baker City v. Murphy,* 35 L. R. A., 88, it is said by Judge Wolverton of the Oregon supreme court:

> "It is a well settled rule of law recognized generally, if not by all of the authorities, that bonds or obligations given to secure the performance of official duties are to be construed with reference to the term for which the incumbent is elected or appointed and it is equally well settled that the law governing as to the term, its time of commencement and expiration, and the conditions and contingencies upon which it shall begin, continue, and come to an end, enters into and forms a part of such bonds or obligations, where general language is used in stipulating the conditions. Sureties upon such undertakings are presumed to have known the duration of the term when they became parties to them, and to have intended to bind themselves to the extent and for and during the time that their principals are bound."

In *Brown v. Lattimore,* 17 Cal., 93, it was held that the legislature had no power to enlarge the liability of the sureties upon the bond of a public officer by extending the term of his office by legislative enactment. The same principle is announced in *King County v. Ferry,* 5 Wash., 536, in which the California case is cited and the doctrine therein announced approved.

All officers whose terms of office are extended by joint resolution No. 1, commonly known as the biennial election amendment to the constitution, were elected for a definite term fixed by law, which entered into and became a part of the contract by which the sureties upon the bonds of such officers undertook to guarantee the official conduct of their respective principals.

The contract entered into by the sureties upon such bonds is that they will guarantee the good conduct of the officers for whom they are sureties during the term for which such officers were elected. Their liability as sureties under the contracts executed by them will end with the expiration of the term of office for which their respective principals were elected.

The extension of the term of office by the constitutional amendment is in effect a new term thereby given to all officers who come within its provisions. The term created by such amendment is no part of the time during which the sureties upon the official bonds of such officers agreed to be responsible for the acts of their principals, and there is no agreement on the part of the sureties that they will answer for the good conduct of their principals during such term.

It is not within the power of the legislature or of the people of the state, either by the enactment of a statute or the adoption of an amendment to the constitution, to enlarge the liability of the sureties upon such official bonds, and extend such liability beyond the period covered by the original contract.

All officers whose terms are so extended by the constitutional amendment must, therefore, execute and file, in the manner provided by law, new bonds with approved sureties for the faithful discharge of their official duties during the new term created by such amendment.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

December 12, 1905.

HON. GILBERT S. GILBERTSON,
Treasurer of State.

FARMERS' INSTITUTE—AID FROM STATE—It is necessary for each farmers' institute in order to avail itself of state aid, to forward to the auditor of state a voucher setting forth the expenses incurred in holding its session during the current year of the appropriation, and before the appropriation has been covered into the state treasury.

SIR—In response to your request for my opinion as to whether you may issue a warrant to the Humboldt Farmers' Institute for the sum of seventy-five dollars, in aid in paying the expenses of a session of such institute

held in January, 1904, for which a voucher was filed in the office of the auditor of state on the 31st day of August, 1904, I submit the following:

Section 116-a of the supplement to the code makes the fiscal year of the state begin with July 1st and end with June 30th of the succeeding year. The unexpended balance of all annual appropriations, except where otherwise provided by law, must, under the provisions of the statute, be charged off and covered back into the treasury at the end of each fiscal year.

The appropriation made by section 1675 of the code, as amended by the acts of the twenty-ninth general assembly, is an annual appropriation made for the purpose of aiding farmers' institutes in defraying expenses incurred in holding sessions during the current year, to an amount not exceeding seventy-five dollars to each institute. If no session of such institute is held in any county during the year for which the appropriation is made, the appropriation for that county must be covered back into the treasury at the end of the fiscal year.

Under this provision of the statute, it is therefore necessary for each farmers' institute to forward to the auditor of state a voucher, setting forth the expenses incurred in holding a session of such institute, during the current year before the appropriation is covered into the treasury.

After the appropriation made to aid farmers' institutes has been covered into the state treasury, the appropriations cease to exist as such, and there is no fund upon which the auditor of state can draw a warrant for the purpose of paying any part of the expenses of a session of such institute. Every farmers' institute which desires to avail itself of the appropriation made by the legislature, must file the voucher required by section 1675 of the code with

the auditor of state on or before the 30th day of June of each year, setting forth the expenses of a session of such institute incurred during the year beginning with the first day of July preceding.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

December 15, 1905.

HON. B. F. CARROLL,
Auditor of State.

EXECUTIVE COUNCIL—PRINTING OF REPORTS OF EXECUTIVE OFFICERS OF STATE INSTITUTIONS.—It is within the power of the executive council to print a limited number of copies of the reports of executive officers of state institutions at the expense of the state.

SIRS—In response to your request for my opinion as to whether the executive council or the board of control has power to print a limited number of the reports of the executive officers of the several institutions under the control of the board of control, when such reports have been, by the governor, under the provisions of section 124 of the code, omitted from the biennial report made by the board of control to the governor and the legislature, I submit the following:

Section 2727-a3 of the supplement to the code contains this provision:

> "The board shall, by the proper authorities, be also furnished with all necessary books, blanks, stationery, printing, postage stamps and such other office supplies as are furnished to other state officers. * * *"

Striking out the intervening words so as to make the provision apply to printing only, it reads:

> "The board shall, by the proper authorities, be also furnished with all necessary printing."

The proper authority referred to in the provision of the statute quoted is the executive council, as chapter 7 of the code gives to that body general charge of the supplies, etc., required for the transaction of the business of the respective state offices and boards.

If, therefore, the executive council shall reach the conclusion that it is necessary to the proper transaction of the business required of the board of control in the management of the affairs of the institutions under its control, that a limited number of copies of the reports of the executive officers of such institutions should be printed, it is clearly within the power of the council to order such reports printed at the expense of the state.

The legislature, by section 3 of chapter 118 of the acts of the twenty-seventh general assembly, appears to have made special provision for the printing required by the board of control in the management of the institutions under its charge, and whatever printing is necessary for the proper conduct of the affairs confided to the board may be ordered by the executive council and paid for by the state.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

December 18, 1905.

TO THE HONORABLE EXECUTIVE COUNCIL
of the State of Iowa.

INSANE—CORRECTION OF AN ERRONEOUS CHARGE AGAINST A COUNTY UPON THE BOOKS OF THE AUDITOR OF STATE.

SIR—In response to your request of the 6th instant as to whether the statement contained in an opinion given by me to you July 30, 1904, which is as follows:

> "The charge of $640.80 upon your books against the county for her support is, therefore, an erroneous charge and the county should receive credit by that amount to properly adjust and balance your books. It

> is not necessary that you should receive any formal order of the board of control to make this correction. It stands as any other erroneous entry upon your books, and is one which you have full power to correct."

should be construed as general in its nature, or simply as applicable to the case then under consideration, I beg leave to say:

The statement is general in its application and applies with equal force whenever there is a dispute between the county and the state as to whether a patient is a county or a state charge, and it is afterward determined that such person is a state patient.

In all such cases the charges made against the county by the state, for the support of the patient before the final determination of the question, are erroneous and should be corrected upon your books. When it is finally determined that the patient is a state charge, that determination carries with it the duty of the state to pay the expenses of such patient in the hospital from the time that the question is raised by the county.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General of Iowa.

December 19, 1905.

HON. B. F. CARROLL,
Auditor of State.

TAXATION—WHEN TAXES BECOME A LIEN—STATE PROPERTY—When the state takes title to real estate, the land is at once exempt from taxation, and unless there were taxes assessed against it which were a lien upon it at the time the state took the title, no taxes can be enforced after the purchase by the state.

SIRS—In compliance with your request for my opinion whether the eighty acres of land in sections 3 and 4, township 84, range 4, owned by the state, is exempt from the taxes of 1904, I submit the following:

From the letter of Mr. A. G. Bauder submitted to me, I learn that this land was assessed in the year 1904 to L. W. Ellis. Ellis conveyed the land to the state on the tenth day of June, 1904.

Section 1303 of the code provides that the board of supervisors shall levy taxes upon the assessed value of all taxable property in the county at the September session of the board.

The state became the owner of the tract of land in question prior to the time of the levy of the taxes thereon by the board of supervisors. Its value had then simply been determined and returned to the county auditor as taxable property by the assessor of the district in which the land is located.

Subdivision 1 of section 1304 of the code exempts all property of the state from taxation.

It therefore follows that when the state took the title to the land it was at once thereupon exempted from taxation, and, unless there were taxes which had been assessed against it and which were a lien upon it at the time the state took the title, no taxes could be levied or enforced against it after the purchase by the state.

If taxes were levied upon the land by the board of supervisors at the September session following the purchase by the state, such levy was erroneous and beyond the power of the board. The land was then the property of the state and no taxes could be levied thereon for any purpose.

It may be stated as a general rule of law that, in the absence of words showing a contrary intent on the part of the legislature, a legislative grant of exemption from taxation takes effect as soon as the act making the grant becomes a law and is accepted by the beneficiary, if express acceptance is required, and relieves from all taxation the

exempted property, the assessment of which has not been completed, and so placed beyond the power of the taxing officers, before the passage of the act.

Wis. Cent. R. Co. v. Comstock, 71 Wis., 88;
People v. Com's of Taxes, 142 N. Y., 348, affirming 76 Hun., 491.

While the exemption in the case under consideration was not created by express legislative grant, yet the principle involved is substantially the same. The land came within the provision of section 1304, which exempts all property of the state from taxation, at the time of the delivery of the deed to the state on the tenth day of June, 1904. At that time no taxes had been actually levied upon the land. It was within the power of the board of supervisors to omit such land from its levy of taxes upon the taxable property of the county.

Under the facts in the case, the land is, in my opinion, exempt from all taxes, and the records of the county should be so made as to show that fact.

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

December 19, 1905.
TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

BIENNIAL ELECTION AMENDMENT—EXTENSION OF TERM OF PUBLIC OFFICERS—NECESSITY FOR ALL OFFICERS TO RE-QUALIFY—It is held that the Biennial Election Law extended the term of all elective officers who fall within its provisions, and that every officer whose term was so extended must again qualify by taking the oath of office, and filing new bond, if one is required by law.

SIR—In compliance with your request for my opinion whether the officers whose terms of office were extended by the adoption of the amendment to the state constitution,

commonly known as the biennial election amendment, must qualify by taking the oath of office prescribed by the constitution and the statutes of the state for the period of such extension, I submit the following:

The extension of the term of all elective officers who fall within the provisions of the constitutional amendment, is not an extension by an act of the legislature. Such extension is effected by the adoption of an amendment to the constitution of the state, which is proposed by the legislature and adopted by a popular vote of the electors of the state. By the adoption of the constitutional amendment all of the officers who fall within its provisions were in effect elected to a further term of office at a general election of November, 1904.

It is true that the amendment was, under the provisions of the constitution, proposed by the general assembly and agreed to by a majority of the members elected to the two houses of two successive legislatures but before it became a part of the fundamental law of the state, it was necessary that it should receive a majority of the votes of all the electors voting thereon, at the general election at which it was submitted.

The right of the officers, therefore, whose terms of office were extended, to hold office for the additional term of one year, is derived from the election at which the constitutional amendment was adopted, and not from an act of the legislature. The officers whose terms are thus extended stand substantially upon the same footing as officers who are elected to a full term of office at a general election by a vote of the electors of the state.

To constitute the holding of an office, there must be the concurrence of two wills, that of the appointive power, whether that power is vested in the electors of the state or

in an executive officer or board, and that of the person who is appointed to the office. In no case will an office be considered as filled until there is an acceptance by the person chosen to fill the same.

People v. Whitman, 10 Cal., 38;
Johnson v. Wilson, 2 N. H., 202 (9 Am. Dec., 50);
Matter of Bradley, 141 N. Y., 527.

The election of a person to office by the qualified electors, and the issuance of a certificate of his election by the proper authorities, without more, do not fill the office to which such person is elected. There must be an affirmative acceptance upon the part of the person elected, and a qualification by him, before he is entitled to perform any of the duties of the office.

In *Matter of Bradley, supra,* it is said by Mr. Justice Gray:

> "It is very clear that the law contemplates two steps by the candidate elected to office. The first to be taken is the filing of his oath of office. When that has been done the office is deemed to have been accepted, and that is equivalent to saying that the officer has entered upon his duties. It is after so entering upon his office, and within a specified time thereafter, that he is required to execute and submit his undertaking. That he is regarded as in office when he has filed his oath is perfectly clear from the provision that neglect to file the oath within the prescribed time causes a vacancy. When he has evidenced in the required manner his acceptance of the office to which elected, his predecessor is out and has no further standing as a member of the town board."

While the case from which the foregoing excerpt is taken is based upon the provisions of the New York statute, yet it announces a general principle of law that obtains where a candidate is elected to office; that is, that he must signify his acceptance of the office to which he is elected by taking the oath prescribed by the constitution and statutes of the state.

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

> "Every person elected or appointed to any office shall, before entering upon the duties thereof, take an oath or affirmation to support the constitution of the United States and of this state, and also an oath of office."

Section 1177 of the code provides:

> "The several officers, before entering upon their duties as such, shall qualify by taking the prescribed oath and by giving, when required, a bond, which qualification shall be perfected, unless otherwise specified, before noon of the first Monday in January following their election."

Sections 1178, 1179 and 1180 prescribe the form of oath to be taken by the several officers in the state.

The taking of the oath of office and the filing of a bond, where a bond is required, have always been understood as being the method prescribed by law for the acceptance of office by the person elected thereto. It is possible that other methods of acceptance, if well defined and certain in their character, might be held to be a valid acceptance of office by the person elected, but the method prescribed by the statute is the taking of an oath for the faithful performance of the duties of the office and the filing of a bond, where one is required, for the faithful discharge of such duties.

It is familiar law that a failure of a person elected to a public office to qualify, by taking the oath of office and filing a bond, where a bond is required, creates a vacancy in the office to which such person is elected.

People v. Taylor, 57 Cal., 620;
Matter of Executive Communication, 25 Fla., 426;
State v. Matheney, 7 Kansas, 327;
State v. Hopkins, 10 Ohio St., 509;
State v. Cocke, 54 Texas, 482;
Winneshiek County v. Maynard, 44 Iowa, 15.

The adoption of the constitutional amendment, by the people, did not *ipso facto* extend the term of office of the several officers who fall within its provisions. Before such term is extended under the provisions of the amendment, the officers who come within its provisions must, by affirmative action, in the manner prescribed by law, accept office for the term of such extension and a failure to do so upon the part of any such officer will create a vacancy in his office. The concurrence of the two wills necessary to constitute the holding of an office within the meaning of the statute would not exist without such acceptance.

It is therefore, in my opinion, necessary that every officer, whose term of office is extended by the constitutional amendment, must, if he desires to hold the office during the term of such extension, take the oath of office prescribed by law.

Respectfully submitted,

CHAS. W. MULLAN,

Attorney-General of Iowa.

December 29, 1905.

HON. A. B. CUMMINS,

Governor of Iowa.

SCHEDULE G.

QUARANTINE—PAYMENT OF EXPENSES—The expenses incurred in establishing, maintaining and raising a quarantine are for the benefit of the public and are to be paid for by the public.

Des Moines, January 8, 1904.

HON. FRANK S. CARROLL,
Harlan, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 7th instant, and in reply to your inquiry will say that in my opinion the expenses which are chargeable to a patient who is quarantined because of a contagious disease are those incurred for his care, needful assistance, medical attendance, supplies and nurses. Section 2570-b separates and classifies all expenses incurred by the board of health in establishing, maintaining or raising a quarantine, including fumigation of the building and providing a pest house, detention or other hospital as a class of expenses which shall be paid by the levy of a tax upon the township, town or city to reimburse the county for the money advanced by it to meet such expenses when incurred.

It is clear from the reading of sections 2570-a and 2570-b that it was not the intention of the legislature to make any person afflicted with a contagious disease dangerous to the public health pay for the expenses of building a pest house, establishing, maintaining and raising a quarantine, all of which is done for the public benefit and not for the benefit of the patient. His care, nursing, medical assistance and supplies are for the benefit of the patient personally and should be paid for by him, and the statute has so provided, if he is able to make such payment. The quarantine is for

the benefit of the public, and the legislature has provided that its expense shall be paid for by the public and not the patient.

I am,

Yours very truly,

CHAS. W. MULLAN.

STATE INDUSTRIAL SCHOOL—A person committed to the state industrial school is entitled to be released under the terms of the statute in force at the time of commitment.

Des Moines, January 14, 1904.

HON. WILLARD H. PALMER,

Maquoketa, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 13th instant.

At the time that Bessie Tracy was committed to the State Industrial School, as shown by the order of commitment enclosed in your letter, the statute provided that a minor child might be committed to the State Industrial School upon the complaint of a parent or guardian, until such minor attained his or her majority.

Section 3188 of the code provides:

> "The period of minority extends in males to the age of twenty-one years, and in females to that of eighteen years."

The court had no power at the time of the commitment of Bessie Tracy to order her detained in the State Industrial School after she attained her majority, which under the statute quoted, she attained when she arrived at the age of eighteen years.

The twenty-ninth general assembly amended section 2708 of the code by striking out the word "majority" in the thirty-first line of the section, and inserting in lieu thereof the words "the age of twenty-one years" (Chap. 119). This act took effect on the fourth day of July, 1902.

Under its provisions the court now has the power to commit a minor to the State Industrial School until such minor attains the age of twenty-one years but as suggested, that power did not exist prior to the enactment of chapter 119 of the acts of the twenty-ninth general assembly.

Under the order of commitment and the statutes of the state as they existed at the time the same was made, Bessie Tracy is entitled to be released and discharged from the State Industrial School when she attains her majority, viz: the age of eighteen years.

As to the other question contained in your letter, I will offer this suggestion: That it appears extremely doubtful to me that a county can be held liable for the office rent, light and fuel used by a county attorney, unless there has been a refusal on the part of the board of supervisors to provide the county attorney with such office, light, fuel, etc.

Yours very truly,

CHAS. W. MULLAN.

PARK COMMISSIONERS—The park commissioners of any city have no authority to loan any part of the park fund to the city for the purpose of paying existing city indebtedness.

Des Moines, January 19, 1904.

MR. FRANK TRUMAN,
Iowa Falls, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 16th instant. The matter concerning which you write is not within the jurisdiction of this office, nor is it one upon which I can express an official opinion unless the question should be referred to me by one of the departments of the state.

I will suggest, however, that I doubt the authority of the park commissioners to loan any part of the park fund to the city for the purpose of paying existing city indebtedness. I call your attention to the provisions of section 904 of the code. I also call your attention to the provisions of section 860 which are as follows:

> "The council shall, in resolution ordering such election, specify the rate of taxation proposed and the number of years the same shall be levied. If a majority vote cast at such election on the proposition so submitted shall be in favor of the adoption of the proposition for taxation, the council *shall* levy the tax so authorized."

These provisions appear to leave little room for discretion on the part of the city council after the proposition to levy the tax has been carried at the election.

I am, Yours very truly,

CHAS. W. MULLAN.

ESCHEAT OF LANDS—The title to lands of a decedent who dies without heirs vests in the state *eo instanti*, and in the absence of any statute, the probate court has no power to order a sale thereof to pay the debts of a decedent.

DEAR SIR—Replying to your favor of the 16th instant, transmitting notice of application to sell real estate to pay debts in the Estate of Joe Erwin, Deceased, I beg to say:

The rule of law governing the escheat of lands appears to be that the title to lands of a decedent, who dies without heirs, vests in the state *eo instanti* and before office found; and after having so vested the probate court has no power to order a sale thereof to pay the debts of the decedent, unless there is a statute specifically giving such power. No such statute exists in this state. It may therefore be said logically to follow that the probate court of this state has no power to order a sale of escheated lands for the purpose of paying the debts of a decedent.

In the case under consideration I should doubt the soundness of the policy of the state in taking the escheated lands and depriving creditors of the amount due them from the decedent. I will, however, be pleased to take such action in the matter as may be deemed advisable by you.

I am, Yours very truly,

CHAS. W. MULLAN.

January 19, 1904.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

PEDDLERS--LICENSE OF—A peddler may be required to take out a license in each town in which he sells his goods, and if he peddles outside of the corporate limits of a city or town, he may be required to secure a license from the county authorities.

Des Moines, January 21, 1904.

MR. J. E. HAWKINS,
Vicksburg, Mich.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 19th instant. Under the laws of this state a peddler may be required to take out a license in each town in which he peddles his goods, and if he peddles outside of the corporate limits of a city or town he may also be required to take out a license from the county authorities.

I am, Yours very truly,

CHAS. W. MULLAN.

SHERIFF—COMPENSATION OF—The mileage earned by a sheriff in serving civil processes belongs to the sheriff, and it cannot be considered as a part of his compensation allowed by statute.

Des Moines, February 4, 1904.

HON. S. C. HUBER,
Tama, Iowa.

DEAR SIR—I am in receipt of your favor of the 21st ultimo, asking my opinion as to the interpretation of section 510 of the code, relating to the compensation of sheriffs.

I have had considerable correspondence in reference to the correct interpretation of the language of this section, and while the intention of the legislature is not very clearly expressed, I have reached the conclusion, and have so written several of the county attorneys throughout the state, that the mileage earned by a sheriff in serving civil processes belongs to the sheriff, and that he is entitled to it whether collected by him or whether paid to the clerk of the court after the end of the year.

The mileage allowed for the serving of processes in civil cases is in effect the re-imbursement to the sheriff of his expenses in serving such processes; that is, it simply repays him for the money expended by him in serving such processes, and cannot be considered as a part of the compensation allowed him by statute as sheriff. It is not a compensation but a repayment of money expended by him.

I am, Yours very truly,

CHAS. W. MULLAN.

INSURANCE—The statute does not fix or limit the amount of assessments in hail insurance companies.

Des Moines, February 15, 1904.

MR. A. D. PLATT,
Gillett Grove, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 11th instant.

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 say that I know of no statute fixing or limiting the amount of assessments in hail insurance companies. Section 1765 of the code which relates to companies of that character, 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."

The limit of assessments should be, and usually is, fixed by the articles of incorporation.

I am, Yours very truly,

CHAS. W. MULLAN.

HOME FOR THE AGED—It is held that the Home for the Aged of Des Moines is a charitable institution and gifts to the Home are exempt from the payment of collateral inheritance tax.

Des Moines, February 26, 1904.

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

DEAR SIR—The question whether the Home for the Aged, of Des Moines, is a charitable institution within the meaning of section 1467 of the code, has been pending in this office for some time; and for the purpose of ascertaining as nearly as possible the exact methods upon which the Home is conducted, I requested its treasurer, Mr. W. E. Coffin, to give me a full statement as to the receipt and expenditure of its funds, the source from which they were derived, and whether they were sufficient to pay the cost of maintaining the Home. I have received such statement from Mr. Coffin, and a careful examination of the matter leads me to the conclusion that the Home is a charitable institution within the meaning of the provisions of the section referred to.

It was established by a small endowment fund. Voluntary contributions are made by the people of Des Moines and others for the purpose of paying the expense of its maintenance. The persons who are admitted to the Home are compelled to pay a comparatively small admission fee, ranging from $150 to $300. Upon the payment of such fee, they are cared for at the Home during the remainder of their lives, and the amounts so paid for admission are wholly insufficient in the aggregate to meet the expenses of the cost, support and maintenance of the inmates of the Home, and the remainder must necessarily be made up by voluntary donations and from the interest upon the endowment fund.

Under the conclusion which I have reached, gifts and bequests to the Home are exempt from the payment of collateral inheritance tax under the provisions of the section referred to.

I am, Yours very truly,

CHAS. W. MULLAN.

STATE CERTIFICATES—DISCRETION OF BOARD IN ISSUING SAME—The board of educational examiners may grant state certificates and state diplomas upon examination only.

Des Moines, March 3, 1904.

HON. JOHN F. RIGGS,

Supt. Public Instruction.

DEAR SIR—Your favor of March 3d is received, in which you request an opinion upon the following question:

> "Under the provisions of section 2629 of the code, must each applicant for a state certificate or state diploma be examined by the board of educational examiners, or has the board discretionary power in the matter of accepting diplomas or certificates from other states in lieu of such examination?"

Section 2629 of the code and supplement contemplates that the board of educational examiners shall grant state certificates and state diplomas upon examination only. Discretion in the issuance of certificates and diplomas (as provided by said section) is excluded. Applicants must present themselves for examination and it is quite evident that certificates and diplomas may be issued to those only who are "found upon examination" to possess the qualifications recited by the section of the code in question.

Yours very respectfully,

LAWRENCE DEGRAFF.

OFFICIAL BALLOTS—NAMES OF CANDIDATES THEREON—A person may not have his name placed upon an official ballot for a municipal election, unless he has been nominated at a convention of delegates, primary, caucus, or meeting of qualified electors representing a party which, at the last preceding general election, polled at least two per cent of the entire vote of the municipality or subdivision thereof.

Des Moines, March 17, 1904.

MR. I. J. SAYRS,
Jewell, Iowa.

DEAR SIR—I am in receipt of your favor of the 16th instant, and in reply will say that I doubt the propriety of my expressing an official opinion upon the matters referred to in your letter, 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, however, as a matter personal to you, make the following suggestions:

Under section 1098, to entitle a nominee to have his name placed upon the official ballot, he must have been nominated at a convention of delegates, primary, caucus or meeting of qualified electors, representing a political party which, at the last preceding general election, polled

at least two per cent of the entire vote of the municipality or division of municipality in which the nomination is sought to be made; that is, the nomination so made must be by a political party which cast that percentage of its votes at the last general election for its candidate or candidates, and a meeting of citizens for the purpose of nominating candidates for office, which does not represent such a political party, cannot make a nomination which entitles the nominees to have their names placed upon the official ballot of such convention, primary, caucus or meeting of electors.

The method by which a nomination may be made by citizens not representing such political party, is provided for by section 1100 of the code. The words "preceding general election" referred to in section 1098 mean the general state election and not the election of the municipality.

I am, Yours very truly,

CHAS. W. MULLAN.

BOARD OF SUPERVISORS—DUTY TO FURNISH COUNTY ATTORNEY AN OFFICE—The statute requires that the board of supervisors shall furnish the county attorney at the county seat, an office with fuel, lights, books, stationery, etc.

Des Moines, March 17, 1904.

HON. WILLARD H. PALMER,
Maquoketa, Iowa.

DEAR SIR—I am in receipt of your favor of the 14th instant. As you are aware section 4868 of the code provides that the board of supervisors shall furnish to the county attorney an office at the county seat, with fuel, lights, blanks, books, stationery, etc., proper to enable him to discharge the duties of his office. As suggested in my former letter to you, I doubt the liability of the county for office rent, fuel, light, etc., in a case where the county attorney

has occupied his own office and been engaged in the practice of law, unless he makes a demand upon the board of supervisors to furnish him an office under the provisions of the section quoted, and such demand is refused. But I think the matter lies within the power of the board of supervisors and that it may properly allow any just claim for compensation by way of rent, light, fuel, etc., to a county attorney, that is fair and just under the circumstances of the particular case; that is, the board of supervisors acting for the county would have the rights to waive the question of previous demand and audit and allow a claim for rent, light, fuel, etc., if in the judgment of the board such claim was equitable and should be allowed.

I am, Yours very truly,

CHAS. W. MULLAN.

MARRIAGE LICENSE—**A license to marry obtained from the clerk of the district court in one county, does not authorize the marriage of the parties thereto in another county.**

Des Moines, March 17, 1904.

HON. I. T. DABNEY,

Bloomfield, Iowa.

DEAR SIR—I am in receipt of your favor of the 14th instant. In reply will say that it appears to me that the questions asked in your favor should be determined by you as county attorney of Davis county, as they fall strictly within the jurisdiction of your office and not within the jurisdiction of the attorney general. I have, however, invariably made it a rule to answer, so far as possible, all questions which have been asked me by county attorneys

pertaining to matters connected with the administration of their offices; and as a matter of courtesy to you I will now make the following suggestions:

Where a license is obtained from the clerk of a district court in one county, and the marriage authorized thereby is solemnized in another county, it is not strictly a statutory marriage, but is unquestionably valid.

Section 3141 of the code provides that previous to the solemnization of any marriage, a license must be obtained from the clerk of the district court of the county wherein the marriage is to take place. Section 3144 provides, if a marriage is solemnized without such license being procured from the clerk, the parties married and all persons aiding and abetting them are guilty of a misdemeanor.

In the case suggested by you, no license was issued by the clerk of the district court of the county where the marriage took place. All of the parties, therefore, fall within the provisions of section 3144, which make their action in solemnizing the marriage without the necessary license of the clerk a misdemeanor, unless they are within the provisions of section 3148, which exempts persons of any particular denomination who have a peculiar mode of entering into the marriage relation from the penalties provided by section 3144.

I also call your attention to the provisions of section 3147 by which the minister conducting the marriage ceremony may be exempted from the penalty for solemnizing a marriage when all of the preliminary steps have not been taken, by making a return within ninety days of such marriage to the clerk of the district court of the county wherein it occurred.

I am, Yours very truly,

CHAS. W. MULLAN.

COLLATERAL INHERITANCE TAX—EFFECT OF NOTICE BY A TESTATOR TO AN ADMINISTRATOR TO MARK CERTAIN NOTES PAID—A written request by a testator to have certain notes marked paid after his death, is of no force or effect in law.

Des Moines, March 21, 1904.

O. H. MITCHELL, *County Attorney,*
Waverly, Iowa.

DEAR SIR—The treasurer of state has called our attention to the matter of the application of Charles Golding, administrator of the estate of Mrs. C. L. Ide, to have the appraisement of four notes of Peter Joens for two hundred dollars ($200) each, belonging to said estate, set aside on the ground that he, as administrator, was not served with notice of appraisement.

The letter of January 27, 1904, of the treasurer of state to you covers this point. We desire that you enter an appearance in this case, file formal resistance to the application and if the court holds adversely to you, save exceptions so that the case may be properly appealed.

It seems to us that these notes must be considered property belonging to the estate and that they possess value. The written request of Mrs. Ide to Charles Golding that he, as administrator, should mark the notes "Paid", and should deliver the same to Peter Joens, the maker, was of no force or effect in law. If there had been lineal heirs they could have successfully resisted any such delivery on the part of the administrator and the notes would have been held assets belonging to the estate, and payment thereof could have been demanded. It will be observed that the written request did not have the legal effect of a will. It was not duly executed as a will. An oral request would have given the administrator the same power as the written request. It is a well received principle of law that the death of the principal terminates the agency *ipso facto.* Upon the death of Mrs. Ide any

power of agency which Charles Golding may have possessed, ended. There are but three classes of cases in which the death of the principal does not revoke the powers of the agent.

First—When a consideration is paid by the agent for the agency. *Second*—When the power of the agent is coupled with an obligation. *Third*—When the power of the agent is coupled with an interest.

The facts in the case do not place Mr. Golding as agent within any one of the above exceptions. Golding's agency was not coupled with an interest. He was simply instructed to turn over certain notes in a certain way after the death of his principal, and at the moment the principal died, the agency died with her; so that Golding, as a matter of law, had no authority whatever to turn over said notes. Taking these premises to be true it must follow that the notes in question possessed value. They belonged to the estate and were assets of the estate.

You are probably fully advised of the law in this case and although there is not much at stake other than the principle involved, we desire that you follow our request as given in the second paragraph above.

Yours very truly,

LAWRENCE DEGRAFF.

NOMINATION PAPERS—COMPUTATION OF TIME AS TO FILING—The day upon which the nomination papers are filed is included and the day of the election excluded.

Des Moines, March 22, 1904.

DR. J. W. LYNCH,
Lawler, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 20th instant. In reply will call your attention to subdivision 23 of section 48 of the code, which provides:

> "In computing time, the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday."

In the application of this rule, the day upon which the nomination papers are filed should be counted, and the day of the election excluded, and if in counting the day upon which the nomination papers are filed there are ten days prior to the day of election, the nomination papers must be held to have been filed in time.

Yours very truly,

CHAS. W. MULLAN.

TAXATION—THE TERM "MERCHANT" CONSTRUED—Any person, firm or corporation to whom personal property has been consigned or who has such property in his possession for sale, is deemed a merchant and the property is taxable.

Des Moines, March 24, 1904.

MR. W. C. CHILDERS,
Athelston, Iowa.

DEAR SIR—I am in receipt of your favor of the 21st instant, and in reply will call your attention to section 1318 of the code which provides that any person, firm or corporation owning or having in his possession or under his control within the state with authority to sell the same, any personal property, purchased with a view of its being sold, or which has been consigned to him from any place out of this state to be sold within the same, "shall be deemed a merchant" for the purposes of taxation, and that such property is taxable under the laws of this state.

I am, Yours very truly,

CHAS. W. MULLAN.

SWAMP LANDS—SALE OF—DISPOSITION OF PROCEEDS—The board of supervisors having expended the proceeds from the sale of swamp lands, cannot be compelled to use a like sum of money for the purpose of constructing levees, ditches or drains.

Des Moines, April 4, 1904.

HON. THOMAS LAMBERT,
Senate Chambers.

MY DEAR SENATOR—In response to your inquiry whether the board of supervisors of a county may be compelled to expend a sum of money equal to the amount received by the county from the sale of swamp lands for the purpose of constructing levees along a river to prevent it from overflowing the adjacent lands in a case where the money received by the county from the sale of swamp lands has been used and expended for other purposes, I have to say—

There is no way by which a board of supervisors under such circumstances can be compelled to expend money in the construction of a levee along a river or other water course for the purpose of preventing such river or water course from overflowing adjacent lands.

It is true that the act of Congress of 1850 granted the swamp lands to the states for the purpose of creating a fund for the construction of levees, ditches, drains and works of like character, but the state has never required the money received from swamp lands to be specifically used for such purposes, and has authorized its use for many other and different purposes, such as the erection of public buildings, the construction of highways and bridges, and other public improvements; and in your case if the supervisors of Jackson county used the money which

they received from the sale of swamp lands for any of the purposes authorized by the statute, it is clear that under any existing law the present board cannot be compelled to use a like sum of money, or even any part of it, for the purpose of constructing levees along a water course.

I am, Yours very truly,

CHAS. W. MULLAN.

EXTRADITION—The governor has no power to issue his warrant for the arrest and return of a citizen of Iowa to another state, charged with murder in that state by sending poisoned candy through the mail.

Des Moines, April 13, 1904.

MR. H. A. SWALLOW,
Danville, Illinois.

DEAR SIR—I beg leave to acknowledge the receipt of your favor of the 11th instant.

I did not give a written opinion to the Governor upon the recent case involving the question of honoring a requisition from the Governor of South Dakota for the surrender of a citizen of Iowa charged with murder in South Dakota by sending poisoned candy through the mail. The matter was referred to me for my verbal opinion and a written one was not asked nor desired by the Governor.

I reached the conclusion that the Governor had no power to issue his warrant for the arrest and return of a citizen of Iowa to South Dakota, for the reason that she had never been in South Dakota and was not, therefore, a fugitive from justice under the federal statute.

I call your attention to the case of *Hyatt v. Corkran* reported in 188 U. S., at page 691, and *Jones v. Leonard*, 50 Iowa, 106, which are clearly conclusive upon the question. I am,

Yours very truly,

CHAS. W. MULLAN.

TAXATION—DELINQUENT TAXES—IMPOSITION OF PENALTY—(1) If the first installment of tax remains unpaid April 1st, the entire tax will be considered as delinquent from March 1st. (2) In imposing the penalty, the fraction of a month is not considered.

Des Moines, April 25, 1904.

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

MY DEAR SIR—Two questions have been submitted by you to this office for answer, and I respectfully submit for your consideration the following:

1. When do taxes become delinquent?

Taxes are payable to the county treasurer each year in two equal installments. The first installment may be paid between the first Monday in January and the first day of April; the second, any time before the first day of October. In case the first installment remains unpaid April 1st, the entire tax will be considered as delinquent from March 1st; and in like manner if the second installment is not paid before October 1st, it is considered delinquent from September 1st. The statute provides that all delinquent taxes shall bear interest from the date of delinquency at the rate of one per cent per month, consequently the penalty could be enforced from March 1st or September 1st, respectively.

2. In computing the penalty, does the law regard the fraction of a month in enforcing the same?

See Code, secs. 1403, 1413 and 1391.

This question must turn on the legislative intent. The uniform custom seems to be to impose the penalty for the month or months only which precede the payment; for example, if the first installment of taxes is not paid by April 1st, one per cent penalty attaches for the month of March. If the taxes are not paid by the first of May, then another per cent is imposed for the month of April. If, however the taxes are paid between the first of April

and the first of May, only one per cent penalty would be collected. In our opinion this is the construction to be placed upon section 1413 of the code. We believe this to be in conformity to the legislative intent and it is sanctioned by the general custom.

Yours very truly,
LAWRENCE DEGRAFF.

QUARANTINE—POWER OF LOCAL BOARD OF HEALTH—The local board of health has authority to establish quarantine against all infectious and contagious diseases, and has power to make and enforce all reasonable regulations in relation thereto.

Des Moines, April 25, 1904.

REV. THOMAS CARSON,
Monmouth, Iowa.

DEAR SIR—I am in receipt of your favor of April 15th which was addressed to me at Waterloo and for that reason did not reach me until Saturday last.

In reply will say that the local board of health has authority under section 2568 of the code to proclaim and establish quarantine against all infectious and contagious diseases dangerous to the public, and may maintain and remove the same as may be required by the regulations of the state board of health. The powers thus conferred upon the local board are extensive and can be exercised in any reasonable manner to prevent the spread of contagious diseases.

There is practically but one limit to the exercise of such power, and that is all ordinances, orders or regulations must be reasonable and not arbitrary. If they are unreasonable they are void, but within that limit they may be legally enforced.

As to whether the order made by the local board of health of Monmouth is reasonable or not depends upon the existing facts. If there is an epidemic of smallpox in the town of Baldwin, and the local authorities of that town have not taken the proper measures to prevent the spread of such contagious disease, it is within the power of the board of health of Monmouth to prevent the citizens of Baldwin from coming to the town of Monmouth, and to prevent the people of Monmouth from going to the town of Baldwin and return. That is, it is within the power of the board to suspend the right of the people of the two towns to mingle and associate together. Whether the conditions are such as to warrant the enforcement of so rigid a measure I cannot determine without full knowledge of all the facts, and ordinarily the question as to the proper measures to be enforced to prevent the spread of contagious diseases is one which is confided by law to the board of health, and regulations of such board can only be held in-operative when they are manifestly unreasonable.

I am, Yours very truly,

CHAS. W. MULLAN.

CRIME—PUNISHMENT OF—A prosecution instituted at the instance of a person committing the crime for the purpose of avoiding the penalty of the law, is not a bar to a subsequent prosecution.

Des Moines, May 7, 1904.

MR. S. C. QUIMBY,
Deputy Game Warden,
Des Moines, Iowa.

DEAR SIR—I am in receipt of your favor of the 5th instant, and in reply thereto and in answer to questions which you asked me verbally, I beg to make the following statement:

Where a crime has been committed or a law violated, a prosecution instituted at the instance of the person who

has violated the law or committed the crime, or by friends of his, for the purpose of avoiding the penalty of the law, is not a bar to a subsequent prosecution. The filing of an information, or procuring the same to be filed, by the defendant or by his friends is not a prosecution in good faith and is fraudulent in its nature, and such a prosecution has been held to be no bar to a prosecution by the proper authorities in good faith. See

State v. Green, 16 Iowa, 239;

State v. Maxwell, 51 Iowa, 314.

Yours very truly,

CHAS. W. MULLAN.

FISH AND GAME—THE TERM "WATERS OF THE STATE" CONSTRUED—A bayou or lake connected with the main body of the Mississippi River, but forming no part of the river, is an inland body of water within the jurisdiction of the state of Iowa.

Des Moines, June 28, 1904.

McCARTHY, KENLINE & ROEDELL,

Dubuque, Iowa.

DEAR SIRS—I beg to acknowledge the receipt of your favor of the 21st instant.

While I have some doubts as to the propriety of expressing an opinion in regard to the question referred to in your letter, unless the same should be referred to me by one of the departments of the state, I will state briefly my views thereon.

From the sketch which you enclose it is clear that what is called Zollicoffer Lake is a bayou extending from the Mississippi River northwesterly about one mile, and that it lies wholly within the state of Iowa. It cannot be said to be any part of the Mississippi river, nor does it form any part of the boundary line between the state of Iowa and the state of Illinois. It lies wholly within the state of Iowa and is a part of the waters of the state.

In *State v. Haug,* 95 Iowa, 413, it is said that the words "from any waters of the state", as used in section 2540 and other sections of the fish and game act, definitely cover all waters lying wholly within this state, and that the provisions of section 2547 of the code exempt from the operation of the fish and game act only the boundary waters of the state over which the state has not exclusive jurisdiction.

In that case it is said by the learned judge who wrote the opinion:

> "We think that the Mississippi river which is excluded from the provision of the act, includes only that body or stream of water which is popularly known as such river; that the wording of section 11 of the act indicates that it was the Mississippi river which constitutes the boundary line of the state, which the legislature had in mind. Again, we may look to the evil sought to be remedied by this legislation. The purpose was to prevent the wanton and unnecessary destruction of fish in the waters over which the state had exclusive jurisdiction; to preserve the fish in said waters for the use of the people of the state. If it be true that these lakes and streams which, though connected with the main body of water known as the Mississippi river, yet form no part of the river proper, are not waters in which seining is prohibited, then the legislation falls far short of remedying the evil which existed, and these waters of the state, which we are justified from the evidence in this case in saying constitute the most valuable fishing grounds in the state, may be despoiled in this wholesale way of their wealth of fish without let or hindrance."

The conclusion of the learned judge who wrote the opinion in *State v. Haug* applies with full force to the conditions existing as to Zollicoffer Lake. As has been suggested, it is a bayou or lake connected with the main body of the Mississippi river, but forming no part of the

river proper. The fact that it was meandered by the government survey does not change its character. It is an inland body of water wholly within the jurisdiction of the state of Iowa.

A question very similar to the one under consideration arose in the case of the *State v. Blount,* 85 Mo., 543. The fish law of Missouri is almost identical in its provisions with that of our own state and it was claimed in that case on the part of the defendant that a certain bayou extending from a lake connected with the Mississippi river was private water from which he had the right to take fish at any season of the year. In determining whether the bayou in question was a part of the waters of the state of Missouri, the supreme court of that state said:

> "That the bayou in question falls within the definition above given of waters of the state, seems to us to be too clear for argument. Bayous are designated by name as being 'waters of the state', and as the bayou in question is not wholly on the premises belonging to defendant, he is not protected by the proviso contained in section 1625 supra."

It is true that the meaning of the phrase "waters of the state", used in the Missouri statute, has been defined by the legislature of that state, and declared to mean all streams, lakes, ponds, sloughs, bayous or other waters wholly or in part within the state, excepting the Mississippi and Missouri rivers, and all such parts of said rivers as shall be within five hundred feet of the mouth of any creek, river, branch, slough, bayou or other water emptying into or connected with said rivers within or on the boundary lines of the state. The definition given the phrase by the Missouri legislature adds little to it, as such phrase must necessarily mean, wherever used in the statute, all streams, lakes, ponds, bayous and other waters wholly or in part within the state, excepting such rivers as form a part of its boundaries.

It seems to me clear, therefore, that Zollicoffer Lake must be held to be waters of the state to which the provisions of section 2540 of the code are applicable, and that any person taking fish from such lake at any other time or in any other manner than that permitted by the statute, is doing so in violation of law.

Yours very truly,

CHAS. W. MULLAN.

ELECTIONS—QUALIFIED ELECTORS DEFINED—A woman is a qualified elector at any municipal election in this state when the question of increasing taxes within the corporation is submitted to the voters.

Des Moines, July 5, 1904.

MR. W. M. HUMPHREY,
Lake City, Iowa.

DEAR SIR—Your favor of the 28th ultimo came to hand several days ago, but extreme pressure of business has prevented my answering the same before.

While I doubt the propriety of my expressing an official opinion in relation to the matter concerning which you write, I will make this suggestion: That the words "qualified electors", as used in section 2 of chapter 114 of the acts of the thirtieth general assembly, should be construed to include women who are entitled to vote at the class of elections therein referred to. While women are not qualified electors in the sense of having the right to vote for persons who are candidates for elective offices, they undoubtedly have the right to vote upon the question of increasing taxes in municipal corporations where that right is given by statute; and where a petition is required to be signed by a majority of the qualified electors of an independent school district, to be filed with the president of the board of directors, asking that an election be

called for the purpose of voting upon the issue of bonds for schoolhouse purposes, the words "qualified electors" must be held to include women who are entitled to vote at that election.

Yours very truly,
CHAS. W. MULLAN.

INTOXICATING LIQUORS—TAXATION OF COSTS IN PROCEEDINGS TO SEIZE AND CONDEMN SAME—When intoxicating liquors are seized and proceedings instituted for their condemnation, no judgment can be entered for costs against any person who does not appear and make claim to any part of the liquor sought to be condemned.

Des Moines, July 13, 1904.

HON. D. H. MILLER,
Adel, Iowa.

DEAR SIR—I am in receipt of your favor of the 11th instant, and in reply will say that I know of no case in which the supreme court of this state has construed the provisions of section 2415 of the code relating to the taxing of costs against a person named in a notice where intoxicating liquors are seized and proceedings prosecuted for the condemnation thereof. I think, however, the language of the statute is conclusive upon the question, and that there can be but one construction placed upon it.

The section provides that in the event of the seizure of intoxicating liquors under a warrant, the officer who seizes the same shall forthwith make return of his acts to the justice of the peace who issued the warrant. The justice shall, within forty-eight hours thereafter, cause to be left at the place where the liquor was seized, and posted in some conspicuous place, and also to be left with or at the last known and usual place of residence of the person named or described in the information as the owner of such liquor, a notice summoning such person and all other persons

whom it may concern to appear before the justice at the time and place named, and show cause, if any they have, why such liquor, together with the vessels in which the same is contained, should not be forfeited and destroyed.

The statute then further provides that if any person shall so appear he shall become a party defendant in the case, and the justice shall make a record thereof, and the person so appearing and being made a party defendant shall then make written plea that said liquor or a part thereof claimed by him was not owned or kept with intent to be sold in violation of law.

The proceedings in the trial shall be substantially the same as in cases of misdemeanor triable before justices of the peace. If no person appears in the manner prescribed by the statute, and no one is made a party defendant in the manner therein prescribed, or if judgment be in favor of all of the defendants who appear and are made such, then the costs of the proceedings shall be paid as in ordinary criminal prosecutions where the prosecution fails.

The effect of this statute is that no judgment can be entered for costs against any person who does not appear and make a claim to any part of the liquor sought to be condemned. Unless some one appears and submits himself to the jurisdiction of the court in which the proceedings are had, such court has no jurisdiction to enter a judgment for costs, as the action is not a civil proceeding, jurisdiction of which is conferred by the service of the original notice; nor is it such a criminal proceeding as brings any person before the court by any process which gives jurisdiction to enter a judgment for costs against him.

The proceeding is *in rem* and not *in personam,* and unless some person claiming the liquors voluntarily subjects himself to the jurisdiction of the court by appearing therein in the manner prescribed by section 2415, the costs must be paid as in ordinary criminal prosecutions where the prosecution fails.

I am, Yours very truly,

CHAS. W. MULLAN.

CITY OR TOWN PLAT—SUBDIVISION OF PLAT INTO BLOCKS—A city council is under no obligation to approve a plat of additions to any city or town, unless such plat complies with the provisions of the law.

Des Moines, July 18, 1904.

MR. I. H. TOMLINSON,
Albia, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 7th instant. While the matter concerning which you write is not one upon which I can express an official opinion, unless the question should be referred to me by one of the departments of the state, I will suggest that the provisions of section 916 of the code define the duties of the person platting an addition to a city or town, and those of the city or town council as to accepting the plat of such addition.

The section provides:

> "All plats of additions to any city or town, or subdivisions of any part or parcel of lands lying within or adjacent to such city or town, shall be subdivided by streets into blocks with alleys separating abutting blocks. * * * "

It is further provided in such section:

"If it is found that such plat conforms to the provisions hereof, the council shall direct the mayor and clerk to certify its resolution of approval, etc. * * *"

Under these provisions the plat must comply with the requirements of the section as to streets, blocks and alleys, and no duty rests upon the city council to approve the plat, unless it complies with the provisions of section 916.

Yours very truly,

CHAS. W. MULLAN.

MUNICIPAL INDEBTEDNESS—CONSTITUTIONAL AND STATUTORY LIMITATIONS THEREON—CONSTRUCTION OF WATER WORKS BY CITY.

Des Moines, August 29, 1904.

MR. F. R. CROCKER,
Chariton, Iowa.

DEAR SIR—I am in receipt of your favor of the 27th instant in which you ask whether the city of Chariton can issue and sell bonds for water works purposes to the extent of two and one-half per cent of the full valuation of property within the city limits, and this in addition to any other indebtedness outstanding against the city which is not for water works purposes.

Chapter 43 of the acts of the 30th general assembly provides that incorporated towns and cities of the second class, for the purpose of erecting or purchasing water works and a system of sewers, may become indebted for said purpose to an amount aggregating with all other indebtedness of such incorporated town or city, in a sum not exceeding two and one-half per cent of the actual value of the property within the said city or town.

Section 1306-b of the supplement of the code provides that no political or municipal corporation including cities acting under such charters shall be allowed to become indebted in any manner or for any purpose, to an amount

in the aggregate exceeding one and one-fourth per cent of the actual value of the property within such corporation to be ascertained by the last state and county tax list previous to the incurring of such indebtedness.

The act of the 30th general assembly referred to above, further provides that before any municipal indebtedness for the purpose of erecting or purchasing water works, etc., may be lawfully contracted in excess of one and one-fourth percentum of the actual value of taxable property within said limits, a petition signed by a majority of the qualified electors of said city or town shall be filed with the council of such city or town asking that an election shall be called, stating the purposes for which the money is to be used and the fact that the necessary water works, etc., cannot be purchased or built and furnished within the limit of one and one-fourth percent of the valuation.

Section 3 of said act provides for notice of such election fixing the time and place thereof, etc. Section 4 provides that if two-thirds or more of all the electors voting at such election vote in favor of the issuance of such bonds, the council of such city or town may then issue the same and make provisions for their payment as provided by sections 2812 and 2813 of the code.

The legislature has thus restricted the power of a municipal corporation in providing for its water works, and if these provisions are complied with, your council would have the right to either purchase or erect and maintain a system of water works and may issue bonds of the city therefor, subject to the limitation of the indebtedness of municipal corporations.

Section 3 of article II of the constitution of the state provides that no municipal corporation may become indebted in any manner or for any purpose to an amount in the aggregate exceeding five percentum of the value of taxable property within such corporation, to be ascertained by the last state or county tax list previous to incurring such indebtedness.

Some doubt has arisen and varying opinions have been given as to the meaning of the phrase "of the value of taxable property" within such corporation. Our supreme court has not given an interpretation to this language. The law in force at the time of the adoption of this constitutional provision contemplated that all property not exempt from taxation within the state, should be assessed at its actual cash value. 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.

The code of 1897 changed the method of making assessments of taxable property requiring that the actual value of the property be stated in the tax lists and fixes the taxable value thereof at twenty-five per cent of such actual cash value. This provision of the legislature 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 law.

It is my opinion, therefore, that the constitutional limitation of indebtedness is based upon the actual value as it appears in the tax lists.

Construing the provisions of the code above noted and the constitutional limitation of indebtedness upon municipal corporations, it appears from your statement of the actual and assessed valuation of property within your city and the present outstanding indebtedness, that you are in a position to erect and maintain a system of water works and to issue bonds therefor.

Yours very truly,

LAWRENCE DEGRAFF.

TAXATION—TELEPHONE AND TELEGRAPH LINES—FILING OF MAP WITH COUNTY AUDITOR—It is held that the maps required to be filed by telephone or telegraph companies operating lines within the state, shall show the mileage it has in all taxing districts in the county, including school districts.

Des Moines, August 30, 1904.

MARSH W. BAILEY,
County Attorney,
Washington, Iowa.

DEAR SIR—I am in receipt of your favor of the 27th instant asking for an opinion on the provisions of chapter 49 acts of the 30th general assembly. This act substantially requires that on or before the first day of August, 1904, each telephone or telegraph company owning or operating a telephone or telegraph line within the state, shall file with the several county auditors of the counties within which any part of its line is located, a map drawn to a certain scale of all its lines within said county, except within any platted city or town, for which a statement shall be filed showing the length of pole line in each taxing district. The map of any line situated upon any highway or street, which is the dividing line between taxing districts, shall show on which side of said street said line is situated, and shall locate all points at which said line may cross said street or highway.

On or before the first day of March, 1905, and annually thereafter, like maps, statements or certificates shall be filed with the several county auditors in counties in which any part of said lines may have been extended, constructed, re-located or abandoned during the preceding calendar year.

In the proviso of section 1, county auditors of the several counties shall upon application of any such company, furnish a map or maps accurately showing the boundaries of all taxing districts in said county and public highways located within such taxing districts.

Section 2 of said act provides that in the event of the failure or refusal of any such company, whose lines are not situated upon the right of way of a railway, to file the map required by section 1 at the time and according to the conditions named, then the county auditor shall have such map prepared and the costs shall be taxed to said company and become a lien upon its property.

The tax contemplated in this act is uniform throughout the township or school district and is entered upon the tax list as a consolidated tax. The plain intent of the legislature is, and the language of the act contemplates, that the maps required to be filed shall show all taxing districts in said county which would include school districts as well as townships. The school district is a taxing district and the proviso of section 1 of this act intends that county auditors, upon the application of any company owning or operating telephone or telegraph lines, shall furnish a map or maps showing the boundaries of all taxing districts in said county. It certainly was intended that the maps to be provided by the county auditors upon application of the respective companies should be the maps which the statute contemplated should be filed by such companies.

Construing the statutory enactment as a whole I have reached the conclusion that the telephone company in question should certify the mileage it has in each school district and the map should show such district lines.

Yours very truly,

LAWRENCE DEGRAFF.

PEDDLERS—CHAPTER 48 ACTS OF THE THIRTIETH GENERAL ASSEMBLY CONSTRUED—The law governing the vocation of peddlers does not apply to persons selling at wholesale to merchants.

Des Moines, September 7, 1904.

MR. C. L. WATROUS,
Des Moines, Iowa.

DEAR SIR—Several inquiries have come to this office relative to the constitutionality and intent of the law governing the vocation of peddlers, chapter 48 acts of the thirtieth general assembly.

This office has refrained from giving any opinion on this particular chapter preferring to allow a test case to be brought wherein the mooted points might be determined by a court of competent jurisdiction. So far as the question raised by you is concerned, the language of section 1 makes it apparent that the provisions do not apply to persons selling at wholesale to merchants.

I respectfully direct your attention to the following cases in which the term "peddler" has received consideration of our supreme court:

City of Stuart v. Cunningham, 88 Iowa, 191;
City of Davenport v. Rice, 75 Iowa, 74;
Thomas Spencer v. Whiting, 68 Iowa, 678.

It will be noticed, however, that the word "peddler" has been given a meaning which is much more comprehensive than indicated by the definitions under the above cases.

Yours very truly,
LAWRENCE DEGRAFF.

LOCAL REGISTRARS OF VITAL STATISTICS—CHAPTER 100 ACTS OF THE THIRTIETH GENERAL ASSEMBLY CONSTRUED—The law contemplates that a burial permit shall be issued by the local registrar of the township, village or city in which the death occurs, and not where the body is buried or otherwise disposed of.

Des Moines, September 7, 1904.

MR. S. M. AINSWORTH,
Arlington, Iowa.

DEAR SIR—Your favor of the 2d instant received and in reply to your question relative to chapter 100 acts of the thirtieth general assembly, I will submit the following answer:

Section 2 of this chapter makes the health officers of cities and the clerks of townships the local registrars of vital statistics. "Cities" would include cities of the first or second class and incorporated towns.

Section 2568 of the code provides for the constitution of a local board of health within towns, cities and townships. It further provides that this board shall appoint a competent physician as its health officer.

Construing this section with section 2 of chapter 100 of the acts of the last general assembly, it is apparent that the health officers of cities and towns and the clerks of townships shall constitute the local registrars of vital statistics.

Section 3 of the above chapter makes it incumbent upon the undertaker or person in charge of the funeral of any person dying in Iowa, to issue a certificate of death to be filled out with the personal particulars contained in the standard blank adopted by the United States census; and in addition thereto, a statement of the cause of death by the attending physician and in his absence, by the health

officer or coroner. This is to be filed with the local registrar (as defined in section 2) and must be done before the body is interred or otherwise disposed of, or removed from the township, village or city in which the death occurred.

The act contemplates that the burial permit shall be issued by the local registrar of the township, village or city in which the death occurs, and not where the body is buried or otherwise disposed of.

The language of this act is plain and to my mind hardly requires interpretation.

Yours very truly,
LAWRENCE DEGRAFF.

DEPUTY REGISTRAR OF VITAL STATISTICS—COMPENSATION OF—The law makes no provision for the payment of any fees or salary to a deputy registrar.

Des Moines, September 10, 1904.

DR. G. J. MACK,
Waterloo, Iowa.

DEAR SIR—Your letter of the 8th instant received in which you ask whether a deputy registrar of vital statistics is entitled to compensation for services rendered.

Chapter 100 acts of the thirtieth general assembly is an act additional to chapter 16, title 12 relating to the state board of health. Section 2 of this act provides that the local registrar shall at once upon his election or appointment, appoint a deputy registrar, subject to the approval of the state board of health, who shall act as registrar in case of his absence, illness or other disqualification.

Section 2568 of the code provides that the mayor and council of each town or city or the trustees of any township shall constitute the local board of health within their

respective jurisdictions. This board has power to appoint a competent physician as health officer and by section 1 of chapter 100 referred to above, such person acts as local registrar of vital statistics.

Section 2568 further provides that the local board of health shall regulate the fees and charges of persons employed by it in the execution of health laws and its own regulations and those of the state board of health.

Section 6 of the amendment provides for certain fees to be paid local registrars out of the county fund and in the proviso of said section, city registrars of cities having a population of ten thousand or more, shall receive no special compensation other than that included in their salaries for acting as registrars under this act.

An examination of the provisions of the code leads me to the conclusion that there is no authority or warrant under the statute for the payment of any fees or salary to a deputy registrar. It seems that whatever he receives must be the voluntary act of the local registrar by a division of the compensation received by him.

Yours very truly,

LAWRENCE DEGRAFF.

STATE LEGISLATURE—VACANCY IN OFFICE—A permanent removal by an incumbent in office from the political division in and for which he was elected, is in effect a resignation and creates a vacancy in said office.

Des Moines, September 15, 1904.

HON. G. R. WHITMER,

Primghar, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 3d instant. In reply will say that section 4 of article 3 of the constitution of the state provides:

> "No person shall be a member of the house or representatives who shall not have attained the age of twenty-one years, be a male citizen of the United

States, and shall have been an inhabitant of this state one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the county or district he may be chosen to represent."

The construction which has been universally placed upon a provision of this character in the various state constitutions is that where an incumbent before the expiration of his term of office removes from the political division in and for which he was elected to perform the duties of his office, such removal, without more is a resignation of the office, which he holds. You were elected as representative from O'Brien county. The provisions of the constitution require that you be a resident of that county to be eligible to hold the office. A permanent removal therefrom by you is in effect a resignation of the office which you hold.

I am, Yours very truly,

CHAS. W. MULLAN.

REGISTRATION OF VOTERS—A complete new registration of voters is required by law in the year of each presidential election.

Des Moines, October 3, 1904.

MR. S. M. GREENE,
Chariton, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 1st instant.

It is my understanding that there must be a complete, new registration of voters made on the year of each presidential election, under the provisions of section 1084 of the code. Section 1081 provides that no person shall be admitted to registry unless he appears in person, except as provided in chapter 2 of title VI of the code. The exception provided for is that for all state or municipal

elections, general or special, the names of the voters may be placed in the registry book by the registers, by copying from the poll book of the preceding general election all the names found therein, and adding thereto those of all persons registered and voting at any subsequent election. But at the time of each presidential election the use of the registry book prepared in that manner is not permissible, and there must be a complete new registration of the voters at that time.

I am, Yours very truly,

CHAS. W. MULLAN.

INCOMPATIBLE OFFICES—It is held that a member of a board of directors of a school district is ineligible to the office of treasurer of said district.

Des Moines, October 3, 1904.

MR. W. T. EVANS,
Parkersburg, Iowa.

DEAR SIR—I am in receipt of your favor of the 30th ultimo. 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:

Section 2757 of the code makes every member of the board of directors of a school district ineligible to election to the office of treasurer of the district, and an election of a member of such board to that office, although he may afterward resign for the purpose of accepting the office of treasurer, is an illegal and invalid election, and the person elected is not entitled to hold the office.

If, however, he qualifies and gives bond and enters upon the duties of the office after such an election, he thereby becomes an officer *de facto*, and his acts, so far as they pertain to the duties of the office, are valid; and if no

action is begun for the purpose of determining his right to hold the office, and to oust him therefrom, he may legally perform all of the duties of the office, and a receipt from him to the former treasurer for the funds of the district would undoubtedly discharge and release the former treasurer from any liability for such funds.

I am, Yours very truly,

CHAS. W. MULLAN.

FISH AND GAME—The American coot or mud hen is not a game bird within the meaning of the law.

Des Moines, October 12, 1904.

HON. GEO. A. LINCOLN,
Cedar Rapids, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 9th instant.

Without going into the question at length as to what birds are protected under the game laws of the state, I will say that an examination of the statute relating to the protection of game birds leads me to the conclusion that the American coot, commonly known as a mud hen, is not protected by the laws of the state. The statute specifically names all of the birds which are protected by law, and any reference to game birds in any other part of the statute necessarily refers to those which are named. The coot is not specifically named or protected by statute, and would not, therefore, fall within the designation of a game bird. I am,

Yours very truly,

CHAS. W. MULLAN.

TAXATION—JURISDICTION OF TOWNSHIP TRUSTEES—Property within the corporate limits of the city is not subject to taxation by the township trustees for highway purposes.

Des Moines, October 14, 1904.

MR. L. A. HAUGE,
Forest City, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 13th instant, and 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, and is strictly within the jurisdiction of your county attorney, who is by law your legal adviser, I will suggest that it is held in *Marks v. Woodbury County,* 47 Iowa, 452, and in *Hawley v. Hoops,* 12 Iowa, 506, that property within the corporate limits of a city is not subject to taxation by the township trustees for highway purposes; and that such trustees cannot include an incorporated town in a road district is held in *Clark v. Epworth,* 56 Iowa, 462.

The cases of *Marks v. Woodbury* and *Hawley v. Hoops,* were decided under a statute which included incorporated towns as well as cities, placing them both upon the same footing so far as the power of township trustees to levy and collect road taxes within the corporate limits, and I think are conclusive as to the right of trustees to levy and collect taxes within the corporate limits of a town.

I am, Yours very truly,

CHAS. W. MULLAN.

FIRE LIMITS—POLICE POWER OF CITIES AND TOWNS—A city has the right to establish fire limits and to prevent the erection of wooden buildings therein.

Des Moines, October 17, 1904.

MR. S. H. BALDWIN,
Grundy Center, Iowa.

DEAR SIR—I am in receipt of your favor of the 8th instant, and in reply will say that 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 suggest that it is within the general police power of cities and towns to provide for the safety of their inhabitants and the destruction of property by fire, to establish fire limits and to prevent the erection of wooden buildings therein. That such an ordinance is not a violation of the constitution of the United States or the constitution of the state, and if properly passed by the city council it is valid and can be enforced. As sustaining these views I call your attention to Dillon on Municipal Corporations, sections 143 and 405; and also the cases of *Louisville v. Webster,* 108 Ill., 414; Ex parte Fiske, 72 Cal., 125; *Klingler v. Bickel,* 117 Pa. St., 326; *Fields v. Stokley,* 99 Pa. St., 306.

The right of cities to establish fire limits and to prevent the erection of wooden structures therein is recognized by our supreme court in *Lemmon v. Guthrie Center,* 113 Iowa, 36.

Yours very truly,
CHAS. W. MULLAN.

MEANDERED LAKES AND LAKE BEDS—HISTORICAL REVIEW OF THE SUBJECT.

Des Moines, October 21, 1904.

HON. JOHN HAMMILL,
Britt, Iowa.

DEAR SIR—Replying to your letter of October 14th, I submit the following proposition as to the title of the state to the lakes and lake beds in Iowa for use in the case of the *State v. Ole Thompson.*

The state of Iowa in its sovereign capacity is the owner of all meandered lakes, lake beds and beds of meandered streams within the state, and its title thereto does not depend upon any act of Congress or grant from the general government. Its title to such lakes, lake beds and beds of streams was acquired in the following manner:

At the time of the formation of the government of the United States, it neither owned nor held any lands whatever under its right of sovereignty. All lands which then became a part of the United States territory were owned, either by the states whose union formed the government, or by private individuals. All lands and all rights which the general government thereafter acquired in what has been generally known as the public domain, came through deeds of cession from some of the original thirteen states, or through treaties with other nations afterward negotiated by the general government.

Virginia was the first state to cede its unoccupied lands to the United States, and its deed of cession was afterwards used as a model by other states in ceding to the government lands to which they claimed title.

One of the rights of sovereignty possessed by the original thirteen states was the title to all the waters within the state and the soil underneath the same. This title included all lakes, lake beds and streams and beds of streams which had been excluded from the public survey made by such states.

One of the provisions of the deed of cession made by Virginia to the government in 1780, under which the lands claimed by that state northwest of the Ohio river were ceded, was that the United States accepted that territory subject to the terms and conditions that the territory so ceded should be laid out and formed into states containing a suitable extent of territory not less than one hundred or more than one hundred and fifty miles square, but as near thereto as circumstances would permit, and that the states so formed should be distinct republican states and admitted members of the federal Union, with the same rights of sovereignty, freedom and independence as the original thirteen states.

The territory now embraced within the boundaries of the State of Iowa was acquired by the United States by the treaty with France negotiated on the 30th day of April, 1803. Article III of that treaty provides:

> "The inhabitants of the ceded territory shall be incorporated into the Union of the United States and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States."

The act of Congress of December 28, 1846, by which Iowa was admitted into the Union provided:

> "That the State of Iowa shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union upon an equal footing with the original states in all respects whatsoever."

Under this treaty and the act of Congress admitting Iowa into the Union, she came in upon an equal footing with the original thirteen states in every particular, and at once acquired in her sovereign right the title to all meandered lakes, lake beds and beds of meandered streams. The fact that such lakes, lake beds and streams were not then surveyed or meandered in no wise could or did change the title of the state thereto. The survey

was simply the means by which the government ascertained the public lands which belonged to it under the treaty with France, and the lakes, lake beds and streams which belonged to the state under such treaty and the act of congress.

This view is taken by the court in *Rood v. Wallace,* 109 Iowa, 8, where it is said:

> "We are quite ready to assume as a general proposition that the title to all lake beds in the state, especially those of navigable lakes, is in the state, and that the general government never had any control or ownership thereof. Indeed this seems to be the almost unbroken voice of authority." Citing a large number of cases in support of the statement made by the court.

The lake in question in Hancock county, therefore, is the property of the state, both as to the water contained therein and the land underneath the water. The state has the absolute right to prevent any destruction thereof, the same as it would have the right to prevent the destruction of other property owned by it.

I would suggest, however, that you first show that the lake is a meandered lake and was excluded as such from the public lands by the government survey. When that fact is established it is proof of the ownership of the lake in the state. The other evidence in the case must necessarily be of a local character and directed to the acts of the defendants in attempting to cut a ditch by which such lake would be drained, and to thus injure and destroy the property belonging to the state. It is and has been for several years past the policy of the state, as declared by its courts and by its executive council, to maintain and preserve all of the lakes within the state for the benefit of the general public, and the action brought against Mr. Thompson to prevent him from destroying such lake is in the line of the policy adopted by the state.

In closing I beg to say that I think you will have no serious difficulty in maintaining and proving your case against Mr. Thompson, and in having your injunction made permanent.

I am, Yours very truly,

CHAS. W. MULLAN.

PRACTICE OF PHARMACY—OWNERSHIP OF PRESCRIPTIONS—A pharmacist is entitled to retain a prescription after same has been filled and the medicine delivered to the customer.

Des Moines, November 25, 1904.

MR. H. C. BECKMAN,
Sibley, Iowa.

DEAR SIR—Your favor of the 16th instant received in which you ask my opinion as to the respective rights of the physician, patient and pharmacist to prescriptions placed on file by the pharmacist.

As a rule the patient pays or agrees to pay the physician for the prescription and upon the delivery of the same to the patient, it becomes his property. That the physician loses all control over and right to it is quite clear. A prescription is seldom addressed to any particular pharmacist, but if it should be so addressed, the patient would be at liberty to take it to any one to be filled, and such person would have the undoubted right to fill it. It is the property of the patient and does not cease to be his property on delivery of the same to the pharmacist. He certainly has the right to have it filled, or if desired, refilled. So much is clearly implied from the transaction.

On the other hand, the pharmacist acquires rights which must be respected. After the prescription has been filled and the medicine delivered to the customer,

the pharmacist is entitled to retain the prescription for his own protection. If charged with a mistake that was the physician's, and not his, the original prescription might be his only protection. The patient, however, is entitled to the full enjoyment of his property except such as he surrenders to the pharmacist from the nature of the transaction. No reason can be perceived why a patient should not be entitled to a copy of the prescription for future use. Such a demand would be reasonable and it seems to me, should be complied with when made. Indeed, it is an open question whether his right to the original prescription is not equal with that of the pharmacist.

In the case of *Stewat Drug Company v. Hirsh,* 50 S. W., 583, the court had occasion to pass upon the right of the druggist to transfer the prescriptions then on file to a third person. The court said:

> "Evidence was heard by the court, very properly we think, to explain the relation of druggists to the prescriptions left with them. There was testimony tending to show that there was a qualified right to the use of the prescription in the person depositing it, if asserted; but otherwise as between a druggist and a third person, the druggist was entitled to them. This was in effect the conclusion of the trial judge. That they were of value to the druggist is amply shown. We are of opinion that upon a conversion of such property, the druggist himself would not have been restricted to an action for the specific property, but could have recovered for the value thereof. He had a right of property in the prescriptions and any such rights are transferable in this state."

Trusting that the above may assist you in determining your rights in the premises, I remain,

Yours very truly,

LAWRENCE DEGRAFF.

JUSTICE OF THE PEACE—CERTIFICATION OF TRANSCRIPT TO COUNTY AUDITOR—It is the duty of the board of supervisors to examine the transcript filed by a justice of the peace and authorize by resolution the payment from the county treasury of such fees as are found due.

Des Moines, November 28, 1904.

J. W. ALLFREE, *Esq.*,
Newton, Iowa.

DEAR SIR—Your favor of the 26th instant received relative to the certification of fees in state cases by justices of the peace under section 4599 of the code. This section provides that the fees contemplated in sections 4597 and 4598 in criminal cases shall be audited and paid out of the county treasury upon the order of the board of supervisors.

In any state case brought before a justice of the peace, the fees to which the justice is entitled, the constable's fees, and the fees of witnesses shall be certified by a transcript of the justice to the auditor of the county in which the jurisdiction of the justice extends. The said transcript being filed with the auditor, it is the duty of the board of supervisors to examine same and when found to be correct, authorize by resolution the payment of such sum from the county treasury as is found due. The clerk of the district court has nothing to do with the filing of such transcript or the payment of such fees. This is true whether or not an appeal has been taken from the judgment of the justice court.

In any appeal case of a criminal nature the transcript of the justice filed with the clerk should show the fees in the case, paid or unpaid; but this does not do away with the necessity of certifying the fees to which the justice court is entitled, and it would be as necessary for him to make affidavit and file with the auditor in order to claim such fees as though no appeal was taken.

The board of supervisors has no authority to make any rule or pass any resolution which would contravene a statutory requirement.

Yours very truly,
LAWRENCE DEGRAFF.

COUNTY TREASURER—CERTIFICATION AS TO TAXES AND ASSESSMENTS DUE ON ANY PARCEL OF REAL ESTATE. Code sections 1393 and 1396 distinguished.

Des Moines, November 29, 1904.

MR. G. G. SHANAFELT,
Sigourney, Iowa.

DEAR SIR—Your favor of the 26th instant received asking for an opinion on the interpretation of code provisions 1393 and 1396.

Section 1393 provides that any person having an interest in any parcel of real estate may request the county treasurer to certify in writing the entire amount of taxes and assessments due thereon, together with all sales of same for unpaid taxes or assessments as shown by the books in his office, with the amount required for redemption from the same if still redeemable. The treasurer is not bound to make such certificate until he is paid or tendered his fees for same at the rate of 50 cents for the first parcel in each township, town or city and ten cents for each subsequent parcel in the same township, town or city. In computing such fees each description in the tax list shall be considered a parcel.

Section 1396 provides that any person may apply by letter to the treasurer for information concerning the amount and interest of unpaid taxes and of any tax sales upon any real estate as shown upon the tax lists in his office. The treasurer is not bound to give this information unless accompanying the letter the applicant sends thirty cents in postage stamps or money and ten cents

additional for each tract of 160 acres in excess of 320 acres and in no case can the fee exceed fifty cents. The primary distinction between the two sections quoted above is that in the former case the county treasurer issues to a person having an interest in the real estate in question, a certificate, which together with the auditor's certificate of redemption from the tax sales therein mentioned, is conclusive evidence for all purposes and against all persons that the parcel of real estate in said certificate and receipt described, was at the date thereof free and clear of all taxes and assessments, etc. While under the latter section any person whether he has an interest in the real estate or not may secure the information upon payment of the fee provided for in said section.

Section 1393 provides for the issuing of a certificate of taxes due, while section 1396 has reference wholly to information as to taxes due.

I am not sufficiently informed by your letter whether the mortgagee desires information as to taxes due or a certificate as contemplated by section 1393. The question involved should find easy solution. The two sections of the code are radically different and the fees to which your office is entitled should be determined by the facts in the case.

Yours very truly,
LAWRENCE DEGRAFF.

INEBRIATES—Any person accused of being an inebriate has the right to demand a trial by jury.

Des Moines, December 9, 1904.

HON. SYLVESTER FLYNN,
Eagle Grove, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 8th instant. In reply I will call your

attention to the provisions of sections 7 and 8 of chapter 80 of the laws of the thirtieth general assembly.

Section 7 provides that when the person accused of being an inebriate, etc., is brought before the judge of the district court for examination, the judge shall, upon his appearance, unless the person accused demands a formal trial, hear any evidence which may be adduced touching the accusation.

The next section provides that if the accused demands a formal trial, the judge shall continue the hearing to the next term of the district court, or if the court be in session the case shall be transferred to it and in either case the cause shall be docketed and tried as a civil action.

The provisions of these sections undoubtedly give the accused a right to demand a trial by jury, and if such demand is made the cause must be tried as a civil action.

I am, Yours very truly,

CHAS. W. MULLAN.

DAMS—MAINTENANCE OF FISHWAY—Every person constructing a dam across any stream in this state must provide a fishway and maintain it during the existence of the dam.

Des Moines, December 16, 1904.

HON. GEO. A. LINCOLN,
Cedar Rapids, Iowa.

DEAR SIR—Replying to your favor of the 7th instant, will say, without going into the matter at length, that it is my understanding that under the provisions of section 2548 of the code, it is the duty of every person or corporation maintaining a dam across any stream in the state, to provide such dam with a fishway, and to maintain such fishway during the existence of the dam.

If the fishway is destroyed by high water, ice or other causes, it is the duty of the owner of the dam to replace the same within a reasonable time; and if he fails to do so, he may be punished under the provisions of the section referred to, or the dam may be declared a nuisance by a proper action. I am,

Yours very truly,
CHAS. W. MULLAN.

FOREIGN CORPORATION—RIGHT TO ADMINISTER UPON ESTATES OR TRUSTS—A foreign corporation may not act as executor, administrator or guardian in this state.

Des Moines, December 28, 1904.

MR. DWIGHT F. DOWNING,
Oskaloosa, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 23d instant.

I rather doubt the propriety of my expressing an opinion as to the correct construction of section 1637 of the code so far as it relates to foreign corporations, unless the question involved should come to me from one of the departments of the state. I will, however, make these suggestions:

(1). It may well be doubted whether any foreign corporation, no matter how organized, has the right under section 1637 to act as executor, administrator or guardian in this state, as such trusts are personal in their character, and the executor, administrator or guardian must necessarily be within the jurisdiction of the court by which he is appointed, and at all times subject to any order or decree of such court.

(2). Such companies could probably act as trustee of certain express trusts under the provisions of section 1637, though I doubt their power to act as trustee in all cases.

(3). I call your attention to sections 359, 360, 361, 362 and 363 of the code which relate to the right of such companies to become sureties on bonds within this state. The conditions of these sections must be complied with before such companies are entitled to become sureties on bonds.

I am, Yours very truly,

CHAS. W. MULLAN.

PUBLIC SCHOOL—USE OF BUILDING—The board of directors may in its discretion permit religious services to be held in the schoolhouse.

Des Moines, January 9, 1905.

REV. SAMUEL KNOER,
Nemaha, Iowa.

DEAR SIR—The right to determine the use of a public schoolhouse is vested by law in the board of directors of the district in which the house is located, and the board may in its discretion permit religious services to be held in the schoolhouse or may exclude the same therefrom.

I am, Yours very truly,

CHAS. W. MULLAN.

IOWA STATE COLLEGE OF AGRICULTURE—GRANT OF LANDS TO—Funds arising from the sale of lands in Iowa granted to the Iowa State College of Agriculture and Mechanic Arts, must be invested in securities named in the act of congress, and constitute a permanent fund.

Des Moines, January 14, 1905.

MR. C. F. CURTISS,
Iowa State College of Agriculture and Mechanic Arts,
Ames, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 12th instant.

The act of congress, under which the lands in Iowa were granted to the Iowa State College of Agriculture and Mechanic Arts, provides that the funds arising from the sale of such lands shall be invested in the securities named in the act of congress and constitute a perpetual fund, the capital of which shall remain forever undiminished, except that an amount not exceeding ten per cent may be expended for the purchase of lands for sites or experimental farms whenever authorized by the legislature.

The land referred to in your letter undoubtedly falls within the provisions of the original grant, and I doubt the authority of the trustees of the College to exchange such tract of land for a tract adjoining the College farm, which I assume is to be used as a part of such farm, without the direct authority of the legislature. Such exchange of land would in effect be equivalent to a sale of the land in Polk county, and a purchase of other land near the College, to be used in connection with it, with the money obtained from the sale of the Polk county

land. Such a transaction under the act of congress is only permissible when authorized by the state legislature, and then only to an amount not exceeding ten per cent of the total fund derived from the sale of the lands granted by the general government.

Very respectfully yours,

CHAS. W. MULLAN.

INTOXICATING LIQUORS—SALE OF BY PARTNER—A permit to sell intoxicating liquors granted to one member of a partnership does not authorize sales of such liquor by another member of the partnership.

Des Moines, January 20, 1905.

MR. C. E. HALL,

Stockport, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 16th instant.

In *State v. McConnell,* 90 Iowa, 197, the supreme court of this state held that a permit to sell intoxicating liquors issued to one member of a partnership does not authorize sales of such liquors to be made by another member who has no permit. As a registered pharmacist I think you would have the right to fill the prescriptions of physicians, although by so doing you compounded liquors containing alcohol with other ingredients. But under the holding of the court you would have no right or authority to sell intoxicating liquors unless you obtain a personal permit therefor.

I am, Yours very truly,

CHAS. W. MULLAN.

TOWNSHIP ASSESSOR—RESIDENCE OF—The statute does not provide in express terms that an assessor elected by the voters of the township outside of the corporate limits of the city or town, must reside outside of such corporate limits.

Des Moines, January 20, 1905.

HON. C. W. PIERSOL,
Ida Grove, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 14th instant.

While the matter concerning which you write is one upon which I cannot express an official opinion, unless the same should be referred to me by one of the departments of the state, I will suggest that the statute nowhere in express terms provides that an assessor who is elected by the voters of the township outside of the corporate limits of a city or town, must reside outside of such corporate limits. And if a person who resides within such limits is elected by the voters residing outside of such limits as assessor, and the person so elected qualifies and enters upon the duties of the office, he is clearly assessor de facto; and I think there would be no vacancy in the office unless such vacancy was declared by an action of quo warranto brought in the proper court. All of his acts as assessor would, in my judgment, be legal as though the same were performed by an assessor residing outside of the corporate limits of the city or town.

I am, Yours very truly,

CHAS. W. MULLAN.

CAPITAL PUNISHMENT—HISTORY OF LEGISLATION THEREON IN IOWA.

Des Moines, January 21, 1905.

MR. ARTHUR W. HOSTETLER,
Glenville, Minnesota.

DEAR SIR—Replying briefly to your letter of the 20th instant, will say that from the organization of the state of Iowa until 1872, capital punishment for murder in the first degree existed. The fourteenth general assembly of the state of Iowa abolished capital punishment and fixed the penalty for murder in the first degree at imprisonment for life at hard labor in the penitentiary. This law remained in force from 1872 until 1878, at which time the legislature amended the law and provided that murder in the first degree should be punished with death or imprisonment for life at hard labor in the state penitentiary as determined by the jury. With a slight modification the act of 1878 is the law of Iowa today, and under the present code if a person is convicted of murder in the first degree the jury must determine by its verdict whether the punishment shall be imprisonment for life at hard labor in the penitentiary, or death.

I think there are no statistics in this state which show the relative number of murders committed during the time that capital punishment was abolished in this state and before or after that period; but it is generally conceded I think by courts and lawyers throughout the state that there was a marked decrease in the number of murders committed in the state immediately after the restoration of the death penalty, and the general consensus of opinion now is that such penalty is upon the whole beneficial to society.

I am, Yours very truly,

CHAS. W. MULLAN.

CRIME—ASSAULT WITH INTENT TO MURDER—A person who with specific intent to kill delivers to another a poisonous substance to be eaten, whereby an injury results, is guilty of assault with intent to murder.

Des Moines, February 16, 1905.

HON. A. B. BARCLAY,
Wall Lake, Iowa.

DEAR SIR—I am in receipt of your favor of the 11th instant, and in reply will say that while the question is not wholly free from doubt, or the authorities uniform, I think the weight of authority and the better reasoning is that the wife, in the case stated in your letter, is guilty of an assault with intent to murder.

It is said in *Commonwealth v. Stratton,* 114 Mass., 303 (19 Am. Rep., 350), that a person is guilty of assault and battery who delivers to another a thing to be eaten, knowing that it contains a foreign substance and concealing the fact, if the other in ignorance of the fact eats it and is injured in health.

The same rule is adopted in *Carr v. State,* 135 Ind., 1, and to the same effect is *Johnson v. State,* 96 Ga., 36; *People v. Blake,* 1 Wheeler's Crim. Cas., 490.

The supreme court of Texas in *Garnett v. State,* 1 Texas App., 605 (28 Am. Rep., 425), appears to be the only court which has held a contrary doctrine; so that it may be fairly said that the weight of authority is that, where one gives poison to another for the purpose of killing the person to whom the poison is given, and the person who takes the poison is injured thereby, the one giving the same is guilty of an assault with intent to murder.

I think the act of the wife in substituting a poison, viz: wood alcohol, for the alcohol which her husband had procured and kept in a bottle for the purpose of drinking

the same, is such an affirmative act upon the part of the wife that, if the husband drank the poisonous wood alcohol and was injured thereby, she could be convicted of an assault with intent to murder.

I am, Yours very truly,

CHAS. W. MULLAN.

INSPECTION OF FACTORIES AND BUILDINGS—CHAPTER 149 ACTS OF THE 29th GENERAL ASSEMBLY CONSTRUED—It is held that the law enacted for the safety and comfort of laborers and other persons assembled in factories and buildings, finds general application to all cities and towns within the state in which are found such factories and buildings.

Des Moines, February 18, 1905.

HON. EDWARD D. BRIGHAM,

Commissioner of Labor Statistics.

DEAR SIR—In response to your request of the 16th instant for my opinion whether chapter 149 acts of the 29th general assembly applies to manufacturing establishments, workshops and hotels in cities organized under special charters, I submit the following:

Chapter 149 acts of the 29th general assembly provides for the safety and comfort of laborers and other persons assembled in factories and buildings. Section 1 of this act provides:

> "Every manufacturing establishment, workshop or hotel in which five or more persons are employed, shall be provided with a sufficient number of water closets, earth closets or privies, for the reasonable use of the persons employed therein, which shall be properly screened and ventilated and kept at all times in a clean condition; and if women or girls are employed in such establishment, the water closets, earth closets or privies used by them, shall have separate approaches and be separated and apart from those used by the men."

It is with special reference to this section that your communication is addressed.

Chapter 14 title 5 of the code of 1897 embodies the law of this state governing cities under special charters. Section 933 of this chapter reads as follows:

> "The provisions of this chapter shall apply only to cities acting under special charter, and no provisions of this code, nor laws hereafter enacted, relating to the powers, duties, liabilities or obligations of cities or towns, shall in any manner affect, or be construed to affect, cities while acting under special charter, unless the same have special reference or are made applicable to such cities."

It is quite apparent that the above section of the code contemplates general laws "as to powers of cities".

It is also apparent that section 1 chapter 149 acts of the 29th general assembly has no reference to the powers of cities or their duties, liabilities or obligations, whether such cities are organized under the general incorporation act or under special charters.

The logical conclusion is that chapter 149 finds general application to all cities and towns within the state in which are found factories and buildings which come within the purview of said chapter.

Yours very truly,

LAWRENCE DEGRAFF.

INTOXICATING LIQUORS—RIGHT OF DRUGGIST TO SELL—A druggist who is not a permit holder has the right to dispense alcohol for the the purpose of compounding medicine, tinctures and extracts that cannot be used as a beverage.

Des Moines, February 18, 1905.

MR. V. L. FERGUSON,
Keswick, Iowa.

MY DEAR SIR—Your favor of the 11th instant received, in which you request my opinion whether a druggist, not

a permit holder, may dispense alcohol in filling doctors' prescriptions. In this state all sales of intoxicating liquors by druggists are unlawful, except such as are made under permits duly issued by the district court, and such permits can be issued only to registered pharmacists. A government license does not protect sales of intoxicating liquors, unless the statutory requirements have been complied with.

Section 1589 of the code provides:

> "Persons holding permits may sell and dispense intoxicating liquors, not including malt liquors, for pharmaceutical and medical purposes," etc.

Section 2382 of the code provides in substance that no one by himself or agent shall directly or indirectly sell, exchange, barter, dispense, etc., any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever.

If the provisions of the code should stop here, it would be apparent that a registered pharmacist, not a permit holder, would not be privileged to sell or dispense alcohol or any other liquor defined by the statute to be intoxicating.

Section 2385 provides that registered pharmacists and physicians holding certificates from the state board of medical examiners and manufacturers of proprietary medicines may buy from permit holders intoxicating liquors (not including malt) for the purpose of compounding medicine, tinctures and extracts, that cannot be used as a beverage.

Section 2401 further provides that licensed physicians may in good faith dispense liquors as medicines to patients actually sick and under their treatment. The supreme court of this state has said that under this provision it is not enough that the physician believes the patient to be sick. If he is not actually sick the physician will not be protected.

State v. Fields, 89 Iowa, page 34.

Construing these provisions of the code, I am of the opinion that the registered pharmacist and registered physician may dispense alcohol under the conditions named above, without incurring any liability under the law.

Yours very truly,
LAWRENCE DEGRAFF.

COUNTY TREASURER—COMPENSATION OF—It is held that the excess of three per cent above the salary of the county treasurer upon taxes collected by him is a part of the general taxes collected by the county, and the same must be distributed in the different tax funds.

Des Moines, February 25, 1905.

MR. C. B. ELLIS,
Onawa, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 18th instant. In reply will say the matter concerning which you write is not 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 may, however, suggest that the construction which must be placed upon the provisions of section 490 of the code is, as it appears to me, that the excess of three per cent above the salary of the county treasurer upon taxes collected by him, must be held to be a part of the general taxes collected by the county, and that it must be distributed or permitted to remain in the different tax funds. I find no provision of the statute authorizing a transfer of any portion of the three per cent which is in excess of the amount of the salary of the county treasurer, to the county fund, and in the absence of such provision such transfer cannot legally be made.

I am, Yours very truly,
CHAS. W. MULLAN.

COUNTY RECORDER—ALTERATION OF INSTRUMENTS FILED FOR RECORD—A county recorder has no authority to change or alter the language of any instrument filed with him for record.

Des Moines, February 25, 1905.

MR. H. R. BERNARD,
Montezuma, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 21st instant.

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 may make the following suggestions:

(1). If an instrument comes into your hands for record, and you discover a mistake in the description of the land described therein, it would be a courteous and proper thing for you to call the attention of the parties to such mistake before recording the instrument, that it might be corrected; but you have no authority to change or alter any description in any instrument which is presented to you for record. The same is true of a mistake in the spelling of names of persons in the instrument. The record should be a perfect transcript of the instrument itself as to spelling, description and all other matters.

(2). If, after a deed is recorded, it is discovered that the land in the same is incorrectly described, and such mistake is corrected in the original instrument, it must be re-recorded, as the record thereof cannot be changed. The only changes which a recorder is authorized to make upon the record are those for the purpose of correcting mistakes which occur in recording instruments, such change being for the purpose of making the record agree with the instrument which is recorded. I am,

Yours very truly,
CHAS. W. MULLAN.

TAXATION—SOLDIERS' AND SAILORS' EXEMPTION—The Statutory exemption from taxation to the extent of eight hundred dollars to soldiers and sailors applies only to those who are residents of this state.

Des Moines, February 27, 1905.

HON. GEO. D. MUSMAKER,
Greenfield, Iowa.

DEAR SIR—I am in receipt of your favor of the 18th instant.

The question which you ask is not free from difficulty, but after an examination of all the authorities which I have been able to find that bear upon the question, I have reached the conclusion that subdivision 7 of section 1304 of the code does not apply to honorably discharged Union soldiers and sailors of the war of the rebellion, or their widows, who are not residents of the state of Iowa.

I have been unable to find any authority bearing directly upon this question. It is a well settled rule of law, however, that taxation is the rule, and exemptions therefrom the exception, and that an exemption will never be presumed or implied, and must be given by an express grant. It can only exist by virtue of some constitutional or legislative provision expressed in clear and unequivocal language and intended to create such an exemption, and permitting no other reasonable construction.

It has been well said that a grant of exemption from taxation being in the nature of a recognition of sovereignty must invariably be construed most strictly against the grantee, and can never be permitted to extend, either in scope or duration beyond what the terms of the concession clearly require.

Subdivision 7 of section 1304 of the code supplement 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 the war of the rebellion, or the widow remaining unmarried of such soldier or sailor. It shall be the duty of every assessor annually to make a list of 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 the failure on the part of any assessor so to do shall not affect the validity of any exemption."

The last clause is a clear indication that it was the intent of the legislature to grant an exemption from taxation to the extent of eight hundred dollars, only to the soldiers, sailors and widows residing within the state. The assessor of each district is required to make a list of all such soldiers, sailors and widows annually, and to return such list to the county auditor upon forms to be furnished by such auditor for that purpose.

The legislature clearly had in mind in enacting subdivision 7 of section 1304 of the code that the assessor should make and return to the county auditor a list of the names of all honorably discharged soldiers or sailors, with widows of soldiers and sailors, within his assessment district, who were entitled to the exemption provided for in the statute; and that such exemption should be confined to the class of persons named residing in the respective assessment districts of the state.

Taking the entire subdivision of the section referred to with the general principles of law governing the construction of statutes of that character, I can reach no other conclusion than that a soldier, or sailor or widow of a soldier or sailor, must be a resident of the state to be entitled to the exemption therein provided.

I am, Yours very truly,

CHAS. W. MULLAN.

EXTRADITION--Where a fugitive from justice is properly charged with a crime under the laws of the state demanding his return, it is immaterial whether the offense charged is a crime under the laws of the state upon which the demand is made.

Des Moines, March 2, 1905.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

DEAR SIR—I have examined the application for a requisition upon the governor of Colorado for the extradition of Mr. A. B. Funk, who is charged with the crime of obtaining property by false pretenses.

The offense with which Mr. Funk is charged is an indictable one under the laws of the state of Iowa, and the suggestion that the requisition should not issue for the reason that such offense is not indictable under the laws of Colorado, is without force. The constitutional provision for the surrender by one state to another of persons charged with treason, felony or other crimes, embraces all indictable crimes and offenses made punishable by the laws of the state wherein the act was done. See,

Kentucky v. Dennison, 24 How., 66;
Taylor v. Taintor, 16 Wall., 366;
Ex parte Reggel, 114 U. S., 642;
Lascelles v. Georgia, 148 U. S., 537;
Morton v. Skinner, 48 Ind., 123.

Where the fugitive is properly charged with a crime under the laws of the state demanding his return, it is immaterial whether the offense charged is a crime under the laws of the state upon which the demand is made. See,

Johnson v. Riley, 13 Ga., 97;
Matter of Hayward, (N. Y. Sup. Ct., 1848), I Am. L. J. N. S., 271.

See, also, opinion of Judges of Maine Supreme Court, 24 Am. Jur., 226.

Under the law as announced by these authorities, the requisition should, in my opinion, issue.

I am, Yours very respectfully,

CHAS. W. MULLAN.

COUNTY ATTORNEY—COMPENSATION OF—RECOVERY OF MONEY PAID ILLEGALLY—If a county attorney is paid additional compensation under an illegal and void resolution of the board of supervisors, such moneys may be recovered from him in a proper action.

Des Moines, March 3, 1905.

HON. G. A. BARNES,

Dubuque, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 1st instant.

While the matter concerning which you write is not 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 may perhaps be permitted to make the following suggestions:

First. The resolution of the board of supervisors of Dubuque county, allowing to the county attorney an additional compensation of one thousand dollars for services performed as the attorney of the board of supervisors of the county, is illegal and void, and whatever money was paid under such resolution was illegally taken from the county treasury and paid to the person who received the same. The resolution gave the county auditor no authority to draw warrants upon the county treasurer for any part of the sum named in the resolution.

Second. Whether the money can be recovered from the parties to whom it was paid, presents a more serious question, and one which is not free from doubt.

The facts as given in your letter appear to me to fall within the rule stated by the supreme court in *Heath v. Albrook,* rather than within the rule given in *Painter v Polk county.* I think they may be fairly distinguished from the Painter case, for the reason that the county attorney of Dubuque county, the board of supervisors and the auditor must all be held to have had knowledge that the resolution of the board of supervisors was void, and gave to the auditor no authority whatever to issue a warrant upon the treasurer for any part of the sum named therein, and gave to the county attorney no authority or right to take or receive any part of such sum from the county treasury.

If I am right in making the distinction between the facts as given in your letter and the case of *Painter v. Polk county,* the money received by the county attorney under the resolution named may be recovered in a proper action.

Third. The county attorney is not, in my opinion, guilty of a misdemeanor under the provisions of section 1297 of the code. That section must be held, under the rules of construction of criminal statutes, to apply only to officers who receive fees as compensation for the performance of their official duties. There is a well recognized distinction between fees which are received by an officer as compensation for the work performed by him, and a salary paid an officer for the performance of his official duties. The provisions of section 1297 cannot be extended beyond the express terms of the statute, and these terms do not include salaries paid to public officers.

I desire, however, in this connection, to call your attention to section 4885 of the code, which provides:

> "If any * * * county * * officer * * directly or indirectly accept any valuable consideration * * other than the compensation allowed him by law, conditioned upon said officer's doing or performing any

official act * * , he shall be imprisoned in the penitentiary not exceeding two years, or in the county jail not exceeding one year, or fined any sum not less than twenty nor more than three hundred dollars."

In the case stated in your letter, the county attorney is a county officer within the meaning of the statute quoted. He has directly accepted from the county a valuable consideration for the performance of the official duties imposed upon him by law; and as I now view the statute, it appears to me to be applicable to his case. It is true the legislature may have had in mind at the time of the enactment of the statute that it desired to prevent an officer from accepting a valuable consideration from any private person or corporation for the performance of his official duties; but the language is broad enough to cover the acceptance of such consideration from the county, as well as from a private individual.

I have not made a careful examination of the authorities upon the question, and in fact have not time to do so, but have given you my views of the law as applicable to the facts involved.

I am, Yours respectfully,

CHAS. W. MULLAN.

OFFICIAL NEWSPAPERS—WHAT CONSTITUTES—All notices and processes of the courts required to be published in a newspaper must be in the English lauguage, unless the statute specifically provides to the contrary.

Des Moines, March 8, 1905.

MR. C. H. VANDER MEULEN,
Sioux City, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 6th instant. In reply will say that 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 may, however, suggest that the English language is the legal language of the country, and that all notices and processes from the courts which are required to be published, must be published in that language, unless the statute specifically provides that they may be published in a foreign language.

It has been recently held in Wisconsin that the publication of a legal notice printed in the English language in a newspaper printed in German is a legal publication of the notice within the statutes of that state; and I think the courts of this state would hold the same rule if the questions were presented. I am,

Yours very truly,

CHAS. W. MULLAN.

SCHOOL LANDS—SALE OF BY FORECLOSURE—School lands bought in at a foreclosure sale become the property of the state, and any increase in the value of such lands thereafter inures to the benefit of the state.

Des Moines, March 8, 1905.

HON. C. E. DEAN,

Glenwood, Iowa.

DEAR SIR—Your favor of the 30th ultimo to the auditor of state has been referred to me for answer.

In reply thereto I beg leave to say that I desire to call your attention to section 2855 of the code, which provides:

> "When any land has been bid in by the county under foreclosure proceedings, the county auditor shall at once notify the state auditor, who shall give the county credit for the amount of the original amount of the notes remaining unpaid. When a resale is made, and the state auditor, through the county auditor, has notice thereof, he shall charge

> the county with the full amount of re-sale, and if the land shall be purchased by a third party for a less amount than due, the loss shall be sustained by the county. County auditors shall, on the first of January, report to the state auditor the amounts of all sales and re-sales of the sixteenth section, five hundred thousand acres grant and escheated estates made the year previous * * * ."

Do not the provisions of the section quoted and those following clearly indicate that the county must account for the full amount of the purchase price of school lands which are sold after the same have been bid in by the county auditor at a foreclosure sale?

It is my understanding that all school lands which are bid in at a foreclosure sale become the property of the state, and must be treated as school lands, which have not been sold to third parties. Any increase in the value of such lands after they are bid in at a foreclosure sale, inures to the benefit of the state, and when such lands are re-sold, the state is entitled to the full amount of the purchase price thereof, which includes any increased value, and no deductions can be made by the county from such purchase price for costs or expenses.

It is not a question of keeping the school fund intact, but rather of accounting to the state for the full amount of the purchase price of school lands sold. The statute expressly requires that the county shall bear all losses and expenses.

Trusting that upon a careful examination of the question by you, you will reach the conclusion herein expressed, and that a satisfactory adjustment of the amount due the state school fund may be made by the county officers, I am,

Yours very truly,

CHAS. W. MULLAN.

PHARMACY—SALE OF WOOD ALCOHOL—Wood alcohol is not an intoxicating liquor and the same may be sold at wholesale if it is properly labeled.

Des Moines, March 9, 1905.

SMITH, LICHTY & HILLMAN COMPANY,
Waterloo, Iowa.

DEAR SIRS—Replying to your favor of the 4th instant, I beg leave to say that I have submitted the question whether wood alcohol is an intoxicant or not to the state chemist, and have received from him a letter in which he says it cannot be classified as an intoxicating liquor. The statute regulating the sale of poisons and providing that they shall only be sold by a registered pharmacist applies to retail dealers and not to persons selling at wholesale.

Wood alcohol not being an intoxicating liquor, I see no reason why you may not sell the same at wholesale if it is properly labeled in the manner required by statute.

I am, Yours very truly,

CHAS. W. MULLAN.

CRIME—EFFECT OF CIVIL ACTION ON CRIMINAL PROSECUTION—A settlement of a civil liability by a person charged with crime arising from the same state of facts, is no defense.

Des Moines, March 10, 1905.

HON. W. M. STRAND,
Decorah, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 8th instant.

The fact that a corporation from which a person has embezzled money or property has brought an action and obtained judgment against such person for the value of the money or property embezzled, has no bearing upon a

criminal prosecution by the state upon the charge of embezzlement. The question upon an indictment charging a person with embezzlement is whether he has been guilty of a violation of a criminal statute of the state in embezzling money or property from his principal or employer. And although he may have repaid the amount of money embezzled, or paid the value of property taken, such payment is no defense to a criminal prosecution. Nor is evidence of the fact that a judgment has been obtained against the person charged, or that he has repaid the money taken by him, competent upon the trial for the purpose of showing a settlement of his civil liability as a defense to the charge upon which he is placed on trial.

As bearing upon this question see—

People v. DeLay, 80 Cal., 52;
Fleener v. State, 58 Ark., 98;
Robinson v. State, 83 Ga., 166;
State v. Frish, 45 La. Ann., 1283;
State v. Noland, 111 Mo., 473;
State v. Pratt, 98 Mo., 482.

Yours very truly,
CHAS. W. MULLAN.

SCHOOL LANDS—FORECLOSURE OF—MORTGAGE THEREON—The county is required to bear the expenses of all legal proceedings in relation to the school fund, and no part of such fund can be applied to the payment of such costs or expenses.

Des Moines, March 10, 1905.

HON. C. E. DEAN,
Glenwood, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your esteemed favor of the 8th instant.

I perhaps inadvertently used the word "expressly" in referring to the provisions of the statute requiring the

county to pay the expenses connected with the foreclosure of mortgages upon school lands. The statute certainly expressly requires counties to bear all losses, and inferentially requires them to pay all expenses connected with such foreclosures.

I call your attention to the provisions of section 2848 in this connection, by which it is provided:

> "The board of supervisors shall hold and manage the securities given to the school fund in its county, and all judgments and lands belonging to said fund. It may have any part of the school lands surveyed when necessary, and employ the county surveyor therefor, who shall be paid out of the county treasury upon proof of the request and performance of the service. All actions for and in behalf of said fund may be brought in the name of the county for the use of the school fund, by the county attorney, or such other attorney as the board may select. Each county shall be liable for all losses upon loans of the school fund, principal or interest, made in such county, unless the loss was not occasioned by reason of any default of its officers or by taking insufficient or imperfect securities, or from a failure to bid at an execution sale the full amount of the judgment and costs."

There is no provision in the law for the payment of any costs incurred in the foreclosure of a mortgage upon school lands out of the school fund. In fact no part of such fund can be taken for any purpose whatever. This is expressly provided for in section 2838 in these words:

> "The permanent school fund, the interest of which only can be appropriated for school purposes, shall consist of five per cent," etc.

Each county is entitled to have paid into its treasury any surplus interest upon the school fund above four and one-half per cent, and the county is authorized by statute to retain such sum for the purpose of indemnifying it for the cost of handling and loaning the school fund, and for any losses which the county may be required to make good.

A careful reading and consideration of the statute relating to the management of the school funds of the state, confirms me in the position taken in my former letter; that is, that the county is required to bear the expenses of all legal proceedings in relation to the school fund, and that no part of such fund can be applied to the payment of any of such court costs or expenses. I can reach no other conclusion in the case under consideration than that the county must account to the state for the entire amount of the sale of the land referred to.

I am, Yours very truly,

CHAS. W. MULLAN.

BOARD OF HEALTH--VACCINATION--The state board of health may require children attending the public school to be vaccinated when there is a threatened or actual epidemic of small pox.

Des Moines, March 14, 1905.

MR. S. B. SNYDER,
Council Bluffs, Iowa.

DEAR SIR—In reply to your favor of the 10th instant, I beg leave to call your attention to section 2572, as the same appears in the code supplement. This section, I think, gives the local board of health full power to enforce the regulations of the state board of health, and to call upon the police authorities to aid them in enforcing such regulations.

The regulation of the state board of health requiring children attending public schools to be vaccinated, can be enforced only where there is a threatened or actual epidemic of smallpox; but if such epidemic exists or is threatened, I think there is no doubt of the power of the local board of health to require all children attending the public schools to be vaccinated. Wherever the question

has arisen in courts of last resort, that power has been declared to exist. If the school board refuses to act or to take the proper steps to enforce the regulation, the local board of health may act and take such steps as are necessary to enforce the same.

I am, Yours very truly,

CHAS. W. MULLAN.

INTOXICATING LIQUORS—SALE OF IN RELATION TO INTERSTATE COMMERCE—It is not a violation of the prohibitory liquor law of this state to solicit orders for intoxicating liquors to be shipped by a nonresident firm to purchasers residing in Iowa.

Des Moines, March 15, 1905.

HON. G. L. SCOVILL,

Malcom, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 14th instant. In reply will say that 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 may suggest, however, that under the decisions in the cases of the *State v. American Express Company* and *State v. Adams Express Company,* a dealer in intoxicating liquors residing in another state has the right to ship liquors to customers residing in the state of Iowa, C. O. D., and the express company must deliver the liquors so shipped to the consignee.

Under the decision of the supreme court of this state in the case of the *State v. Hanaphy,* 117 Iowa, 15, it is held that it is not an offense against the prohibitory liquor laws of this state to solicit orders for intoxicating liquors to be shipped by a firm transacting business in another state, to purchasers residing in Iowa.

In *State v. Hutchins,* 74 Iowa, 20, it is held that the statute does not forbid the giving away of intoxicating liquors except as done as an evasion of the penalties for selling or as a subterfuge to conceal unlawful sales; except where liquors are given to minors or to persons in the habit of becoming intoxicated, the exception being contained in section 2403 of the code as amended by the acts of the twenty-eighth general assembly.

If the person referred to by you has been guilty of giving intoxicating liquors to minors or to persons in the habit of becoming intoxicated, he is subject to the penalty provided for in section 2403 of the code; but under the facts as given in your letter I do not see how he can be reached under any other provision of the statute.

I am, Yours very truly,

CHAS. W. MULLAN,

MUNICIPAL CORPORATION—EXTENSION OF CORPORATE LIMITS—EFFECT ON BOUNDARIES OF SCHOOL DISTRICT—When the corporate limits of any city or town are extended outside an existing independent school district, the boundaries of such independent district are also correspondingly extended.

Des Moines, March 20, 1905.

MR. W. F. GOLTRY,
Russell, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 15th instant. In reply will say that 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, however, call your attention to the provisions of the statute governing questions of the character of that submitted in your letter.

Section 615 of the code provides that any city or town may have its limits enlarged by resolution of the council, the question of such extension being submitted to a vote of the electors of the city or town, including the residents of the territory proposed to be incorporated within the city or town limits.

Section 2793-a, which appears upon page 321 of the supplement to the code, provides that when the corporate limits of any city or town are extended outside the existing independent district, the boundaries of such independent district or districts shall also be correspondingly extended; that is, when a city or town extends its municipal limits, the boundaries of the independent school district of such city or town are correspondingly extended, and the territory included within such extension becomes a part of the independent school district of the city or town, the boundaries of which are so extended.

Section 622 of the code, and those following, provide for severance of territory from cities and towns where the inhabitants of such territory do not wish the lands owned by them to become a part of the municipal corporation. A perusal of the sections referred to will give you all of the information which you desire upon the subjects of your letter.

I am, Yours very truly,

CHAS. W. MULLAN.

COLLATERAL INHERITANCE TAX—Real estate located outside of the state of Iowa is not subject to collateral inheritance tax when the fee therein passes directly from the decedent to collateral heirs.

Des Moines, March 24, 1905.

HON. J. L. CARNEY,

Marshalltown, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 23d instant. In reply will say that the construction which has been given section 1467-b of the

supplement to the code is that real estate located outside of the state of Iowa is not chargeable with the collateral inheritance tax where the fee of such real estate passes directly from the decedent owner to the collateral heirs, and is not by the provisions of the will converted into personalty and distributed as such.

I call your attention to the provisions of the section referred to which is in these words: "Except as to property passing to persons, corporations and societies exempted by section 1467 of the code from the collateral inheritance tax, and real property located outside of the state passing in fee from the decedent owner", the tax imposed under chapter 4 shall be assessed, etc.

The collateral inheritance tax is a tax upon succession rather than upon property, and the title of property must pass under the laws of descent of this state to make it chargeable with the tax. I am,

Yours very truly,

CHAS. W. MULLAN.

ELECTIONS—CANVASS OF THE BALLOTS—The statutory provision fixing the time within which the board of canvassers of an election must canvass the vote, is directory and not mandatory.

Des Moines, March 30, 1905.

MR. JOHN CARMICHAEL,
Richland, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 29th instant.

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 suggest, however, that the time fixed by the statute within which the board of canvassers of an election must canvass the vote and declare the result, is directory and not mandatory, and that a canvass and declaration of the result of the election after the time fixed by statute is valid.

It was the duty of your board, under the provisions of section 1169 of the code, after a canvass of the ballots had disclosed that there was a tie vote upon the office of mayor, to determine by lot which one of the persons having the highest number of votes should be declared to have been elected. A failure upon the part of the board to determine that question by lot as provided by statute does not create a vacancy in the office, and I would suggest that the board be called together at once and, if practicable, at the place where the original canvass was made, and that the question be determined by drawing one of the two names from a receptacle in the manner provided by the section referred to; that such drawing and all proceedings connected therewith be public, and after it is determined which one of the two candidates is elected in the manner provided, a supplemental return be made by the election board showing that the drawing has taken place in accordance with the provisions of the statute, and declaring the result thereof, and that such supplemental return be made to the officer to whom the original return was delivered. I am,

Yours very truly,

CHAS. W. MULLAN.

COMMISSION OF PHARMACY—GRANTING OF CERTIFICATE WITHOUT EXAMINATION—A pharmacist registered without examination forfeits his registration when he voluntarily severs his connection with the drug business for a period of two years at the place designated in the certificate.

Des Moines, April 3, 1905.

B. F. KELTZ,
Commissioner of Pharmacy,
Des Moines, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of recent date submitting to me the following facts and requesting my opinion thereon:

It is shown by the records in the office of the commissioner of pharmacy that one J. F. Wall was duly registered as a druggist and pharmacist on the 31st day of July, 1880; that no renewal was ever requested by the certificate holder and the certificate itself is marked forfeited.

The holder of said certificate now requests that a new certificate be granted him and the question presented in this brief statement of facts is, whether the commission is legally empowered, or may in the exercise of discretion grant to petitioner the certificate in question.

Prior to the passage of chapter 75, acts of the 18th general assembly (1880) known as the Iowa pharmacy law, the petitioner was engaged in the business of pharmacy and by virtue of the provisions of section 4 of said act, he was registered by the then commissioners of pharmacy without examination, and a certificate of registration was duly issued to him.

Section 4 of said act provides in substance that the commissioners of pharmacy shall register without examination as registered pharmacists, all pharmacists and druggists who are engaged in business in the state of Iowa at the time of the passage of this act, as owners or

principals of stores or pharmacies for selling at retail, compounding or dispensing drugs, etc., provided that in case of failure or neglect on the part of any such person to apply for registration within sixty days after notification, such person shall undergo an examination as provided for in section 5 of the act.

A reading of the original pharmacy law clearly shows that it was not the intention of the legislature to deprive persons engaged in the business as pharmacists at the time of its enactment, of the right to continue their business. Their status as druggists at the time of the enactment of the law entitled them to registration. In effect it was a recognition of a vested right.

Chapter 137, acts of the 19th general assembly (1882) amended section 4 by providing as follows:

> "Druggists and pharmacists who were registered without examination forfeit their registration when they have voluntarily sold, parted with or severed their connection with the drug business for a period of two years at the place designated in certificate of registration. Should such party who has thus forfeited his registration wish to re-engage in the practice of pharmacy, he is required to be registered by examination as per section 5. Every registered pharmacist who desires to continue his profession, shall on or before the 22d day of March of each year, pay to the commissioners of pharmacy the sum of one dollar for which he shall receive a renewal of his certificate, unless his name has been stricken from the register for a violation of law."

The facts in the instant case show that the petitioner has at no time complied with the requirements of the law, and it was for this reason that the commissioners of pharmacy properly considered his certificate void, and accordingly marked it forfeited upon the register.

Under the statute enacted by the 19th general assembly providing that pharmacists who were registered without examination forfeit their registration when they voluntarily sever their connection with the drug business for a

period of two years at the place designated in the certificate, it is my opinion that any druggist who has thus forfeited his registration and who wishes to re-engage in the practice of pharmacy, may be registered only by examination as provided by section 2589 of the code.

In further support of this opinion, I direct your attention to the case of *Braniff v. Weaver,* et al, Commissioners of Pharmacy, 72 Iowa, 641.

Yours very respectfully,

LAWRENCE DEGRAFF.

ELECTIONS—THE WORDS "QUALIFIED ELECTOR" CONSTRUED—The term "qualified elector" is held to mean a person entitled to vote at all general elections, unless the statute specifically uses it in a different sense.

Des Moines, April 11, 1905.

MR. J. M. WILSON,
Centerville, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your esteemed favor of the 7th instant. In reply will say that 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, however, suggest—

(1). That it can hardly be said that women fall within the definition of the words "qualified elector", as used in section 643 of the code. The fact that they may under the provisions of the statute vote at certain elections where the question of the issue of bonds or the increase of taxation is involved, does not constitute them qualified electors. Their right to vote is limited, while the words "qualified elector", as used in the section referred to,

must be held to mean persons who are entitled to vote at all general elections held for the election of officers. Under this view I think a woman is not eligible to the appointment of city clerk.

(2). I think it is a well settled proposition of law that the acts of any officer de facto are valid, and although the person filling the office and performing its duties may be ineligible thereto, yet, so long as he is in fact an officer, the legality of his acts cannot be questioned.

I am, Yours very truly,

CHAS. W. MULLAN.

BOARD OF SUPERVISORS—POWER TO GRANT A FRANCHISE—A board of supervisors has no right or authority to grant a franchise to construct and maintain poles and wires in a public highway for the purpose of conducting electricity.

Des Moines, April 11, 1905.

HON. W. M. STRAND,
Decorah, Iowa.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 7th instant.

I know of no statute bearing upon the question of the right of a board of supervisors to grant a franchise to construct and maintain poles and wires in a public highway for the purpose of conducting electricity for motive and lighting purposes. Section 1482 of the code gives to the board of supervisors of the county general supervision over the roads, and power to establish, vacate and change them as the interest of the public shall demand; but I doubt their power to permit them to be used for other purposes than that of general public travel.

Another question which would arise, even if the board had power to grant the right to erect and maintain such poles and wires, is whether the erection and maintenance thereof would not be an additional burden upon the land occupied as a highway which would entitle the owner thereof to damages for its use for that purpose.

I have not given the matter a very extended or careful examination, and simply write you my views as they present themselves to my mind.

I am, Yours very truly,

CHAS. W. MULLAN.

SHERIFFS—FEES IN JUSTICE COURTS—The fees received by a sheriff for services preformed in a justice court must be accounted for by him and added to the fees which he receives in the district court.

Des Moines, April 19, 1905.

HON. A. A. KUGLER,
Osage, Iowa.

DEAR SIR—I beg leave to acknowledge the receipt of your favor of the 8th instant.

Without going into the question contained in your letter at length, I will call your attention to a provision contained in subdivision 23 of section 511, as the same appears in the code supplement, the provision being this:

> "When sheriffs perform official duties in justices' courts, their fees shall be the same as allowed constables."

This provision fixes the fees which sheriffs are allowed to charge for services performed in justice's courts, and such fees thereby become a part of the compensation of the sheriff as fees which are earned for services in the district court.

Section 510-a of the code supplement provides:

> "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, be reported to the board of supervisors and paid into the county treasury."

Under these provisions and under the other provisions of section 510, it seems clear that whatever fees are received by a sheriff for services performed in a justice's court, must be accounted for by him, and added to the fees which he receives for services in the district court for the purpose of determining whether the fees so received by him equal the amount of compensation to which he is entitled under section 510-a; and if such fees do not in the aggregate equal the amount of compensation to which he is entitled, the difference must be paid to him out of the county treasury, as provided by the section referred to. I am,

Yours very truly,
CHAS. W. MULLAN.

OFFICIAL NEWSPAPERS—DEFINITION OF—It is held that an official newspaper is one which has general circulation among the people without regard to class, vocation or calling and is devoted to the gathering and dissemination of current events.

Des Moines, June 5, 1905.

MR. CARL W. ROSS,
Iowa City, Iowa.

DEAR SIR—I am in receipt of your favor of the 2d instant. In reply will say that 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, however, refer you to some of the cases bearing upon the question of what is and what is not a newspaper within the meaning of the statute.

It is difficult to determine with clearness and exactness what are and what are not newspapers in the legal acceptance of the term, and to distinguish such papers from the numerous publications devoted to some special purpose and which circulate only among a certain class of people and are not within the purview of the statutes requiring publication of legal notices. The daily and weekly newspapers common to all parts of the country of general circulation among the people, without regard to class, vocation or calling, devoted to the gathering and dissemination of news of current events, are without doubt newspapers within the meaning of the statute requiring publications to be made in newspapers of general circulation. On the contrary, many publications such as literary, scientific, religious, medical and legal journals, which are obviously intended for but one class of people, and that class a small part of the entire public, are not newspapers within the legal and ordinary meaning of the word.

Hanscom v. Meyer, 60 Neb., 68; 48 L. R. A. 409;
Rosewater v. Pinzenscham, 38 Neb., 835; 57 N. W., 563;
United States v. Burnell, 75 Fed., 824;
Kellogg v. Carico, 47 Mo., 157;
Beecher v. Stevens, 25 Minn., 146.

I am, Yours very truly,
CHAS. W. MULLAN.

MEANDERED STREAMS—TITLE TO LANDS BORDERING THEREON—The riparian owner of a meandered stream takes title to the land to the ordinary high water mark.

Des Moines, June 13, 1905.

MR. J. FRANK JAQUA,
Humboldt, Iowa.

DEAR SIR—In answer to your favor of the 9th instant, I will say that 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, and any suggestion made in this letter must not be taken as such an opinion.

There was no reservation by the state along the banks of the Des Moines river when the land, originally granted by the government to the state for the purpose of making that river navigable, was granted by the state to the Des Moines River Navigation Company. Wherever the stream was meandered, the riparian owners take the title to the land to the ordinary high water mark of the river. They do not own the bed of the stream or its banks from the ordinary high water mark upon one side to the ordinary high water mark upon the other.

The supreme court of Iowa has indicated in at least two cases that the bed of an unnavigable meandered stream from the ordinary high water mark upon one side to the ordinary high water mark upon the other is in the United States government. These cases, however, were early decisions of the court and the soundness of the proposition has since been doubted, and the question of the ownership of the bed of such streams is a somewhat vexed one.

I am, Yours very truly,

CHAS. W. MULLAN.

TAXATION—DOGS—CODE SECTIONS 457 AND 458 CONSTRUED—Dogs are not listed as property that is taxable for state and county purposes, and a special tax assessed against the owner, goes into the general county fund.

Des Moines, June 26, 1905.

HON. A. B. BARCLAY,
Wall Lake, Iowa.

DEAR SIR—I beg leave to acknowledge the receipt of your favor of the 23d instant.

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 a matter personal to you, briefly give you my views thereon.

Under the provisions of sections 457 and 458 of the code, dogs are not listed as property which is taxable for state and county purposes. A special tax is assessed against the owner of dogs which goes into the general county fund. Such tax has no relation to their value and is not based upon valuation.

Under this view there is no conflict between sections 457 and 458 and section 889 of the code, which gives to the council of any city or town power to levy and collect a tax on dogs and other domestic animals not included in the list of taxable property for state and county purposes.

I am, Yours very truly,

CHAS. W. MULLAN.

PUBLIC SCHOOLS—USE OF THE BUILDING BY A SECTARIAN SCHOOL—A board of directors may not by resolution make disposition of any school house or permit the building to be used for sectarian school purposes, unless the question has been submitted to the voters at the annual school meeting.

Des Moines, June 29, 1905.

HON. JOHN F. RIGGS,

Superintendent of Public Instruction.

DEAR SIR—Your favor of the 27th instant received in which you asked an official opinion upon the following question:

> "May the board of directors of an independent school district lawfully permit the use of a public school building in the district for the purpose of holding therein a Norwegian sectarian school?"

It appears from the statement of facts giving rise to this question that those in charge of the sectarian school consulted the directors and received their permission to use the building; that the board did not act officially in granting this request; that the question was not submitted to the school electors at the annual meeting; nor was anything done except securing the consent of the individual members of the board.

It is quite apparent from this brief statement of the facts that the action taken was irregular and that no right was conferred upon the Norwegian sectarian school to use the building in question for conducting said school.

Section 2749 of the code provides:

> "The voters assembled at the annual meeting shall have power: * * * 2. To direct the sale or make other disposition of any schoolhouse or site or other property belonging to the corporation and the application to be made of the proceeds of such sale. * * * 4. To instruct the board that school buildings may or may not be used for meetings of public interest."

The above provisions clearly indicate that the board may not by resolution make disposition of any schoolhouse or other property belonging to the corporation, or permit

the school building to be used unless the question has been submitted to the voters at the annual school meeting.

It is a rule of statutory construction that if any particular thing is declared essential to the validity of an act, the statute is held to be mandatory.

Goerdt v. Trunn, 118 Iowa, 207.

The question also arises whether a public school building may be used for sectarian school purposes. It has been determined by the Iowa supreme court that the electors of a school district may legally permit the schoolhouse in the district to be used for the purposes of religious worship and Sunday Schools.

Townsend v. Hagan, 35 Iowa, 194.

In opinion it is said:

> "The statute confers authority on the electors, when legally assembled 'to direct the sale or other disposition to be made of any schoolhouse * * * that may belong to the district. * * * They may sell or lease it as they think proper, or permit it to be used for any proper purpose. * * * Their authority in the premises is subject to the control of the electors of the township.' * * * The position of appellant's counsel is that the electors have no power to permit the use of the schoolhouses for any purpose, except for the use of the public schools. If this be correct, then the keeping of a select school in a public schoolhouse would be prohibited, although it be conducted in all respects as a public school.
>
> "We have seen that the statute confers the power on the electors of the district, when lawfully assembled, to make such disposition of the schoolhouses as they may deem right and proper. They may permit any reasonable and proper use of them, which, in their discretion, may be determined upon."

The principles affirmed in the Hagan case were approved in *Davis v. Boget,* 50 Iowa, 11. In the latter case it was also contended that the use of a public school building for such purposes was in conflict with section 3, article 1

of the state constitution; in that the use of a public schoolhouse for religious worship, or sectarian purposes, is indirectly compelling the tax payer to pay taxes for the building or repairing of places of worship. In opinion it is said:

> "We think that the use of a public school building for Sabbath schools, religious meetings, debating clubs, temperance meetings and the like, and which of necessity must be occasional and temporary, is not so palpably a violation of the fundamental law as to justify the courts in interfering. Especially is this so, where as in the case at bar, abundant provision is made for securing any damages which the tax payer may suffer by reason of the use of the house for the purposes named.
>
> "We may further say that the use for the purposes named is but temporary, occasional and liable at any time to be denied by the district electors, and such occasional use does not convert the schoolhouse into a building for worship within the meaning of the constitution."

We believe that the foregoing makes answer to the propositions submitted for determination, and that the school board in question can lawfully act in accordance with the principles stated.

Yours very respectfully,

LAWRENCE DEGRAFF.

INTOXICATING LIQUORS—SALE OF BY PHARMACISTS—General principles of law applicable thereto.

Des Moines, July 6, 1905.

MR. CHARLES W. PHILLIPS,

Secretary Pharmacy Commission.

MY DEAR SIR—I am in receipt of your request for a statement of legal principles governing the sale of intoxicating liquors by pharmacists, and in reply thereto respectfully submit the following:

The sale of intoxicating liquor by a pharmacist is a special privilege granted to him to be exercised only in strict compliance with the requirements of the statute, and it is his duty to know that he brings himself within the law. He sells at his peril. Our supreme court has said to hold otherwise would be to open wide the door for the evasion of this statute and give it a meaning at variance with its intent and purpose.

State v. Swallum, 111 Iowa, 39;
State v. Harris, 122 Iowa, 78.

A registered pharmacist has the right to compound and sell drugs and medicines even though they contain intoxicating liquor, but he is not privileged to sell any preparation or compound, intoxicating in character, that might be used as a beverage.

State v. Gregory, 110 Iowa, 626.

Section 2385 of the code which governs the sale of liquors by a pharmacist, reads in part as follows:

> "Registered pharmacists * * * may buy from permit holders intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage; but nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound under any name, form or device, which may be used as a beverage and which is intoxicating in its character."

Section 2394 of the code provides that the request of the applicant for the purchase of intoxicating liquors, must state "the actual purpose for which the request is made and for what use desired".

Our supreme court has said:

> "The request for liquor must state the actual purpose for which the request is made and for what use desired. If for medicinal use, it must so state; if for chemical or mechanical purposes, the exact purpose and use for which required must be specified by the purchaser. No other construction can be given the

statute unless we eliminate therefrom the word 'specified' which was placed therein for the evident purpose of guarding against deception and fraud in the sale of liquor."

State v. Swallum, 111 Iowa, 39.

In brief, the permit holder may sell intoxicating liquors for such purposes as are specified in the statute and for no other. Persons holding permits are subject to the penalties prescribed for owning and keeping liquors with unlawful intent, or for keeping and maintaining a place in which such liquors are sold or kept for sale unlawfully.

State v. Douglass, 73 Iowa, 279;
State v. Webber, 76 Iowa, 686.

When proper requests have been made for the purchase of intoxicating liquor of a permit holder, the question of the seller's good faith in making the sale is an issue, and that question is one of fact for the jury.

State v. Cummins, 76 Iowa, 136;
State v. Huff, 76 Iowa, 203;
State v. Aulman, 76 Iowa, 628;
State v. Gregory, 110 Iowa, page 626.

If it can be shown that the liquor sold by a pharmacist is so compounded with other substances as to lose its distinctive character as an intoxicant and to be no longer desirable for use as a stimulating beverage and is in fact a medicine, then the law has not been violated in making the sale.

State v. Gregory, 110 Iowa, page 627.

Whether or not a pharmacist made sales of liquor as a medicine, it is competent to show the frequency of the sales, the appearance of the persons to whom the sales were made, whether the sales were made upon a prescription and any other fact which would tend to establish the mala fide character of the sale in question.

State v. Huff, 76 Iowa, 200.

A purchaser from the pharmacist may be interrogated as to the object of the purchase and may be questioned for the purpose of showing that the alleged object was a mere pretense.

State v. Cummins, 76 Iowa, 133.

A pharmacist cannot plead as a defense his lack of knowledge that the liquor sold is intoxicating.

State v. Lindoen, 87 Iowa, 702.

Nor can he defend by showing that the liquors sold were for an innocent purpose.

Craig v. Plunkett, 82 Iowa, 474.

Any liquor that contains alcohol is defined as an intoxicating liquor (Code section 2382), and such liquor is intoxicating in law regardless of the quantity to be used or the extent to which it is or may be diluted.

State v. Yager, 72 Iowa, 421.

In the recent case of *State v. Colvin et al,* 103 N. W., 968, the supreme court held that any liquor containing alcohol and used as a beverage is an intoxicating liquor. This is true regardless of the per cent of alcohol or whether or not the liquor is in its effect intoxicating. Sufficient to show that the liquor or liquid in question, contains some per cent of alcohol and is used as a beverage. This decision does not mean that every liquor containing alcohol is necessarily an intoxicating liquor and its sale prohibited by the statute, for it might be shown that the liquor in question was so compounded with other substances as to be no longer desirable for use as a stimulating beverage, and is in fact medicine. Under such conditions the sale is not unlawful.

State v. Laffer, 38 Iowa, 422;
State v. Gregory, 110 Iowa, 627.

In other words, the state would have the burden of showing in a prosecution of this character, that the liquor contained some per cent of alcohol and was or might be used as a beverage. Both facts would be mere matters of evidence upon the trial.

In conclusion it may be stated that laws regulating the sale of intoxicating liquors are regarded as police regulations, and in this state, prohibition is the rule and permission to sell is the exception; and he who claims the right to sell must bring himself within the exception.

Yours very respectfully,

LAWRENCE DEGRAFF.

CORONER— HOLDING OF INQUEST—It is the duty of the coroner to hold an inquest only where the person is supposed to have died by unlawful means.

Des Moines, July 7, 1905.

HON. JOHN J. HESS,

Council Bluffs, Iowa.

DEAR SIR—In reply to your favor of the 3d instant will say that section 515 of the code apparently defines the duties of a coroner as to holding inquests upon deceased persons. The language of the section indicates that it is his official duty to hold an inquest only where the person is supposed to have died by unlawful means, or in other cases required by law.

Section 2303 which applies to insane persons, provides:

> "If a death shall occur suddenly and without apparent cause, or a patient dies and his relatives so request, a coroner's inquest shall be held as provided by law."

This, I think, is the only provision for holding an inquest upon deceased insane persons, except where it is believed they have died by unlawful means.

Section 516 provides that the coroner shall hold an inquest and make a careful inquiry into the cause of the death of a person connected with the working of a coal mine.

I know of no provision of the statute requiring the coroner to hold an inquest upon the body of a deceased insane person, where such person has died from natural causes, either in a public or private hospital.

I am, Yours very truly,

CHAS. W. MULLAN.

INTOXICATING LIQUORS—SALE OF MALT LIQUORS BY PHARMACISTS—Permit holders may not lawfully sell or dispense malt liquors, nor buy the same for the purpose of compounding medicines, tinctures or extracts.

Des Moines, July 10, 1905.

FRED RUSSELL, *Esq.*,

Iowa State Pharmacy Commission.

DEAR SIR—Your favor of the 7th instant received in which you ask an official opinion upon the following question:

> "Can a registered pharmacist, with or without a permit, sell malt liquors containing any alcohol, if it is sold not as a beverage, but as a medicinal preparation?"

In reply thereto I respectfully submit the following answer:

The sale of intoxicating liquor by a pharmacist is a special privilege granted to him to be exercised only in strict compliance with the requirements of the statute.

Section 2385 of the code provides as follows:

> "Persons holding permits may sell and dispense intoxicating liquors, not including malt liquors, for pharmaceutical and medical purposes, and to permit holders for use and re-sale by them, only for the purposes authorized in this chapter. * * * Registered

pharmacists * * * may buy from permit holders intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures and extracts that cannot be used as a beverage; but nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound under any name, form or device, which may be used as a beverage and which is intoxicating in its character."

Under the provisions quoted, it is quite apparent that the above question must be answered in the negative. The statute is plain and in fact does not require interpretation. Stripped of all verbiage the statute says that permit holders may not lawfully sell or dispense malt liquors, and that registered pharmacists may not buy malt liquors for the purpose of compounding medicines, tinctures, etc. This is the plain intendment of the statute and the exception therein specifically excludes the sale of malt whether the same is for medicinal purposes or otherwise.

Yours very respectfully,

LAWRENCE DEGRAFF.

DRAINAGE—ASSESSMENTS OF BENEFITS TO HIGHWAYS—Benefits accruing to highways by the construction of any improvement under the drainage act must be paid from the road funds of the district.

Des Moines, August 5, 1905.

HON. C. W. CRIM,
Estherville, Iowa.

DEAR SIR—Your favor of the 26th ultimo came to hand several days ago.

I have gone carefully over the provisions of the drainage law relating to the assessment of benefits to highways thereunder, having in mind at the same time the provisions of the road law and the control of the road funds by the trustees of the township.

I can reach no other conclusion than whenever any highway within the drainage district is beneficially affected by the construction of any improvement in said district under the drainage act, it is the duty of the commissioners to classify and assess the benefit accruing to the highway in the same manner as benefits to private property are classified and assessed under the provisions of the act. The controlling idea was clearly in the minds of the legislators at the time of the passage of the drainage act, that the benefits accruing to highways should be paid from the road funds of the district, and it may be that they did not carefully consider the possible result of this particular provision.

It is possible that in the practical operation of the law the various road funds of the state will not be so depleted as to cause serious inconvenience to the township trustees or prevent them from keeping the roads of the township in repair. In any event I think the construction suggested must be given the statute, and that method followed under the existing provisions thereof.

I am, Yours very truly,

CHAS. W. MULLAN.

INSANITY COMMISSION—JUDICIAL FUNCTIONS OF—The finding of the board of commissioners of insanity is a judicial determination as to the sanity of the patient, the certificate of the physician appointed by the board to the contrary notwithstanding.

Des Moines, August 9, 1905.

MR. H. A. KINNAMAN,
Keokuk, Iowa.

DEAR SIR—I am in receipt of a letter signed by you, Theodore A. Craig and Ed. S. Lofton, commissioners of insanity for Lee county, in which you ask me whether the

board of commissioners of insanity has the power to commit a patient to a state hospital where the examining physician certifies that such patient is not insane.

Without going into the question at length, I will say that the board of commissioners of insanity, appointed under the provisions of section 2261 of the code, is a body invested with judicial functions; and that finding of such board upon the evidence authorized by the provisions of section 2265 of the code, is a judicial determination as to the sanity or insanity of the patient, so far as his commitment to a state hospital is concerned.

The certificate of the physician appointed by the board to make an examination of the condition of the patient, is not binding upon the board. It is in the nature of evidence required by statute which the board should consider with the other evidence adduced upon the investigation.

If upon all of the evidence the board finds that the patient is insane, he should be committed to a state hospital, although the certificate of the physician is to the effect that he is not insane.

A certified copy of the physician's certificate should accompany the warrant of commitment, and be delivered to the superintendent of the hospital by the sheriff or other person who is charged with conveying the patient to such hospital. That is, certified copies of all of the records required by section 2266 should accompany the warrant in all cases where a commitment is ordered.

I am, Yours very truly,

CHAS. W. MULLAN.

SCHOOL DISTRICT—ISSUANCE OF BONDS—CONDITION OF—School bonds may not be lawfully issued for any purposes except those specified in section 2812 of the code.

Des Moines, August 10, 1905.

MR. HUGH H. CRAIG,
Keokuk, Iowa.

DEAR SIR—Your favor of the 28th ultimo has been on my desk several days, but pressure of other business has prevented me from answering the same before.

While the question therein asked 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 suggest that I see no way under the provisions of the statute for your district to issue bonds for the outstanding indebtedness referred to, except upon a vote of the electors of the district.

Section 2812 specifically provides the purposes for which school bonds may be issued viz: (1) To pay any judgment against the corporation; (2) any indebtedness under bonds lawfully issued and redeemable by their terms; (3) school tax funding bonds to the extent of any lawful schoolhouse tax duly authorized by the voters; (4) school building bonds for the purpose of providing funds for the erection and completion and improvement of schoolhouses and the purchase of sites therefor.

School bonds may not be lawfully issued for any purposes other than those specified in the section referred to. If the electors of your district at a regular or special meeting called for the purpose should vote a schoolhouse tax sufficient to pay off the outstanding indebtedness, bonds could then be issued in anticipation of the collection of such tax, and the proceeds thereof used to discharge the indebtedness. I see no other way of meeting the conditions. I am,

Yours very truly,
CHAS. W. MULLAN.

DENTISTRY—CERTIFICATE TO PRACTICE—The board of dental examiners has the power in its discretion to restore a certificate forfeited by the holder thereof.

Des Moines, August 10, 1905.

DR. E. D. BROWER,
Le Mars, Iowa.

DEAR SIR—I am in receipt of your favor of the 5th instant enclosing a letter of Mr. J. Hilsinger, relating to the right of Dr. Rebman to have his certificate to practice dentistry in the state of Iowa restored to him by the state board of dental examiners.

Under the original dental act a certificate which was forfeited by the holder could only be restored upon the holder thereof paying to the dental board of examiners the sum of twenty-five dollars. This statute recognized the power of the state board of dental examiners to restore a forfeited certificate, and placed a restriction upon such power. The act of 1890, repealing the former law, placed no such restriction upon the state board of dental examiners, and under the present law I think the board has the power in its discretion to restore a certificate which has been forfeited by the holder thereof.

I am, Yours very truly,

CHAS. W. MULLAN.

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LIMITATION ON INDEBTEDNESS THEREOF—It is held by the supreme court of Iowa that the constitutional provision that no municipal corporations hall incur indebtedness exceeding five per cent of its property, applies to the actual value of the property as returned by the assessor.

Des Moines, August 21, 1905.

MR. C. W. STUART,
Clarinda, Iowa.

DEAR SIR—The case which you refer to is that of *Halsey & Co. v. The City of Belle Plaine.* The opinion was handed down by the supreme court on the 13th day of July.

The effect of the holding of the court is that the constitutional provision that no municipal corporation shall incur an indebtedness exceeding five per cent of the value of its property, applies to the actual value as returned by the assessor, and not the taxable value or twenty-five per cent of the actual value, under the present law.

Under this decision all municipal indebtedness which does not exceed five per cent of the actual value of the property of such corporation, is valid, although it exceeds five per cent of the taxable value of such property.

I am, Yours very truly,

CHAS. W. MULLAN.

INSANE—PAROLE OF PATIENTS—There is no statutory provision authorizing a reference of an application for the parole of an insane patient by the board of control to the county board of commissioners of insanity.

Des Moines, August 25, 1905.

DR. W. S. DEVINE,
Marshalltown, Iowa.

DEAR SIR—I am in receipt of your favor of the 21st instant.

I find no direct authority in the statute for the reference of an application for the parole of an insane patient to the county board of commissioners of insanity, although such has been the practice of the board of control for some time. It appears to have been a matter of comity between the board of control and the various county boards.

There being no direct authority in the statute for such act on the part of the board of control, and no provision of the statute fixing the compensation of the county commissioners for passing upon such application for parole, it follows that they are not entitled to charge or receive the statutory fee fixed by section 2309 of the code for performing the duties of their office as fixed by statute.

I am, Yours very truly,

CHAS. W. MULLAN.

MEDICAL PRACTICE ACT—EXEMPTION OF PHYSICIANS FROM EXAMINATION—PROVISIONS OF THE LAW CONSTRUED.

Des Moines, September 6, 1905.

HON. ALBERT W. HAMANN,

Davenport, Iowa.

DEAR SIR—In answer to your letter of August 29th, I will say that I am in receipt of a letter from Dr. Kennedy, secretary of the state board of medical examiners, giving the history of the Palmer case, and I find that Mr. Palmer does not now and never has either applied for or held a certificate to practice medicine or osteopathy in the state of Iowa.

Section 8 of the original act passed by the twenty-first general assembly, which provided for the examination of physicians and the issuance of certificates to practice medicine in the state of Iowa, exempted from the provisions of the act physicians who had, at the time ot its passage, been in the practice of medicine in the state for five consecutive years, three of which had been in one

locality; and further provided that such physician should furnish the state board of medical examiners satisfactory evidence of such practice, and thereupon procure a certificate authorizing them to practice medicine in the state.

Section 9 of the act prohibited any person from practicing medicine or surgery in the state unless he had complied with the provisions of the act.

This law continued in force until the adoption of the code, and section 2579 of the code is a re-enactment of section 8 with but slight changes. That section, after defining who shall be deemed a practicing physician within the meaning of the act, exempts certain persons from its provisions and among them physicians who have been in the practice in this state for five consecutive years, three of which shall have been in one locality.

My view of this provision is that it is a re-enactment of section 8 of chapter 104 of the acts of the twenty-first general assembly, and that the physicians who are exempted by section 2579 of the code must have been in the practice of medicine in the state of Iowa five years prior to the fourth day of July, 1886.

It cannot be said that any person could acquire a right to practice medicine in the state of Iowa after the passage of chapter 104 of the acts of the twenty-first general assembly, without complying with its provisions, as any attempt to practice medicine in the state without complying with the provisions of that chapter was a criminal offense for which the offender could be arrested, fined and punished. And it cannot be said that the legislature intended that any person, who had been practicing medicine in violation of the provisions of chapter 104 of the acts of the twenty-first general assembly, and who by so doing had committed a criminal offense, should thereby gain the right to practice under the exemption provided in section 2579 of the code.

The true rule must be that the re-enactment of section 8 of chapter 104 of the acts of the twenty-first general assembly, as section 2579 of the code, is simply a continuance of chapter 104 in force in the state, except as amended by such re-enactment.

This view finds support in

Central Pac. R. Co. v. Shakelford, 63 Cal., 261;
People v. Sutter St. R. Co., 107 Cal., 604;
Ely v. Holton, 15 N. Y., 598;
Mudgett v. Liebes, 14 Wash., 482.

Also see, *Horn v. State,* 114 Ga., 50, where it is said:

> "In case a statute is re-enacted and some of the provisions of the old law are omitted from the new, this constitutes a repeal of the omitted provisions; but the re-enacted provisions are to be read as part of the earlier statute and not of the re-enacted one, if they conflict with another statute passed after the first but before the last act."

I am, Yours very truly,

CHAS. W. MULLAN.

COUNTY RECORDER—The county recorder must report quarterly to the board of supervisors, make an annual settlement with the board and pay over all fees received by him during the preceding year.

Des Moines, September 7, 1905.

MR. U. G. DECK,
Oskaloosa, Iowa.

DEAR SIR—The matter concerning which you write is not one upon which I can express an official opinion, unless it should be referred to me by one of the departments of the state, and perhaps should be referred by you to the county attorney who is by law your legal adviser. I will, however, make the following suggestions:

The act of the thirtieth general assembly did not change the law regarding the duty of the county recorder to report quarterly under oath to the board of supervisors, all fees

collected by him, and to make an annual settlement with the board on the first Monday in January of each year and pay into the county treasury all fees received by him, except that he is not permitted to retain any fees received, and is to be paid an annual salary as provided in chapter 21 of the acts of the thirtieth general assembly.

A fair construction of section 495 of the code, as amended by the act of the thirtieth general assembly, appears to be that the recorder must settle annually with the board of supervisors and pay over all fees received by him during the preceding year; that he must also during each quarter of the year report to the board the amount of fees which he has received. If for safety, convenience and dispatch of the business of his office, he desires to pay over quarterly the fees received by him, no objection can be made to his so doing under the provisions of the statute.

It is a well settled rule of law that no public officer can charge fees for any service performed by him, except such as are specifically fixed by statute, and section 498 of the code provides that the recorder shall charge and receive for recording each instrument containing four hundred words or less, fifty cents; and for each additional one hundred words or fraction thereof, ten cents. He is not entitled to charge or receive any fees in addition to those provided for by the section referred to.

If a deed transferring both land and town lots is recorded in the record of land deeds and also in the record of deeds of town lots, under the provisions of section 2941 of the code, I think you would be entitled to charge for recording the same in both records.

I am, Yours very truly,

CHAS. W. MULLAN.

SCHOOL BOARD—POWER TO DEFINE A SCHOOL DAY—It is within the power of the board of directors, with the consent of the county superintendent, to reduce the number of hours of the school day.

Des Moines, September 7, 1905.

MR. THEODORE SAAM,
Lake City, Iowa.

DEAR SIR—I am in receipt of your favor of the 5th instant.

I think it is within the power of the board of directors, with the consent of the county superintendent, to shorten the number of hours of a school day in any of the departments, under the provisions of section 2773, if the circumstances warrant or demand the reduction of the school hours of the day.

I am, Yours very truly,
CHAS. W. MULLAN.

COUNTY TREASURER—SETTLEMENT WITH THE BOARD OF SUPERVISORS—CODE SECTIONS 1416 AND 1458 CONSTRUED.

Des Moines, September 13, 1905.

HON. HUGO F. GOELDNER,
Sigourney, Iowa.

DEAR SIR—Replying to your favor of the 12th instant, I beg leave to say that the provisions of sections 1416 and 1458 of the code, in my opinion relate to the settlement required to be made by the board of supervisors with the county treasurer semi-annually, and the credits given him for unavailable taxes under the provisions of section 1458 do not in any wise change the character of such taxes. If any part of the taxes for which credit is given the county treasurer as unavailable, is afterwards collected, the tax so collected should be distributed among the several funds in the same manner as though it had never been credited to the county treasurer as being unavailable.

I know of no decision of the supreme court directly construing these statutes, but think they are not susceptible of any other construction than the one suggested.

I am, Yours very truly,

CHAS. W. MULLAN.

SCHOOL DISTRICTS— EFFECT OF CHANGING THE LINES OF A CIVIL TOWNSHIP ON THE BOUNDARIES THEREOF.

Des Moines, September 21, 1905.

HON. F. E. NORTHRUP,

Marshalltown, Iowa.

DEAR SIR—I beg leave to acknowledge the receipt of your esteemed favor of the 19th instant.

In answer will say that 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, however, suggest that the status of the school districts annexed to Marion township by the board of supervisors is a matter of some doubt, as there is no provision of statute governing cases of that character. The language of section 551 indicates that if the board of supervisors changes the lines of any civil township, and the lines as changed correspond with those of the congressional township, it may divide any school district or township without a vote of the electors. It also indicates that if a school district is divided, the part segregated from the township ceases to be a part of that school district.

In the case under consideration, if Marion township was organized upon the township district plan, I think there would be no doubt that the territory set off from Linn township and annexed to Marion, would become a part of such township district; but the fact that Marion township is organized upon the independent district plan leads

me to the conclusion that the territory severed from Linn and annexed to Marion must also organize as independent school districts, and become a part of the independent school district system of Marion township.

There is no doubt of the power and right of the electors of such territory to so organize, and that such an organization would be legal in every respect. If done, it will be a solution of the question.

I am, Yours very truly,

CHAS. W. MULLAN.

FISH AND GAME LAW—FEES TAXABLE TO AN INFORMANT FOR A VIOLATION OF—An informant in any prosecution for a violation of the fish and game law is entitled to a fee of five dollars upon each count upon which there is a plea of guilty or judgment of conviction.

Des Moines, October 16, 1905.

MR. W. P. STONE,
Spirit Lake, Iowa.

DEAR SIR—I am in receipt of your favor of the 14th instant. 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 suggest that the present statute contains no provision which entitles the informant to one-half of the fine imposed for violation of the game laws.

Section 2559 provides that upon conviction there shall be taxed as a part of the costs in the case a fee of five dollars to the informant, and a like fee of five dollars to the attorney prosecuting the case, upon each count upon which there is a plea or verdict of guilty and a judgment of conviction; but in no event shall this fee be paid out of the county treasury.

Section 2556, which fixes the penalty that may be imposed for a violation of the game law, provides that the person convicted shall stand committed to the county jail for thirty days, unless the fine which is imposed by the court, and the costs of prosecution, are sooner paid.

The costs of prosecution referred to in the section last named include the fee of five dollars upon each count upon which there is a conviction, which should be taxed for the benefit of the informant, and the person convicted should be required to pay both fine and costs before being released. The informant is not entitled under the statute to any part of the fine, and Mr. Blackburn cannot under its provisions have any part thereof paid to him by the county.

I am, Yours very truly,

CHAS. W. MULLAN.

CRIME—SENTENCE—ESCAPE OF PRISONER—EXTRADITION—(1) When any person escapes from a penal or reformatory institution, the period during which he is at large may not be deducted from the term of his sentence (2) Extradition will not lie for an escaped inebriate.

Des Moines, October 25, 1905.

HON. W. M. STRAND,
Decorah, Iowa.

DEAR SIR—I am in receipt of your favor of the 20th instant. In answer will say that I think the rule is that where a person is sentenced to serve a term in any penal or reformatory institution, and he escapes therefrom, and by his own misconduct prevents the execution of the sentence, in whole or in part, the period during which he is at large should not be deducted from the term of his sentence. He may be retaken, even after the time at which his term would have expired had he remained in confinement, and be compelled to serve out the term of sentence.

This rule, I think, applies to inebriates who are sentenced to a reformatory institution.

Extradition will not, in my opinion, lie for an escaped inebriate. It is authorized only in cases where a person is charged with the commission of a crime.

I am, Yours very truly,

CHAS. W. MULLAN.

CORPORATION— ASSIGNMENT OF STOCK—A corporation cannot by a by-law prohibit or restrict a stockholder therein from selling his stock to whom he pleases.

Des Moines, October 25, 1905.

HON. B. F. CARROLL,
Auditor of State.

DEAR SIR—The rule, as established by what is practically an unbroken line of authorities, is that a stockholder of a corporation cannot be prohibited or restricted from selling his stock to whom he pleases, by a by-law of the corporation. Such a by-law is of no force or effect. The authorities hold, however, that, if there is a provision in the articles of incorporation, or in the charter of the corporation, which restricts the sale of the stock by the stockholders, such an article is valid and enforcible, as the restriction arises with the corporation and is a part of its fundamental law.

I am, Yours very truly,

CHAS. W. MULLAN.

LOAN AND TRUST COMPANIES—TIME DEPOSITS—LIMITATION AS TO AMOUNT—INVESTMENT OF FUNDS—(1) A loan and trust company may incur liabilities for time deposits to any amount not in excess of its available assets exclusive of its capital. (2) There is no provision of the statute defining or prescribing the character of the investments of the funds of a loan and trust company.

Des Moines, October 27, 1905.

HON. WM. L. EATON,
Osage, Iowa.

MY DEAR EATON—I am in receipt of your favor of the 25th instant, and will briefly give you my views as to the matters therein contained.

First. As you are aware, section 1889 of the code provides that loan and trust companies may receive time deposits subject to the same limitations as are now or may hereafter be prescribed for the receiving of deposits by state banks. The limitation upon the receipt of deposits by state banks is the provision of section 1611 that the liability of a corporation shall not exceed two-thirds of its capital stock, except risks of insurance companies and liabilities of banks not in excess of their available assets, not including their capital. In other words, a state bank may incur liability for deposits in an amount equal to its available assets, not including its capital.

The provisions of section 1889 make the provision of section 1611 referred to applicable to loan and trust companies. I think there is no other provision of statute upon the question, and the conclusion must be reached that a loan and trust company may incur liabilities for time deposits to any amount which is not in excess of its available assets, not including its capital.

You are undoubtedly familiar with the provisions of chapter 65 of the acts of the thirtieth general assembly, relating to the amount of capital required for the organization of loan and trust companies.

Second. I know of no provision of the statute limiting a loan and trust company in the investment of its funds, or requiring that its funds be invested in any particular class of securities. Under the statute such companies may loan money upon real estate securities in other states, and may buy municipal bonds, county and school warrants, and securities of like character, either within or without the state of Iowa. Such investments have been constantly made for many years by loan and trust companies in this state, and I have never heard their authority to do so questioned.

I am, Yours very truly,

CHAS. W. MULLAN.

MUNICIPAL OFFICES—VACANCY IN—HOW FILLED—A vacancy in the office of mayor and all other elective offices in any city is filled by appointment by the city council thereof.

Des Moines, November 3, 1905.

MR. E. E. TRIEM,
La Porte City, Iowa.

DEAR SIR—I am in receipt of your favor of the 2d instant.

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, however, as matter of courtesy to you and to my friends at La Porte City, give you my views.

Section 1272 of the code, as amended by chapter 41 of the acts of the thirtieth general assembly, provides the manner in which a vacancy in the office of a mayor of a city or town shall be filled, as follows:

> "* *in the office of councilman or mayor of any city and all other elective offices, the city council may appoint any qualified elector to fill such vacancy, who

shall qualify in the same manner as persons regularly elected to fill such office, and shall hold office until the qualification of the officer elected to fill such vacancy, who shall be elected at the next regular municipal election."

The effect of this statute as amended is that the vacancy occurring in the office of mayor should be filled by appointment by the city council, and the person so appointed shall hold office until the next regular municipal election, and until the person chosen at that election to fill the vacancy has qualified and accepted the office to which he is elected.

The thought which appears to have been in the mind of the legislature in amending section 1272 was to dispense with a special city election for the purpose of filling a vacancy occurring in a city office, and to provide that such vacancy should be filled by appointment.

I am, Yours very truly,

CHAS. W. MULLAN.

NOTARY PUBLIC—THE SEAL—The statute prescribes the words which shall appear on the seal of a notary public and its provisions are mandatory.

Des Moines, December 4, 1905.

MR. A. E. IRVINE,
Oelwein, Iowa.

DEAR SIR—I am in receipt of your favor of the 2d instant. In answer will say that I think the statute of Iowa requires the words "Notarial Seal" to be engraved upon the seal of every notary public in the state. The statute has prescribed the words which shall appear upon such seal, and its provisions are mandatory. The engraving of other words of like import is not a substantial compliance with the provisions of the statute.

I am, Yours very truly,

CHAS. W. MULLAN.

ELECTIONS—THE AUSTRALIAN BALLOT SYSTEM—PROVISIONS OF THE LAW.

Des Moines, December 5, 1905.

MR. C. B. SLEMP,
Abingdon, Va.

DEAR SIR—In answer to your letter of the 27th ultimo, I will say that the Australian ballot is used in all general elections in this state. There never has been any complaint that the rights of the minority have not been fully protected under our system.

In cities and towns the councilmen are the election judges. In the country precincts the township clerk and township trustees are election judges, subject in both cases to the rule that all of the judges shall not be of one political party, and if all of the city or town council or the clerk and trustees of a township belong to the same political party, the law requires that one of their places shall be taken by a competent person belonging to another political party.

In cities and towns special police are appointed to preserve order and to enforce the provisions of the Australian ballot system.

No persons are, during the receiving and counting of the ballots, permitted to loiter or congregate or to do any electioneering or soliciting of votes within one hundred feet of any outside door of any building affording access to any room where the polls are held, except that three persons from each political party having candidates to be balloted for may be appointed by such party as challenging committees and may remain at the polls for that purpose, and for the further purpose of witnessing the casting and counting of the ballot.

Any person who conducts himself in a noisy, riotous or disorderly manner at or about the polls so as to disturb the election, or insults or abuses the clerks or commits a breach of the peace, must be at once arrested, either by the regular or special police or constable of the voting precinct.

Our system works very well in this state, but it is possible that it would not be successful in very large cities.

I am, Yours very truly,

CHAS. W. MULLAN.

OFFICIAL BONDS—The statute prescribes the conditions to be incorporated in an administrator's or executor's bond.

Des Moines, December 6, 1905.

HON. W. E. WALLACE,
Williamsburg, Iowa.

DEAR SIR—I am in receipt of your favor of the 5th instant.

Without going into the question which you ask at length, I will say that a careful reading of sections 1183 and 3301 of the code, and section 1177-a of the supplement to the code, confirms me in the opinion which I have always had with reference to the conditions to be incorporated in an administrator's or executor's bond; that is, that the conditions of the bond should be substantially those provided for in section 1183 of the code.

Section 3301 provides that the penalty of the bond shall be fixed by the court, and when so fixed the executor or administrator must execute and file his bond conditioned for the faithful discharge of the duties imposed upon him by law, and the conditions so imposed are those specified in section 1183, and should be incorporated in the bond.

I am, Yours very truly,

CHAS. W. MULLAN.

CLERK OF COURT— ISSUING OF MITTIMUS—It is the duty of the clerk at once when judgment of imprisonment or fine and imprisonment is entered by the court, to issue a mittimus.

Des Moines, December 8, 1905.

MR. THOS. HICKENLOOPER,
Albia, Iowa.

DEAR SIR—I am in receipt of your favor of the 8th instant, and in answer will say that while the question contained in your letter, is not a matter upon which I can give an official opinion unless it should be referred to me by one of the departments of the state, I will call your attention to the case of *Miller v. Evans,* 115 Iowa, 101 which is, I think, decisive of the question submitted. In that case it is said:

> "It was undoubtedly the duty of the clerk to issue mittimus, and of the sheriff to execute the same, promptly upon the rendition of judgment."

This statement refers to a judgment by which the defendant was sentenced to pay fine of $300 and costs of prosecution, and to stand committed to the jail of Linn county, Iowa, for a period of ninety days, unless said fine is sooner paid.

Under sections 443 and 444 of the code, it appears to be the duty of the clerk at once, when judgment of imprisonment or fine and imprisonment until such fine is paid, is entered by the court, without waiting for an order from any one, to issue a mittimus and place the same in the hands of the sheriff for execution.

I am, Yours very truly,

CHAS. W. MULLAN.

SCHOOL DISTRICTS—RESTORATION OF TERRITORY—When territory has been severed from a school district to which it geographically belongs, it may be restored by (1) a concurrence of the two boards of the respective school townships; or (2) upon a written application of two-thirds of the electors residing upon the territory, with the concurrence of the county superintendent and the board of the school corporation receiving back the territory.

Des Moines, December 9, 1905.

HON. M. X. GESKE,
Elkader, Iowa.

DEAR SIR—I am in receipt of your favor of the 5th instant, and in answer will say that section 2792 of the code provides two methods by which territory may be restored to a school district to which it geographically belongs when it has been previously severed therefrom. . .

First. By a concurrence of the two boards of the respective school townships.

Second. Upon a written application of two-thirds of the electors residing upon the territory set off or attached, with the concurrence of the county superintendent and the board of the school corporation which is to receive back the territory.

In the second method of procedure there must be a petition signed by two-thirds of the electors and the concurrence of the county superintendent, and the board of the school district which is to receive the territory.

In the case of *Johnston v. Sanborn* there was no concurrent action of the county superintendent, which was necessary, under the method of procedure pursued in that case, to transfer the territory to the school township of

Summit. The petition signed by the electors of the territory was presented to the board of directors of the independent district of Sanborn for its concurrence, and not to the county superintendent, as the law requires.

I see no conflict between the case of *Johnston v Sanborn* and the provisions of the statute.

I am, Yours very truly,

CHAS. W. MULLAN.

COUNTY ROAD FUND—EXPENDITURE OF—No part of the county road fund can be used for paying the members of the board of supervisors for committee service, nor can a contract be let to any member of the board for any portion of the work for which the tax is to be expended.

Des Moines, December 9, 1905.

HON. J. B. DUNN,
Bedford, Iowa.

DEAR SIR—I am in receipt of your favor of the 29th ultimo. In answer will say that I see no distinction between the expenditure of the county road fund levied under section 1530 of the supplement to the code, and the expenditure of any other tax levied for a special purpose by the board of supervisors under a provision of law authorizing the same. Such road fund, so far as its expenditure is concerned rests up the same footing as a bridge fund, or a special fund to be used for a particular, designated purpose.

In all such cases I think that no part of the fund can be used for paying members of the board of supervisors for committee service, nor can a contract be let to any member of the board for any portion of the work for which the tax is to be expended. Whatever is done in

the nature of overseeing, the work performed by a member of the board of supervisors must be done as a committee appointed by the board, and the compensation of such member for committee service should be paid under the provisions of section 469 of the code.

I know of no decisions bearing upon the question, but it seems to me that no other conclusion can be logically reached than that herein indicated.

I am, Yours very truly,

CHAS. W. MULLAN.

OFFICIAL BONDS—SUIT ON PRIOR TO THE EXPIRATION OF THE TERM—Suit on the bond of a county official may be instituted upon any breach of the obligation of the bond, although the term of office has not expired.

Des Moines, December 14, 1905.

HON. W. G. BLOOD,
Keokuk, Iowa.

DEAR SIR—I am in receipt of your favor of the 16th ultimo. An answer thereto has been delayed on account of extreme pressure of business.

I will briefly give you my views upon the questions contained in your letter.

(1). I think the provisions of section 337 apply to all precincts in the county alike, and that the list of jurors drawn by the board of supervisors must be drawn from all the lists taken from the poll books of the various voting precincts in the county.

(2). The question whether an action may be maintained upon the bond of a county official prior to the expiration of his term, depends very largely upon the wording of the bond. The intention of the obligor and obligee in the bond must be deduced from its language. Where the bond requires the official performance of the

duty of the obligor during his term of office, and there has been a failure to perform such duty on the part of the officer, such failure is a breach of the obligation of the bond, and action may be maintained thereon, although the term of office has not expired.

In Murfree on Official Bonds, section 497, the general rule is stated as follows:

> "The general rule is, however, as above stated, that where the guaranty is for the due performance of duty, the breach occurs, and the cause of action accrues, whenever the duty is not duly performed."

In *State v. Nevin,* 19 Nevada, 162, an action was brought upon a county treasurer's bond before the expiration of the office for a breach of its conditions, whereby he failed to retain in his possession as such treasurer the money of the county. In that case a part of the money belonging to the county had been stolen from the treasurer and his defalcation was admitted. Action was brought upon his official bond before the expiration of the term of his office, and the defense that the action was premature was urged. The supreme court of Nevada in passing upon the question said:

> "The other positions taken by appellant relative to the time when the cause of action could be commenced, are wholly untenable. Having admitted the defalcation and claimed the right to interpose the defense inserted in his answer, the state was not compelled to wait until the close of appellant's term of office before commencing an action upon his bond."

This is the only case I have been able to find which is directly in point upon the question, but the principle there announced appears to be conclusive.

(3). In a recent opinion given by me to the treasurer of state, I have held that the extension of the term of office of all officers whose terms are extended one year by the constitutional amendment, is in the nature of a new term, and that the bonds given by them for the term for which they were originally elected do not cover

such extension. Under this rule every county treasurer whose term of office is extended must give a new bond and make a settlement with the county when he enters upon the term created by the constitutional amendment, precisely as if he were entering upon a new elective term, and he must account for and deliver to himself as his successor in office all moneys which should be on hand and held by him as county treasurer.

I am, Yours very truly,

CHAS. W. MULLAN.

PUBLIC SCHOOLS—POWER OF BOARD OF DIRECTORS TO COMPEL VACCINATION—It is within the power of the school board to exclude children from the public schools who have not been vaccinated, when there is an epidemic or threatened epidemic of small pox, but there is no statute by which a local or the state board of health may compel persons to be vaccinated.

Des Moines, December 15, 1905.

MR. L. B. MOFFETT,
Oelwein, Iowa.

DEAR SIR—Your favor of the 5th instant came to hand several days ago, but extreme pressure of other business has prevented my answering the same.

There is no statute by which a local or the state board of health can compel persons to be vaccinated. It is within the power of a school board to exclude children from the public schools who have not been vaccinated, when there is an epidemic, or a threatened epidemic, of smallpox. The courts have never gone so far as to hold that children can be excluded from the public schools for the reason that they are not vaccinated, under other circumstances or conditions.

If there is an epidemic, or a threatened epidemic, of smallpox in Oelwein, the board has the power to exclude pupils from the schools who are not vaccinated, but beyond that it may not go.

Section 2823-a of the supplement to the code makes the parents or guardians of children between the ages of seven and fourteen guilty of a misdemeanor if they prevent such children from attending school unless a sufficient reason exists therefor. But I do not believe the provisions of that section can be so far extended as to require parents or guardians to have their children vaccinated that they may attend the public schools where vaccination is required by the board, and I think that parents or guardians would not be guilty of a misdemeanor under the provisions of the section because they failed to have their children vaccinated under such circumstances.

The condition presented in your letter is one which has not been provided for by the legislature, and as the public health and public welfare are of the first importance, the order of the board to exclude the children from the public schools should be carried out, even though the children were excluded from the public schools under the compulsory educational law.

I am, Yours very truly,

CHAS. W. MULLAN.

INSANE—RIGHT OF ONE COUNTY TO MAINTAIN AN ACTION AGAINST ANOTHER UNDER THE PROVISIONS OF CHAPTER 16 TITLE 12 OF THE CODE—It is held that such an action may not be maintained.

Des Moines, December 22, 1905.

HON. WILLARD H. PALMER,

Maquoketa, Iowa.

DEAR SIR—Without going into the questions at length which are submitted by your letter, I will say—

First. I know of no statute which authorizes a county of this state to maintain an action against another county for money expended under the provisions of chapter 16 of title XII of the code and amendments thereto, and

under the ruling in the recent case of *State v Colligan* there must, I think, be a provision of the statute authorizing such action before it can be maintained.

Second. I think your construction of the provisions of section 2569 as to the powers and duties of the township trustees acting as a local board of health thereunder, is correct; but I think an action by injunction for the removal of the building and to prevent the waters of the stream being polluted, will lie and should be granted by a court, and I further think that the proprietors of the rendering works should be indicted if they persist in carrying on the business at the place named.

I am, Yours very truly,

CHAS. W. MULLAN.

JUSTICE OF THE PEACE—POWER TO APPOINT A GUARDIAN AD LITEM—A justice of the peace has power to appoint a guardian ad litem to defend for a minor in a civil action brought before him.

Des Moines, December 22, 1905.

MR. I. J. SAYRS,
Jewell, Iowa.

DEAR SIR—Without going into the question submitted in your letter at length, I will say that I think it is within the power of a justice of the peace to appoint a guardian ad litem to defend for a minor in a civil action brought in a justice court, and that such guardian may be appointed upon motion of the plaintiff.

Section 3482 provides that no judgment can be rendered against a minor until a defense is made by a guardian. This provision is general and applies to inferior as well as superior courts.

In *Mockey v. Grey,* 2 Johns, 192, and in *Bullard v. Spoor,* 2 Cow., 390, it was held by the New York court that a justice of the peace has power to appoint a guardian ad litem under a statute containing substantially the same provision as ours as to the rendition of a judgment against a minor.

I am, Yours very truly,

CHAS. W. MULLAN.

CONSTABLE—FEES ALLOWED—A constable is entitled to charge for the actual expenses incurred by him in the service of a warrant and the conveyance of the person arrested to the county jail, but he is not permitted to charge double mileage.

Des Moines, December 22, 1905.

HON. EDWARD S. WHITE,

Harlan, Iowa.

DEAR SIR—In answer to your favor of the 21st instant, I will suggest:

First. Under the provisions of section 1292 of the code a constable is entitled to charge for the actual expenses incurred by him in the service of a warrant of arrest and the conveyance of the person arrested to the jail of the county, or the court where such warrant is returnable. The section referred to provides that every officer who shall arrest any one with a warrant or order issued by any court or officer shall be allowed the same fees and expenses as provided for in case such service is by the sheriff. Subdivision 3 of section 511 provides for the repayment of any amount actually paid by the sheriff as necessary expenses in executing a warrant.

There is no provision in section 4598 as to the expenses incurred in executing a warrant by a constable. He would therefore be entitled, under the provisions of the section referred to, to charge the actual expenses incurred by him in executing such warrant.

Second. I think the principle laid down in *Redfield v. Shelby County,* 64 Iowa, 11, is controlling as to the question of the right of a constable to charge double mileage. In my letter to you of April 11, 1905, I said I knew of no rule of law which permitted a constable to charge double mileage. The law permits every constable to charge five cents a mile for actual travel only, and where a constable has a number of subpoenas or warrants to serve in one locality, if he were permitted to charge mileage upon each one of such subpoenas or warrants, he would be charging mileage for distance which had not been actually traveled by him in such case.

I am, Yours very truly,

CHAS. W. MULLAN.

REGISTRATION OF BIRTHS AND DEATHS—It is the duty of the registrar of vital statistics to obtain and report to the clerk of the district court births and deaths occurring within the district during the preceding year.

Des Moines, December 23, 1905.

MR. R. B. OLDHAM,
Greenfield, Iowa.

DEAR SIR—I am in receipt of your favor of the 21st instant, and in reply will say that the matter concerning which you write is not 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 chapter 100 of the acts of the thirtieth general assembly covers the entire subject relating to the registration of births and deaths. The manner in which births and deaths shall be registered is set forth in that chapter in detail, and all acts or parts of acts in conflict therewith are repealed by a provision of the act referred to. The effect of enacting chapter 100 of the acts of the thirtieth general assembly is to relieve assessors of the duty of obtaining and reporting to the clerk of the district court births and deaths which have occurred within their respective districts during the preceding year, and has placed the duty of obtaining information as to such births and deaths upon the registrar of vital statistics in each district.

It is not, therefore, necessary for the assessors to ascertain or make a report of births and deaths at the time of the assessment of property in their respective districts.

I am, Yours very truly,

CHAS. W. MULLAN.

MULCT LAW—WITHDRAWAL OF NAME FROM PETITION OF CONSENT—Any signer of a petition of consent for the operation of a saloon under the mulct law, may withdraw his name from such petition at any time before it is acted upon by the board of supervisors.

Des Moines, December 28, 1905.

MR. I. F. DIFENBAUGH,
218 N. Walnut Street,
Creston, Iowa.

DEAR SIR—I am in receipt of your favor of the 27th instant. Although the matter concerning which you write is not one upon which I can express an official opinion unless the question should be referred to me by one of the

departments of the state, I will make the following suggestions as to the law controlling the conditions which appear to exist:

Under the ruling of the supreme court in *Green v. Smith,* 111 Iowa, 183, an elector, who signs a petition of consent for the operation of saloons under the mulct law, may withdraw his name from such petition at any time before it is acted upon by the board of supervisors. When, however, the board of supervisors has acted upon such petition its action is an adjudication either that the petition is sufficient or insufficient, and if it is found by the board to be sufficient the names of the electors subscribed thereto cannot be withdrawn after such adjudication.

After the petition has been adjudged sufficient by the board of supervisors it is effectual as to the consent given to conduct saloons under the mulct law; until it is revoked or forfeited in the manner provided by section 2451 of the supplement to the code.

I am, Yours very truly,

CHAS. W. MULLAN.

INDEX.

Page

Accident:
See INSURANCE.
Andersonville Monument Commission:
Title to land selected as a site for Iowa monument..... 196
Appropriations:
Construction of chapter 177 of the acts of the Twenty-ninth General Assembly..... 92
Louisiana Purchase Exposition:
Construction of chapter 164 acts of the Thirtieth General Assembly..... 107
Payment of cost of publishing report of..... 230
Unexpended balance of the annual appropriation for state library commission carried over into succeeding year..... 115
Farmers' institute entitled to aid from state, when..... 309
Ballot:
See ELECTIONS.

Banks and Banking:
Shares of national banks are credits from which the owner's valid debts may be deducted..... 54
Savings banks; right to sell, discount and loan upon commercial paper..... 89
A loan and trust company may not conduct a banking business; exception..... 251
Biennial Election Amendment:
Provisions of construed; vacancy in office, how filled thereunder. 278
Extension of term of public officer thereunder..... 306
Necessity for all officers to requalify under terms thereof..... 315
Births and Deaths:
Local registrars of vital statistics; who are..... 170
Duty of local registrar of vital statistics to issue burial permits... 353
Duty of the registrar to make report of to clerk of court..... 445
Board of Control:
Payment of bills for demurrage charges; how paid..... 70
Power to designate and approve institutions which shall have control of children committed..... 165
Power of in relation to parole of insane patients..... 421
Board of Educational Examiners:
A teacher may be employed to give instruction on subjects in which he was not examined..... 42
State certificates and diplomas granted only upon examination 327

Page

Board of Health:
State:
May adopt regulations for the inspection of petroleum products.. 127
Vaccination may be required of pupils attending the public schools 393, 441
Local:
Expenses of quarantine to be paid by the public..... 320
Power of to establish quarantine against contagious diseases.... 338
Board of Medical Examiners:
Power to revoke certificates to practice..... 85
Power of with respect to issuing subpoenas for witnesses..... 167
Examinations by applicant for certificates to practice; number of 167
Power of with respect to granting examination to applicant who is blind or otherwise incapable mentally or physically..... 233
Board of Supervisors:
Construction of dike and fishway in the drainage of a lake; paid from the district drainage fund..... 248
Auditing and allowing claims for expenses of an insane patient at state hospital when legal settlement is in a county other than from which the patient is sent..... 236
Duty to furnish county attorney with office..... 329
Disposition of proceeds from sale of swamp lands by..... 335
Power of to authorize payment of fees of justices of the peace.... 366
Void resolution of confers no authority upon county auditor to draw warrants..... 385
Power of to grant a franchise 402
Reports of county recorder to..... 424
Settlement of county treasurer with..... 426
County road fund may not be used for paying members for committee services..... 438
Board of Trustees:
Iowa State College of Agriculture and Mechanic Arts:
Power of board to lease building sites to members of faculty..... 243
Investment of proceeds from sale of lands; kind of securities..... 372
Bonds:
Issued by the Sanitary District of Chicago..... 67
Debenture bonds may not be issued by savings banks..... 128
Validity of; executed by foreign corporation.....289, 371
Requirement of public officers to furnish new bonds under biennial election amendment..... 306
Issuance of by school district; conditions of..... 419
Administrators; conditions of fixed by statute,..... 435
Suit on bond of county official before expiration of term..... 439
Building and Loan Associations:
Voluntary liquidation of; limitation of expenses..... 284
Capital Punishment:
History of legislation in Iowa..... 375

Page

Capitol Decoration:

Captiol commission contract construed 211

Census:

Cost of transmitting census cards by county auditor 185
Enumeration of; powers of executive council therein 256

Cities and Towns:

Power of city council to construct bridges 191
Extension of corporate limits; effect on boundaries of school district 194, 395, 427
The indebtedness of an incorporated town does not affect the issuance of bonds by a school district within said limits 197
Liability of railway and acreage property for tax in support of public libraries 214
Improvements by a city creating a nuisance to state property may be abated 267
Park commissioner may not transfer park funds for other city purposes 322
Plat of; approval of by city council 346
Construction of water works by; limitation on indebtedness for ... 347
Duty of local registrar of vital statistics to issue burial permits .. 353
Fire limits; power of city council to establish 360
Township assessors; qualification as to residence 374
Power to levy and collect a tax on dogs 407
Constitutional limitation on indebtedness thereof 421
Vacancies in offices of; how filled 432

Civil Cases:

Pending:
In the district court of Iowa 32
In the supreme court of Iowa 33
In the United States circuit court Southern District of Iowa 34
Disposed of 23, 29

Clerk of Court:

Duty of in issuing mittimus 436
Report of births and deaths by registrar of vital statistics 445

Coal Mine:

Definition of; jurisdiction of the state over 285

Code:

Sections of construed:

337	439	643	401
360	289	732	215
443	436	757	191
457	407	860	323
468	262	916	346
495	425	1078	174
510	325	1081	356
511	403	1098	328
551	427	1169	398
615	396	1183	435

Page

1266..... 277
1272..... 432
1292..... 444
1297..... 386
1304..... 38, 383
1306-b..... 347
1311..... 56
1318..... 334
1331..... 220
1333..... 114
1339..... 215
1391..... 337
1393..... 367
1403..... 337
1413.....45, 53
1416..... 426
1458..... 426
1467..... 396
1477-d..... 182
1482..... 402
1530..... 438
1532..... 187
1533..... 44
1540-a..... 45, 235
1589..... 379
1637..... 370
1675..... 310
1694..... 240
1709.....161, 204
1736..... 39
1747..... 163
1749..... 36
1751..... 161
1765..... 326
1779..... 120
1782..... 37, 200
1806..... 67, 117
1808..... 121
1842..... 223
1843..... 252
1850..... 89, 271
1856..... 223
1889.....254,273, 431
2180..... 283
2184..... 218
2209..... 179
2212..... 219
2261..... 418
2266..... 236
2283..... 124
2292..... 238
2303..... 414
2309..... 422
2385.....379, 415
2394..... 411
2415..... 344
2448..... 35
2451..... 447
2539..... 46
2545..... 48
2548.....84, 369
2551..... 50
2559..... 428
2561..... 51
2568.....338, 355
2569..... 443
2570..... 320
2572..... 393
2576.....168, 233
2579.....85, 425
2583..... 233
2589..... 401
2629.....42, 327
2647..... 243
2656..... 243
2691..... 166
2708..... 321
2727..... 311
2749..... 408
2755..... 175
2757..... 357
2764..... 198
2791..... 225
2792..... 437
2802..... 194
2806..... 282
2807..... 261
2814..... 58
2816..... 228
2848..... 392
2855..... 388
2888-h..... 115
3144..... 331
3188..... 321
3482..... 443
4599..... 366
4868..... 329
5682..... 177

Page

Collateral Inheritance Tax:

Reporting of estates subject to, by county attorney; fees for same 181
Bequests to Home for the Aged of Des Moines exempt from payment of 326
Notice of appraisement; notes ordered paid considered assets, 332
Real estate located outside of the state not subject to when fee passes directly 396

Commissioners of Insanity:

Judicial functions of 417

Commissioner of Labor:

Inspection of factories and buildings; law construed 377

Commitment:

When term of imprisonment begins and ends 177
Term of imprisonment of escaped inebriate 304
Statute in force at time of commitment governs 321
Duty of clerk of court to issue mittimus 436

Common Carriers:

Demurrage charges of; rules of Western Car Service Association construed 70

Convicts:

Discharge of from state penitentiary; computation of term of commitment 177

Corporations:

Payment of subscription to capital stock 64
Articles of incorporation of savings banks; recitals of 222
Subscriptions to the capital stock of an insurance corporation, when valid 238
Voluntary liquidation of building and loan associations 284
Right of loan and trust companies to acquire and hold stock of other corporations 292
A foreign corporation may not act as executor, administrator or guardian 370
By-laws of may not restrict stockholder from assigning his stock 430
Statute does not prescribe the character of investments of the funds of a loan and trust company 431

County Attorney:

Compensation of for reporting estates subject to collateral inheritance tax 181
Liability of county for office rent, light, fuel, etc, 322,329
Compensation of; recovery of money paid illegally under a void resolution of board of supervisors 385
Suit on official bond may be instituted, when 439

County Coroner:

Inquest by; when necessary 414

Page

County Recorder:
Instruments filed for record; language of may not be changed by 381
Reports of to the board of supervisors..... 424
County Superintendent:
Teacher in a public school may be employed to teach subjects in which he has not been examined..... 42
Cost of supplies for the office of must be paid from county funds 261
County Treasurer:
Imposition of penalty on delinquent taxes..... 53
Certification as to taxes and assessments due on real estate..... 367
Compensation of..... 380
Reports of and settlement with board of supervisors..... 426
Crimes:
Prosecution instituted at instance of defendant himself; effect of.. 339
Capital punishment; history of legislation in Iowa..... 375
Assault with intent to murder; delivering a poisonous substance to be eaten..... 376
Effect of civil action on criminal prosecution..... 391
Escape of prisoner; time at large in relation to his sentence.....304,429
Criminal Cases:
Submitted in supreme court of Iowa in 1904-1906 12
Pending in supreme court of Iowa on January 1, 1906..... 21
Drainage:
Assessments of benefits to highways; how paid..... 416
Dams:
Maintenance of fishway therein..... 369
Dentistry:
Certificate to practice; power of board to restore forfeited certificate..... 420
Dipsomaniacs:
See INEBRIATES.
Elections:
Registration of voters in school districts having a population of five thousand or more..... 174
Notice for special election to fill vacancy..... 277
Vacancy in office in state legislature; biennial election amendment construed..... 278
Necessity for public officers to re-qualify under terms of biennial election amendment..... 315
Conditions for placing names of candidates on official ballots.... 328
Computation of time as to filing nomination papers..... 333
Women are qualified electors, when..... 343
Change of residence by incumbent in office is in effect a resignation 355
Registration of voters required in each year of presidential election..... 356
Canvass of ballots by board is directory only..... 397
Qualified elector; the term defined..... 401
Australian ballot system; statutory provisions of..... 434

Page

Escheat of Lands:

Liability of escheated lands for debts of decedent 323

Examination:

Dentistry:

Power of board to restore forfeited certificate 420

Medicine:

Number of examinations applicant is entitled to..... 167
Board may not grant examination to applicant who is blind.. 233
Exemption of physicians from; conditions of 422

Pharmacy:

Certificate to practice may not be granted without examination 399

Teachers:

State certificates may be granted upon examination only.... 327
May instruct in branches not examined in..... 42

Executive Council:

Power to drain and sell meandered lakes..... 59
Power to convey land belonging to state 125
Payment of cost of transmitting census cards..... 185
Powers of in census enumeration, ministerial and not judicial.... 256
Power of to condemn land for purpose of constructing dikes. 270
Power of to print reports of executive officers of state institutions 311

Exemption:

Statutory provisions relating to exempt property of soldiers, sailors and widows of such, apply to property without the county of their residence..... 38
Members of National Guard not liable to pay poll tax..... 178
Bequests to Home for the Aged of Des Moines exempt from collateral inheritance tax 326
Soldiers' and sailors' exemption applies only to residents of this state..... 382

Extradition:

See FUGITIVES FROM JUSTICE.

Factory Inspection:

Law governing; applies to cities organized under special charter 377

Farmers' Institute:

Requirements necessary to secure aid from state..... 309

Fees and Expenses:

Open accounts must be kept by auditor and treasurer of state of moneys received as fees from state boards and officers..... 172
Insurance agents' license fees paid to auditor of state; how held.. 180
Fees of county attorney for reporting estates subject to collateral inheritance tax..... 181
Mileage earned by sheriff in serving civil processes belongs to sheriff..... 325

Page

Payment of by board of supervisors to justices of the peace..... 366
Sheriff must account for fees for services in justice courts..... 403
Fees taxable to informant for violation of fish and game law..... 428
Of constable; entitled to be paid..... 444

Fire Limits:

See CITIES AND TOWNS.

Fish and Game Laws:

A gun may be seized and destroyed as a public nuisance, when.. 46
An artificial ditch connecting public with private waters comes within the purview of the game law..... 46
Jack snipe is not protected by..... 49
Venue of action in prosecution for illegal shipment of game..... 56
The term "Waters of the state" construed..... 340
The American coot or mud hen not a game bird..... 358
Fishways; maintenance of in dams.....84, 369
Fees taxable to informant for a violation of..... 428

Foreign Corporations:

Right of auditor of state to impose retaliatory measures upon insurance companies 39, 41
Foreign insurance companies are taxable at two and one-half per cent upon gross premiums..... 112
Power of attorney filed with auditor by foreign insurance company may not be revoked..... 117
Validity of bonds executed by foreign surety companies..... 289
Power of to act as executor, administrator or guardian in this state..... 370

Fugitives from Justice:

Power of governor to issue requisition for person charged with murder by sending poisoned candy through the mail..... 336
Law governing crime in state demanding requisition determines status of..... 384
An escaped inebriate is not subject to extradition..... 429

Hail Insurance:

Statute does not limit amount of assessments in such companies.. 325

Home for the Aged:

Institution is charitable and gifts and bequests to are exempt..... 326

Inebriates:

Escape of from asylum; period of imprisonment..... 304
Right of to demand trial by jury..... 368
Extradition will not lie for escaped inebriate..... 429

Insane Persons:

Correction of an erroneous charge to the county on the books of the auditor of state.....111, 312
Cost and expenses for the care, commitment and transportation of 122
Payment of expenses for care of; chargeable to county of his legal residence..... 236

Page

Payment of expenses for care and commitment of insane patient having no legal settlement in this state..... 302
Inquest upon the body of by coroner..... 414
Commission of insanity; judicial functions of..... 417
Parole of; power of commissioners of insanity therein..... 421
Right of one county to sue another for expenses of commitment, etc..... 442

Insurance:

Power of an insurance company to appoint agents and fix compensation thereof..... 36
The auditor of state may impose retaliatory measures upon foreign insurance companies doing business in this state..39, 41
Kinds of securities that insurance companies may deposit with auditor..... 67
Payment of taxes by foreign insurance company..... 112
Acceptance of securities of life insurance company by auditor.... 117
Power of attorney filed with auditor by foreign insurance company may not be revoked..... 117
Fees paid to auditor of state by insurance company; how held... 180
Discriminations between persons insured; law construed..... 199
Kinds of insurance risks; physicians' liability policy construed; the term "accident" defined 204
Subscription to capital stock of corporations; when binding..... 238

Interstate Commerce:

See INTOXICATING LIQUORS.

Intoxicating Liquors:

A saloon may not operate within three hundred feet of a church 35
Taxation of costs in proceeding to seize and condemn..... 344
Right of partner in drug business to sell.... 373
Right of druggist to sell, in compounding medicines, tinctures, etc..... 378
Wood alcohol not within the definition of..... 390
Sales of in relation to interstate commerce..... 394
Sale of by pharmacists; general principles of law applicable thereto..... 410
Pharmacists may not sell or dispense malt liquors..... 415

Joint Resolution:

See LEGISLATION.

Justice of the Peace:

Transcript; certification of to county auditor..... 366
Fees received by sheriff for services performed in a justice court.. 403
Power to appoint a guardian ad litem..... 443
Constable; fees to which he is entitled..... 444

Legal Settlement:

Payment of costs and expenses for care, commitment and transportation of insane person who has no legal settlement within state..... 122,302

Page

Legislation:

Essentials for valid law under the constitution 96

Library:

State:

Unexpended balance of annual appropriation must be carried over into the succeeding year..... 115

City:

Taxation of railway and acreage property in support of..... 214

Loan and Trust Companies:

Amount of capital stock of; examination by auditor of state; cannot conduct a banking business..... 251

Powers and privileges of; general statutory requirements governing same..... 271

Right of to acquire and hold stock of other corporations..... 292

Investment of funds by; liabilities for time deposits..... 431

Louisiana Purchase Exposition Commission:

Appropriations for; how apportioned and when available..... 107

Publication of report; cost to be paid from what fund..... 230

Marriage License:

Solemnization authorized in county of issuance..... 330

Meandered Lakes and Streams:

The executive council may determine when any meandered lake bed shall be drained and improved..... 59

Cost of building and maintaining dike and fishway in the drainage of; how paid..... 248

Injunction will lie against person or persons attempting to drain meandered lake..... 250

Land cannot be condemned for the purpose of constructing dikes 270

Meander lines follow ordinary high water mark in making survey of..... 280

Riparian owners own to the ordinary high water mark..... 288

Historical review of the subject..... 361

Title to lands bordering thereon defined..... 405

Medical Practice Act:

Board of medical examiners may revoke certificate to practice, when..... 85

Number of examinations of applicant for certificate not limited by statute..... 167

Board of medical examiners may not grant privilege of taking an examination to applicant who is blind..... 233

Exemption of physicians from examination; conditions of..... 422

Mines and Mining:

Definition of coal mine; jurisdiction of Iowa over mine workings. 285

Mulct Law:

A saloon must cease its business whenever a church is built within three hundred feet thereof..... 35

Page

Taxation of costs in proceedings to seize and condemn intoxicating liquors 344
Sale of intoxicating liquors by drug firm; rights of partner therein 373
Sales of intoxicating liquor in relation to interstate commerce 394
Sales of intoxicating liquors by pharmacists 410, 415
Petition of consent; withdrawal of name of signer therefrom 446

Municipal Corporations:

See CITIES AND TOWNS, ROADS AND HIGHWAYS AND SCHOOL DISTRICTS.

Mutual Reserve Life Insurance Company of New York:

Executive Agents' application thereof construed 36

Notary Public:

Seal of; what words shall appear thereon 433

Official Newspapers:

What constitute for purposes of publishing notices and processes 387
Legal definition of 404

Park Commissioner:

Power of to transfer park fund for other city purposes 322

Peddler:

License of; number required 324
Selling at wholesale to merchants does not constitute 352

Penalty:

See TAXATION.

Pharmacy:

Prescriptions; ownership of 364
Permit to sell intoxicating liquors; rights of partner thereunder .. 373
Druggists may dispense alcohol in compounding medicines, tinctures, etc 378
Sale of wood alcohol by druggists .. 390
Certificates to practice; forfeiture of 399
Sale of intoxicating liquors by druggists; conditions of 410
Malt liquors; sale of prohibited by law 415

Pharmacy Commission:

Power to grant certificate to practice without examination 399

Plats:

Approval of by a city council 346

Practice of Dentistry:

See DENTISTRY.

Practice of Medicine:

See MEDICAL PRACTICE ACT AND BOARD OF MEDICAL EXAMINERS.

Practice of Pharmacy:

See PHARMACY.

Page

Public Office:

Removal of member of state legislature to another district causes vacancy....277, 355
Biennial election amendment construed as to vacancy in office in state legislature.... 278
Extension of term of public officers under the biennial election amendment....306, 315
Incompatible offices; member of school board ineligible to the office of school treasurer.... 357
Vacancy in municipal offices, how filled.... 432

Quarantine:

Expenses of to be paid by public 330
Power of local board of health to establish.... 338

Registrar of Vital Statistics:

See VITAL STATISTICS.

Registration of Voters:

Required in the year of each presidential election.... 356
In school districts having a population of five thousand or more.. 174

Roads and Highways:

Consolidation of road district; how effected.... 186
Assessments of benefits to highways accruing by improvements under drainage act.... 416
County road fund; expenditure of.... 438

Road Tax:

The levying, collection and expenditure of 43, 186
Property within a city not subject to tax by township trustees.... 359

Sac and Fox Indians:

History of title to lands held by them.... 263

Saloon:

May not operate within three hundred feet of a church.... 35
Petition of consent for; withdrawal or name of signer.... 446

Savings Banks:

Right to sell, discount and make loans upon commercial paper 89
Right to issue debenture bonds.... 128
Articles of incorporation of, must contain what.... 222

Schools:

A teacher may be employed to give instruction in subjects in which he was not examined.... 41
A schoolhouse site must be located upon an established highway . 58
Inmates of state institutions not counted in school enumeration. . 198
Rents from unsold school lands; disposition of.... 203
Schoolhouse site reverts to owner by reason of non-user.... 228
Schoolhouse tax; how voted 281

Page
School building; use of for religious services..... 371
School lands; foreclosure of; payment of costs.....388, 391
Use of building by a sectarian school; determined by electors 408
School day; board has power to define..... 426

School Directors:

A schoolhouse site must be located upon an established highway 58
Limitation on powers of..... 229
Duty of in apportioning schoolhouse tax among subdistricts.... 281
Member of board may not be school treasurer..... 357
Power of to permit religious services in school building..... 371
Power of to permit a schoolhouse to be used for sectarian purposes..... 408
Power of to define a school day..... 426
Power of in restoring territory to district..... 437
Power of to compel vaccination of pupils..... 441

School Districts:

Registration of voters for school elections..... 174
Boundaries of changed by extension of the corporate limits of a city or town.....194, 427
An incorporated town and the school district within same are distinct corporations as to indebtedness..... 197
Change of boundaries; limit of extension under section 2791..... 225
Extension of corporate limits of city or town; effect on..... 395
Issuance of bonds by; conditions of..... 419
Restoration of territory; how same may be done..... 437

Sheriff:

Compensation of; mileage earned in serving civil processes belongs to..... 325
Fees in justice courts..... 403

Soldiers and Sailors:

See EXEMPTION.

State Board of Health:

See BOARD OF HEALTH.

State Board of Medical Examiners:

See BOARD OF MEDICAL EXAMINERS.

State Industrial School:

Commitment of children to, for what time..... 321

State Life Insurance Company of Indiana:

Policy of construed as to discriminations between persons insured 199

State Militia:

Members of not liable to pay poll tax..... 178
Compensation of members appointed by governor for special purposes..... 218
Legislative control of..... 283

Page

Surety Companies:

Validity of bonds executed by corporation organized in another state.....289, 371

Swamp Lands:

Sale of; disposition of proceeds..... 335

Taxation:

Statutory exemption of property of soldiers, sailors and widows of such, applies to property situated without the county of residence of the soldier, sailor or widow..... 38

Road taxes are collected by county treasurer in same manner as other taxes.....43,186

Penalty on delinquent taxes; when imposed..... 53,337

Shares of national banks are credits from which valid debts may be deducted..... 54

A foreign insurance company is taxable at two and one-half per cent on gross premiums..... 112

Payment of taxes under protest; duty of state treasurer in relation thereto..... 171

Members of national guard; liability of to pay poll tax..... 178

Liability of railway and acreage property within a city for public libraries..... 214

Assessments of telephone companies under section 1331 of code held unconstitutional..... 220

Duty of township assessor to furnish to clerk duplicate copy of assessor's book..... 235

Apportionment of schoolhouse tax among the several sub-districts 281

Lien for taxes in relation to land becoming property of the state 313

Property of merchants; what subject to..... 334

Telephone and telegraph lines; filing of map with county auditor showing taxing districts..... 350

Jurisdiction of township trustees to tax property within a city for highway purposes..... 359

County treasurer; certification of taxes and assessments due on real estate by..... 367

Township assessors; qualification of as to residence..... 374

Soldiers' and sailors' exemption applies only to residents of this state..... 382

Of dogs; code sections 457 and 458 construed..... 407

Assessments of benefits to highways under the drainage act..... 416

Telephone Companies:

Taxation of under code section 1331 unconstitutional..... 220

Taxation of; filing of map with county auditor showing taxing districts..... 350

Franchise for may not be granted by board of supervisors..... 402

Township Trustees:

No power to tax property within a city for road purposes..... 359

Page

Vaccination:

See BOARD OF HEALTH AND SCHOOL DIRECTORS.

Vacancy:

See ELECTIONS AND PUBLIC OFFICE.

Vital Statistics:

Registrars of, who are; compensation of..... 170
Local registrar; issuance of burial permit..... 353
Deputy registrar, compensation of..... 354
Report of registrar to clerk of court as to births and deaths..... 445

Woman's Suffrage:

See ELECTIONS.