SIXTH BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA

CHAS. W. MULLAN
ATTORNEY-GENERAL

FOR TERM ENDING DECEMBER 31, 1906

Printed by Authority of General Assembly.

DES MOINES
EMORY H. ENGLISH, STATE PRINTER
1909

STATE OF IOWA,
ATTORNEY GENERAL'S OFFICE,

To the Honorable Albert B. Cummins, Governor of Iowa:

In compliance with law I hereby submit to you a report of the business transacted by this office during the year 1906.

Schedule A is a complete list of all appeals in criminal cases, submitted to the supreme court during the year 1906, and also all rehearings asked during that period, and shows the final disposition of the cases.

Schedule B is a list of all criminal cases pending on the first day of January, 1907.

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 are now pending in the state and federal courts in which the state is a party.

Schedule E is the official written opinions given by this office during the year 1906.

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

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 year 1906 and the final disposition of the cases:

Title of Case.	County.	Decisions.	Offense.
State v. Abrams, H. H., Appellant.	Buchanan ...	Reversed Sept. 25, 1906	Carrying concealed weapons.
State v. Andrews, Chas., Appellant.	Polk	Petition for rehearing overruled May 19, 1906	Rape.
State v. Arthur, James, Appellant.	Pottaw't'mie .	Affirmed Dec. 14, 1906	Breaking and entering.
State v. Athey, Jas. M., Appellant.	Poweshiek ..	Affirmed July 10, 1906	Adultery.
State v. Buck, Millard W., Appellant	Jasper	Affirmed Sept. 26, 1906	Murder.
State v. Brotherton, Wm., Appellant	Harrison ...	Affirmed June 12. 1906	Gambling nuisance.
State v. Brown, Jerome V., Appellant	Butler	Affirmed March 7, 1906 (Petition for rehearing overruled May 19, 1906)	Assault with intent to maim and disfigure.
State v. Bernstein, S., Appellant...	Warren	Reversed Feb. 6, 1906	Giving intoxicating liquors.
State v. Bristow, Ed, Appellant....	Plymouth ...	Reversed Oct. 19, 1906	Peddling without a license.
State v. Beinke, Chas., Appellant...	Cedar	Affirmed July 10, 1906	Keeping and maintaining a liquor nuisance.
State v. Brown, L. W., Appellant..	Harrison ...	Affirmed Dec. 11, 1906	Liquor nuisance.
State v. Crouch, F., Appellant....	Palo Alto ...	Affirmed May 8, 1906	Carnal knowledge of an imbecile.
State v. Caine, D. F., Appellant...	Woodbury ...	Reversed Feb. 6, 1906	Conspiracy.
State v. Disbrow, H. H., Appellant.	Van Buren ..	Reversed March 6, 1906	Larceny by bailee.
State v. Dunning, Day, Appellant..	Ringgold	Reversed June 5, 1906	Fraudulent banking.
State v. Dolan, Ed., Appellant....	Jackson	Reversed Nov. 13, 1906	Seduction.
State v. Davis, Wm. J., Appellant..	Marion	Stricken Sept. 27, 1906	Depositing dynamite.
State v. Eno, Albert, Appellant....	Adams	Reversed Oct. 16, 1906	Conspiracy.

State v. Franklin, Ollie, et al, Appellants	Monroe	Affirmed Sept. 27, 1906	Maintaining a liquor nuisance.
State v. Gibson, Ralph, Appellant	Polk	Affirmed March 6, 1906 (Petition for rehearing overruled Oct. 23, 1906)	Obtaining property by false pretenses.
State v. Grendahl, Ed, Appellant	Wapello	Affirmed Oct. 16, 1906	Larceny.
State v. Harter, John C., Appellant	Henry	Affirmed July 10, 1906	Perjury.
State v. Hayden, John, Appellant	Decatur	Affirmed June 5, 1906	Murder.
State v. Harvey, Clyde and Hattie, Appellants	Carroll	Reversed April 9, 1906	Arson.
State v. Harding, Dick, Appellant	Cass	Dismissed Nov 15, 1906	False pretenses.
State v. Hatlestad, M. L., Appellant	Hardin	Reversed Nov. 13, 1906	Nuisance.
State v. Hollingsworth, J. W., Appellee	Polk	Affirmed Dec. 11, 1906	Obtaining money by false pretenses.
State v. Jackson, H. O., Appellee	Jasper	Petition for rehearing overruled Jan. 16, 1906	False pretenses.
State v. Judd, Jane, Appellant	Mitchell	Affirmed Nov. 20, 1906	Incest.
State v. Loser, Leon, Appellant	Pottaw't'mie	Petition for rehearing overruled Nov. 21, 1906	Conspiracy.
State v. Logan, A. A., Appellant	Warren	Affirmed May 18, 1906	Forgery.
State v. Logan, A. A., Appellant	Warren	Affirmed May 18, 1906	Forgery.
State v. Logan, A. A., Appellant	Warren	Affirmed May 18, 1906	Forgery.
State v. Logan, A. A., Appellant	Warren	Affirmed May 18, 1906	Forgery.
State v. Logan, A. A., Appellant	Warren	Affirmed May 18, 1906	Forgery.
State v. Logan, A. A., Appellant	Warren	Affirmed May 18, 1906	Forgery.
State v. Leuch, August, Appellant	Cedar	Petition for rehearing overruled Jan. 16, 1906	Kidnapping.
State v. Lomack, F. C., Appellant	Polk	Reversed March 7, 1906	Libel.
State v. Long, E. N., Appellant	Polk	Affirmed Oct. 22, 1906	Liquor nuisance.
State v. Lloyd, Chas., Appellant	Pottaw't'mie	Affirmed Nov. 20, 1906	Larceny.
State v. Luddington, Wm., Appellee	Dallas	Reversed Oct. 16, 1906	Receiving money as township trustee under contract with road superintendent.
State v. Luddington, Wm., Appellee	Dallas	Reversed Oct. 16, 1906	Receiving money as township trustee under contract with road superintendent.

SCHEDULE "A"—CONTINUED.

Title of Case	County	Decisions	Offense
State v. Matheson, Geo., Appellant.	Pottaw't'mie .	Petition for rehearing overruled April 10, 1906	Assault with intent to commit murder.
State v. Metcalf, Chas., Appellant..	Woodbury ...	Affirmed Jan. 16, 1906	Incest.
State v. Moore, Wm. H., Appellant.	Muscatine ...	Affirmed Feb. 6, 1906 (Petition for rehearing overruled June 12, 1906)	Murder.
State v. McFadden, Emma, Appellant	Mahaska ...	Affirmed Jan. 16, 1906	Adultery.
State v. McKenney, Horace H., Appellee	Harrison ...	Affirmed April 7, 1906	Embezzlement.
State v. McClain, Ed., Appellant...	Polk	Affirmed March 7, 1906	Larceny from the person.
State v. Moore, Chas. W., Appellant	Mahaska	Affirmed March 6, 1906	Liquor nuisance.
State v. Mulhern, J. W., Appellant.	Madison	Affirmed March 6, 1906	Liquor nuisance.
State v. Mitchell, Geo. Allen, Appellant	Poweshiek ..	Affirmed June 6, 1906	Murder.
State v. Moran, Thomas, Appellant.	Monona	Affirmed Oct. 17, 1906	Larceny.
State v. Mathews, Neal, Appellant..	Polk	Affirmed Nov. 13, 1906	Murder.
State v. Mack, Tim, Appellant.....	Wapello	Affirmed May 11, 1906	Liquor nuisance.
State v. Nowell, Elmer, Appellant..	Pottaw't'mie .	Affirmed Dec. 11, 1906	Murder.
State v. O'Malley, J. E., Appellant.	Dallas	Affirmed Oct. 25, 1906	Nuisance.
State v. Porter, Cynthia A., Appellant	Madison	Affirmed June 5, 1906	Keeping house of ill fame.
State v. Rehard, Leonard, Appellant	Madison	Dismissed Jan. 9, 1906	Uttering a forged bank check.
State v. Riley, Oscar O., Appellant.	Mahaska	Affirmed Jan. 16, 1906	Adultery.
State v. Rocker, Chas., Appellant..	Lyon	Reversed March 13, 1906	Murder.
State v. Salyers, I. N., Appellant...	Emmet	Dismissed March 12, 1906	Taking game fish.
State v. Seery, Francis E., Appellant	Benton	Affirmed Jan. 9, 1906	Murder.
State v. Smith, John, Appellant...	Linn	Reversed Feb. 15, 1906	Burglary.

State v. Shepherd, Dan, Appellant..	Jefferson	Affirmed Feb. 15, 1906	Murder.
State v. Spiker, F. W., Appellant..	Cass	Affirmed July 10, 1906	Forgery.
State v. Steinecke, Herman, Appellant	Benton	Affirmed April 6, 1906	Liquor nuisance.
State v. Speers, Andrew, Appellant.	Greene	Modified and Affirmed April 3, 1906.....	Rape.
State v. Sloan, H. B., Appellant...	Henry	Dismissed Oct. 19, 1906	Embezzlement.
State v. Stewart, James, Appellant.	Plymouth ...	Affirmed Sept. 27, 1906	Rape.
State v. Smith, Thomas, Appellant.	Monroe	Affirmed Oct. 16, 1906	Murder.
State v. Thomas, J. H., Appellant..	Warren	Affirmed Jan. 18, 1906	Uttering a forged instrument.
State v. Thomas, Chas., Appellant..	Polk	Affirmed Nov. 21, 1906	Murder.
State v. Wescott, Martin, Appellant.	Cerro Gordo.	Petition for rehearing overruled Feb. 12, 1906	Murder.
State v. Woodard, Charles, Appellant	Decatur	Affirmed July 14, 1906	Murder.
State v. Wick, R. E., Appellant....	Butler	Affirmed March 6, 1906	Illegal sale of school books by a school director.
State v. Waters, Chas. E., Appellant	Cass	Affirmed Dec. 11, 1906	Rape.
State v. Woodard, Chas. Appellant.	Decatur	Dismissed June 6, 1906	Murder.
State v. Wilhite J. C., Appellant...	Webster	Affirmed Nov. 14, 1906	Illegal practice of medicine.
State v. Wyckoff, Jas. W., Appellant	Wapello	Affirmed May 11, 1906	Liquor nuisance.
State v. Yates, Silas, Appellant....	Fremont	Affirmed Dec. 11, 1906	Assault with intent to commit murder.
State v. York, A. P., Appellee....	Dallas	Reversed Oct. 16, 1906	Receiving money as township trustee under contract with road superintendent.
State v. York, A. P., Appellee....	Dallas	Reversed Oct. 16, 1906	Receiving money as township trustee under contract with road superintendent.

SCHEDULE "B"

The following is a list of criminal cases pending in the Supreme Court of Iowa, January 1, 1907:

Title of Case.	County.	Offense.
State v. Athey, James M., Appellant. (Rehearing).	Poweshiek	Adultery.
State v. Blydenburgh, E. S., Appellant (Rehearing)	Hardin	Murder.
State v. Baldes, Mathias, Appellant (Rehearing).	Sioux	Murder.
State v. Bricker, L. J., Appellant	Lee	Rape.
State v. Blee, James, Appellant	Marion	Murder.
State v. Blades, Jack, et al, Appellants	Polk	Keeping a gambling house.
State v. Brown, L. W., Appellant (Rehearing)	Harrison	Liquor nuisance.
State v. Brown, W. E., Appellee	Buena Vista	Receiving and accepting a deposit when and while insolvent.
State v. Brown, W. E., Appellee	Buena Vista	Receiving and accepting a deposit when and while insolvent.
State v. Brown, W. E., Appellee	Buena Vista	Receiving and accepting a deposit when and while insolvent.
State v. Brown, W. E., Appellee	Buena Vista	Receiving and accepting a deposit when and while insolvent.
State v. Brown, W. E., Appellee	Buena Vista	Receiving and accepting a deposit when and while insolvent.
State v. Blackburn, Nick, Appellant	Marshall	Rape.
State v. Bennett, Burton, Appellant	Bremer	Seduction.
State v. Caine, D. F., Appellant (Rehearing)	Woodbury	Conspiracy.
State v. Crofford, J. W., Appellant	Clarke	Murder.
State v. Cothron, C. W., et al, Appellants	Monroe	Larceny.
State v. Conroy, Michael, Appellant	Scott	Burglary.
State v. Ezecheck, John, Appellant	Johnson	Murder.
State v. Fielding, Marshall, Appellant	Mahaska	Murder.
State v. Harmann, Peter, Appellant	Dubuque	Adultery.
State v. Hoffman, George C., Appellant	Lee	Embezzlement.
State v. Hanley, Thomas, Appellant	Monroe	Possession of burglars' tools with intent to commit burglary.

State v. Hobson, Mrs. Ralph, Appellant	Monroe	Prostitution.
State v. Hoover, Carl, Appellant	Audubon	Assault with intent to commit rape.
State v. Hooker, Robert, Appellant	Delaware	Larceny.
State v. Hanlin, J. M., Appellant	Lucas	Making false entries as deputy clerk.
State v. Johnson, Lee, Appellant	Benton	Assault with intent to commit rape.
State v. Johnson, Chas. M., Appellant	Black Hawk	Assisting a prisoner in jail escape.
State v. Johnson, T. W., Appellant	Linn	Liquor nuisance.
State v. Kendig, A. J., Appellant	Madison	Practicing medicine without a license.
State v. Kehr, W. N., Appellant	Linn	Burglary.
State v. Leslie, Joseph, Appellant	Pottawattamie	Burning the wood timber of another.
State v. Mathews, Neal, Appellant (Rehearing)	Polk	Murder.
State v. Manchester, Wm., Appellant	Woodbury	Burglary.
State v. McGovern, Bernard, Appellant	Clinton	Larceny.
State v. McDonald, L. A., Appellant	Pottawattamie	Incest.
State v. Martin, Johnson T., Appellant	Keokuk	Murder.
State v. Meyer, Fritz, Appellant	O'Brien	Assault with intent to commit rape.
State v. Nowell, Elmer, Appellant (Rehearing)	Pottawattamie	Murder.
State v. Norman, C. J., Appellant	Decatur	Larceny of domestic fowls in the night time.
State v. Nugent, Thomas J., Appellant	Greene	Seduction.
State v. O'Malley, J. E., Appellant, (Rehearing)	Dallas	Nuisance.
State v. Reiff, George E., Appellee	Pottawattamie	Larceny.
State v. Rutledge, Homer, Appellant	Appanoose	Murder.
State v. Smith, Thomas, Appellant (Rehearing)	Monroe	Murder.
State v. Smith, Andrew, Appellant	Monroe	Murder.
State v. Scott, E. W., Appellant	Polk	Receiving stolen property.
State v. Stevens, Tom, Appellant	Polk	Rape.
State v. Steidley, A. M., Appellant	Lee	Burglary.
State v. Thomas, Chas., Appellant (Rehearing)	Polk	Murder.
State v. Thompson, Andrew P., Appellant	Harrison	Adultery.
State v. Usher, Joseph, Appellant	Linn	Murder.
State v. Von Kutzelbein, Erich, Appellant	Iowa	Murder.
State v. Woodard, Chas., Appellant (Rehearing)	Decatur	Murder.
State v. Walker, John, Appellant	Polk	Murder.
State v. Waterbury, Frank, Appellant	Linn	Uttering a forged instrument.
State v. Young, James, Appellant	Mahaska	Rape.

SCHEDULE "C."

FOR THE YEAR 1906.

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

Mutual Hailstorm Insurance Asso. of Iowa v. G. S. Gilbertson.
Action at law to recover tax.

Iowa Mutual Tornado Insurance Asso. v. G. S. Gilbertson.
Action at law to recover tax.

Iowa Mutual Dwelling House Insurance Asso. v. G. S. Gilbertson.
Action at law to recover tax.

Mutual Horticultural Insurance Asso. of Iowa vs. G. S. Gilbertson.
Action at law to recover tax.

The Mutual Windstorm Insurance Assn. v. G. S. Gilbertson, et al.
Action at law to recover tax.

Farm Property Mutual Insurance Assn. of Iowa v. Gilbertson.
Action at law to recover tax.

Iowa Assessment Mutual Fire Insurance Assn. v. Gilbertson.
Action at law to recover tax.

Eastern Hail Insurance Assn. of Iowa v. G. S. Gilbertson.
Action at law to recover tax.

Farmers Mutual Hail Insurance Assn. of Iowa v. G. S. Gilbertson.
Action at law to recover tax.

Home Mutual Insurance Assn. of Iowa v. Gilbertson.
Action at law to recover tax.

Grain Growers Mutual Hail Ins. Ass'n of Iowa v. Gilbertson.
Action at law to recover tax.

Retail Merchants Mutual Fire Ins. Assn. v. Gilbertson.
Action at law to recover tax.

State Farmers Fire & Tornado Ins. Assn. of Iowa v. Gilbertson.
Action at law to recover tax.

Merchants Mutual Ins. Assn. v. Gilbertson.
Action at law to recover tax.

Mutual Fire and Tornado Assn. v. Gilbertson.
Action at law to recover tax.

Iowa Mercantile Mutual Fire Ins. Assn. v. G. S. Gilbertson.

Action at law to recover tax.

Iowa Implement Mutual Ins. Co. vs. G. S. Gilbertson.
Action at law to recover tax.

Iowa Mutual Plate Glass Ins. Assn. v. Gilbertson.
Action at law to recover tax.

The State of Iowa for the Use of the Town of Sharon v. S. A. Smithart.

Cora Honaker v. F. P. Fitzgerald.
Habeas corpus.

State of Iowa v. R. H. Stringfellow et al, Appellants.
Injunction. Dismissed by appellants.

State of Iowa v. Wm. Greenway et al, Appellants.
Injunction. Dismissed by appellants.

State of Iowa, ex rel. L. R. Bone, v. W. A. Hunter, Warden of State Penitentiary at Anamosa.
Habeas corpus.

Rock Island Brewing Company v. Albert B. Cummins et al.
Injunction.

L. M. Carpenter, Assignee of all Creditors of E. E. Snyder, v. Jones County, Iowa, et al.
Action to set aside assessment.

State of Iowa v. Amana Society.
Wrongful exercise of corporate powers.

Louis Busse v. Wm. A. Hunter, Warden State Penitentiary.
Habeas corpus.

In the Matter of the Estate of Thos. Stone, Deceased.
Collateral inheritance tax.

John O. Staley v. Howard Tedford et al.
Injunction.

SCHEDULE "D."

1906.

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

Mrs. F. M. Randolph v. Cottage Hospital, State of Iowa, et al.

State of Iowa, ex rel. C. W. Mullan, Atty. General, v. German Mutual Insurance Company of Council Bluffs, B. F. Loose et al.

Western Union Telegraph Company v. B. F. Carroll.

State of Iowa v. Lafayette Young.

State of Iowa v. Suel J. Spaulding.

State of Iowa v. Ole Thompson.

In the Matter of the Estate of Richard Wilde, Dec'd.

Edward H. Farley et al v. Northwestern Life and Savings Co., B. F. Carroll et al.

Sioux City Gas & Electric Co. v. Wm. B. Martin et al.

Robert C. Rice et al v. Northwestern Life and Savings Co., B. F. Carroll et al.

Western Union Telegraph Co. v. B. F. Carroll.

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

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

State of Iowa, ex rel. B. F. Carroll, v. New Liberty Savings Bank.

Frank L. McCoy et al v. Jas. L. Paxton et al.

Isaac Hall v. Butler County and F. W. Powers, Pres. State Board of Health.

Omaha Bridge & Terminal Railway Co. v. Chas. R. Hannan et al.

Silas Wilson v. La. Purchase Exposition Commission et al.

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

J. W. Murphy v. La. Purchase Exposition Commission et al.

State of Iowa, ex rel. C. W. Mullan, Atty. Genl., v. The Fraternal Accident Society of Cedar Rapids, Iowa.

State of Iowa v. A. J. Fuhrmeister et al.

The Whitney Realty Company, Limited, v. Chas. R. Hannan et al.

L. W. Nichols et al v. The Natl. Masonic Acci. Ass'n et al.

City of Council Bluffs et al v. W. B. Martin, Secy. of State, et al.
James Barr Ames et al. v. Chas. R. Hannan et al.
Wm. H. Semonies et al v. Chas. W. Needles et al.
George Baxter et al v. Chas. R. Hannan et al.
Rose Ann Carravan et al v. Martin Harkins et al.
State of Iowa v. Syndicate Land Company.
Freemont Benjamin et al v. B F. Huff et al.
William A. Montgomery et al. v. G. S. Gilbertson.
George C. Clark et al. v. J. W. McIntosh et al.
City of Marshalltown v. George LaPlant et al.
Chas. R. Hannan v. W. B. Martin et al.
H. A. Merrill et al v. Board of Supervisors of Cerro Gordo County et al.
G. S. Gilbertson v. T. H. Kenefick et al.
Dumbarton Realty Co. v. W. B. Martin et al.
Dumbarton Realty Co. v. F. M. Mollyneux et al.
Dumbarton Realty Co. v. Paul King et al.
Dumbarton Realty Co. v. E. Erickson et al.
Dumbarton Realty Co. v. Charles Newton et al.
State of Iowa v. J. N. Jones et al.
A. White v. State Board of Medical Examiners et al.
C. L. Dunlap v. C. M. Keller et al.
Carrie C. Catt v. Mary Catt et al.
State of Iowa v. Addie Scott et al.

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

SCHEDULE "E."

OFFICIAL OPINIONS.

Following are the official written opinions of the Attorney General during the year 1906:

APPROPRIATION OF MONEY FROM STATE TREASURY—CANNOT BE MADE BY JOINT RESOLUTION.—Held: (1) That a joint resolution although passed with all the formalities of a bill is not a law within the meaning of the provisions of the constitution. (2) That no money may be drawn from the state treasury except by the passage of a law as provided by the constitution.

SIRS: In compliance with the request of your secretary, Mr. A. H. Davison, for my opinion as to whether a valid appropriation of money from the state treasury is made by joint resolution No. 6 of the acts of the thirtieth general assembly, I submit the following:

In an opinion given to the board of control of state institutions on the 26th day of July, 1904, I considered and determined the question whether a joint resolution passed by the legislature is a law within the meaning of the constitution of the state, and after a careful and somewhat exhaustive examination of the authorities, I reached the conclusion that a joint resolution, although passed with all the formalities of a bill, is not a law within the meaning of the provisions of the constitution.

Having reached that conclusion, the question to be now determined is: Can money be appropriated by the legislature in any other manner than by the passage of a law as provided by the constitution?

Section 24 of article III of the constitution of the state provides:

> "No money shall be drawn from the treasury but in consequence of appropriations made by law."

Without again discussing in detail the authorities which enunciate the principles governing the question, it is sufficient here to say that the word "law," as used in the provision of the constitution quoted, means an act regularly passed by the legislature in the manner prescribed by the constitution. A joint resolution is not

such an act. It follows therefore that an appropriation of money cannot be made by a joint resolution or paid out of the treasury under authority thereof.

Respectfully submitted,

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

January 4, 1906.

TO THE HONORABLE EXECUTIVE COUNCIL OF THE STATE OF IOWA.

INSOLVENT CORPORATION—PROPERTY IN HANDS OF A RECEIVER—PRIORITY OF CLAIM DUE THE STATE.—In the absence of statute the claim of the state for taxes due on the property of an insolvent corporation is not a preferred claim.

SIR: In the case of *M. Seager v. American Fire Insurance Company* now pending in the district court of Polk county, Iowa, the following question has been submitted by the auditor of state upon the record therein:

Is a debt due the state whether a lien upon property or not, entitled to priority of payment over claims of individuals when property of an insolvent corporation is in the hands of a receiver for distribution?

Our statute does not provide that the claim of the state for the payment of taxes against property or the proceeds thereof in the hands of a receiver, is paramount to the claims of any other person.

The only provision relating to liens is found in code section 2835, which reads as follows:

> "Persons having liens upon the property placed in the hands of a receiver, shall, if there is a test as to their priority, submit them to the court for their determination."

It has been held by our supreme court that statutory provision for the payment of taxes in the case of an assignment for the benefit of creditors, does not apply to property in the hands of a receiver for distribution.

Howard County v. Strother, 71 Iowa, 683.

I find numerous decisions which hold that a debt due the state, whether a lien upon property or not, is entitled to priority of payment over claims of individuals; but an examination of these decisions discloses that the principle announced by the court is based

upon a statute making the claim of the state for taxes due, a preferred claim.

By a statute of Massachusetts, it is expressly provided that,

> "In the settlement of estates by receivers, the following claims shall be entitled to priority and to be first paid in full in their order: First. All debts due the United States and all debts and taxes assessed by this commonwealth or by any county, city or town therein." (Gen. Stat. 1897, Chapter 400.)

Under the New Jersey statute, all taxes upon personal property remain a lien for the term of one year from date of assessment and it is further provided that taxes shall be preferred claims.

Similar statutes prevail in New York, Missouri, Rhode Island and Oklahoma.

In the following cases the principle finds application:

Waite v. Worcester Brewing Co. et al, 176 Mass., 283;

Central Trust Company v. New York City & N. R. Co., 110 N. Y., 250;

Greely v. Bank, 98 Mo., 458;

Gray, Receiver, v. Logan County, 7 Okla., 321;

Duryee v. United States Credit System, 55 N. Y., 311.

It is my opinion that in the absence of a statute making taxes due the state a preferred claim, the claim of the state for the payment of taxes against property in the hands of a receiver for distribution, is not entitled to priority of payment over the claims of individuals.

Yours very truly,

LAWRENCE DEGRAFF.

January 5, 1906.

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

GUARANTEE FUND OF INSURANCE COMPANY NEED NOT BE SET OUT IN ANNUAL STATEMENT.—Held: First. The guarantee fund of the Royal Union Mutual Life Insurance Company does not become a liability within the meaning of the law until the board of directors authorizes the withdrawal of such fund, and until such time it need not be set out as a liability in the annual state-

ment which the company is required by law to make. Second. The fund should be reported as a guarantee fund, but not included in the total footing of liabilities. A foot-note to the report should state the manner in which such fund was created by the stockholders and how and when it may be withdrawn.

SIR: I am in receipt of your letter of the 8th instant, in which you request my official opinion upon the following questions:

First. Is the guarantee fund of the Royal Union Mutual Life Insurance Company and the manner in which it is created in the articles of incorporation of said company, of such a nature that it is a liability of the company that should be set out as such in the annual statement which the company is required by law to make to this department?

Second. If the nature of said guarantee fund is such that it should not be set out as a liability in the annual statement of the company, how should it be treated or set out in such statement?

In response to such request I submit the following:

First. Sections 1 and 2 of article IV of the articles of incorporation of the Royal Union Mutual Life Insurance Company provide the manner in which the guarantee fund of such company shall be created and paid into the treasury of the company. Section 2 of the same article provides that the guarantee fund shall be invested in the class of securities in which insurance companies are authorized to invest their funds in the state of Iowa, and that such securities shall become a part of the assets of the company. It is further provided in the same section that the entire assets of the company shall stand as an indemnity and guarantee of all risks and liabilities of the company.

Section 3 provides that the interest earned by the investment of the guarantee fund shall belong to the shareholders thereof and paid to them at least once a year, as the board of directors may determine.

Section 4 of the same article provides that the board of directors of the company shall have power to declare dividends on the unimpaired guarantee fund from the net surplus earnings of the company in an amount not exceeding the equivalent of seven per cent per annum, as compensation to the shareholders for guaranteeing with such fund the risks and obligations of the company.

Section 5 of the same article provides that a majority of the directors may, at any time after twelve years from the date of establishing such fund, authorize its withdrawal; provided such with-

drawal shall not impair the strength and stability of the company.

The question which arises under these provisions of the articles of incorporation of the insurance company is, whether the guarantee fund created and used in the manner provided, is a liability of the company.

The solution of this question involves the legal meaning of the word "liability." Numerous definitions of this word have been given by the courts of this country and England, but the one which is probably the most satisfactory is given in the case of *Reynolds v. Waterville,* 92 Me., 319:

> "To be liable is to be bound in the present to pay in the future certainly or upon a contingency."

This definition of Judge Savage coincides very closely with that given in Bouvier's Law Dictionary as follows:

> "The state of one who is bound in law and justice to do something which may be enforced by action."

The definition adopted by Bouvier is that given by Mr. Justice Day in *McElfresh v. Kirkendahl,* 36 Iowa, 224, in which it is said:

> "Liability is responsibility; the state of one who is bound in law and justice to do something which may be enforced by action."

Under the provisions of section 5 of article IV of the articles of incorporation of the company, the directors may, after twelve years from the date of the establishing of the guarantee fund, authorize its withdrawal by the subscribers thereto, if such withdrawal does not impair the strength and stability of the company; but there is no obligation resting upon the directors of the company, or of the company itself, to repay such fund to the subscribers thereto. The company is not in the position of one who is bound in law and justice to do something which may be enforced by action. No action can be maintained by any of the subscribers to such fund against the company, until a majority of the board of directors, after the lapse of twelve years, authorizes the withdrawal of said fund from the company.

There is no present obligation on the part of the company to repay any part of such fund now or at any time in the future. If, after the lapse of twelve years, the company, by a majority of the board of directors, authorizes the withdrawal of such fund, it then becomes a liability, because an obligation then would exist which could be enforced by action against the company. Until such

action is taken by the company, through its board of directors, the fund is not a liability within the meaning of the statutes of the state.

Second. I think the fund should be reported as a guarantee fund, but not included in the total footing of liabilities, and that a foot-note to the report should set forth the manner in which such fund was created by the stockholders, and how and when it may be withdrawn.

In this connection I call attention to the manner in which this fund is reported by the insurance commissioner of Illinois and superintendent of insurance of Ohio, as appears upon pages 231 of the Life Insurance Report of Illinois for 1905, Part II, and upon page 246 of the Life Insurance Report of Ohio for 1905. The suggested foot-note may be substantially as follows:

> "This company has a guarantee fund created by the stockholders, which the company is required to invest in the same class of securities as its other funds, and pay to the contributors the interest which it earns. The company may also declare dividends, not exceeding seven per cent, from the earnings of the company. The fund may, in the discretion of the board of directors, be repaid to the contributors after twelve years from the time it was created, if such payment shall not impair the strength and stability of the company."

Such explanatory foot-note will inform the public of the character of the fund, and upon what condition it may be repaid to the contributors.

Respectfully submitted,

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

January 26, 1906.

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

INCREASE IN SALARY OF JUDGE OF SUPREME COURT.—Held that the extension of the term of a judge of the supreme court by the adoption of the amendment to the constitution was in effect a re-election for the further term of one year. Held therefore that a judge of the supreme court whose term was thus extended one year by the biennial election amendment is entitled to the increase of salary provided in chapter 12, acts of the twenty-ninth general assembly.

SIR: I am in receipt of your favor of the 26th instant, requesting my opinion upon the following question:

Is the judge of the supreme court, whose term of office was extended one year from the 31st of December, 1905, by the adoption of the amendment to the constitution, commonly known as the biennial election amendment, entitled to the increase of salary provided in chapter 12 of the acts of the twenty-ninth general assembly?

In a recent opinion given by me to the governor upon the question whether the officers, whose terms of office were extended by the adoption of the amendment referred to, were required to qualify by taking oath of office prescribed by the constitution and statute of the state for the period of such extension, it was said:

> "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."

The judge whose term of office was extended by the adoption of the amendment was elected at the general election in the year 1899 for the full term of six years. He entered upon the duties of his office on the first day of January, 1900, and the term to which he was elected expired on the 31st day of December, 1905.

Under the provisions of the constitution, his compensation could not be increased or diminished during the term of office to which he was elected. By the adoption of the amendment to the constitution, at the general election in the year 1904, he was re-elected for a further term of one year. His title to the office, and his right to the compensation provided therefor, are held directly from the sovereign power of the state, and based upon his election in

the year 1904 to such extended term. When he accepted office under that election, and entered upon the duties thereof, he was entitled to the compensation then fixed by law.

The act of the twenty-ninth general assembly was in force at the time of the adoption of the amendment, and fixed the compensation of judges of the supreme court at six thousand dollars a year.

The constitutional provision is that the salary of a judge of the supreme court shall not be increased or diminished during the term of office for which he shall have been elected. In the case under consideration that term ended on the 31st day of December, 1905. The additional year given by the adoption of the amendment is no part of that term, and the constitutional provision cannot by any interpretation, be held to forbid a judge, whose term was extended by the adoption of the amendment, from receiving the compensation fixed by statute prior to the extension of his term of office.

I am therefore of the opinion that a judge of the supreme court whose term of office was extended by the adoption of the constitutional amendment, is entitled to receive the salary provided for by section 5 of chapter 12 of the acts of the twenty-ninth general assembly, i. e., six thousand dollars per annum from and after the first day of January, 1906.

Respectfully submitted,

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

January 26. 1906.

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

MUNICIPAL CORPORATIONS. CHANGE FROM CITY OF SECOND CLASS TO CITY OF FIRST CLASS—A city of the first class must have a population of 15,000 or over. Within six months after the publication of any state or federal census the executive council shall cause a statement and list of each city or town affected thereby in its class as a municipal corporation to be published in some newspaper at the seat of government. When it is proposed to change a city of the second to a city of the first class, the city council must make and publish such ordinances as are necessary for the organization of the city as a city of the first

class, and such ordinances must be in force at the time of the next annual or biennial election. In making such change it becomes necessary for a city of the second class to reorganize its entire city government.

SIR: I am in receipt of a letter from Mr. B. F. Swisher, city solicitor of the city of Waterloo, informing me that the city council of that city desires my written opinion upon the steps necessary to be taken to effect the change of a city from a city of the second class to one of the first class, and whether all of the city officials are to be elected in March, 1906. In compliance with such request I submit the following:

Section 638 of the code provides:

> "Every municipal corporation now organized as a city of the first class, or having a population of fifteen thousand or over, shall be a city of the first class."

Section 639 of the code provides:

> "Within six months after the publication of any state or federal census, the executive council shall cause a statement and list of each city or town affected thereby in its class as a municipal corporation, to be published in some newspaper at the seat of government and in each city or town the class of which is changed by an increase of population."

The city of Waterloo has a population exceeding fifteen thousand as shown by the census of 1905, and the publication has been made by the executive council as provided in section 639.

The object of the publication of the statement and list provided for in section 639 is that a sufficient notice shall be given each city or town, the class of which is changed by the publication of a federal or state census, that it may take the necessary steps to conform its municipal government to the class in which it is placed by the census, before the next annual or biennial municipal election.

Section 640 of the code provides:

> "At the next regular annual or biennial period for the election of officers after such statement is published showing a change of class of a city or town, the council shall make and publish such ordinances, not inconsistent with law, as may be necessary to perfect such organization in respect to the election, duties and compensation of officers * * *."

While the meaning of the word "at" in the first line of the portion of the section quoted may be slightly ambiguous, the meaning of the provision of the section is clear and certain. The clear, expressed intent of the legislature is that, after the publication of the statement and list required by section 639, the council of a city or town, the class of which is changed by the publication of a state or federal census, shall, before the next annual or biennial municipal election, make and publish such ordinances, not inconsistent with law, as may be necessary to perfect the organization of a municipal government of the class in which the city or town is placed by the census; that is, when, by the state or federal census, a city of the second class becomes a city of the first class, the city council must make and publish such ordinances as are necessary for the organization of the city as a city of the first class, and such ordinances must be in force at the time of the next annual or biennial election.

The word "at" as used must be construed to mean the same as the word "before," and the intent of the legislature thus effectuated. Such construction harmonizes all of the provisions of the statute, and gives force and effect to each provision thereof. It is fully authorized by the rules of statutory construction and, in my opinion, must be so construed whenever the question shall come before the courts.

Section 645 of the code provides:

> "City and town councils shall be composed as follows: In cities of the first class a mayor, two councilmen at large, and one councilman from each ward; * * * "

Section 646 provides:

> "On the organization of a city or town, or on its reorganization after the change of its class, a council shall be elected at the first ensuing municipal election as follows: By the election in cities of the first class of two councilmen at large, but if any city embraces within its limits the whole or parts of two or more townships, two of which contain one thousand or more electors, only one of the councilmen at large shall be chosen from any one such township. There shall also be elected at the same time one councilman from each ward, who shall be chosen by the electors residing within the limits thereof. Thereafter the successors of such councilmen at large and ward councilmen shall be chosen at the regular biennial elections and shall hold office for two years. * * * "

Section 647 provides:

> "In all cities of the first class, there shall be elected biennially a mayor, solicitor, treasurer, auditor, city engineer, assessor and, where there is no superior courts, a police judge."

Under these provisions of the statute, the transition of a city from a city of the second class to one of the first class requires the reorganization of its entire municipal government and an election of a complete new set of municipal officers. The old organization expires at the first election held after the change of class, and the terms of office of all officers under such old organization expire at the same time. The city enters a new class, and must elect all of the officers required in cities of the class which it enters. It is divested of its previous organization and the rights and duties thereunder, and emerges from such organization with new rights, new duties and new responsibilities. It therefore becomes necessary for the protection of such rights and the performance of the duties and obligations imposed upon it as a city of the first class, to reorganize its entire city government for the purpose of exercising such rights and discharging such duties and obligations.

This necessity has been anticipated by the legislature, and the method of transition and the assumption of new rights, new duties and new responsibilities has been declared by the provisions of the statute quoted.

Under these provisions there can be no doubt as to the duty of the city council. That body must prepare, make and publish the ordinances necessary for the reorganization of the city, and the election of all of the officers required of a city of the first class at the first annual or biennial election following the publication of a state or federal census.

That election occurs in the city of Waterloo in March, 1906, at which time all of the officers named in section 647 of the code must be elected, and, in addition thereto, the councilmen provided for in subdivision 1 of section 646. All of these officers and members of the council when so elected will hold their respective offices for the terms named in the sections referrd to.

Respectfully submitted,

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

February 10, 1906.

TO THE HONORABLE MAYOR AND CITY COUNCIL OF THE CITY OF WATERLOO, AND TO HON. B. F. SWISHER, CITY SOLICITOR.

UNIFORM TEXT BOOKS—CONSTRUCTION OF THE WORD "COST" AS USED IN SECTION 2824 OF THE CODE.—Held that the word "cost" as used in section 2824 of the code means the contract price. Any extra expense connected with securing the text books should not be added to the purchase price, but should be paid from the contingent fund.

SIR: In reply to your favor of the 12th instant requesting my opinion as to the construction of the word "cost" as found in section 2824 of the code, I submit the following:

Code sections 2824 to 2832 inclusive relate to the uniformity, purchase and loaning of text books.

Section 2824 provides:

> "The board of directors of each and every school corporation in the state of Iowa is hereby authorized and empowered to adopt text books for the teaching of all branches that are now or may hereafter be authorized to be taught in the public schools of the state, and to contract for and buy said books and any and all other necessary school supplies at said contract prices, and to sell the same to the pupils of their respective districts at cost, and said moneys so received shall be returned to the contingent fund. * * * "

Section 2825 provides:

> "All the books and other supplies purchased under the provisions of this chapter shall be paid for out of the contingent fund, and the board of directors shall annually certify to the board of supervisors the additional amount necessary to levy for the contingent fund of said district to pay for such books and supplies. * * * "

Section 2832 provides for a uniform series of text books for use in any county of the state and empowers the county board of education to select school text books for the entire county and contract for the purchase of same and "sell them to the school districts at the same price as provided for in section 2824 of this chapter."

The intent and purpose of these provisions is to secure uniformity in cost for the same text books in a certain territory and at the same time minimize as far as possible the cost of the text books to the pupils therein.

In view of the plain intendment of the statute, the word "cost" in section 2824 of the code must be construed to mean contract

price and any extra expense connected with the securing of the books, such as expense for handling, drayage, storage, etc., should not be added to the purchase price, but must be paid from the contingent fund. In this way only the cost to the purchaser will agree with the contract price and uniformity in cost for the same book will obtain in a large district having several depositories.

I am therefore clearly of the opinion that the word "cost" must be construed to mean contract price of the text books or other school supplies in question.

Respectfully submitted,

LAWRENCE DEGRAFF,
Assistant Attorney-General.

February 13, 1906.

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

REORGANIZATION OF SCHOOL DISTRICTS IN CITIES OF FIRST CLASS—METHODS OF ELECTING DIRECTORS.—The procedure for effecting adjustment of a school district when the city passes from a second to a first class city should be substantially the same as required for organization of an independent district. The provisions of section 2795 should govern so far as applicable in the manner of choosing a board of directors.

SIR: I am in receipt of your communication of the 5th instant, inclosing a letter from Mr. A. J. Edwards, president of the school board of the independent district of East Waterloo, and asking my opinion as to the method of procedure by which that school district shall be so reorganized as to conform to the provisions of the statute relating to independent school districts in cities of the first class. In compliance with your request I submit the following:

Section 2754 of the code provides:

> "In any district, including all or part of a city of the first class, or a city under special charter, the board shall consist of seven members, three of whom shall be chosen on the second Monday in March, 1898, two on the second Monday in March, 1899, and two on the second Monday in March, 1900."

The effect of this provision is that school districts of the class referred to must elect three of the seven directors at one annual election, two at the next annual election, and two at the following annual election. The directors so elected hold office for the term of three years, and their terms of office expire in the order in which they were elected.

Such action should be taken by the independent school district of East Waterloo, as it is now a part of a city of the first class, as will adjust the time of the election of a board of seven directors and the expiration of their respective offices so as to conform to the provisions of section 2754. Such adjustment should be made at the first annual election after the city of Waterloo became a city of the first class. The procedure for effecting such adjustment should be substantially the same, so far as applicable, as is required for the organization of an independent district.

Section 2795 provides the manner of choosing a board of directors in a newly organized independent school district, and the terms to which the directors shall be elected. While the provisions of such section do not in all respects apply to the condition existing at Waterloo, I think the procedure pointed out therein should be followed as far as it can be made applicable. That is, at the annual school election in March, 1906, three directors should be elected for the full term of three years, and one for the term of two years. The district will then have seven directors, as is required by law, and their terms of office so adjusted that the terms of office of two will expire and their successors elected at the annual election in 1907, the terms of office of two will expire and their successors be elected at the annual election in 1908, and the terms of office of three will expire and their successors be elected at the annual election in 1909.

Respectfully submitted,

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

February 22, 1906.

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

STATE HOSPITAL FOR INEBRIATES—PAROLE OF PATIENTS—MONTHLY REPORTS OF PAROLED PATIENTS—RETURN OF ESCAPED PATIENT OR PATIENTS WHO HAVE VIOLATED THEIR PAROLE—EXPENSE

INCURRED IN THE RE-CAPTURE AND RE-COMMITMENT OF ESCAPED PATIENTS, BY WHOM PAID.—A patient committed to the state hospital for inebriates may be paroled by superintendent, and such paroled patient must make monthly reports to the superintendent. For a violation of any of the conditions of the parole, the patient may be returned to the hospital. Under the direction of a superintendent, any peace officer is authorized to return to the hospital any escaped patient or any patient who has violated his parole. All expenses incurred in the re-capture or re-commitment of an escaped patient shall be paid by the state.

SIRS: I am in receipt of your favor of the 15th ultimo, and also yours of the 17th, in which my opinion is requested upon the following questions:

1. In the case of paroled patients committed and paroled under chapter 93 aforesaid:

(a) To whom are they to make the monthly reports?

(b) In case they violate the conditions of their paroles, what process or authority is required for their return, and should they be returned to hospitals as designated in our order—males to Knoxville and females to Mount Pleasant?

(c) Can such patients be returned for breach of conditions set out in section 14 of said chapter 80, or for failure to report as required by section 3 of said chapter 93?

2. In the case of escaped patients committed under said chapter 93, on what authority or process are they to be returned, should the males be returned to Knoxville and the females to Mount Pleasant; and how are the expenses of capture and return to be paid?

3. By whom are paroles under section 14 of said chapter 80 to be issued?

4. Are patients committed under chapter 93 to be paroled by the governor on the recommendation of the superintendent as provided in that act, or does section 14 of chapter 80 of the acts of the thirtieth general assembly govern?

5. Does a patient who escapes from the hospital for inebriates and is thereafter captured and returned to the hospital, or who makes an uneffectual attempt to escape, lose all right to a parole thereafter, or must he be held to the end of his term?

These questions will be answered in the order in which they are stated.

First. (a) Section 14 of chapter 80 of the acts of the thirtieth general assembly provides that a patient, committed under the provisions of the act, may be paroled by the superintendent of the hospital under certain conditions. It further provides that the paroled patient must make written reports to the superintendent of the hospital at the beginning of each month to the effect that he has not in any respect violated any of the terms and conditions of his parole. This section was enacted by the legislature as a substitute for section 2310-c of the supplement to the code. It is in direct conflict with the provisions of the last named section, and its provisions were evidently intended to supersede those of section 2310-c.

The provisions of the statute are analogous to statutes which relate to remedies, and may, therefore, be changed or modified by the legislature.

Section 22 of the act of the thirtieth general assembly repeals all acts and parts of acts in conflict with the provisions of chapter 80 of the laws of the thirtieth general assembly. The reports of the patients paroled under the provisions of that chapter should, therefore, be made to the superintendent of the institution to which they were committed.

(b). Section 14 of the act provides, if any patient shall fail to make a report or in any manner fail to perform all of the conditions of his parole, he may, without any further proceeding whatever and on the written order of the superintendent of said hospital, be taken and returned to the hospital and there detained.

The section further authorizes any peace officer, or any officer or person whom the superintendent of the hospital may direct, to return such patient to the hospital for a violation of his parole. The written order of the superintendent is sufficient authority for the arrest, detention and return of a patient who has escaped, or who has violated his parole, and such order should be executed by any peace officer in the state to whom the same is given for service, or by any officer or person designated by the superintendent of the hospital. In each case the patient should be returned to the hospital from which he has escaped; that is to say, if the patient is a male he should be returned to Knoxville, and if a female, to Mount Pleasant.

(c). Section 14 of the act of the thirtieth general assembly in terms provides that a paroled patient may be returned to the hospital upon the written order of the superintendent, for a failure to make the report required by the provisions of the act;

that is, the report which the patient must make to the superintendent of the hospital from which he is paroled.

Chapter 93 of the acts of the twenty-ninth general assembly provided that, if a patient on parole should fail to make the report to the governor as required by the act, the sheriff of the county wherein such patient resides should, without further writ or warrant, return the patient to the hospital.

The legislature, by the enactment of chapter 80, modified the provisions of chapter 93 of the acts of the twenty-ninth general assembly, relating to reports to be made by patients on parole, and such reports are now required to be made to the superintendent of the hospital and not to the governor.

Second. Section 17 of the act of the thirtieth general assembly provides that female inebriates may be committed for treatment to a state hospital for the insane to be designated by the board of control; and section 18 of the act provides that when the hospital for inebriates is open for the reception of patients the board of control shall cause to be transferred to it all male patients then in the inebriate hospitals connected with the state hospitals for the insane.

These two sections, in connection with the order of the board designating the hospital at Mount Pleasant as the state hospital to which the female inebriates shall be committed, fix the places to which such patients shall be committed, and in which they shall be confined. Any patient who escapes from either of these hospitals should be returned to the institution from which he or she has escaped; that is, the females should be returned to Mount Pleasant and the males to Knoxville.

Section 25 of the act of the thirtieth general assembly provides that all necessary expenses incurred in the re-capture and recommitment of an escaped patient shall be paid by the state. No method of procedure for the payment of such expenses from the state treasury is pointed out, but under the provisions of the act and those of chapter 118 of the acts of the twenty-seventh general assembly, I think the superintendent of the institution from which the patient escaped should make a fully itemized account of all expenses incurred in the arrest and return of such patients to the hospital, which account should be verified and transmitted to the board of control for its approval. If approved by the board, the auditor of state should draw a warrant upon the treasury for the amount thereof, which warrant should be sent to

the superintendent of the institution by which the expenses were incurred, to be used in the payment of such expenses.

Third. While the provisions of section 14, relating to the issuance of a parole, are not as clear as might be desired, it is, I think, certain that the legislature intended that such parole should be issued by the superintendent of the hospital in which the patient is confined. All of the provisions relating to reports to be made by the patient require that they shall be made to the superintendent of the hospital and that in case of a failure to make such reports, or of a violation of the conditions of the parole, the superintendent shall issue his written order for the arrest and return of the patient. The entire procedure relating to the parole, arrest and return of the patient for a violation thereof, is based upon the thought that such parole shall be issued by the superintedent, and this construction harmonizes and makes effective all of the provisions of the act.

Under this view of the act of the thirtieth general assembly, as expressing the intent of the legislature, there is a conflict between the provisions of section 14 of the act and section 3 of chapter 93 of the acts of the twenty-ninth general assembly, and the provisions of section 3 of said act, so far as they conflict with the provisions of section 14 of the act of the thirtieth general assembly, are repealed by section 22 of the later act.

It must, therefore, I think, be held that the parole must be given by the superintendent of the institution in which the patient is confined, and that all reports must be made to such superintendent, and that he has the general supervision of the conduct of the patient during the term of such parole, and the power to have the patient re-arrested and returned for any violation thereof.

It must, I think, also be held that the provisions of section 14 of the act of the thirtieth general assembly, and the mode of procedure designated therein, as hereinbefore set forth, apply to patients committed under chapter 93 of the acts of the twenty-ninth general assembly, as well as those committed under chapter 80 of the acts of the thirtieth general assembly.

Fourth. Section 7 of the act of the thirtieth general assembly provides that the term of detention and treatment of a patient committed under the provisions of the act, shall be until such patient is cured, and not exceeding three years. The commitment of a patient is not for the purpose of inflicting punishment upon him, but for the purpose of curing him of a habit or disease which unfits him for work and for society. The legislature in declaring

that he shall be committed until cured of such habit or disease, has clearly indicated that he is not to be detained in the hospital after such cure is effected.

Section 14 of the act provides that when the patient has been returned to the hospital because of a violation of the terms of his parole, he is to be detained and treated as provided in the act; that is, he is to receive such treatment as is deemed best to eliminate the effects of the alcohol or narcotic drug, and to build up the system physically and mentally, and which will tend to strengthen the moral character of the patient and enable him to resist the temptation to drink or to use narcotic drugs. He is to be detained in the hospital for such treatment until he is cured of the habit or disease because of which he was committed. If such cure is effected before the expiration of the term for which he is committed, no reason exists why he may not be paroled by the superintendent of the institution, although previous to that time he has violated the condition of a former parole.

It therefore follows that, if the superintendent of the hospital shall believe that a patient is wholly cured of the habit, disease or malady which was the cause of his commitment, he may, under the provisions of the act of the thirtieth general assembly, parole such patient although the patient may have violated the terms of a former parole and have been returned to the hospital for further treatment.

Respectfully submitted,

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

March 12, 1906.

TO THE HONORABLE BOARD OF CONTROL OF STATE INSTITUTIONS.

STATE PHARMACY COMMISSION—ELIGIBILITY OF MEMBERS.—No person is eligible to appointment to state pharmacy commission who has not been engaged in practicing pharmacy in the state of Iowa for the five years preceding the time of his appointment.

SIR: In compliance with your request of the 19th instant, in which you ask my opinion as to the construction which must be given the provisions of section 2584 of the code relating to the appointment of commissioners of pharmacy, I beg leave to say:

The section provides:

> "The commission of pharmacy shall consist of three competent pharmacists who have been for the preceding five years residents of the state and engaged in the practice of pharmacy, one of whom shall be annually appointed by the governor and hold office for three years and until his successor is appointed and qualified."

The question presented for determination under this provision of the statute is: Must an applicant, to be eligible to appointment to the state board of pharmacy, have been engaged in the practice of pharmacy for a period of five years preceding such appointment?

But one answer can be given to the question. No person is eligible to appointment to the state board of pharmacy who has not been engaged in practicing pharmacy for the five years preceding the time of the appointment. The statute provides that he must be engaged in practicing pharmacy. It is not sufficient that he is the owner, in whole or in part, of a pharmacy conducted by some other person, and although he may own a drug store or pharmacy, if he has not been engaged for five years prior to the time of the appointment in practicing pharmacy, he is not eligible to the place.

The purpose of the provision of the statute is that one appointed to such position shall bring with him to the office knowledge of the modern discoveries in pharmacy and the latest and best information relating to that branch of science.

The evidence submitted with your letter shows that Dr. O. W. Phelps is the owner in good faith of an interest in a drug store located in the town of Kanawha, Hancock county, Iowa, and that since the year 1903 he has been located at Hawarden in Sioux county where he has been engaged in the management of a sanatorium. Under these facts he has not been engaged in practicing pharmacy for five years preceding his application for appointment, within the meaning of the statute quoted.

I am, therefore, compelled to reach the conclusion that he is not eligible to appointment to the state board of pharmacy.

Respectfully submitted.

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

March 20, 1906.

HON. A. B. CUMMINS,
Governor of Iowa.

RAILWAY COMPANIES—DISCRIMINATION IN RATES.—Held that a grouping of coal mines in any district in the state by a railway company so that one community would receive an advantage over other communities, would be a violation of section 2125 of the code.

SIRS: I am in receipt of your communication of the 13th ultimo, asking my opinion whether a number of coal mines within a certain district in southern Iowa can be, by the railway companies, grouped for the purpose of fixing rates for the transportation of coal therefrom, and the same rate be made applicable to the product of each mine, without regard to the distance which the coal is hauled by the railway companies. In answer to such inquiry I respectfully submit the following opinion:

Section 2125 of the code provides:

> "It shall be unlawful for any common carrier, subject to the provisions of this chapter, to make or give any preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever; * * * "

The question which arises is: If the railway companies should group the coal mines in any district in the state, and give each mine owner the same rate for transporting his coal that should be given to every other mine owner within the group, without regard to the distance of the haul, would such act on the part of the railway companies be a violation of the provisions of section 2125 quoted?

The section referred to expressly prohibits any railway company from giving any preference or advantage to any locality or to any particular description of traffic. The phrase "any particular description of traffic" is clearly intended to mean and cover every commodity transported by railway companies.

No advantage can, therefore, under the statute, be given to any locality that shall not be, upon equal terms, given to all localities, and no particular commodity shall be given any advantage as to the price for transportation, which shall not be given to all commodities of the same class.

Without going into the question at length, I think it is clear that under the present statute any grouping of coal mines in any

particular portion of the state, by means of which a certain locality would receive an advantage in the price paid for the transportation of coal, is in violation of the terms of the statute and cannot lawfully be done by the railway companies.

Respectfully submitted,

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

April 3, 1906.

TO THE HONORABLE RAILROAD COMMISSIONERS OF THE STATE OF IOWA.

BANKS—CAPITAL AND SURPLUS.—A banking corporation desiring to have a capital and surplus equal to two hundred and fifty thousand dollars must provide in its articles of incorporation for a capital and surplus equal to that sum.

SIR: I am in receipt of your favor of the 29th ultimo, enclosing a letter of Senator Ericson relating to a question which was referred by your department to me some time ago.

If I correctly understand the question presented, it is in substance this: Can a bank, incorporated with a paid up capital of one hundred thousand dollars and a surplus of fifty thousand dollars, create and maintain a separate fund of one hundred thousand dollars which shall be liable for the debts of the bank but which shall not be subject to taxation as capital or surplus, and which shall give to the bank the right to advertise in effect that it has a capital and surplus of two hundred and fifty thousand dollars?

In answer to the question I beg leave to say:

Under the common law, which controls, defines and limits the powers of banks, except as enlarged or modified by statute, but three funds are recognized in their organization and operation: (1) the capital, (2) the surplus, and (3) undivided profits.

In this state the capital of a bank must be fully paid before it begins the transaction of its business. It may create a surplus at the time of its organization by requiring its stockholders to pay more than the par value of the shares of stock subscribed for by them, or it may set aside from its earnings any portion thereof which may be agreed upon as a surplus. It may also, if its directors and stockholders so agree, retain such an amount of the undivided profits as may be deemed desirable and invest the same in securities in the same manner as the capital and surplus

may be invested. But it is not, in my opinion, within the power of a bank, either under the common law or under our statute, to create a fund of the character of that suggested in the inquiry.

The surplus and undivided profits must be taken into consideration in fixing the taxable value of the shares of the corporation, and no fund can be created or maintained by the bank which should not be taxed in the same manner as the capital and surplus are taxed.

Any fund which should be created by the bank and set aside in the manner suggested, whether it came from direct payments made by the stockholders at the time of the organization, or from the earnings of the bank after its organization, would be a surplus, pure and simple, and would have to be treated as such in all respects, including the taxation thereof in the manner provided by law.

Under the view as expressed, it follows that the section of the articles of incorporation submitted could not be approved by the banking department of the state, if it appeared in the articles of incorporation under which the bank was seeking to become incorporated.

If the corporators desire to have the credit and benefit of a capital and surplus equal to two hundred and fifty thousand dollars, they must provide in their articles of incorporation for a capital and surplus equal to that sum.

Respectfully submitted,

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

April 5, 1906.

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

FRATERNAL BENEFICIARY SOCIETIES—MEDICAL EXAMINATION OF APPLICANTS—WHO MAY MAKE SUCH EXAMINATION—PHYSICIAN DEFINED.—Under section 139 of the code requiring every applicant for membership in any fraternal beneficiary society to first be examined by a physician holding a certificate from the state board of medical examiners, held that the word "physician" means one who is exercising the calling of treating the sick by medical agencies as commonly practiced throughout the state, and that an osteopath is not authorized under said section to make the required examination.

SIR: I have the honor to acknowledge the receipt of your communication asking my opinion as to the construction which must be given the provisions of section 1839 of the code relating to the medical examination of applicants for membership in fraternal beneficiary associations, the questions upon which my opinion is asked being:

1st. Under the section cited, is an osteopathic physician authorized to examine applicants for membership in fraternal beneficiary associations in this state?

2d. Does the section cited prohibit osteopathic physicians residing in another state from examining applicants for admission to fraternal beneficiary associations organized under the laws of this state, but authorized in such other state, if the laws of such other state permit such physicians to make the examination?

First. The section of the code referred to provides:

> "Every applicant for membership in any association organized in this state shall first be examined by a physician holding a certificate from the state board of medical examiners."

The question which is presented for determination under this section is, what is meant by the word "physician" as used therein. Bouvier defines the word "physician" to mean:

> "A person who has received the degree of doctor of medicine from an incorporated institution. One lawfully engaged in the practice of medicine."

This definition has been generally adopted by the courts of this country.

In *Whitlock vs. Commonwealth,* 89 Va., 338, the word "physician" is defined as one who practices medicine.

In *Nelson vs. State Board of Health,* 108 Ky., 776, it is said:

> "The terms 'physician,' 'practice medicine,' and 'medical college,' used in the act, have a well-defined popular meaning, and were used, we think, by the legislature, in this sense. The term 'physician' refers to those exercising the calling of treating the sick by medical agencies, as commonly practiced throughout the state at the time the act was passed. The term 'medical college' refers to those schools of learning teaching medicine in its different branches, at which physicians at that time were educated, or schools of that character

organized since. At such an institution an essential part of the instruction was in teaching the nature and effect of medicines, how to compound and administer them, and for what maladies they were to be used. In such institutions also surgery is an essential part of the instruction. Without a knowledge of surgery or medical agencies, no person would be deemed equipped to practice medicine by any medical college; for these things lie at the base of the instruction given in such schools. Osteopathy teaches neither therapeutics, materia medica, nor surgery. Bacteriology is also ignored by it. As we undertsand the record, it relies entirely on manipulation of the body for the cure of diseases. Its theory is that a large number of ailments are due to irregular nerve action, and that by stimulating or repressing the nerve centers by manipulation they enable nature herself to right the evil. It administers no drugs; it uses no knife. It does not profess to cure all diseases. When a case is presented requiring surgery or medication, the osteopath gives way to the physician. Faith cure or magnetism has no place in the system. It relies wholly upon manipulation aiding the *vis medicatrix naturae.* The main things taught in the school are physiology, anatomy, and the treatment of diseases by manipulation. The system is new, and, of necessity, imperfect as yet, but, if we may credit the evidence in this record, is often efficacious where the regular practice is ineffective. Still a school which teaches neither surgery, bacteriology, materia medica, nor therapeutics cannot be regarded as a medical college within the popular meaning of those terms as understood in this state when the act in question was passed.''

Our statute requires every person to pass an examination by the state board of medical examiners in anatomy, histology, pathology, gynecology, obstetrics and theory of osteopathy before he can practice osteopathy in this state. No examination is required in materia medica, therapeutics, the principles and practice of medicine, or surgery. These subjects, as is so well said in *Nelson vs. State Board of Health, supra,* lie at the base of the instruction given in medical schools. No one can be deemed a physician or qualified to practice medicine unless he possesses a knowledge of materia medica, therapeutics and surgery.

The purpose of section 1839 is to require every applicant for membership in any fraternal beneficiary society to be subjected

to an examination by a skilled and competent physician for the purpose of ascertaining whether such applicant is afflicted with any disease, the probable effect of which would be to shorten his life.

The person who makes such examination must bring to his aid the knowledge, skill, learning and experience which is generally understood to be necessary to enable him to determine the physical health and character of the applicant.

The legislature has said that the person who shall make such examination must be a physician, and the word "physician" must be held to have been used in the ordinary sense, that is, to mean one who is exercising the calling of treating the sick by medical agencies as commonly practiced throughout the state at the time the act was passed.

The statute in terms prohibits an osteopath from prescribing or using drugs in his practice, and from performing major or operative surgery. As the science of medicine and of surgery lies at the base of the training of a physician, it cannot be said that an osteopath is a physician within the meaning of the word as used in the statute quoted.

It must, therefore, be held that an osteopath is not authorized, under section 1839 of the code, to examine applicants for membership in any fraternal beneficiary association organized under the laws of this state.

Second. Every member of a fraternal beneficiary association which is organized and transacting business under the laws of this state, must be admitted to such membership in accordance with the provisions of our statute. One rule or method of admission of members to such association cannot obtain in the state of Iowa, and another in other states. All must be admitted upon the same terms and upon the same footing.

It therefore logically follows that, if a member cannot be admitted to membership in such an association in this state without being examined by a physician for the purpose of ascertaining his physical condition and health, no person residing in another state can be admitted to such membership except upon such examination. The fact that the laws of other states may permit osteopaths to make a medical examination of applicants for life insurance or for membership in fraternal beneficiary associations, is immaterial, for the reason that such an association, incorporated under the laws of the state of Iowa, is governed by the laws of this state, and its business must be conducted in accordance therewith.

The laws of other states may prescribe certain regulations and restrictions as to the transaction of its business within the boundaries of those states, but they cannot permit the association to receive persons into its membership in violation of the requirements of the Iowa statute.

All persons desiring membership in such associations organized under the laws of this state must therefore submit to an examination by a physician as provided by the section of the code referred to.

Respectfully submitted,

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

April 9, 1906.

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

SPECIAL APPROPRIATION—UNEXPENDED BALANCES.—Appropriations for the Iowa State College of Agriculture and Mechanic Arts are specific appropriations to be used for a specific purpose, and the rule that all unexpended balances of annual appropriations shall be turned into the state treasury at the end of the fiscal year, does not apply.

SIR: I am in receipt of your favor of the 16th instant, in which you ask my opinion whether the unexpended balances of the special appropriations, made by section 1 of chapter 156 of the acts of the thirtieth general assembly to the Iowa State College of Agriculture and Mechanic Arts, aggregating $54,500, to be specifically used as follows:

> For central heating plant and chimney, $25,000.
>
> For equipment for central heating plant, tunnel to central building and Morrill Hall, and for wreckage of old building and transferring boilers to the new building, $29,500,

may be drawn from the state treasury and used for the purposes designated in the act making the appropriation, after the 30th day of June, 1906.

In answer to your request I respectfully submit the following:

The appropriations named are specific appropriations to be used for a specific purpose, and the rule which applies to annual appropriations made by the legislature is not applicable. No time is

fixed in the act within which the appropriations named shall be drawn from the state treasury and used for the purposes for which they were made, and the reason for the rule which requires that all unexpended balances of annual appropriations shall be covered into the state treasury at the end of the fiscal year, does not exist as to the appropriations under consideration.

The money was appropriated by the state for certain work and improvements at one of the state educational institutions and while it is undoubtedly the duty of the persons having charge thereof to prosecute the same with all reasonable diligence, it does not follow that the institution should be deprived of an unexpended balance which is necessary to carry out such work, because it is not completed before the end of the fiscal year.

There is no provision of law which requires unexpended balances of specific appropriations of the character of those under consideration, to be covered into the state treasury because the work for which the appropriation was made is not completed and the money drawn from the treasury before the end of the fiscal year.

Any unexpended balance of these appropriations may be drawn from the treasury and used for the purposes named in the act making the appropriation after the 30th day of June, 1906.

Respectfully submitted,

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

April 17, 1906.

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

STATE BOARD OF MEDICAL EXAMINERS—QUALIFICATIONS OF APPLICANT TO TAKE AN EXAMINATION BEFORE SUCH BOARD.—An applicant for a certificate authorizing him to practice medicine in the state shall be competent both mentally and physically to take the required examination. Held that an applicant who is blind does not meet these requirements.

SIR: I am in receipt of your communication of the 18th instant, enclosing application of Dr. George C. Farmer to practice medicine in the state of Iowa, and requesting my opinion as to whether, under the laws of this state, he is entitled to a certificate permitting him to practice medicine therein.

In response to such request I beg leave to say:

On the 16th day of June, 1905, I gave to the state board of medical examiners a written opinion in which I held that every person who appears before that board 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. That the board is without authority to give to an applicant who is incapable, either mentally or physically, of taking the examination so prescribed, an examination of different character than that required by law.

This opinion was in a case where an applicant was blind and for that reason unable to take the examination prescribed by the statute.

A further consideration of the question involved has convinced me of the soundness of the opinion which I gave at that time. It may possibly work a hardship in some instances, but the law requires that all applicants for a certificate authorizing them to practice medicine in the state shall be competent, mentally and physically, to take the required examination.

I am informed by the letters attached to the application of Dr. Farmer that he is blind and has been for a number of years. He was permitted to take an examination by the state board of medical examiners of the state of Illinois, but is not qualified physically to take the examination required by our law. The scope of the examination given by the Illinois board is, therefore, less than that prescribed by the laws of this state, and cannot, in my opinion, be held to entitle Dr. Farmer to a certificate to practice medicine in this state under the provisions of chapter 102 of the acts of the thirtieth general assembly. To hold otherwise would be to do violence to the provisions of our statute, which prescribe the examination which shall be taken by every applicant to practice medicine in this state.

The reciprocity provision of our statute is based upon the theory that a physician, coming from another state and presenting a certificate showing that he was authorized to practice medicine in the state from which he comes, successfully passed the same character of examination which would have been required if his application for a certificate to practice medicine had been made to the state board of medical examiners in this state. And if it shall conclusively appear that the examination upon which the certificate of such physician was issued was not of the character which is required by the laws of Iowa, the applicant does not come within the reciprocity provisions of the statute, and the certificate issued by the

board of medical examiners of another state cannot be accepted as evidence of his qualification to practice medicine in Iowa.

If a resident of this state is disqualified from taking the examination for a certificate authorizing him to practice medicine herein, because of a physical defect, no reason can be given why a resident of another state, suffering from a similar physical defect, should be granted a certificate because the examining board of the state from which he comes permitted him to take an examination which he could not take in this state.

It is with reluctance that I reach this conclusion, but I see no escape from it under the provisions of our statute.

Respectfully submitted,

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

April 20, 1906.

DR. J. F. KENNEDY,
Secretary State Board of Medical Examiners.

REGIMENTAL STAFF OFFICERS—APPOINTMENT OF—Section 6, chapter 91, acts of the thirty-first general assembly construed.

SIR: In response to your request of the 29th instant for an opinion as to whether the re-enactment of section 5 of chapter 77 of the acts of the thirtieth general assembly by the thirty-first general assembly, will require the reappointment of certain officers named in both acts, I beg leave to submit the following:

Section 6 of the acts of the thirty-first general assembly is a re-enactment of section 5 of chapter 77 of the acts of the thirtieth general assembly with slight additions included therein. The act of the thirty-first general assembly does not affect the tenure of any staff officer appointed under the provisions of section 5 of chapter 77 of the acts of the thirtieth general assembly, which is continued by the provisions of the last act.

The appointing power remains the same and no change is made by the legislature in any of the offices which are included in both acts. Section 6 is, so far as it relates to officers appointed under the provisions of section 5 of chapter 77 of the acts of the thirtieth general assembly, which are named in the act of the thirty-first general assembly, a reiteration of the provisions of section 5 of the acts of the thirtieth general assembly, and does not affect the

officers named in the last act as to their right to hold office by appointment under the former act.

Respectfully submitted,

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

April 20, 1906.

GEN. W. H. THRIFT,
Adjutant-General of Iowa.

TENURE OF OFFICE—REPEAL OF STATUTE AS AFFECTING.—An act repealing a statute creating an office abolishes the office, and the tenure of office of all the officers holding under such statute terminates when the law repealing the statute takes effect.

SIR: In response to your request of the 24th instant for a further construction of the act of the thirty-first general assembly, known as senate file No. 279, I respectfully submit the following:

An examination of senate file No. 279, as passed by the legislature and as shown by the engrossed copy on file in the office of the secretary of state, shows that section 7 of chapter 77 of the acts of the thirtieth general assembly was repealed by the act referred to, the repeal of the section being in these words:

> "That section 2189 of the code be and the same is hereby repealed. The law as it appears in section 7 of chapter 77 of the acts of the thirtieth general asstmbly be and the same is hereby repealed."

It is a well settled rule of law that the repeal of a statute creating an office abolishes the office.

Throop on Public Officers, sec. 304;

Chandler v. City of Lawrence, 128 Mass., 215.

Under this rule all of the offices created by section 7 of the act of the thirtieth general assembly are abolished by its repeal, and the tenure of office of the officers named therein expired when the law repealing that section went into effect.

The act became a law on the 12th day of April, 1906.

At that time the tenure of office of all officers named in section 7 terminated, and the persons who had previously thereto filled the offices therein named ceased to be such officers. It follows, therefore, that wherever any of the offices named in section 7 of the act of the thirtieth general assembly are re-created by the acts of the thirty-first general assembly, the office so re-created is in effect a

new office and must be filled by a new appointment made in the manner provided by the act of the thirty-first general assembly.

Respectfully submitted,

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

April 26, 1906.

HON. W. H. THRIFT,
Adjutant-General of Iowa.

TREASURERS OF SCHOOL DISTRICTS.—The act of the thirty-first general assembly abolishing the September meeting of the board of directors of school district, and making the school year end in July rather than September, and providing for the election of officers named in said act at the July meeting, had the effect of so changing the tenure of office of school treasurer as to make it begin immediately following the July meeting.

SIR: I am in receipt of your favor of the 10th instant, asking me for a construction of section 2757 of the code and the substitute for senate file No. 27 of the thirty-first general assembly, so far as they relate to the tenure of office of treasurers of school districts, and in compliance therewith I submit the following:

The act of the thirty-first general assembly abolishes the September meeting of the board of directors which was provided for by section 2757, and makes the school year end in July instead of in September. It also provides for the election of the treasurer of the district at the July meeting. The effect of the abolishment of the annual meeting of the board in September and the fixing of such meeting in July, at which time the officers named must be elected makes the terms of office of all treasurers of school districts, who were elected in September, 1905, end at the July meeting of 1906. The treasurers who are elected at the July meeting of the board in 1906 will enter upon the duties of their respective offices immediately after they are elected, and hold office until the next annual meeting of the board.

Respectfully submitted,

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

April 27, 1906.

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

UNINCORPORATED LOAN AND TRUST COMPANIES—EXAMINATION BY AUDITOR—MAY CONDUCT BUSINESS OF BANKING.—There is no statute authorizing the auditor of state to make an examination of the affairs and business of an unincorporated loan and trust company, nor is there any statute prohibiting such company from engaging in the banking business, but such an institution is prohibited from using the term "bank of savings."

SIR: In response to your request of the 20th ultimo, in which you ask whether unincorporated loan and trust companies are subject to examination by the auditor's department, and whether such an unincorporated company is permitted under the law to do a banking business, and to use as its name the title "Bank of Savings," I beg leave to say:

First. In the opinion given you in relation to loan and trust companies on the 6th of September, 1905, what is said in relation to such institutions refers wholly to incorporated companies. There is no statute authorizing the auditor of state to make an examination of the affairs and business of unincorporated loan and trust companies.

Second. I know of no statute which prohibits individuals or partnerships from transacting a banking business and at the same time conducting what may be termed a loan and trust business. The legislature has not undertaken to regulate either the banking or loan and trust business when carried on by individuals or partnerships.

Under the present statute I think no objection can be urged against individuals or partnerships conducting both a banking and loan and trust business.

Third. Section 1859 of the code provides:

> "Any bank, banking association, private banker or person incorporated under the provisions of this chapter * * * who shall advertise, issue or circulate any card or other paper, or exhibit any sign as a savings bank or savings institution * * * shall be guilty of a misdemeanor," etc.

The clear meaning of the provisions of this section is that no person, partnership or corporation shall advertise its business as a savings bank or savings institution, unless it is a corporation organized under the provisions of chapter 10 of title IX of the code. The use of the name "Bank of Savings" as descriptive of the character of the business conducted by an individual or a partner-

ship is, in my opinion, equivalent to advertising the business of such individual or partnership as a savings bank. The name clearly conveys to the general public the information that the business transacted by the person or firm is that ordinarily done by a savings bank.

The use of the words "Bank of Savings," therefore, falls within the provisions of the section quoted, and is prohibited thereby. The person or firm using the same is liable to the penalty provided in the section for the unlawful advertising of any bank or other institution as a savings bank which is not organized under the provisions of chapter 10 of title IX of the code.

Respectfully submitted,

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

May 2, 1906.

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

IOWA STATE COLLEGE OF AGRICULTURE AND MECHANIC ARTS—APPROPRIATION FOR—WHEN PAYABLE—Held that under the provisions of an act of the twenty-ninth general assembly, the Iowa State College of Agriculture and Mechanic Arts is entitled to receive such pro rata portion of the first quarterly installment of the annual appropriation made by the thirty-first general assembly as the whole amount of the quarterly installment bears to the time which will elapse between the taking effect of the act and the 1st day of July following.

SIR: I am in receipt of your communication of the 8th instant, in which you request my opinion whether the Iowa State College of Agriculture and Mechanic Arts may be permitted to draw from the state treasury the pro rata portion of the annual appropriation made by the thirty-first general assembly, which the amount of the quarterly installment of such annual appropriation bears to the time from the taking effect of the act to the first day of the succeeding quarter. In compliance with such request I respectfully submit the following:

Chapter 177 of the acts of the twenty-ninth general assembly makes the fiscal year of the state begin with July 1st and end with June 30th of the succeeding year, and provides that when annual appropriations are made payable quarterly, the quarters shall end

with September 30th, December 31st, March 31st and June 30th. Section 2 of that chapter provides:

> "Annual appropriations hereafter made shall be disbursed in accordance with the provisions of the act granting the same, pro rata from the time such acts take effect until the first day of the succeeding quarter, as provided in section 1 of this act."

House file No. 400 of the thirty-first general assembly became a law on the 13th day of April, 1906. Under the provisions of section 2 of the act of the twenty-ninth general assembly, the Iowa State College of Agriculture and Mechanic Arts is entitled to receive such pro rata portion of the first quarterly installment of the annual appropriation made by the thirty-first general assembly, as the whole amount of the quarterly installment bears to the time which will elapse between the taking effect of the act and the first day of July following.

The same rule must be applied to all annual appropriations made to other state institutions by the thirty-first general assembly, which are payable in quarterly installments, as all such appropriations are governed by the provisions of section 2 chapter 177 of the acts of the twenty-ninth general assembly.

Respectfully submitted,

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

May 10, 1906.

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

DEPARTMENT OF AGRICULTURE—POSTAGE EXPENSE.—Held that under the provisions of section 8 chapter 58 of the acts of the twenty-eighth general assembly, the department of agriculture is not entitled to draw from the supply department of the state, postage stamps to be used in connection with business pertaining distinctly to the state fair.

Des Moines, May 31, 1906.

HON. A. H. DAVISON, Secretary Executive Council.

DEAR SIR: In compliance with your request for my opinion as to the right of the agricultural department to draw from the sup-

ply department, stamps to be used in circulating printed and other matters distinctly relating to the state fair, I submit the following:

Section 13 of chapter 58 of the acts of the twenty-eight general assembly provides that the office of the department of agriculture shall be entitled to such supplies and stationery, postage and express as may be required, which shall be furnished by the executive council in the same manner as other officers are supplied.

Section 8 of the act is as follows:

> "The board shall have full control of the state fair grounds and improvements thereon belonging to the state, with requisite powers to hold annual fairs and exhibits of the productive resources and industries of the state. They may prescribe all necessary rules and regulations thereon. The board may delegate the management of the state fair to an executive committee, and to two or more additional members of the board; and for the special work pertaining to the fair they may employ an assistant secretary and such clerical assistance as may be deemed necessary. All expenditures connected with the fair, including the per diem and expenses of the managers thereof, shall be regarded separately and paid from the state fair receipts."

The clear intent of the legislature in enacting this section of the statute was that all expenses of every character and nature distinctly pertaining to the state fair should be paid from its receipts. The postage stamps so used are as much a part of the expenses connected with the fair as is the employment of additional clerical assistance.

It follows that the department of agriculture would not be entitled to draw from the supply department of the state postage stamps to be used distinctly for the purposes of the state fair.

Respectfully submitted,

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

CORPORATIONS—WESTERN LAND AND LOAN COMPANY.—The articles of incorporation and method of securing subscriptions to the stock of a company bring said corporation within the provisions of chapter 66 acts of the thirtieth general assembly. Under the provisions of said chapter, the plan of business of

said corporation must be approved by the executive council before allowing same to be carried on.

SIR: In compliance with your request for my opinion as to whether the Western Land and Loan company falls within the provisions of chapter 66 of the acts of the thirtieth general assembly, I submit the following:

From the articles of incorporation and blank subscriptions to the stock of the company submitted with your request, I find that the company is offering to prospective investors an installment subscription for stock which clearly falls within the provisions of the chapter referred to, and is prohibited by that chapter unless the plan of business of the company is approved by the executive council as therein provided.

I also find from the papers submitted that the company is advertising its capital stock at one million dollars, when, so far as appears, but $1,250 of its capital stock has been subscribed or paid. Such advertisement is a fraud and the company should not be permitted to transact business in Iowa while thus falsely and fraudulently advertising its means.

An examination of its articles of incorporation discloses that it has attempted to take to itself the power to transact and perform almost every kind and character of business known to the commercial world. This attempt upon the part of the company is in violation of the spirit of our statute and of the general public policy of the country. A corporation should be confined to the particular class of business which it is organized to carry on, and should not be permitted to transact or carry on any other kinds or classes of business.

The entire scheme, from the organization of the company to the sale of stock upon the installment plan, has a fraudulent appearance.

Citizens of the state of Iowa organized a corporation in the state of Nevada. By the articles of incorporation they have undertaken to authorize the corporation to transact all classes of business. The promoters then subscribed $1,250 to the capital stock, opened an office in this state, advertised the capital stock of the company as being one million dollars, and sent out attractive and alluring circulars inviting subscriptions to the capital stock of the corporation to be paid upon the installment plan. All this has been done apparently with the purpose on the part of the promoters to obtain money from investors upon a misrepresentation as to the responsibility of the corporation.

A corporation of this character, which is practically without any capital whatever, should not be permitted to solicit subscriptions to its capital stock upon the installment plan in this state; and I am further of the opinion that, because of the apparent fraudulent misrepresentations of the company and of its apparent fraudulent character, it should not be permitted to transact any character of business in this state.

Respectfully submitted,

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

June 6. 1906.

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

HOSPITAL FOR INEBRIATES—LIMITATION OF TERMS OF PATIENTS.—The district court has no authority to limit the term of a patient committed to less than three years.

SIR: I am in receipt of the communication of Dr. Willhite of June 11th referred to me by you, and also your favor of the 28th ultimo.

In answer to the suggestions made by Dr. Willhite, I will say that I have not written any opinion to the effect that patients cannot be kept for the full period of the time of their commitment for a violation of the rules and regulations of the hospital for Inebriates at Knoxville.

In your favor of the 28th ultimo you say that you desire my opinion upon the following questions:

1. What effect, if any, is to be given the limitation of terms to less than three years, especially if the patient be not cured within that time?

2. In case a patient committed under a specified limitation of less than three years be paroled, is he required by section 14 of the act to make reports after the time fixed in the order of commitment has expired?

First. It is a well settled principle of law that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding upon every other court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply

void, and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

Elliott vs. Piersol, 1 Pet., 328, 340.

It is also clear upon principle and authority that a void judgment cannot be validated by citing the party against whom it was entered to show a cause why it should not be declared valid, nor by the court's approval of a sale on execution under it, nor by the subsequent taking and dismissing of an appeal from such judgment.

Jewett vs. Iowa Land Co., 64 Minn., 531;

Williamette Real Estate Co. vs. Hendrix, 28 Ore., 45;

Jones vs. Pharis, 59 Mo. App., 254.

To enter a valid judgment, the court must have jurisdiction of the persons, of the subject matter, and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it, nor adjudicate upon a subject which does not fall within its province as defined or limited by law. Neither can it go beyond the issues and pass upon matter which the parties never submitted nor intended to submit for its determination.

Black on Judgments, sec. 215.

The only issue which can be submitted to a judge of the district court under the provisions of chapter 80 of the acts of the thirtieth general assembly, is whether the accused is a proper person to be committed to the state hospital for inebriates, and this issue is the only one which the court has jurisdiction to determine. It is not within the province of the district court to determine the length of time which the patient shall be detained in the hospital after his commitment, and it therefore has no power to adjudicate and determine that question.

The statute clearly defines and limits the power of the judge of that court in making an order of commitment. Its language is as follows:

> "In case said application be voluntarily or involuntarily made and the said judge shall determine that the accused is a proper person to be committed to said hospital, he shall make an order committing him thereto; otherwise he shall be discharged."

Under this statute the judge before whom the trial is had can do but one of two things: Either commit the person to the hospital, or discharge him. If the court attempts to enter a judgment of wider scope and to determine the time during which the patient shall be detained for treatment, that part of the judgment which so attempts to fix the time during which the patient shall be detained is beyond the issue submitted and which the court has jurisdiction to determine. It is an attempt to decide a question which could not, under the statute, be submitted to the court for its determination.

It therefore logically follows that any order of commitment made by the court which purports to fix the time during which the person committed under such order shall be detained in the state hospital for inebriates, is absolutely void. The statute fixes the time during which the person so committed shall be detained, which is until the patient is cured and not exceeding three years, and the unauthorized order of a court is of no force and effect as against such statute.

Second. A determination of the first question submitted is in effect a determination of the second, as it logically follows that, if the attempt of the district court to limit the time during which the patient shall be detained to a period of less than three years, is void, then such patient may be required, under section 14 of the act, to make reports to the superintendent of the hospital after he has been paroled until he is finally discharged therefrom.

Respectfully submitted,

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

July 3. 1906.

TO THE HONORABLE BOARD OF CONTROL
of State Institutions.

STATE AND SAVINGS BANK—STATEMENT BY.—Under the provisions of subdivision 4 of code section 1872, held that the statement required must fully, clearly and accurately set forth the amount which the bank making the report has on deposit with solvent banks or bankers, and give the name of each bank or banker with whom the deposit has been made and the name of the city or town where such bank or banker is located.

SIR: In response to your request for a construction of subdivision 4 of section 1872 of the code, I submit the following opinion:

That section provides that all savings and state banks shall make a full, clear and accurate statement of the condition of the bank, verified by the oath of the president, vice-president, cashier or assistant cashier, and attested by at least three of the directors, or verified by the oath of two of its officers and attested by two of the directors, which statement shall contain:

> "4. The amount subject to be drawn at sight then remaining on deposit with solvent banks or bankers of the country, specifying each city and town and the amount deposited in each and belonging to such bank."

This provision of the statute is, in my opinion, susceptible of but one construction, and that is that the statement required by the section referred to must fully, clearly and accurately set forth the amount which the bank making the report has on deposit with solvent banks or bankers of the country, and give the name of each bank or banker with whom the deposit has been made, and the name of the city or town where such bank or banker is located. The words "and the amount deposited with each" clearly refer to the amount deposited with each of such solvent banks or bankers.

A statement in the report required by section 1872 that the bank has on deposit in New York, Chicago or elsewhere a sum of money subject to check, is not a compliance with the statute. The report should clearly set forth the name of the bank or banker with whom there is a deposit subject to check, and the name of the city or town in which the bank or banker holding such deposit is located.

Respectfully submitted.

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

July 24, 1906.

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

BANKS—OFFICERS.—Under the provisions of section 1869 of the code, held that bank directors are officers of the bank coming within the provisions of said section.

SIR: In compliance with your request for an opinion as to whether bank directors are officers of a bank, within the meaning of the provisions of section 1869 of the code, I submit the following:

The section of the statute referred to provides:

> "No officer or employe of the bank shall in any manner, directly or indirectly, use its funds or deposits, or any part thereof, except for the regular business transactions of the bank, and no loan shall be made by it to them except upon the express order of the board of directors made in the absence of the applicant, duly entered in the record of the board proceedings, and only upon the same security as required of others. Any officer or employe of the bank violating the provisions of this section shall be deemed guilty of embezzlement."

A similar question arose in *Commonwealth vs. Wyman,* 8 Metc., 247. A director of the Phoenix Bank of Charleston, Mass., was indicted for embezzlement under a statute which provides that any cashier or other officer or servant of any bank, who shall embezzle or fraudulently convert to his own use, shall be guilty, etc. In the course of the opinion it is said:

> "Who are officers of the institution? Who but its president and directors, as well as its tellers, and bookkeepers, and discount clerks; all who have an oversight, management, care or trust of a permanent character, within its walls? The word 'officer' here used is, *ex vi termini,* sufficient to, and does, by necessary implication, include the president and directors of the bank. Their names indeed are not inserted, as in the act to prevent frauds against the Massachusetts bank, but they are persons, from their confidential intercourse with inferior officers appointed by them, from their access to the various parts of the banking house, and from their ability to direct the disposition of its funds, in a situation to commit the offenses intended to be prevented."

In *United States vs. Means,* 42 Fed. Rep., 599, Judge Hammond, in charging the jury in a case where the defendants had been indicted as officers of a national bank for making false entries in the books of the bank, said:

> "As to the directors, there is not the shade of doubtful construction of this act. They are not only officers, but managers of our national banks. They come within every sense

and meaning of the word officer, and are within the rule of the association of words in the act already referred to and of the decisions cited. * * The president and vice-president are only directors with official titles, and charged with doing in detail what the directors are charged with doing generally. They are only agents of the directory; and it is well enough that these cases should teach the directors of national banks that they cannot, by inactivity, neglect of duty and inattention, shirk their responsibilities or escape their share of blame for such wrongdoing as is displayed in this proof in plain violation of this act of congress. They are the managing officers of the bank; and this statute against false entries protects them against deceit and was intended to do so."

The doctrine laid down in these cases has been generally accepted throughout the country as clearly defining the official status of bank directors. They are officers of the bank, elected by its stockholders, and to them is confided the general management of the affairs of the corporation. All of the business transacted by the bank is directly under their control, and every other officer and every employe is subject to the power of the board of directors. Upon the members of the board rests the duty of faithfully conducting the business and affairs of the bank in accordance with law.

As such officers they clearly fall within the provisions of section 1869 of the code, and no state or savings bank can make a loan of money to one of its directors except upon the express order of the board of directors made in the absence of the applicant and duly entered upon the records of the board proceedings, and then only upon the same security as is required by the bank of other customers.

Respectfully submitted,

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

July 25, 1906.

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

FOREIGN CORPORATIONS—CERTIFIED COPIES OF ARTICLES OF INCORPORATION MUST BE FILED WHEN.—Under the provisions of section 1637 of the code, held that a foreign corporation engaged in making gas and producing electricity for sale, is a corporation

conducting and carrying on a manufacturing business, and is not, therefore, required to file a certified copy of its articles of incorporation with the secretary of state, nor pay an incorporation fee, before it has the right to transact business in this state."

SIR: I am in receipt of the letter of Mr. E. E. Cook, referred to me by you for my opinion upon the questions therein contained. These questions may be reduced to one question, and stated as follows:

Is a corporation, organized under the laws of the state of Illinois, and engaged in that state in making gas and generating electricity to be used for the purposes of light, heat and power, compelled to file a certified copy of its articles of incorporation with the secretary of state of the state of Iowa, and to pay the fee required by section 1637 of the code, before it is entitled to enter the state of Iowa and transact its business therein?

The answer to this question must turn upon the construction of section 1637 of the code. That section provides:

> "Any corporation for pecuniary profit, other than that for carrying on mercantile or manufacturing business, organized under the laws of another state or any territory of the United States, or any foreign country, which has transacted business in the state of Iowa since the first day of September, 1886, or desires hereafter to transact business in this state, and which has not a permit to do such business, shall file with the secretary of state a certified copy of its articles of incorporation duly attested, accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state; said application to contain a stipulation that such permit shall be subject to the provisions of this chapter. Before such permit is issued, the corporation shall pay to the secretary of state the same fee required for the organization of corporations in this state, * * * ."

Under this statute it is clear that every foreign corporation for pecuniary profit other than for carrying on mercantile or manufacturing business, must file a certified copy of its articles of incorporation with the secretary of state of the state of Iowa, and pay the fee required by the section quoted, before it is authorized

to transact business in this state. In other words, every foreign corporation engaged in carrying on or transacting for pecuniary profit any business except a mercantile or manufacturing business, falls within the provisions of the statute and must file the copy of its articles of incorporation and pay the fee required before it has the right to transact business in this state.

It must, therefore, first be determined whether a corporation making gas and generating electricity is a corporation engaged in the business of manufacturing within the meaning of the statute.

Gas is undoubtedly a manufactured product, and a corporation engaged in making it is a manufacturing corporation within the meaning of the statute.

Nassau Gas Light Co. vs. Brooklyn, 89 N. Y., 409.

The question whether a corporation engaged in generating electricity which is used for the production of light, heat and power is a manufacturing corporation is more difficult. It is impossible in the existing state of human knowledge to give a satisfactory definition of electricity. The views of various experts, scientists and authorities radically differ as to what electricity is and the theory of its production.

Mr. Sidney F. Walker, in discussing the nature and origin of electricity, said:

> "What is electricity? We do not know, and for practical purposes it is not necessary that we should know."

Weale's dictionary of terms defines it as follows:

> "Electricity is one of those hidden and mysterious powers of nature which has thus become known to us through the medium of its effects."

Ganot's physics defines electricity as "a powerful physical agent which manifests itself mainly by attractions and repulsions, but also by luminous and heating effects, by violent commotions, by chemical decompositions, and many other phenomena. Unlike gravity, it is not inherent in bodies, but is evoked in them by a variety of causes."

In Daniel's physics we find the following:

> "Electricity and magnetism are not forms of energy; neither are they forms of matter. They may perhaps be provisionally defined as properties or conditions of matter; but whether this matter be the ordinary matter or whether it be, on the other

hand, that all-pervading ether by which ordinary matter is surrounded, is a question which has been under discussion and which now may be fairly held to be settled in favor of the latter view."

Mr. Park Benjamin gives the following definition:

"What is electricity? No one knows. It seems to be one manifestation of the energy which follows the universe and which appears in a variety of other forms, such as heat, light, magnetism, chemical affinity, mechanical motion, etc."

While Mr. Sylvanus P. Thompson urges a theory opposed to that of Mr. Benjamin as follows:

"The theory of electricity adopted throughout these lessons is that electricity, whatever its true nature, is one, not two; that this electricity, whatever it may be proved to be, is not matter, and is not energy; that it resembles both matter and energy in one respect, however, in that it can neither be created nor destroyed."

Other definitions given by men of science and by electrical experts might be quoted, but we should be no nearer a true definition of electricity.

It is perhaps unimportant whether electricity from a scientific viewpoint is believed to be matter, energy, or a combination of both, or something entirely different which resembles both matter and energy, as the courts of this country have taken the broad view that commercially it may be considered as a manufactured product.

One of the earlier cases in which the question arose is *Commonwealth vs. Northern E. L. & P. Co.*, 145 Pa. St., 105. The question in that case was whether a corporation whose business it was to produce electricity and sell it to customers for light, heat or power, was a manufacturing corporation within the meaning of section 20 of the act of June 30, 1885, exempting from taxation the capital stock of manufacturing corporations. The judge of the court of common pleas of Dauphin county in an able opinion held that such a corporation was not a manufacturing corporation, and did not, therefore, fall within the provisions of the act of 1885, exempting the capital stock of manufacturing corporations from taxation. The judgment of the lower court was based upon the theory that electricity, generated by the Light & Power company, and which was distributed by means of wires, and sold for the purpose of producing light, heat or power, was not a manufactured

article. From the judgment of the court of common pleas the defendant appealed to the supreme court of Pennsylvania. The judgment of the court below was affirmed, but the supreme court, in an opinion written by Mr. Justice Williams, held that the opinion of the trial court that electricity as generated, distributed and sold was not a manufactured article, was erroneous. In the course of the opinion of the appellate court it is said:

> "This company whose charter we are considering sells the electricity it makes, or brings into being, as a commodity. It provides the lamps or appliances for the use of its customers, by means of which the light is produced; it sells them the electricity, measures it as it is delivered, and is paid according to the quantity furnished. Whatever electricity may be it seems to be absolutely within the power and control of the company that brings it into being. It is compelled by the process employed to come into being. It is secured, stored, poured out or liberated at will. Its manifestations are both seen and felt. It moves with incredible velocity and power. It carries the tones and inflections of the human voice, or it moves loaded cars, depending on the volume of the current and the manner of its application. It may be, in the hands of the physician, a soothing remedial agent, and in the hands of the law an instrument of execution swifter and surer than the headsman's axe. It may be too early to say just what it is. The scientists whose views the learned judge adopted, may be right or wrong. We have no need to decide that question.
>
> Laws are written ordinarily in the language of the people, and not in that of scientists; and if this case depended on the question on which it turned in the court below, we should be led by the findings of the fact to a different conclusion of law from that which was there reached, and hold that its company was a manufacturing company."

In the case of the *People ex rel. The Brush Elec. Mfg. Co. vs. Wemple,* 129 N. Y. Court of Appeals, 543, the question was squarely presented whether the Brush Electric Manufacturing company was a manufacturing corporation within the provisions of the New York statute exempting such corporations from taxation. The method by which electricity is produced is there described clearly and concisely as follows:

> "A steam engine is used as a motive power for the propulsion of machinery, which is attached to a driving wheel, which,

by means of a belt connected with another wheel or pulley of the dynamo, turns or revolves the armature. The armature is a coil of wire wound on a metal core and mounted on a shaft, and is revolved by the power communicated from the engine through the means of the belt. The armature is revolved within or between the ends of a large horseshoe magnet, the opening of which is downward. The magnet is made by winding a soft iron horseshoe, or soft curved horseshoe shaped iron with a coil of conducting wire, and sending through the coil a current of electricity. When once vitalized by such current, the magnet never loses this magnetic property, even after the current stops, but is ever afterwards available for the purpose of electric currents, upon the armature being revolved between the poles of this magnet. By the rapid revolution of the armature within what is termed the field of force between the poles of the magnet, this mysterious force or energy is accumulated, known as electricity and is thence conducted over copper bars or mains throughout the territory or city in which it is used, and is distributed on smaller wires or mains to the houses or places which are to be lighted."

In determining whether electricity produced in this manner is a manufactured article, the learned judge of the court of appeals said:

"The materials from which all manufactured things originate exist in a natural state, but the manufacturer, by the application to these materials of labor and skill, gives to them a new and useful property. The electricity which is generated and transmitted by the operations of the relator and which, under its manipulations, illuminates houses and streets, is a very different thing from that mysterious element that is said to pervade nature."

In the course of the opinion it is further said:

"When we attempt to establish the proposition that the gas which lights one room is a manufactured product, and the electricity which lights another is not, we are obliged to rely more upon the definition of terms and the distinctions of scientists than the actual practical processes and operations by means of which results, in all respects or at least substantially the same, are produced. If due weight is given to the fact

that electricity, as now used and applied to the business of life, such as the lighting of streets and buildings, the propulsion of cars and machinery and like operations, is essentially the product of the skill and labor of man, there is no difficulty in reaching the conclusion that a corporation engaged in the business of generating, storing, transmitting and selling it is what was commonly known at the time of the passage of the corporation law in 1880, a manufacturing corporation."

The exception contained in section 1637 includes every corporation organized under the laws of another state or territory of the United States, or a foreign country, which carries on a manufacturing business. The artificial production of electricity by means of machinery for the purpose of sale as a commodity is, under the decisions of the courts cited, a manufacturing business. These decisions must be regarded as authority, and will undoubtedly be followed by the courts of this state if the question is ever presented for their determination.

Under the principles enunciated it must, in my opinion, be held that a corporation engaged in making gas and producing electricity for sale, is a corporation conducting and carrying on a manufacturing business, and is not, therefore, required to file a certified copy of its articles of incorporation with the secretary of state, nor pay an incorporation fee, before it has the right to transact its business in this state.

Respectfully submitted,

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

August 10, 1906.

HON. W. B. MARTIN,
Secretary of State.

RAILROAD COMMISSIONER—EXPENSES OF EXPERTS AND AGENTS.—Expenses incurred by the commission in taking experts and agents with them to aid them in determining questions arising in railway matters, is not such an expense as requires auditing by the executive council before being paid by the state.

SIR: I find upon my desk a letter from the board of railroad commissioners, asking my opinion whether expenses, incurred in taking experts and agents with them to aid the board in determining questions arising in railway matters, are expenses covered

by chapter 7 of the acts of the thirtieth general assembly, which must be audited by the executive council before being paid by the state. Your deputy, Mr. Brandt, has also requested my views upon the question. I therefore submit the following opinion:

Section 2151 of the code provides:

> "The commissioners and their secretary shall be carried free while performing their duties, on all railroads and trains in the state, and may take with them experts or other agents, who shall be carried free."

The power conferred by this section upon the board of railroad commissioners to take their secretary, experts and other agents with them when in the judgment of the board it shall be necessary, carries with it the power to incur the expenses necessary to the taking of such secretary, experts or agents with them as circumstances may demand. Such expense is incurred by the board of railroad commissioners in the discharge of its duties as a board, and not by any individual member thereof; that is, the expense is not the expense incurred by an individual member of the board, but a necessary expense incurred by the board acting as such. It does not, therefore, in my opinion, fall within the provisions of chapter 7 of the acts of the thirtieth general assembly, and it is not necessary that such expense should be audited by the executive council before being paid by the state.

The purpose of the act of the thirtieth general assembly was to require all accounts for personal expenses incurred by state officers and members of boards and commissions, to be audited by the executive council before being paid by the state, and was not intended, and does not apply, to other expenses authorized by law and incurred in the transaction of the business of the office or board.

A proper warrant, therefore, should be drawn by the auditor of state upon the certificate of the board of railroad commissioners.

Respectfully submitted,

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

August 18, 1906.

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

DELINQUENT TAXES—PENALTY ON DELINQUENT STATE TAXES PAID THE STATE.—The interest or penalty collected by the county treasurer belongs to and is a part of the tax upon which it is assessed, and when assessed and collected upon such taxes should be remitted to the state treasurer.

SIR: In response to your communication asking my opinion whether the several counties of the state should account to the state and pay into its treasury interest or penalty collected by the county treasurers on delinquent state taxes, I submit the following:

Section 1413 of the code provides:

> "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 day of March following the levy; and if the first half shall be paid when due, and the last half shall not be paid by October first following such levy, then a like interest shall be charged from the date such last half became delinquent; and the tax with all penalties shall be collected at the same time and in the same manner."

Section 1416 provides:

> "The auditor shall keep a complete account with the treasurer, with each separate fund or tax by itself, and in each account he shall charge him with the amounts in his hands at the opening of such account whether it be delinquent taxes, notes, cash or other assets belonging to such fund, the amount of each tax for each year when the tax list is received by him, and all additions to each tax or fund, whether by additional assessments, interest on delinquent taxes, amount received for licenses, or other items, * * * ."

Under the provisions of these sections, all interest or penalties collected by the treasurer shall be credited to and distributed among the several funds for which taxes are levied and collected.

The interest or penalty collected by the county treasurer belongs to, and is a part of, the tax upon which it is assessed, and when assessed and collected upon the state tax should be remitted to the state treasurer in the same manner as the state tax is required by law to be remitted. A county has no right to retain or use any part of the interest or penalty assessed and collected upon the state

tax, and if any county in the state has neglected or failed to remit any interest or penalty which has been assessed and collected upon such tax, the auditor of state should at once require such county to remit to the state treasurer the amount so assessed and collected.

Respectfully submitted,

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

August 29, 1906.

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

CORPORATIONS—RIGHT TO HOLD STOCK IN OTHER CORPORATIONS DOES NOT EXIST.

SIR: I am in receipt of your favor of the 18th instant, enclosing a letter from Mr. Joseph Marwick, cashier of the State Bank of Story City, Iowa, in which he asks:

1. May a corporation, organized to buy, lease, hold, sell and convey real and personal property, and to erect, remodel, repair and otherwise improve buildings and other property, purchase and hold shares of stock of a bank organized under the laws of this state?

2. May a bank, organized under the laws of this state, be compelled to issue stock to such a corporation upon the surrender of a certificate issued to an individual stockholder and assigned to the corporation, when the corporation offers to surrender such certificate and demands a new one in lieu thereof?

In answer to such inquiries I submit the following:

First. On the second day of November, 1905, I gave an opinion relating to the right of one corporation to hold the stock of another. That opinion was written after a careful examination and review of all of the authorities upon the subject. The conclusion reached is, I think, correct. The reasons given in that opinion why one corporation may not purchase and hold the stock of another corporation apply with full force to the questions asked in the letter of Mr. Marwick.

Our statute provides that any number of persons may become incorporated for the transaction of any lawful business. Following this provision the statute defines the powers of such corporations, and the method by which they may be organized. The word "person," as used in section 1607 of the statute referred to, cannot, in my opinion, be extended so as to include corporations. The

statute does not permit a number of incorporated companies to organize another incorporated company by subscribing to the capital stock thereof and complying with the provisions of the statute relating to the organization of corporations for pecuniary profit.

This proposition is sustained by high authority. The cases are cited in my former opinion, and will not now be reiterated.

If incorporated companies are not permitted under the statute to associate themselves together and form another corporation as individuals may do, no logical reason can be given why such incorporated companies should be permitted to acquire the stock of a corporation organized by individuals under the statute and thereby obtain control of the business of such corporation.

Mr. Thompson in his work on corporations clearly lays down the rule that one corporation cannot be permitted to acquire the stock and control of another corporation, and gives the reason for such rule 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 corporation could become a banking corporation. This the law will not allow.' "

The rule given by Mr. Thompson applies with full force to the facts included in the questions asked by Mr. Marwick. The North-

western Land & Trust Company is not a banking corporation. It has no right to transact a banking business. It has no right to obtain the stock of a bank organized under the laws of this state, and thereby control the business of such bank. It therefore logically follows that it has no right to purchase and hold in its corporate capacity any part of the stock of such bank.

The rule laid down is of course always subject to certain exceptions, among which is the right of any corporation to secure a debt owing to it by taking an assignment of the stock of another corporation. This exception is based upon the exigencies of the case, but the corporation has no right to go into the market or elsewhere and purchase the stock of another corporation and retain the same as a stockholder.

Second. The conclusion reached as to the first question asked by Mr. Marwick is also an answer to the second. If the corporation has no right to purchase and hold the stock of a bank, the officers of such bank are under no legal obligation to take up a certificate of stock which has been assigned to the corporation and issue a new certificate to such corporation in lieu thereof.

Respectfully submitted,

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

August 31, 1906.

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

BOARD OF EDUCATIONAL EXAMINERS—TO ISSUE CERTIFICATES—EXPENSE.—Held that under sections 13 and 15 of chapter 122 acts of the thirty-first general assembly, it is the duty of the board of educational examiners to issue to each successful applicant for a certificate to teach, a certificate which shall be forwarded to the county superintendent and delivered by him to the applicant, and that the expense incurred shall be paid by the state.

SIR: I am in receipt of your communication of the 30th instant, in which you ask my opinion upon the following questions:

1. Are certificates to be issued by the board to those who successfully pass the examination?

2. Is the cost of procuring such certificates and preserving the record thereof a part of the expenditures referred to in section 15?

3. If such cost is a part of the lawful expenditures, must they be within the limitation of section 15, and if not, what fund can they be paid from?

These questions will be considered in the order stated.

First. Section 13 of chapter 122 of the acts of the thirty-first general assembly provides:

> "As soon as the examination is completed the county superintendent shall forward to the superintendent of public instruction, a list of all applicants examined, with the standings of each in didactis and oral reading, and his estimate of each applicant's personality and general fitness, other than scholarship, for the work of teaching. He shall at the same time forward to the superintendent of public instruction the answer papers written, with the exception of those in didactics. Under the supervision of the educational board of examiners, the papers shall be graded and the scholastic qualification determined. The result of such examination of persons who pass the same shall be entered upon a certificate provided by such board, and shall be transmitted to the county superintendent of the county in which the person entitled thereto resides."

While the language of the act is somewhat involved and slightly ambiguous, I think it must be held that it is the duty of the educational board of examiners to issue to each applicant who passes the examination a certificate, which certificate shall be transmitted to the county superintendent of the county in which the applicant resides, and delivered by such county superintendent to the person entitled thereto.

Second. Section 13 requires that the certificate which must be given to an applicant who has successfully passed the examination shall be "provided by such board"; that is, the certificate must be procured by the educational board of examiners, the name of the applicant who has successfully passed the examination must be written therein, and the certificate transmitted by the board to the county superintendent.

The expense incurred in procuring such certificate, and in filling out and transmitting the same to the county superintendent, is an expense authorized by the act of the thirty-first general assembly.

Section 15 of the act provides:

> "All expenditures authorized by this act shall be certified by the superintendent of public instruction to the executive

council, who shall cause the audtior of state to draw warrants therefor upon the treasurer of state, but not to exceed the fees paid into the treasury under the provisions of this act."

The provision of the act which requires the board to procure a certificate and transmit the same to the county superintendent, clearly authorizes the incurring of the expense necessary to carry out the provisions of the statute, and such expense should be paid under the provisions of section 15 of the act.

Third. The answer to the second question is an answer to the third. The procurement of a certificate by the board is an expenditure authorized by the act of the thirty-first general assembly, and must be paid under the provisions of section 15 of that act.

Respectfully submitted,

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

August 31, 1906.

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

ISLANDS IN MISSISSIPPI RIVER—JURISDICTION OF.—The eastern boundary of the state of Iowa is the center of the main channel of the Mississippi river. If Iowa acquires jurisdiction of certain islands by virtue of their being on the Iowa side of the channel, it would not lose its jurisdiction over said islands should the main channel shift so as to flow between the islands and the Iowa shore.

SIR: I am in receipt of your letter of August 3d, transmitting to me a letter of Mr. A. H. Borman of Guttenberg, Iowa, which in substance sets forth the following facts:

That there are a number of islands in the Mississippi river which lie between Clayton county in the state of Iowa and Grant county in the state of Wisconsin, over which Iowa for many years has assumed and exercised jurisdiction for taxation and other purposes. That there are two channels of the Mississippi river, one upon each side of the islands, the one upon the Iowa side being known as the Guttenberg channel, and the one upon the Wisconsin side being known as the Cassville or Twelve Mile slough. That the United States government has decided to improve what is known as the Guttenberg channel, and that the authorities of the state

of Wisconsin now claim jurisdiction of the islands for the purpose of taxation.

The question is: Which state, under these facts, has jurisdiction of the islands for taxation and other purposes?

The facts are not as fully stated in the letter as they should be, and my opinion must, therefore, be largely in the abstract.

The constitution of Iowa in defining the boundaries of the state provides that such boundary line extends east along the parallel of latitude of forty-three degrees and thirty minutes until such parallel intersects the middle of the main channel of the Mississippi river, thence down the middle of the main channel of the Mississippi river to a point directly east of the middle of the main channel of the Des Moines river. The act of congress enabling Wisconsin to adopt a constitution and be admitted into the Union as a state defines the western boundary of that state, afer reaching the river St. Croix as follows: "Thence down the main channel of said river to the Mississippi, thence down the center of the main channel of that river to the northwest corner of the state of Illinois."

The constitutions of both states and the respective acts of congress under which they were admitted into the Union make the middle of the main channel of the Mississippi river the boundary line between them.

In the case of the *State of Iowa vs. State of Illinois,* 147 U. S., 1, the middle of the main channel of the Mississippi river is defined to be the center of the main channel ordinarily used for the purpose of navigation.

If the main navigable channel of the Mississippi river existed easterly of the islands in question at the time Iowa assumed jurisdiction over them, it must be held that Iowa rightfully assumed such jurisdiction. They were an appendage to the state within the boundaries and subject to its jurisdiction. A subsequent change of the main channel of the Mississippi river to the arm flowing westerly of the islands would not affect the right of the state of Iowa to continue to exercise its jurisdiction over the same.

In Sir Edward Creasy's First Platform of International Law, page 222, it is said:

> "It has been stated that where a navigable river separates neighboring states, the *Thalweg,* or middle of the navigable channel, forms the line of separation. Formerly a line drawn along the middle of the water, the *medium filum aquae,*

was regarded as the boundary line; and it still will be regarded *prima facie* as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the *medium filum*. When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation. * * * Grotius and Vattel speak of the middle of the river as the line of demarcation between two jurisdictions, but that modern publicists and statesmen prefer the more accurate and more equitable boundary of the navigable mid-channel. If there be more than one channel of a river, the deepest channel is regarded as the navigable mid-channel for the purposes of territorial demarcation; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of deepest depression of its bed. The islands on either side of the mid-channel are regarded as appendages to either bank; and if they have once been taken possession of by the nation to whose bank they are appendant, a change in the mid-channel of the river will not operate to deprive the nation of its possession, although the water-frontier line will follow the change of the mid-channel."

The doctrine enunciated by Sir Edward Creasy is quoted with approval in the case of *Iowa v. Illinois, supra,* and it may therefore be taken as the rule announced by the supreme court of the United States as to the jurisdiction of the several states over islands existing in navigable rivers.

Under this rule, if the main mid-channel of the Mississippi river existed between the islands in question and the Wisconsin shore at the time that Iowa assumed jurisdiction over such islands, the jurisdiction of this state was rightfully assumed. The islands were appendant to the Iowa shore and were a part of that state. No subsequent change in the middle of the main channel of the Mississippi river would affect the jurisdiction of the state, and although the water of such channel may now flow between the islands and the Iowa shore, the state of Iowa will still retain its jurisdiction over such islands for taxation and other purposes.

It may perhaps be said that there is a lack of logical harmony in a rule that permits one state to exercise jurisdiction over territory which is technically within the boundaries of another state, but a careful consideration of the question will lead to the conclusion that the rule announced is the best and most equitable that

can be applied to such conditions. No other rule would give stability of jurisdiction to either state. A rule that the jurisdiction of a state over islands in a river which forms the boundary between two states changes from one state to the other as the main channel of the river changes from one side of the islands to the other, would be productive of endless confusion and conflict of jurisdiction. Every flood might change the main mid-channel from one arm of the river to the other. The islands might be within the jurisdiction of one state during one part of a year and within the jurisdiction of another state during another part of the same year. The collection of taxes and the processes of the courts would be hindered or wholly prevented by the shifting sands of the bed of the river. Such a condition should not be permitted to exist, and the rule that where one state has legally assumed jurisdiction over such islands, the changing of the channel of the river does not remove them from the jurisdiction of such state, is a rule conducive to stable government under which the rights of persons and property are secured.

Respectfully submitted,

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

September 1, 1906.
HON. W. B. MARTIN,
Secretary of State.

COMMISSION FOR UNIFORM SYSTEM OF MUNICIPAL ACCOUNTS—JURISDICTION OF—EXPENSE.—Under the provisions of chapter 34, acts of the thirty-first general assembly, held that the commission has jurisdiction over library and park fund, but not over school fund. It is authorized to visit such cities in the state as may be deemed advisable for the purpose of collecting information to aid it in its work. The expenses incurred thereby shall be paid by the state.

SIR: In compliance with your request of the 18th ultimo for my opinion as to the extent of the jurisdiction of the commission created by chapter 34 of the acts of the thirty-first general assembly over school, library and park funds; also whether such commission has authority to incur the expense necessary to send one of its members to one or more special chartered cities in the state to obtain such information as is necessary to aid the commission in its work, I submit the following:

First. The library and park funds of a city are a part of its revenue obtained by taxation. The library tax is levied by the city council under the provisions of section 894, and certified to the auditor of the county in which the city is located, under the provisions of section 902 of the code. It is collected by the county treasurer and paid over to the treasurer of the municipality in the same manner as other city taxes. The fact that the treasurer of the municipality is required to pay the fund arising from such tax to the treasurer of the library board, does not change the character of the fund. It is derived from taxes levied upon the property of the municipality, the members of the library board who are charged with the duty of its disbursement are city officers appointed by the mayor, and the fund must be held to be a city fund within the meaning of the act of the thirty-first general assembly.

Second. Although the taxes from which the park fund is derived are certified directly to the county auditor by the park board, and when collected by the county treasurer are paid over to the treasurer of such board, such facts do not change the character of the fund. The members of the park board are officers of the municipality, and in the discharge of their duty they are required to certify to the county auditor the amount of tax necessary for park purposes, and when such tax is collected it is paid over to the treasurer of the board in his capacity as an officer of the city. The fund is derived wholly from taxes levied upon the property of the municipality, and is one of the funds of the city. As such it falls within the provisions of chapter 34 of the acts of the thirty-first general assembly.

Third. While the fund of a school district, the boundaries of which are co-extensive with and conform to those of a city, is derived from taxes levied upon the same property which is taxed for city purposes, the school district is a distinct political corporation, and the taxes from which its fund is derived are levied upon the property of the district and not upon the property of the city corporation as such. The business and affairs of the district are entirely separate and distinct from those of the city. Its board of directors is charged with the duty of levying and certifying the taxes necessary for school purposes, and of expending the same when collected and paid over by the county officers. The members of the board are elected by the people and derive no power from the city government. Such fund is not, therefore, a city fund and does not fall within the provisions of chapter 34 of the acts of

the thirty-first general assembly. The commission created by such act has no authority in relation thereto.

Fourth. Section 4 of the act of the thirty-first general assembly provides:

> "To insure careful consideration of the merits and defects of existing methods in local accounting, the auditor of state shall appoint an advisory committee of not less than five nor more than seven persons familiar with municipal accounts, a majority of whom shall be city accounting officers; said committee shall serve without compensation, except that their necessary traveling and hotel expenses for a period not to exceed thirty days, shall be allowed them, and for such expense the auditor of state is authorized to issue warrants upon the treasurer of state."

This provision of the statute clearly contemplates that the advisory committee appointed by the auditor shall visit such cities in the state as may be deemed advisable, for the purpose of collecting information to aid the commission in its work of establishing a uniform system of accounts.

The statute also clearly provides that the expenses incurred by such committee in visiting cities for the purpose of obtaining such information, shall be paid by the state upon warrants issued by the auditor of state upon the treasurer.

Respectfully submitted,

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

September 6, 1906.

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

SCHOOL BOARDS OF DISTRICT TOWNSHIP—AUTHORITY TO PURCHASE ROADS—FURNISHING CONVEYANCE FOR PUPILS.—The school board has no authority to expend funds of the district in payment for a road to its schoolhouse, unless given such authority by a vote of electors of the district. Under section 2774 of the code, held that whether or not the board will arrange for transportation of pupils to and from school is a matter wholly within its discretion.

SIR: I am in receipt of your favor of the 6th instant, requesting my opinion upon the following question:

Is the school board of a district township required under the statute either to purchase a school road to enable a pupil who lives two and one-half miles distant to reach the schoolhouse of the district, or to furnish transportation to such pupil?

First. A school board has authority to purchase a road at the expense of the corporation for proper access to its schoolhouse only when such authority is given by a vote of the electors of the school district at the annual meeting thereof under the provisions of section 2749 of the code. Unless such authority is given the board has no power either to purchase such a road or to use the school funds of the district in payment therefor.

Second. Section 2774 of the code provides:

> "And when there will be a saving of expense and children will also thereby secure increased advantages, it (the school board) may arrange with any person outside the board for the transportation of any child to and from school in the same or in another corporation, and such expense shall be paid from the contingent fund."

The provisions of this section are not mandatory. Whether the board will arrange for the transportation of children to and from the school is a matter wholly within its discretion. If the board does not think such an arrangement a wise one, there is no way by which it can be compelled to make the arrangement or to transport children.

Respectfully submitted,

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

September 10, 1906.

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

INSURANCE COMPANIES—STANDARD POLICY—WAIVER OF CONDITION IN—Where the policy is not a standard form prescribed by statute, held that a clause which requires the waiver of any portion of the policy to be in writing and attached to the policy, may be waived by a subsequent oral agreement. The agent of an insurance company, if acting within the scope of his

employment, has the power to waive condition in a standard form of policy where such condition is inserted solely for the benefit of the insurance company, although the policy provides that such condition can only be waived by written agreement endorsed upon or attached to the policy.

SIR: I am in receipt of your favor in which you ask my opinion as to the effect upon the provisions of section 1750 of the code of the following clause which is proposed to be inserted in the standard policy to be recommended by your commission, viz.:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or attached hereto, shall be void if the insured now has or shall hereafter make or procure any contract of insurance, valid or invalid, on the property covered, in whole or in part, by this policy."

The question is not without difficulty, and the authorities bearing upon the principles involved are conflicting.

Where the policy of insurance is not a standard form prescribed by statute, it has been generally held that a clause which requires the waiver of any provision of the policy to be in writing and attached to the policy, may be waived by a subsequent oral agreement. The reason given for the rule has been differently stated in various jurisdictions. In some of the courts the doctrine is based on the theory that the restriction can be waived in the same manner as any other condition, and in others on the ground that, notwithstanding the limitation, the insured can rely on a subsequent parole agreement as an estoppel.

In *German Ins. Co. v. Gray,* 43 Kansas, 497 (8 L. R. A., 70), it was held that, though a policy requires that a waiver shall be in writing, such condition can be waived, for, if the company has the power to waive a condition in its policy, it can do so by parole.

And in the leading case of *West Chester Fire Ins. Co. v. Earle,* 33 Mich., 143, it is said:

> "The fact that the policy is written does not prevent its change by subsequent parole agreement. Any written contract not within the statute of frauds may be changed by parole, and this has been applied to the enlargement and continuance of policies."

In Massachusetts, Nebraska and New Jersey a contrary doctrine prevails. The courts of those states hold that where a policy

prescribes the manner in which its conditions may be waived, they cannot be waived in any other manner.

Kyte v. Commercial Union Assurance Co., 144 Mass., 43;

Burlington Ins. Co. v. Campbell, 42 Neb., 208;

Wheeler v. United States Casualty Co., 59 Atl. (N. J.), 347.

The doctrine expressed by the courts of Massachusetts, Nebraska and New Jersey has been in a limited degree, adopted by the courts of this state.

In *Taylor v. Ins. Co.,* 98 Iowa, 521, the policy contained the following provisions:

> "No officer, agent or representative of this company shall be held to have waived any of the terms or conditions of this policy, unless such waiver shall be endorsed hereon in writing."

And—

> "If, without written consent herein, there is any prior or subsequent insurance, valid or invalid, then this policy shall be void."

Also—

> "This policy is made and accepted upon the above express condition, and no part of this contract can be waived, except in writing signed by the secretary of the company."

The policy was issued upon the property and machinery of a printing office which was burned on the 30th day of March, 1894. After the policy was delivered the insured obtained $1,000 additional insurance upon the property. The company failed to pay the loss, and action was begun upon the policy by the insured. The company answered and among other things set forth that the additional insurance was obtained without the consent of the company in writing endorsed upon the policy, and that the entire policy was for that reason void. The insured replied and averred that the additional insurance was taken by and with the consent of the defendant, and that it had full knowledge of such insurance and did not object thereto, and that it waived the conditions of the policy relating to subsequent insurance. The evidence disclosed that the local agent placed the additional insurance upon the property in another company and had full knowledge of its existence.

The question, therefore, which was presented to the court for its determination was whether the local agent, by writing such additional insurance and consenting thereto, could waive the conditions of the policy which required that such consent must be endorsed upon the policy. The court held that the original conditions of the policy were valid and controlled the liability of the insurance company, that the local agent had no power to waive such provisions, and that the failure to endorse upon the policy according to its provisions consent to such additional insurance, rendered the policy void and relieved the insurance company from liability thereon. The decision in this case was rendered in May, 1896.

In *O'Leary & Bro. v. Ins. Co.,* 100 Iowa, 173, which was decided in December, 1896, the same question was presented to the supreme court for its determination. The doctrine announced in the Taylor case was re-affirmed. A petition for rehearing was filed, the rehearing was granted, and the case re-argued. A supplemental opinion was then filed, in which Judge Kinne, speaking for the court, held that conditions in a policy of insurance of the character of those named could not be waived by a parole agreement made by the local agent.

Both of these cases were decided after the original enactment of section 1750 by the Eighteenth General Assembly, and the court had full knowledge of the provisions of that section as it then existed. The provisions of the section were enlarged and re-enacted in the code in its present form, and while it is of broader scope in its present form, it does not go to the extent of declaring that a local agent who solicits insurance and delivers a policy issued by the company may waive conditions in the policy when the contract itself provides that such conditions can only be waived by the written consent of the company endorsed upon the policy.

But in *Corson v. Anchor Ins. Co.,* 113 Iowa, 641, which was decided in 1901 and after section 1750 was adopted in its present form, our court appears to have followed the doctrine announced by the Michigan and Kansas courts. In that case a printed slip was attached to the policy by which the insured agreed to keep a set of books showing a complete record of the business transacted, and to keep such books, together with the inventories received, securely locked in a fire proof safe at night. It was conceded that such provision attached to the policy had not been complied with by the insured. Such non-compliance was known to the insurance company immediately after the loss. Notwithstanding such knowledge,

the adjuster of the company required invoices to be procured by the insured and proofs of loss to be made and filed with the company. After the insured had procured such invoices and proofs of loss, the company refused to pay the loss upon the ground that the clause referred to had been violated by the insured and the policy rendered void because of such violation. An action was brought upon the policy by the insured, and the company pleaded a breach of the "iron safe" clause as a defense to the action. In passing upon the question the court held that the adjuster in demanding the invoices and proofs of loss of the insured, waived any defense which might have been urged because of a breach of the clause referred to, and that the company could not successfully plead such defense because of the waiver thereof.

The provisions of section 1750 are not referred to in the opinion of the court, and the effect of the decision is to declare that the adjuster sent by the company to adjust the loss was acting within the scope of his employment when he demanded the invoices and proofs of loss, and that thereby the company waived any defense which might have otherwise been made because of a breach of the "iron safe" clause.

What has been said applies to the ordinary policy issued by an insurance company and not to a standard form required by statute.

A standard form of policy required by statute is a part of the law regulating insurance in the state where such standard form is adopted. The force of such policy as a statutory law is recognized in *Goodhue v. Hartford Ins. Co.*, 175 Mass., 187.

In *Simonton v. Liverpool, London & Globe Ins. Co.*, 51 Ga., 76, it was held that a statute providing that all insurance contracts must be in writing, required that all alterations of such contract should also be in writing. The effect of this decision is that no provision in a standard form of policy adopted by the legislature of a state can be altered or changed unless such alteration or change is also in writing.

The principle upon which the Georgia decision is based does not appear to me to be sound. It is clear that an executed written contract may be modified or changed by a subsequent parole agreement, and I see no reason why a statutory provision may not be waived or modified by a parole agreement made by the person who is benefited by such provision.

In *Goit v. Nat. Protective Ins. Co.*, 25 Barbour, 189, it is said:

> "It is a well settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no

matter in what manner it may have been made or secured (Broom's Legal Maxims, 547). It extends to all provisions, even constitutional and statutory, as well as conventional. The law will not compel a man to insist upon any benefit or advantage secured to him individually. Hence it was the privilege of the insurers in this case, if they elected so to do, to waive the condition making the actual payment of the premium a condition precedent to the binding efficacy of any insurance, as it was a provision inserted for their benefit and in which they alone were interested. This waiver may be established by evidence of an express waiver or by circumstances from which such waiver may be inferred; and it may be by the managers of the company or by a duly authorized agent."

The opinion of the court in *Goit v. Nat. Protective Ins. Co.* is cited with approval and quoted from in the recent case of *Knarston v. Manhattan Ins. Co.,* 140 Cal., 57. In the latter case the insured failed to pay his premium upon a life policy at the time the same became due. There was a provision in the policy that the policy should become void if the insured failed to pay the premium thereon when due. When the premium became due the insured asked for an extension of the time of payment, and such extension was verbally granted by a general agent of the insurance company. The verbal agreement of the general agent to extend the time of payment was held by the California court to be within the scope of his employment and to be a waiver of the provision of the policy that it should be void upon the failure of the insured to pay the premium when due.

Section 1750 of the code contains the following provision:

"Any officer, agent or representative of an insurance company doing business in this state, who may solicit insurance, procure applications, issue policies, adjust losses or transact the business generally of such companies, shall be held to be the agent of such insurance company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws or articles of incorporation of such company to the contrary notwithstanding."

Under the provisions of this section every person acting as an agent of an insurance company binds such company by his acts if performed within the scope of his employment. The statute does

not attempt to bind an insurance company by any act or representation made by an agent of the company which is beyond the scope of his employment.

Every forfeiture clause contained in a policy of insurance, whether it be a standard policy or not, is inserted for the benefit of the company which issues such policy, and no reason exists why the company for whose benefit such provision is inserted may not waive the provision, whether in a standard or other form of policy.

Under the principles of law enunciated by the authorities cited, I think the true rule is that an agent of an insurance company, if acting within the scope of his employment, has the power to waive a condition in a standard form of policy where such condition is inserted solely for the benefit of the insurance company, although the policy provides that such condition can only be waived by a written agreement endorsed upon or attached to the policy.

Respectfully submitted,

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

September 11, 1906.

HON. JAMES H. JAMISON,
Chairman Legislative Insurance Commission.

NATIONAL BANKS—MAY CONDUCT SAVINGS DEPARTMENT.—A national bank may legally organize and conduct a savings department, and may advertise and inform the public that it is maintaining such department.

SIR: I am in receipt of your favor of the 13th instant, enclosing letter of Arthur Reynolds, and asking whether such letter is a violation of the provisions of the Iowa statute relating to savings banks.

The letter states that the Des Moines National Bank is maintaining and conducting a savings department, and solicits deposits therein. The question, therefore, which arises is whether a national bank may maintain a savings department and by means of letters or circulars inform the general public of such fact and solicit deposits to be made therein.

In an opinion given to the Honorable Frank F. Merriam, Auditor of State, on the 31st day of October, 1902, I held that a national or private bank may lawfully organize and conduct a savings department in connection with its general banking business. The opinion was based upon the authority of *State v. Scougal,* 3. S. D., 55;

National Bank v. Ferguson, 48 Kansas, 739; Zane on Banks and Banking, section 122, and *Western National Bank v. Armstrong,* 152 U. S., 346.

Under these authorities it is clear that a national bank may legally organize and conduct a savings department. It logically follows that it may advertise and inform the public by any proper means that it is conducting such savings department, and may legally solicit deposits to be made therein.

The letter of Mr. Reynolds does not, therefore, in my opinion, contravene any of the provisions of the Iowa statute relating to savings banks.

Respectfully submitted,

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

September 14, 1906.

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

BOND—RELEASE OF SURETY.—The Capitol Commission in accepting and paying for certain work done by the Florentine-Wilhelm Company waives no right which the state has against the principal or surety upon the bond given by the said company for the maintenance of such work.

DEAR SIRS: I am in receipt of your request for my opinion whether the Capitol Commission in accepting and paying for the scagliola work done by the Florentine-Welhelm Company in the hall of the house of representatives, would waive any right which the state now has against the principal or surety upon the bond given by the Florentine-Wilhelm Company for the maintenance of such work for a period of five years.

The facts upon which the inquiry is based, as given in the letter of your secretary of September 18th, are substantially these:

The scagliola work was in process of construction and not completed at the time the bond of the Florentine-Wilhelm Company for the maintenance of such work against cracking and crazing was executed and delivered. The completion of the work was deferred in the fall of 1905 for the reason that the hall had to be prepared and put in condition for the legislature in the winter of 1906. In the spring of 1906 the work was again taken up and completed to the satisfaction of the Commission. Between the time of the sus-

pension of the work in the fall of 1905 and the time it was again resumed in the spring of 1906, a slight cracking or crazing appeared upon the surface of the scagliola columns. These defects were remedied and the work completed.

The bond, therefore, was given nearly a year in advance of the completion of the work. It is a bond for maintenance and could, of course, be given as well before as after the completion of the work. The fact that it was executed and delivered before the work was actually completed has no bearing upon its validity.

It recites that the said Florentine-Wilhelm Company has completed a certain contract to construct and complete the scagliola work in the state capitol building at Des Moines, and that said Company has entered into a second or supplemental contract to maintain said scagliola work against cracking and crazing for a period of five years from the date of the completion of said contract.

It is said by your secretary that it was expected that the work would be completed by the time the bond arrived after its execution. Such fact, however, appears to me to be of no importance. The work was not actually completed at the time that the bond was executed and delivered, and the recitation in the bond that such work was completed would not have the effect to release the principal and surety from their respective obligations under the bond, if such bond was in fact executed and delivered to the Capitol Commission prior to the completion of the work.

The effect of the recitation referred to, if any effect it has, is to estop both principal and surety from claiming that the work was not completed at the time of the execution and delivery of the bond in any action which may be brought by the state for a breach of its conditions. Such recitation cannot be pleaded, either by the principal or surety, as a defense in any action brought for a breach of the conditions of the contract.

The bond, in my opinion, is a valid, continuing bond, and one which can be enforced by the state in case there is a breach of its conditions.

Respectfully submitted,

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

September 24, 1906.

CAPITOL COMMISSION,
Des Moines, Iowa.

BUILDING AND LOAN ASSOCIATIONS.—Under section 1890 of the code, held that every person borrowing money of a domestic building and loan association on real estate mortgage, in accordance with the articles of incorporation and by-laws of the association, becomes a member of such association. A domestic local association must confine its entire membership and business to the county in which is situated its principal place of business, except when its principal place of business is located in a city or town which extends into more than one county. In such instance it may make loans within the corporate limits of such city.

SIR: I am in receipt of your favor of the 11th instant, requesting my opinion upon the following questions:

First.—Has a domestic local building and loan association the right to make loans to non-residents of the county in which it is located, where the real estate security offered is within the county in which the association is located?

Second. Has a domestic local building and loan association the right to make loans to residents of the county in which it is located, where the mortgage security is partly within the county and partly outside of the state, and where the amount within the county is not sufficient according to the statutory requirements?

Third. Has a domestic local building and loan association the right to make loans to residents of the county in which it is located where the security offered is part within the county of its location and part outside of the county, but within the state?

These questions will be considered in the order stated.

First. It may be stated as a general rule that building and loan associations possess only such powers as are expressly granted by the statute authorizing their creation, and such incidental powers as are necessary to accomplish and carry into effect the powers expressly granted. A transaction not authorized by the statute and not incidental to the conduct of the business of the association is *ultra vires* and void.

Section 1890 of the code defines and classifies building and loan associations as follows:

> "Corporations organized for the purpose of furnishing money to their members upon sufficient security, shall be known as building and loan or savings and loan associations. Domestic local building and loan or savings and loan associations shall include corporations, societies, organizations or associations

> incorporated under the laws of this state for the purpose of and doing business only within the county in which is situated the town or city named in its articles of incorporation as its principal place of business; provided that, where the town or city named in its articles of incorporation as the principal place of business is situated in more than one county, and the business of the association is restricted to the town or city and to the county within which is located its principal office, said association shall be deemed a domestic local building and loan or savings and loan association within the meaning of this chapter.'' * * *

Under the provisions of this section, every person who borrows money of a domestic local building and loan association and secures the money so borrowed by a mortgage upon real estate in accordance with the articles of incorporation and by-laws of the association, becomes a member of such association. The provisions of the section quoted restrict the business of domestic local building and loan associations to the county in which is situated the town or city named in its articles of incorporation as its principal place of business, except that such an association may transact business within the corporate limits of the town or city named in its articles of incorporation as its principal place of business, if such town or city is situated in more than one county. In other words, its right to accept persons as members of the association, and to loan them money on real estate security, is, by the statute, restricted to the county in which is situated the town named in the articles of incorporation of the association as its principal place of business, except that it may receive persons as members and loan to them money upon approved securities within the corporate limits of the city or town in which is located its principal place of business, although such corporate limits extend into another county.

Under this statute, therefore, a domestic local building and loan association has no right, power or authority to loan money to persons who are not residents of the county in which is located its principal place of business, unless such persons reside within the corporate limits of the city or town in which such principal place of business is located.

Second. It follows from what has been said before that a domestic local building and loan association must confine its entire membership and business to the county in which is situated its principal place of business, except as hereinbefore stated.

It cannot, therefore, loan money to residents of the county in which is located its principal place of business and take as security for such loans property outside of the county or outside of the state.

Third. Nor has it the power or right to make loans to residents of the county in which its principal place of business is located, and take as security for such loans a mortgage upon property, a part of which is within the county where the principal place of business of the association is located, and a part outside of such county, within the state.

As suggested in the first paragraph of this opinion, the membership and business of a domestic local building and loan association must be wholly confined to the county in which is located its principal place of business, except that it may transact business within the corporate boundaries of the city or town in which is located its principal place of business, where such boundaries extend beyond the county where the principal office of the association is maintained.

Respectfully submitted,

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

September 29, 1906.
HON. B. F. CARROLL,
Auditor of State.

FOREIGN CORPORATIONS—CERTIFICATE REQUIRED—PAYMENT OF FEE—DURATION OF PERMIT—Section 1637 of the Code requires any foreign corporation doing business in this state since September, 1886, or desiring to transact business in this state to file a certified copy of its articles. A filing fee shall be required in all cases except of corporations transacting business in this state prior to September 1, 1886. The transacting of business by such corporation, without first having secured a valid permit, is a misdemeanor. A permit once secured continues during life of corporation.

SIR: I am in receipt of your favor of the 15th ultimo, in which you ask my opinion as to the following questions:

First. Is a foreign corporation that is not exempt under the "manufacturing" or "mercantile" clause as provided in section 1637, of the code, that transacted business in this state prior to

September 1, 1886, and has continued to transact business therein since that date, required to file a certified copy of its articles of incorporation and secure a permit before it is entitled to legally transact business in this state? In other words, does the fact that such corporation did transact business in this state prior to September 1, 1886, relieve such corporation from the requirements of this section relative to filing a certified copy of its articles of incorporation and securing a permit?

Sceond. If you find that such corporation must comply with the provisions of this section and secure a permit before it can legally do business in this state, at what time will the legal rights of such corporation to transact business in this state become established?

Third. Are such corporations subject to the same limitations as to corporate period and renewal thereof as domestic corporations of the same class?

Fourth. If you find that such a corporation is not exempt from the provisions of section 1637 relative to filing a certified copy of its articles of incorporation and securing a permit, does the fact that said corporation transacted business in this state prior to September 1, 1886, relieve such corporation from the payment of the fees required of domestic corporations of the same class under sections 1610 and 1291?

Fifth. If you find that such corporations are exempt from the payment of the fees above noted, but are required to renew their filing at the expiration of the period at which same would have expired if organized under the laws of this state, when such renewal articles for an extension of its corporate period are filed, will it be the duty of the secretary of state to collect the fees now required to be paid by domestic corporations under section 1618?

Sixth. If such a corporation transacted business in this state prior to September 1, 1886, and after that date continued to do so for a number of years, say ten, without securing a permit as provided in section 1637 and at this time the proper instruments are presented to the secretary of state for filing and accepted by him, what would be the legal status of such corporation in so far as the continuation and expiration of its corporate life is concerned; would such expiration be at the end of the period allotted to domestic corporations of this class dating from the date of such filing, or from the time such filing should properly have been made under the provisions of this act?

These questions will be taken up and considered in the order stated.

First. Section 1637 of the code provides:

> "Any corporation for pecuniary profit other than for carrying on mercantile or manufacturing business, organized under the laws of another state or of any territory of the United States, or of any foreign country, which has transacted business in the state of Iowa since the first day of September, 1886, or desires hereafter to transact business in this state, and which has not a permit to do such business, shall file with the secretary of state a certified copy of its articles of incorporation duly attested, accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state, said application to contain a stipulation that such permit shall be subject to the provisions of this chapter."

This section requires every foreign corporation which has transacted business in this state since the first day of September, 1886, or which desires to transact business in this state, to file a certified copy of its articles of incorporation, accompanied by a resolution of its board of directors or stockholders, with the secretary of state, and obtain from him a permit to transact business in this state.

The fact that such corporation transacted business in this state prior to September 1, 1886, does not relieve it from the duty of filing a certified copy of its articles of incorporation with the secretary of state and procuring a permit to transact its business.

Second. The legal right of a foreign corporation to transact and carry on its business in this state begins when the secretary of state has issued and delivered to such corporation a permit authorizing it to transact business in this state under the provisions of section 1637 of the code.

Third. There is no provision of statute which limits the life of the permit issued by the secretary of state to a foreign corporation. The legislature has not undertaken to require that the permit issued to a foreign corporation to transact its business in this state shall be renewed upon the lapse of the period of time at which domestic corporations are required to renew their corporate existence.

Under the law as it now exists, a foreign corporation, after it has complied with the provisions of section 1637 of the code, and obtained a permit from the secretary of state to transact its business, may continue to carry on its business in this state indefinitely, as there is no provision of statute requiring a renewal of such permit.

Fourth. It is a general rule that corporations organized under the laws of one state may exercise any and all of their powers in another state, unless the latter state, by its statutes, decisions or policy, forbids the exercise of such powers by foreign corporations.

2d Cook on Corporations, (5th ed.) sec. 696;

Tootle vs. Singer, 118 Iowa, 536.

Under this rule every corporation organized under the laws of any of the other states of the United States may rightfully and legally carry on and conduct its business in the state of Iowa, subject only to the restrictions and regulations of the statute of the latter state.

By section 1637 every such corporation is required to file its articles of incorporation and procure from the secretary of state a permit to transact business in the state of Iowa.

Section 1639 provides that any foreign corporation which shall carry on its business without having complied with the statute and obtained a valid permit to transact its business in the state, shall forfeit and pay to the state for every day in which such business is transacted, the sum of one hundred dollars to be recovered by suit in any court having jurisdiction.

The same section further provides that any agent, officer or employee who shall knowingly transact the business of such corporation when it has no valid permit, shall be guilty of a misdemeanor and punished therefor.

Section 1637 contains this provision:

> "Any corporation transacting business in this state prior to the first day of September, 1886, shall be exempt from the payment of the fees required under the provisions of this section."

The effect of these two sections is to require all foreign corporations to obtain a permit from the secretary of state to transact business in this state, and to require all corporations which had not transacted business in this state prior to the first day of September, 1886, to pay to the secretary of state the same fee re-

quired for the organization of corporations under the laws of this state. The provision of section 1637 which exempts corporations which were transacting business in this state prior to the first day of September, 1886, from the payment of the fees required by that section, is an exception to the general rule fixed by the statute.

The clear purpose of the legislature, as gathered from the act, was to permit corporations which were transacting business in the state prior to the first day of September, 1886, to file a certified copy of their articles of incorporation and receive from the secretary of state a permit to transact business in the state, without paying the corporation fee required of other foreign corporations. This exception is specific in its terms, and there is no provision of the statute which limits its operation.

It is true that section 1639 provides that nothing contained in chapter 1 of title IX of the code shall relieve any person, company, corporation, association or partnership from the performance of any duty or obligation now enjoined upon or required of it, or from the payment of any penalty or liability created by the statutes heretofore in force, and that all foreign corporations and the officers and agents thereof doing business in this state shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers.

This section, as well as section 1637, was originally enacted by the twenty-first general assembly, and was afterward, with some modifications and additions, incorporated into the present code.

The provision that "nothing contained in this chapter shall relieve any person, company, corporation, association or partnership from the performance of any duty or obligation now enjoined upon it or required of it, or from the payment of any penalty or liability created by the statutes heretofore in force," clearly has no reference to the provisions of section 1637 requiring corporations to pay a fee to the secretary of state for a permit to transact business, and does not in any way affect the provision of the section referred to by which corporations which were transacting business in the state prior to the first day of September, 1886, are exempted fom the payment of such fee.

The remaining provision of section 1639, which is as follows:

> " * * and all foreign corporations and the officers and agents thereof doing business in this state shall be subject to all the liabilities, restrictions and duties that are or may be

> imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers''—

cannot be held to take foreign corporations which were transacting business in this state prior to the first day of September, 1886, out of the exception and exemption made by the provisions of section 1637, and require such corporations to pay a fee to the secretary of state for a permit to transact business.

While an exception to a general statute is to be strictly construed, such exception and any exemption from the general law therein continues until the exception is modified or repealed by the legislature.

It is clear that the legislature in adding the clause last quoted to the act of the twenty-first general assembly did not attempt to repeal, modify or change the provisions of section 1637 by which certain foreign corporations were exempted from the payment of fees to the secretary of state.

It is a well settled rule of law and a canon of statutory construction, that no person or corporation can be required to pay any fee to any public officer, nor can any public officer exact the payment of any fee from any person or corporation, unless such fee is expressly fixed and required to be paid by statute.

Chapter 1 of title IX expressly requires the payment of a fee by certain foreign corporations when they apply to the secretary of state for a permit to transact business in this state. It requires only one payment of such fee. There is no provision for a renewal of such period, and the secretary of state is not authorized by the statute to demand or exact of such corporations more than one payment of such fee.

I am, therefore, compelled to reach the conclusion that a corporation which transacted business in this state prior to the first day of September, 1886, is, under the present law, exempted from the payment of the fees required of domestic corporations for a renewal of their corporate franchise under the provisions of section 1610 of the code, and that no fee can be charged under section 1291, as there is no provision for the renewal of the permit issued to a foreign corporation.

Fifth. When a foreign corporation has filed with the secretary of state a certified copy of its articles of incorporation, duly attested and accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing

service of process to be made upon any of its officers or agents in this state engaged in transacting its business, paid the fee required by statute, and received from the secretary of state a permit to transact business in this state, it has fully complied with all of the provisions of the statute fixing the conditions upon which such corporations may enter the state and transact business therein. The legislature has required nothing further to be done by such corporations so far as their right to transact business in this state is concerned. They are of course subject to the general corporation laws of the state, but are not required to again file a certified copy of their articles of incorporation, the resolution required by section 1637, or to obtain a renewal of the permit issued by the secretary of state.

Sixth. From what has been hereinbefore said, it follows that there is no expiration of the right of a foreign corporation to transact business in this state, so far as the provisions of our statute are concerned. This statement must not be understood to mean that a foreign corporation can continue to transact business in this state after its corporate life has expired in the state in which it is organized; but it may continue to transact business in this state under our statute, after it has once obtained a permit from the secretary of state in the manner provided by chapter 1 of title IX of the code, as long as it retains its corporate existence under the laws of the state in which it is organized.

A corporation which had transacted business in the state prior to September 1, 1886, might be liable to the penalties provided by section 1639, if it failed to file with the secretary of state, within a reasonable time after the enactment of the statute, a certified copy of its articles of incorporation and a resolution of its board of directors, and to obtain a permit to transact business as provided in section 1637; but such liability, if it existed, would not affect the right of the corporation to continue to transact its business in the state after it had obtained a permit from the secretary of state by complying with the provisions of section 1637. After obtaining such permit it is entitled to continue to transact its business in the state without a renewal thereof, as long as its corporate life exists, unless it is excluded from the state by an act of the legislature or

forfeits its right to transact business therein by the violation of a statutory provision.

Respectfully submitted,

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

October 1, 1906.

HON. W. B. MARTIN,
Secretary of State.

TEACHERS' CERTIFICATES—GRADES OF—WHEN SAME SHOULD BE RENEWED.

SIR: I am in receipt of your favor of the 13th instant, requesting my opinion upon the following questions:

1. Where the holder of a first grade certificate issued prior to October 1, 1905, may have renewal privileges under section 11 of chapter 122 of the acts of the thirty-first general assembly, is it required that such certificate shall have been in full force and effect on the first day of October, 1905?

2. If not required that the certificate shall have been in full force and effect on the first day of October, 1905, and the teacher is found to be the holder of both a first grade certificate and a second grade certificate issued prior to October 1, 1905, but the second grade certificate of more recent date, shall the educational board of examiners, in determining the renewal privileges to which the teacher is entitled, consider the first grade or the second grade certificate?

First. Section 11 of chapter 122 of the acts of the thirty-first general assembly provides:

> "Any person who has held a first grade certificate or a special certificate in any county of this state for one or more years prior to the taking effect of this act, may have the same renewed by the board of examiners, provided said person has taught continuously during the preceding year, and provided further that the members of the school board of the school corporation of the county and the county superintendent of the county where such person has been employed, and, if in a graded school, the principal or superintendent under whom such person has taught, certify to the success of the applicant as a teacher of efficiency, scholarship and professional spirit."

The act of the thirty-first general assembly became a law on the first day of October, 1906.

Under the provisions of the section quoted, any teacher who held a first grade or special certificate in the state for one or more years prior to the taking effect of the act, and had taught continuously during the preceding school year, is entitled to have such certificate renewed without examination upon the recommendation of the school board, county superintendent and principal or superintendent of schools, as provided in the section quoted.

It will be observed that one of the conditions upon which the right of a teacher to have his certificate renewed, is that he shall have taught continuously during the preceding year.

Section 2773 of the code provides that the school year shall begin on the third Monday in March, and that each school shall continue for at least twenty-four weeks of five school days each during the school year.

Section 2788 of the code provides that no person shall be employed as a teacher in a common school which is to receive its distributive share of the school fund, without having a certificate of qualification given by the county superintendent of the county in which the school is situated, or a certificate or diploma issued by some other officer duly authorized by law.

Section 11 of chapter 122 of the acts of the thirty-first general assembly clearly contemplates that the teacher applying for a renewal of his certificate under the provisions of that section shall have taught during the preceding year under the authority of a certificate issued by the county superintendent or other officer authorized by law. It follows, therefore, that such teacher must have held a certificate which was in force during the entire preceding school year, and such period of time would cover and include the first day of October, 1905.

Second. Where a teacher has received a second grade certificate upon an examination given subsequently to an examination upon which a certificate of the first grade was issued, the later certificate must be considered as the one in force, as it is the official evidence of the teacher's grade and standing as ascertained upon the last examination given. It must be considered, therefore, to supersede the previous certificate, and the educational board in determining the renewal privileges to which such teacher is en-

titled must be governed in its action by the later certificate and not one which has been discredited by a subsequent examination.

Respectfully submitted,

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

October 22, 1906.

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

STATE BOARD OF EDUCATIONAL EXAMINERS—ISSUANCE OF CERTIFICATES TO TEACH.—If on examination of an applicant for a first grade certificate, it is disclosed that he is not entitled to such first grade certificate, but is entitled to a second or third grade certificate, it is within the power of the board to grant such lower grade certificate.

SIR: In compliance with your request of the 9th instant for my opinion whether the state board of educational examiners has the power to issue a second or third grade certificate under the provisions of chapter 122 of the acts of the thirty-first general assembly, where the applicant has entered upon an examination for a first grade certificate and it is found by the board that he is not entitled to a first grade certificate, but is entitled to one of a lower grade, under the provisions of such act, I submit the following:

Section 4 of the act of the thirty-first general assembly provides:

> "The examination for a first grade certificate shall include competency in, and ability to teach orthography, reading, writing, arithmetic, geography, grammar, history of the United States, didactics, elementary civics, elementary algebra, political economy, elementary economics, elementary physics, elements of vocal music, physiology and hygiene. * * * "

The act nowhere specifically provides what branches shall be included in an examination for a second or third grade certificate.

Section 8 of the act is as follows:

> "Applicants whose examination entitles them to a second grade certificate only, shall receive the same for not to exceed two years, with the privilege of one renewal without further examination, under the same rules as govern renewals of first grade certificates."

Section 9 provides:

> "Applicants whose examination entitles them to a third grade certificate only, shall receive the same for six months, provided that the county superintendent may, at his option, extend such certificate to the first day of the July following its issue. * * * "

These sections must, I think, be harmonized and construed together, and the interpretation which must be given them is that every applicant for a first grade certificate must take an examination as to his attainments in the branches named in section 4 of the act. If such examination discloses that he is not entitled to a first grade certificate, but is entitled to one of the second or third grade, it is clearly within the power of the board to grant such lower grade certificate. That is, the board may determine from the result of an examination for a first grade certificate whether the applicant is entitled to a certificate of a lower grade, and if so, issue to him the certificate to which he is entitled.

Respectfully submitted,

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

November 12, 1906.

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

STATE BOARD OF EDUCATIONAL EXAMINERS—RENEWAL OF CERTIFICATES BY.—Under the provisions of section 11 chapter 122 of the laws of the thirty-first general assembly, held that to entitle a holder of a first grade certificate to a renewal, it is necessary that said applicant for a renewal should have taught continuously in a public school of the state during the preceding year.

SIR: I am in receipt of your favor of the 4th instant, asking whether, under the provisions of section 11 of chapter 122 of the laws of the thirty-first general assembly, the educational board of examiners may renew a first grade certificate of one whose experience in teaching during the preceding school year has been in a private normal school.

In answer thereto I will say that the act of the thirty-first general assembly relates to the public schools of the state and to the qualification required of the teachers therein. Section 11 of the act provides:

> "Any person who has held a first grade certificate or a special certificate in any county of this state for one or more years prior to the taking effect of this act, may have the same renewed by the board of examiners, provided said person has taught continuously during the preceding school year, and provided further that the members of the school board of the school corporation and the county superintendent of the county where such preson has been employed, and if in a graded school the principal or superintendent under whom such person has taught, certify to the success of the applicant in teaching and in efficiency, scholarship and professional spirit."

The terms "school board" and "school corporation" must be held to refer to the board and school corporation of the public schools of the state, and the term "county superintendent" must be interpreted as referring to the county superintendent of the public schools. The section requires that the members of the board of the school corporation and the county superintendent where the applicant has been employed as a teacher, must unite in recommending him for a renewal of his certificate.

All of the provisions and conditions of the section clearly relate to the public schools of the state, and there is no escape from the conclusion that an applicant who applies for a renewal of his certificate must have taught continuously in a public school of the state during the preceding year, and that such work as a teacher in a school of that character is one of the conditions requisite for the renewal of a certificate.

Respectfully submitted,

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

December 5, 1906.

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

BANK DEPOSITS—INSURANCE OF.—Sections 1709 and 1710 of the code construed as prohibiting insurance companies insuring bank deposits.

SIR: I am in receipt of your communication of the 10th instant, in which you ask my opinion upon the following questions:

1st. Are bank deposits the subject of insurance under the laws of this state?

2d. Can banks take and hold stock of an insurance company organized for the purpose of insuring bank deposits, and carry such stock as a part of their assets?

These questions will briefly be considered in the order stated.

First. Section 1709 of the code, as amended by the acts of the twenty-eighth, twenty-ninth and thirty-first general assemblies, is as follows:

> "Any company organized under this chapter or authorized to do business in this state may:
>
> 1. Insure houses, buildings, and all other kinds of property against loss or damage by fire or other casualty, and make all kinds of insurance on goods, merchandise, moneys and securities or other property in the course of transportation, whether on land or water, or any vessel or boat wherever the same may be;
>
> 2. Insure the fidelity of persons holding places of private or public trust, or execute as surety any bond or other obligation required or permitted by law to be made, given or filed, except bonds required in criminal causes. None but stock companies shall engage in fidelity and surety business;
>
> 3. Insure the safe keeping of books, papers, moneys, stocks, bonds and all kinds of personal property, and receive them on deposit;
>
> 4. 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, and stock companies may insure horses and registered cattle against loss by death from disease or accident;
>
> 5. Insure the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water, insure against loss or damage to property caused by accidental discharge or leakage of water from automatic sprinkling systems, 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 property, or both, occurring in or connected with

the transaction of their business, or from the operation of any machinery connected therewith;

6. Insure against loss or injury to person or property, or both, growing out of explosion or rupture of steam boilers;

7. Any insurance company organized and incorporated on the stock or mutual plan may insure against loss or damage resulting from burglary or robbery or attempt thereat. A mutual company organized under this subdivision shall not issue any policy to any person, firm or corporation other than banks, bankers, loan companies, trust companies and county treasurers. Provided, also, that companies organized to transact business as provided by this subdivision seven (7) may hold their annual meetings in the month of July instead of January;

8. Insure or guarantee and indemnify merchants, traders and those engaged in business and giving credit from loss and damage by reason of giving and extending credit to their customers and those dealing with them, which business shall be known as credit insurance."

Section 1710, as amended by the thirty-first general assembly, provides that no company organized under the laws of this state or authorized to do business therein, shall issue policies of insurance for more than one of the eight purposes mentioned in section 1709 of the code, except that under certain conditions insurance companies may issue policies for more than one kind of risks specified. Such exceptions, however, are not material to the question under consideration.

The legislature of Iowa has clearly defined the kind and character of risks upon which insurance may be written. The effect of the act of the legislature is to prohibit insurance being written in this state upon any risks other than such as are defined and permitted by statute.

It follows, therefore, that unless authority is given by section 1709 of the code, which defines the character of risks as to which insurance may be written, no company can insure the re-payment of bank deposits under the laws of this state.

A contract of insurance by which re-payment of money deposited in a bank is guaranteed, is in its nature fidelity insurance. It is, therefore, necessary to examine the provisions of the statute relating to that class of insurance, for the purpose of determining whether they are broad enough to permit the insurance of bank deposits.

Subdivision 2 of the section quoted authorizes companies organized under the laws of this state, or transacting business therein, to insure the fidelity of persons holding places of private or public trust, and to execute as surety a bond or other obligation required or permitted by law, except bonds in criminal causes.

Subdivision 3 of the section permits such companies to insure the safe keeping of books, papers, money, stocks, bonds and all kinds of personal property.

Subdivision 7 permits such companies to insure against loss resulting from burglary or robbery, or attempt thereat.

Subdivision 8 permits such companies to insure merchants, traders and those engaged in business and giving credit, from loss by reason of extending credit to their customers, and those dealing with them.

These subdivisions of section 1709 are the only provisions of the statute which fix and define risks ordinarily classified as belonging to fidelity insurance which may be insured against by companies authorized to write insurance in this state. A careful examination of the provisions of these subdivisions fails to disclose any authority given by statute to insurance companies transacting business in this state to insure depositors against loss caused by the failure of the bank in which the deposit is made, the dishonesty of its officers or employees, or from other cause.

Under a familiar rule of law, the naming of the character of risks which may be insured against, excludes all others, and as no authority is found in the statute for the insurance of bank deposits, it follows that such risks were excluded by the law making power of the state, and that no insurance company authorized to transact business under the laws of this state is authorized under our statute to enter into a contract of insurance of that character.

Bank deposits are not, therefore, the subject of insurance under the laws of Iowa.

Second. While the conclusion reached upon the first question considered may render an opinion upon the second unnecessary, I will briefly give my views in relation thereto.

On November 2, 1905, I gave to the honorable auditor of state an opinion upon the question of the right of corporations to subscribe for or purchase, take and hold the stock of another corporation. That opinion appears upon page 292, et seq., of the report of the attorney-general for the year 1906. The cases bearing upon the question were at that time collated, and, after a careful examination of the authorities, the conclusion was reached that it

was against public policy to permit one corporation to either subscribe for or to purchase and hold the stock of another, and to control the business of such other corporation.

The reason for such rule is clearly stated by Mr. Thompson in his work on Corporations, section 1103, 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 has the support of the great weight of authorities of this country, and may be taken as a fair and conservative statement of the rule of law which obtains.

Under the principle of law as stated by Mr. Thompson, it is clear that a bank cannot subscribe to or purchase and hold the stock of an insurance company organized for the purpose of insuring bank deposits, or for any other purpose. Such acts would be beyond the powers conferred upon banking corporations by the

statutes of the state, as it is no part of a general banking business which such corporations are authorized to transact.

Respectfully submitted,

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

December 13, 1906.

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

EXTRADITION—EXPENSE OF PAID BY THE STATE—WHEN.—Under the provisions of section 5169 of the code, the state should in no case pay the costs of returning a fugitive if he has not been tried for the offense with which he is charged, unless it is shown to the satisfaction of the governor that the failure to try said fugitive was not due to the fault or neglect on the part of the county attorney or sheriff.

SIR: I am in receipt of your favor of the 28th ultimo, requesting a construction of section 5169 of the code, which relates to the payment of expenses by the state in extradition cases. In compliance with such request I submit the following:

The section provides for the appointment by the governor of agents to demand of the executive authority of another state or territory, or from the executive authority of a foreign government, a fugitive from justice charged with treason or felony.

It further provides that the expenses allowed such agent shall not exceed ten cents a mile each way for all the necessary travel of the agent, and five cents a mile for the number of miles which the fugitive shall have been conveyed. It requires that bills for such expenses shall be made out, verified as provided therein, and that the same shall be audited by the auditor of state and paid out of the state treasury. Then follows this provision:

> "But the state shall in no case pay the cost of returning the fugitive if he has not been tried, unless it is shown to the satisfaction of the governor that a failure of trial has not occurred by any fault or neglect on the part of those interested in the prosecution."

It is this clause of the section that obscures its meaning and makes its interpretation difficult.

The question which arises is, to whom does the phrase "those interested in the prosecution" refer? It may be said that every good citizen of the state is interested in the prosecution of a fugitive from justice who is returned upon a requisition of the governor to be tried for a crime committed by him; but it cannot be contended that the legislature intended to include in the phrase under consideration every law abiding citizen of the state, and that the expense incurred by the agent appointed by the governor to demand and return the fugitive for trial should not be paid because some citizen of the state was negligent or at fault. So, in a narrower sense, it may be said that every law abiding citizen of the county where the crime was committed is interested in the prosecution of the person who committed such crime, but the legislature clearly could not have intended that the expenses of the agent should not be paid by the state if there was a failure to try the fugitive because of some fault or neglect on the part of a citizen of the county, unless some special or specific duty rested upon such citizen to carry on the prosecution and to place the fugitive upon trial for the offense with which he was charged.

It may also truthfully be said that a prosecuting witness and his or her relatives are interested in the prosecution of a fugitive who is returned to the state for trial, and this is particularly true in cases of rape and seduction. In the latter class of cases the prosecution is usually begun by the relatives of the person wronged, and the extradition of the person who has committed such an offense is usually at the request of the relatives of the girl who has been seduced, and, therefore, it may properly be said that they are interested in the prosecution of the fugitive.

But where can the line be drawn? Can it be said that the father and mother of a girl who has been wronged are so interested in the prosecution of the person guilty of the offense that if the fugitive is not tried because of fault or neglect upon their part, the agent shall not be paid his expenses, while if the fugitive is not tried because of the fault or neglect of brothers, uncles or other relatives farther removed, the expenses of the agent shall be paid by the state upon proof being made that it was through no fault or neglect on the part of the prosecuting witness or her father or mother that the fugitive was not tried?

The difficulty in reaching a true interpretation of the phrase is in drawing the line which shall include those who are legally interested in the prosecution of a fugitive and excluding those who do not fall within the meaning of the statute and of all the difficulties

which arise in giving to it a correct interpretation, has led me to the conclusion that it must be held to refer to and include only the persons who are by law charged with the prosecution of a fugitive from justice who has been returned to the state to be tried for the offense with which he is accused.

The county attorney and sheriff of the county within which the offense was committed for which a fugitive from justice has been returned are by law charged with the prosecution of such fugitive, and are, therefore, in a legal sense interested in the prosecution; that is, they have a special interest in the prosecution of the person charged with the crime which is different from that of the citizens of the county and from that of the prosecuting witness and his or her relatives. Upon them rest the legal obligation and duty of prosecuting a fugitive who has been returned for trial. The provision of the statute cannot, in my opinion, be extended beyond the officers of the law whose duty it is to prosecute persons charged with criminal offenses committed within their respective counties.

The fact that the return of a fugitive from justice is usually accomplished through the request and efforts of the county attorney and sheriff of the county in which the crime was committed, and that the sheriff is usually the agent who is appointed by the governor to arrest and return the fugitive, has some bearing upon the interpretation of this statute. The members of the legislature were familiar at the time the statute was enacted with the practice usually pursued in such cases, and therefore may very properly have concluded that if the sheriff and county attorney of the county in which a crime has been committed obtained the return of the fugitive by extradition, they must be diligent in the prosecution of such fugitive, and if he was not tried by reason of any fault or neglect upon the part of either of such officers, the expenses of the agent should not be paid from the state treasury.

From the views expressed, it follows that the state shall in no case pay the cost of returning the fugitive if he has not been tried for the offense with which he is charged, unless it is shown to the satisfaction of the governor that a failure of trial has not occurred through any fault or neglect on the part of the officers of the law upon whom rests the duty of prosecuting the fugitive,

namely: the county attorney and sheriff of the county in which the crime was committed.

Respectfully submitted,

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

December 29, 1906.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

IOWA MONUMENT COMMISSION—APPROPRIATION FOR.—The appropriation made by the thirty-first general assembly was to defray the expenses of several commissions, except the expenses of the governor and his staff, which expenses should be paid out of the appropriation for the governor's office.

SIR: In response to your request for a construction of the provisions of chapter 190 of the acts of the thirty-first general assembly, I submit the following opinion:

Section 1 of the act appropriates $7,500, or so much thereof as may be necessary, out of any money in the state treasury not otherwise appropriated, to pay the expenses of the members of the Iowa Shiloh Battlefield Monument Commission, the Iowa Vicksburg Park Monument Commission, the Iowa Lookout Mountain and Missionary Ridge Monument Commission, and the Iowa Andersonville Prison Monument Commission, such speakers as may be invited, and musicians, upon a joint visit to the several battlefields and prison grounds upon which such commissions have, under the authority of the state of Iowa, erected monuments to the memory of Iowa soldiers of the war of the rebellion, for the purpose of dedicating the same.

Section 2 of the act provides that the sum so appropriated, or any part thereof, may be drawn upon vouchers of the executive council and shall be expended under its direction.

Section 3 of the act is as follows:

> "All unexpended appropriations for the construction of the monuments under the supervision of the said several commissions, and all sums in said appropriations which have been set apart by law for the payment of expenses of dedication, shall be returned to the general funds of the state, it being the intent that the sum hereby appropriated shall cover all the expenses of said dedication, except the expense of the governor

and his staff, which shall be paid out of the appropriations for the governor's office."

It is a cardinal principle of statutory construction that every provision of an act of a legislature must be given its full force and meaning according to the intent of the legislature as ascertained from the language of the act, if the provisions of the act admit of such construction. Under this rule sections 1 and 3 of the act under consideration must be construed together and full force must be given to the provisions of both sections if possible.

Section 1 appropriates $7,500 to pay the expenses of the members of the various battlefield monument commissions, speakers and musicians incurred upon a joint visit to the several battlefields and prison grounds, for the purpose of dedicating the monuments erected thereon by such commissions. The purpose of the legislature in making the appropriation was to place a fund at the command of the executive council of the state which could be used in defraying the expenses incurred by the commissions in making a joint visit to and in dedicating the monuments erected by them.

The provision of section 3 by which all unexpended balances of appropriations made prior to the passage of the act of the thirty-first general assembly, for the construction of the monuments erected by the several commissions, and all sums of such appropriations which had been set apart by law for the payment of the expenses of the dedication of such monuments, were returned to the general funds of the state, was a withdrawal by the legislature from the several commissions of all unexpended balances of such appropriations.

The appropriation of $7,500 made by the act of the thirty-first general assembly was placed at the disposal of the executive council in lieu of appropriations made by former general assemblies, and the act itself, without more, returned to the general funds of the state all unexpended balances of previous appropriations made by the legislature for the purpose of erecting and dedicating the monuments upon such battlefields and prison grounds.

By the use of the phrase "unexpended balances" I do not wish to be understood as holding that no part of any such appropriations may not be legally used to satisfy any unpaid part of the cost of the construction of such monuments, or in defraying any unpaid expenses of the commissioners incurred in supervising the erection thereof. The unexpended balances of the appropriations which were by the thirty-first general assembly returned to the general

fund, are the sums which shall remain after all liabilities and expenses incurred in the construction of the monuments shall have been paid from the respective appropriations.

The purpose of the thirty-first general assembly in making the appropriation of $7,500 is clearly stated in a clause contained in section 3 of the act, which is as follows:

> "It being the intent that the sum of money hereby appropriated shall cover all the expenses of said dedication, except the expenses of the governor and his staff, which shall be paid out of the appropriations for the governor's office."

The fact that all unexpended balances, of prior appropriations made for the erection of monuments upon the battlefields and prison grounds of the south were by the legislature returned to the state treasury, and that the $7,500 appropriated by the thirty-first general assembly was by that body declared to be appropriated for the specific purpose of paying all expenses incurred upon a joint visit of the several commissions to such battlefields and prison grounds and in the dedication of the monuments erected thereon, except the expenses of the governor and his staff, forces the conclusion that no part of such former appropriations can be used to pay any portion of the expenses incurred by the commission in making such joint visit, or in the dedication of the monuments erected by them.

It is true that section 1 of the act which declares that the $7,500 is appropriated for the purpose of paying the expenses of the members of the various commissions, the speakers and musicians, might be held to exclude other expenses incurred in the dedication of the monuments, were it not for the provisions of section 3 which must be construed and harmonized with those of section 1. When the general assembly declared by the enactment of section 3 that it was the intent of the legislature that the sum of $7,500 appropriated by the act should cover all the expenses of the dedication, except the expenses of the governor and his staff, that declaration must be held to extend the provisions of section 1 and to be a formal declaration by the legislature that all expenses properly incurred by the various commissions upon their joint visit to the battlefields and prison grounds, and in the dedication of the monu-

ments erected thereon by them, shall be paid from the appropriation made by the thirty-first general assembly.

Respectfully submitted,

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

December 31, 1906.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

UNIFORM SYSTEM OF ACCOUNTS—WHEN IN EFFECT—PRINTING AND DISTRIBUTION OF REPORTS.—Reports to the auditor of state required by chapter 34 acts of the thirty-first general assembly are not required by the act to be made until April 1, 1907. Under section 3 of said act, the auditor may print and distribute the report he is required to make as he may think advisable to accomplish the purpose of the act.

SIR: I am in receipt of your communication of the 3d ultimo, in which my opinion is requested upon the following questions:

"First. Does the act of the thirty-first general assembly, which relates to the examination of municipalities and a uniform system of accounting, require the municipal officers to report the current year's business to the auditor of state on or before the first day of July, 1907?"

Second. Has the auditor of state authority, under the provisions of the act, to print all or any part of the report required to be made, and distribute the report so printed at the expense of the state?

These questions will be considered in the order stated.

First. Section 1 of chapter 34 of the acts of the thirty-first general assembly makes it the duty of the chief accounting officer of each city and town, namely: The auditor or clerk, to prepare and publish an annual report of the financial condition and transactions of the city or town, as required by law at the time of the passage of the act, or as may be hereafter required.

Section 741-c of the supplement to the code makes it the duty of each municipality to prepare and publish a report which shall contain an accurate statement of all collections made or receipts of such municipality from all sources, all accounts due the public but not collected, and all expenditures for every purpose; and a state-

ment in detail of the cost and operation and all income of each public utility operated or owned by the municipality.

The statute further requires that such report shall show in detail the entire public debt of such municipality and the amount of debt which the municipality may under the law contract for the year for which the report is made.

Section 2 of the act of the thirty-first general assembly requires the report to be printed in pamphlet form, and at least five hundred copies thereof to be published at the expense of the city in all cities having a population of five thousand or more. The same section further provides that in cities and towns having less than five thousand population the report may be published in pamphlet form if authorized by the city council.

Section 3 of the act requires the auditor or clerk of each city or town to forward to the auditor of state a certified copy of such annual report, in the form prescribed by the thirty-first general assembly. The same section provides that the auditor of state shall publish in a separate volume such returns, showing under appropriate schedules the total receipts, expenditures, assets and indebtedness, and related data, of all cities and towns in the state, together with his comment and recommendations respecting desirable changes in the law governing financial administration in municipalities.

Section 4 of the act provides:

> "That uniformity in the methods of accounting for and reporting the financial transactions of municipalities may be secured, the auditor of state is authorized, and he is hereby directed, to formulate and prescribe a system of municipal accounts and methods of presenting departmental and general reports, which shall be adopted and complied with in the administration of all cities and towns on and after April 1, 1907."

The system to be formulated by the auditor is the form of accounting referred to in section 3 of the act. Reports to the auditor in the form prescribed are not required by the act to be made until April 1, 1907. It therefore follows that no publication of the reports of cities and towns made under the provisions of the act can be made by the auditor until after that date. On April 1, 1907, the act becomes effective. Cities and towns are then required to report to the auditor upon forms prescribed by law, and

from such returns he is required to publish a report showing under appropriate schedules the receipts, expenditures, assets and indebtedness of all cities and towns in the state.

Second. The provision of section 4 which requires the auditor of state to formulate and prepare a system of municipal accounts and method of presenting departmental and general reports which must be adopted and complied with by all of the cities and towns in the state, carries with it the authority to print and distribute to the proper officers of the several cities and towns such blanks as may be required for the obtaining of the information contemplated by the act. He may also, under the provisions of section 3, print and distribute at the expense of the state such portions of the report which he is required to make as may in his judgment be advisable to accomplish the purposes of the statute.

Respectfully submitted,

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

January 2, 1907.
HON. B. F. CARROLL,
Auditor of State.

SOUTHERN BATTLEFIELD MONUMENT COMMISSION—COMPENSATION FOR SERVICES.—The commissioners appointed by the governor under the act creating the commission are public officers. Held that under the act creating said commission, the commissioners are not allowed pay for services performed.

SIR: I am in receipt of your favor of the 5th ultimo, in which you ask my opinion whether any member of the commission appointed to erect monuments upon Lookout Mountain and Missionary Ridge, under chapter 197 of the acts of the twenty-ninth general assembly, can lawfully claim compensation for services performed by him. In compliance with such request I submit the following:

Section 2 of the act provides that the board of commissioners shall consist of one member from each of the eleven Iowa commands which participated in the battles of Lookout Mountain and Missionary Ridge. That they shall be appointed by the governor and that their duties shall be to superintend the plans for and the

erection of the monuments provided for in the act. The same section contains the following provision:

> "They (the commissioners) are to receive actual expenses for the time they are actually employed in attending to their duties as commissioners, to be paid on itemized statements sworn to by the claimant, and the amount of said expenses shall not exceed in the aggregate the sum of three thousand dollars, to be paid out of the appropriation hereby made."

It is a universal rule of law that no public officer is entitled to any compensation for services performed by him unless such compensation is provided for and either fixed by law, or the method by which the amount thereof may be ascertained pointed out by statute. Many adjudicated cases could be cited in support of this principle of law, but it is so well settled that citation of authorities is not deemed necessary.

The commissioners appointed by the governor under the act of the twenty-ninth general assembly fall within the classification of public officers, and unless the statute provides for and fixes the amount of compensation to be paid them for their services, or points out the manner in which the amount thereof can be ascertained, they are not entitled to compensation for services and must be held to have undertaken to perform the duties of the office to which they were severally appointed without pay.

The statute nowhere provides for or fixes any compensation to be paid such commissioners for services to be performed by them, nor does it point out any method by which the amount of any such compensation can be ascertained.

It is true that section 4 of the act contains the following provision:

> "It shall not be lawful for any member of the board to be directly or indirectly interested in or derive any profit from any contract, employment or purchase connected with the monuments; nor shall any member thereof be the owner or interested in any claim against the state growing out of the erection of said monuments other than compensation for their services."

While the word' compensation" appears in the provision quoted, the mere use of that word by the legislature in the connection in which it appears, without more, is not sufficient to provide for or fix any compensation to be paid by the state, to such commissioners.

To entitle them to compensation from the state, the legislature must have provided for and fixed the amount thereof or indicated the manner in which it should be ascertained.

Section 2 of the act provides that they are to receive actual expenses for the time they are actually employed in attending to their duties as commissioners, which are to be paid on itemized statements, sworn to by the claimant, and that the aggregate amount of said expenses shall not exceed the sum of three thousand dollars which is to be paid out of the appropriation made for the erection of the monuments.

This provision of the statute is in effect a statement made by the law making power of the state that the commissioners appointed under the act are not to receive anything beyond their actual expenses incurred by them in the performance of the duties of their respective offices.

Under the plain rules of statutory construction, I am forced to the conclusion that the commissioners appointed under the act referred to are not entitled to compensation, although their services may have been meritorious in a high degree. If they have performed extra labor and given a greater amount of time to the discharge of their duties than was contemplated by the act, they should in equity be compensated for such labor and time, but it will require an act of the legislature to authorize the payment of money from the state treasury as compensation therefor.

Respectfully submitted,

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

January 3, 1907.

HON. ALBERT B. CUMMINS,
Governor of Iowa.

LOAN AND TRUST COMPANY—NOTES GIVEN FOR UNPAID CAPITAL—DEMAND MAY BE MADE FOR NOTES WHEN PAID—DEPOSIT OF SECURITIES BY INSURANCE COMPANY AFTER TAKING OVER LOAN AND TRUST COMPANY.

SIR: In compliance with your request for an opinion upon the following questions:

1st. May the stockholders of the National Life & Trust Company withdraw from the auditor's office the notes given by them for the

unpaid portion of the capital stock of that company, if such notes are paid in full?

2d. If they may legally withdraw such notes from the auditor's office, must the National Life Insurance Company of U. S. A. maintain in the office of the auditor of state a deposit of securities amounting in the aggregate to $100,000 in addition to the full legal reserve of the National Life & Trust Company policies in force?

I submit the following:

The National Life & Trust Company was incorporated under the insurance laws of the state of Iowa in 1899, with an authorized capital stock of $200,000, $100,000 of which was paid in cash, invested in approved securities and deposited with the auditor of the state of Iowa, pursuant to the provisions of section 1769 of the code of Iowa. The remaining $100,000 was represented by capital stock notes, executed and certified as required by section 1771 of the code. At the time these notes were executed they were not required to be deposited with the auditor of state. Subsequently, the law was amended so as to require a deposit with the auditor of state, which was accordingly done. (Twenty-ninth General Assembly, Ch. 75, sec. 1.)

On May 12, 1903, the National Life & Trust Company was taken over by the National Life Insurance Company of the United States of America, which latter company took all of the property and business of the Trust Company, assumed all of its obligations, and became the owner of all its capital stock. This amalgamation was submitted to and approved by the auditor of the state of Iowa, and such approval was embodied in a formal written contract between the Insurance Company and the Trust Company upon the one hand, and the state of Iowa upon the other hand, whereby the Insurance Company

> "agrees, binds and obligates itself that it will preserve and maintain in the office of the auditor of state of the state of Iowa the deposit of securities now held by said auditor or others of like kind and character, to an amount equal to the net cash value of all the insurance and investment contracts, bonds and policies of the said National Life & Trust Company in force at the date of the agreement hereinbefore referred to, the amount of said securities so deposited and required hereby to be preserved and maintained with the auditor of state to be

subject to diminution only as may be caused by a reduction of the net cash value of the insurance and investment contracts, bonds and policies of said National Life & Trust Company."

The said Insurance Company further obligated itself

"that it will from time to time, and at all times when required so to do, add to such deposit of securities to be preserved and held by the auditor of state such other amounts of lawful securities as may be necessary to make said deposit at all times equal to any increased net cash value of the insurance and investment contracts, bonds and policies of said National Life & Trust Company; and that it will at all times be controlled and governed by the laws of the state of Iowa in respect to the deposit, preservation and maintenance of such securities with the auditor of state of the state of Iowa, as fully as though it were a corporation organized under the laws of said state."

After the assets of the National Life & Trust Company had been transferred to the National Life Insurance Company of U. S. A., and after the latter company had assumed all of the liabilities of the former, the remainder of the unpaid capital stock of the former company was called and required to be paid in by a resolution of its board of directors. The National Life Insurance Company of U. S. A. being the sole stockholder responded to the call made, and has paid into the treasury of the company the sum of $100,000 as the unpaid portion of the capital stock of the Trust Company. This sum has been invested in the class of securities required by the Iowa law, and such securities have been tendered to the auditor as a deposit made by the National Life Insurance Company under the terms of its contract with the National Life & Trust Company, and the stockholders of the latter company now ask to be permitted to withdraw their notes given for the unpaid portion of the stock of the National Life & Trust Company from the office of the auditor of state, that such notes may be canceled or destroyed.

First. The first question which arises is: Have the stockholders of the National Life & Trust Company the right, under the facts as stated, to withdraw their notes from the office of the auditor of state?

These notes represented a portion of the unpaid capital stock of the National Life & Trust Company. The directors of that company had the legal right at any time they deemed advisable to require the payment of the entire capital stock of the company, and

to make an assessment upon the stockholders therefor. Having that right, and having made such assessment, it was the duty of the National Life Insurance Company as sole stockholder to pay into the treasury of the National Life & Trust Company, or for its benefit, the entire amount of such unpaid capital stock. Having made such payment, the notes given by the stockholders of the National Life & Trust Company were thereby satisfied and discharged, and the makers of such notes have the legal right to demand that the same be surrendered to them as obligations which had been satisfied in full by the payment of the amount of the assessment made.

The auditor of state should, therefore, in my opinion, surrender to such stockholders the notes given by them for the unpaid portion of the capital stock of the National Life & Trust Company.

Second. Under the law of the state and under the provisions of the contract between the National Life Insurance Company and the National Life & Trust Company, no obligation rests upon the former Company to maintain with the auditor of state a larger deposit of securities than could have been required of the National Life & Trust Company if its assets and liabilities had not been transferred to the National Life Insurance Company. That is to say, so far as the latter named company is required under its contract to maintain a deposit of securities with the auditor of state of the state of Iowa, it stands upon the same footing which the National Life & Trust Company stood before the execution of the contract by which the assets of the National Life & Trust Company were transferred to the National Life Insurance Company, and the liabilities of the former company assumed by the latter.

The obligation undertaken by the National Life Insurance Company is that it will preserve and maintain in the office of the auditor of state the deposit of securities now held by such auditor, or others of like kind and character, to an amount equal to the net cash value of all the insurance and investment contracts, bonds and policies of the National Life & Trust Company in force at the date of the agreement, the amount of such securities so required to be maintained with the auditor of state to be subject to diminution only as may be caused by a reduction of the net cash value of the insurance and investment contracts, bonds and policies of said National Life & Trust Company.

It further obligated itself in the contract that it would at all times be controlled and governed by the laws of the state of Iowa in

respect to the deposit, preservation and maintenance of such securities with the auditor of state of the state of Iowa as fully as though it were a corporation organized under the laws of said state.

Under the provisions of this contract all that can be required of the National Life Insurance Company is that it shall maintain a deposit with the auditor of state which shall at all times be equal to the net cash value of all the insurance and investment contracts, bonds and policies of the National Life & Trust Company outstanding and in force. There is no provision of the contract, nor is there any provision of the statute, by which it can be required to maintain a deposit of $100,000 in excess of such net cash value.

Respectfully submitted,

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

January 5, 1907.
HON. B. F. CARROLL,
Auditor of State.

SCHEDULE F.

INTOXICATING LIQUORS—C. O. D. SHIPMENTS—WHERE SALE IS COMPLETED.—The United States Supreme Court holds that C. O. D. shipments of liquors from one state to another, the sale is made where the goods are delivered to carrier.

Des Moines, January 4, 1906.

MR. A. L. CHANTRY,
Sidney, Iowa.

DEAR SIR: I am in receipt of your favor of the 2d instant, and in answer I call your attention to the case of American Express Company v. Iowa, which is reported in the 196th United States, at page 133.

In that case the supreme court of the United States reversed the supreme court of Iowa upon the holding that, where liquors were shipped by express from another state into the state of Iowa, C. O. D., the sale was made in Iowa and a prosecution could be maintained in the county where such liquors were delivered to the consignee. The holding of the supreme court of the United States is that the sale is made and completed at the place where the liquors are delivered to the common carrier, and that no prosecution can

be maintained in the state of Iowa at the place where the carrier delivers them to the consignee. I am,

Yours very truly,

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

TAXES DUE STATE—NOT A PREFERRED CLAIM.—Taxes due the state are not a preferred claim against a company's assets that is prior to individual claims against such assets in the absence of statute.

Des Moines, January 6, 1906.

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

DEAR SIR: I referred the matter of Seager v. American Fire Insurance Company to my assistant, Mr. DeGraff, to make a careful examination of the question whether taxes due the state were a preferred claim against the assets of the company, and am now in receipt of his report to me in relation thereto.

A full examination of all the authorities that are available has led Mr. DeGraff to the conclusion that, in the absence of a statute making taxes due the state a preferred claim against property in the hands of a receiver, such claim is entitled to no priority over the claims of individuals.

I think the conclusion which Mr. DeGraff has reached is correct, and that the state cannot enforce its claim for taxes as a prior claim against the property in the hands of the receiver. I am,

Yours very truly,

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

COUNTY RECORDS—EXAMINATION BY CITIZENS.—A citizen has a right to examine and copy any public record of the county if he does not interfere with the transaction of the business of the office while so doing.

Des Moines, January 17, 1906.

MR. S. LUCAS,
Bedford, Iowa.

DEAR SIR: I am in receipt of your favor of the 16th instant. I doubt the propriety of my expressing an opinion in reference to the matter concerning which you write, unless it should be referred to me by one of the departments of the state.

I will, however, suggest that I know of no reason why a citizen may not examine and copy any public record of the county, if he does it at such time and under such circumstances as not to interfere with the transaction of the business of the office in which such record or document is kept. I am,

Yours very truly,

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

COLLATERAL INHERITANCE TAX—DEDUCTIONS FROM.—The statute provides for a $1,000 exemption in each instance. County attorney to see that deductions are not made where the estate is not liable for same.

Des Moines, January 18, 1906.

HON. A. P. BARKER,
Clinton, Iowa.

MY DEAR JUDGE: I am in receipt of your esteemed favor of the 13th instant. The departments of the state have always adhered to the view that the only deductions which can be made from the estate of a decedent in a collateral inheritance tax proceeding are those specified in section 1467-a of the supplement to the code.

While there is no provision for notice to the treasurer as to an order making such deductions, I think the intent of the statute is that the county attorney shall appear in behalf of the state and take such action in reference to deductions which are asked for as the circumstances of each case may demand.

In saying that deductions may only be made as specified in the section referred to, I of course do not intend to exclude the one thousand dollar exemption which may be deducted from every estate liable to collateral inheritance tax.

I think the county attorney is charged with the duty of protecting the interest of the state, and of objecting to any deductions

from an estate liable to pay the collateral inheritance tax, which the law does not authorize.

I am not sure that the foregoing letter fully meets the question raised by your favor, but I have endeavored to outline the policy of the state department so far as it relates to deductions from estates liable for collateral inheritance tax. I am,

Yours very truly,

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

BIENNIAL ELECTION LAW—EXTENSION OF TERM OF OFFICE—TOWNSHIP OFFICERS.—The biennial election amendment to the constitution applies to township officers and would extend the term of office one year.

Des Moines, January 18, 1906.

HON. E. R. SEATON,
Eldora, Iowa.

DEAR SIR: I found your letter of the 3d instant upon my desk at Waterloo last Saturday, and my absence from Waterloo for two weeks prior to that date accounts for my not answering the same before.

I think the provisions of the amendment to the constitution, known as the biennial election amendment, cover a case where the township officers were elected in 1905, and that the terms of such officers are extended the same as those elected prior thereto. The extension of the term of office, so far as it relates to county and township officers, is that all such officers whose terms would otherwise expire in January, 1906, are extended for the period of one year. The terms of all county or township officers who fall within that provision are extended thereby, without regard to the time of their election. I am,

Yours very truly,

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

ROAD BLOCKADED WITH SNOW—DUTY OF TRUSTEES TO OPEN SAME—TRAVELER MAY PASS OVER ADJOINING LAND.—It is the duty of the township trustees to open a road blockaded with snow. Travelers may pass over adjoining land until road is opened.

Des Moines, January 24, 1906.

MR. GEORGE LACKEY,
Monroe, Iowa.

DEAR SIR: I am in 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 it should be referred to me by one of the departments of the state, I will suggest that it is the duty of the township trustees of the township in which the road lies to open the same for travel in case it is blockaded with snow. It is a rule of law in this state, as well as elsewhere, that where a road becomes impassable, a traveler may turn aside and pass over the adjoining land, doing as little damage as possible. Such rule sometimes works hardships upon adjoining land owners, but is necessary for the reason that all persons are entitled to pass over the land or roads from one place to another. I am,

Yours very truly,

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

SERVICE OF PAPERS IN STATE CASES APPEALED TO SUPREME COURT—WHO MAY ACCEPT SERVICE.—Pleadings in appeal cases must be served on the attorney-general. Service on county attorney not good.

Des Moines, January 31, 1906.

HON. CHAS. C. HELMER,
Carroll, Iowa.

DEAR SIR: I am in receipt of your favor of the 30th instant. In answer will say that an acceptance of service of an abstract or brief by a county attorney in a criminal case which has been appealed to the supreme court, is not service thereof within the meaning of the statute, as, after the appeal is taken, all papers in such cases must be served upon the attorney-general. It is necessary that this provision of the statute be followed strictly in order that he may have a complete record of all criminal appeals in his office, and thus be enabled to argue and arrange the hearing of the cases as circumstances may demand.

The manuscript of the amended abstract which you forwarded will be printed and filed in due time.

Yours very truly,

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

JUVENILE COURTS—CONSTRUCTION OF CHAPTER 8-A, TITLE XVI OF THE SUPPLEMENT TO THE CODE.

Des Moines, February 1, 1906.

HON. L. W. OWEN,
Spirit Lake, Iowa.

DEAR SIR: In answer to your favor of the 26th ultimo, I will say that an examination and comparison of chapter 8-A of title XVI of the supplement to the code, and chapter 11 of the acts of the thirtieth general assembly has led me to the conclusion that section 1 of chapter 11 takes from mayors and justices of the peace the power to commit children under the provisions of chapter 8-A.

Section 1 of chapter 11 of the acts of the thirtieth general Assembly confers upon the district court original and full jurisdiction to hear and determine all cases coming within the purview of the act.

Section 2 of that act defines the words "dependent children or neglected children" to be those who are destitute, homeless or abandoned, or dependent upon the public for support, or who have not proper parental care or guardianship, or who habitually beg or receive alms, or who are found living in any house of ill fame, or with any vicious or disreputable person, or whose home, by reason of neglect, cruelty or depravity on the part of their guardians, parents or other person in whose care they may be, is an unfit place for such children.

The term is further made to include any child under the age of ten years who is found begging or giving any public entertainment upon the street for pecuniary gain for self or another, or who continues or is used in aid of any person so doing, or who by reason of other vicious, base or corrupt surroundings is, in the mind of the court, within the spirit of the act.

The phrase "delinquent child" is made to include any child under the age of sixteen years who violates any law of the state, or any city or village ordinance, or who is incorrigible, or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly frequents a house of ill fame, or who patronizes any policy shop or place where any gaming device is or shall be operated, or who habitually wanders about in railroad yards or tracks, gets upon any moving train, or enters any car or engine without lawful authority.

A comparison of section 2 of the acts of the thirtieth general Assembly with section 3260-d of the code shows that the same class of children is included and referred to in both sections. It therefore follows that, when the legislature gave to the district court full and original jurisdiction as to the commitment of the class of children referred to, in section 3260-d of the supplement and sections 2 of the act of the thirtieth general assembly, such jurisdiction was withheld from any other court or judge.

I think the construction above indicated must be given these two provisions of the statute, and that the power of a justice of the peace to commit a child under chapter 8-A of title XVI has, by the enactment of chapter 11 of the acts of the thirtieth general assembly, been withdrawn.

Yours very truly,

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

BOARD OF SUPERVISORS—REMISSION OF MULCT TAX.—The investigation of the remission of mulct tax shall be at a regular session of the board.

Des Moines, February 1, 1906.

HON. GEORGE COSSON,
Audubon, Iowa.

DEAR SIR: I am in receipt of your favor of the 30th ultimo. In answer will say that I think the per diem which the board of supervisors receives from the county for their services is not a part of the costs referred to by section 2443 of the code. I have not been able to find any case bearing directly upon the question, but upon general principles I am unable to reach the conclusion that the compensation provided by law for county officers for the time employed by them when deciding matters which come before them for determination, is any part of the costs of such proceeding within the meaning of the provision of the statute.

The provision of the section referred to requires that the investigation of the question of the remission of the mulct tax shall be at a regular session of the board, and it must, I think, be disposed of by them as other business which comes before them.

I am,

Yours very truly, CHAS. W. MULLAN,
Attorney-General of Iowa.

CONSTRUCTION OF WORD "COST" IN SECTION 2824 OF THE CODE.

SIR: In reply to your favor of the 12th instant requesting my opinion as to the construction of the word "cost" as found in section 2824 of the code, I submit the following:

Code sections 2824 to 2832, inclusive, relate to the uniformity, purchase and loaning of text-books.

Section 2824 provides:

"The board of directors of each and every school corporation in the state of Iowa is hereby authorized and empowered to adopt text-books for the teaching of all branches that are now or may hereafter be authorized to be taught in the public schools of the state, and to contract for and buy said books and any and all other necessary school supplies at said contract prices, and to sell the same to the pupils of their respective districts at cost, and said moneys so received shall be returned to the contingent fund. * * * "

Section 2825 provides:

"All the books and other supplies purchased under the provisions of this chapter shall be paid for out of the contingent fund, and the board of directors shall annually certify to the board of supervisors the additional amount necessary to levy for the contingent fund of said district to pay for such books and supplies. * * * "

Section 2832 provides for a uniform series of text-books for use in any county of the state and empowers the county board of education to select school text-books for the entire county and contract for the purchase of same and "sell them to the school districts at the same price as provided for in section 2824 of this chapter."

The intent and purpose of these provisions is to secure uniformity in cost for the same text-books in a certain territory and at the same time minimize as far as possible the cost of the text-books to the pupils therein.

In view of the plain intendment of the statute, the word "cost" in section 2824 of the code must be construed to mean contract price and any extra expense connected with the securing of the books, such as expense for handling, drayage, storage, etc., should not be added to the purchase price, but must be paid from the contingent fund. In this way only the cost to the purchaser will agree with the contract price and uniformity in cost for the

same book will obtain in a large district having several depositories.

I am therefore clearly of the opinion that the word "cost" must be construed to mean contract price of the text-books or other school supplies in question.

Respectfully submitted,

LAWRENCE DEGRAFF,
Assistant Attorney-General.

February 13, 1906.

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

SECTION 1304 OF CODE DOES NOT INCLUDE TEAM AND WAGON OF RURAL MAIL CARRIER.

Des Moines, February 15, 1906.

MR. CHESTER MILLER,
Clear Lake, Iowa.

DEAR SIR: I am in receipt of your favor of the 24th ultimo. In answer thereto will say that 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, however, suggest that the provisions of subdivision 5 of section 1304 of the code must be limited to teamsters and draymen, and is not broad enough to cover the team and wagon of a rural mail carrier. I am,

Yours very truly,

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

INTOXICATING LIQUORS—SALE BY AGENT.—The act of solicitation for the sale of liquor is a part of interstate commerce in selling and transporting and cannot be prohibited or regulated by the legislature.

Des Moines, February 15, 1906.

HON. JAMES A. SMITH,
Senate Chamber.

MY DEAR SENATOR: The case of the State v. Pat Hanaphy holds that the act of soliciting orders for intoxicating liquors by

an agent of a firm or corporation in another state is a part of the sale by such firm to the person who gives the order, that the same is made in the state where the liquors are delivered to the common carrier for transportation, and that the act of solicitation is a part of interstate commerce in selling and transporting such liquors from another state to the consignee in the state of Iowa, and cannot, therefore, be prohibited or regulated by the state legislature. I am,

Yours very truly,

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

STATE BOARD OF HEALTH—ENFORCEMENT OF RULE 6.—If tuberculosis is contagious rule 6 of state board of health may be enforced.

Des Moines, February 19, 1906.

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

DEAR SIR: I am in receipt of your favor of the 25th ultimo, asking me whether rule 6, adopted by the state board of health, can be enforced under the provisions of section 2572 of the code. In answer will say that, if tuberculosis is contagious, as I assume it is, I think it is within the power of the state board of health, under section 2565 of the code, to adopt the rule, and that the same can be enforced under the provisions of section 2572 as amended. I am,

Yours very truly,

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

QUARANTINE AND EXPENSE OF SAME.—Construction of section 2570-b of the supplement to the code.

Des Moines, February 20, 1906.

HON. L. W. OWEN, County Attorney,
Spirit Lake, Iowa.

DEAR SIR: The provisions of section 2570-a of the supplement to the code, as amended by the acts of the thirtieth general assembly, appear to have been framed for the purpose of making

the party who is quarantined because of a contagious disease, liable for the expenses of the quarantine and the raising of the same, which I think would include the fumigation of the premises.

In this connection, however, I desire to suggest that in my opinion the law should have a very liberal construction, as the quarantine and expenses connected therewith, including the fumigation, are for the benefit of the public and not for the benefit of the person who is ill with a contagious disease. The quarantine is established and the premises fumigated to prevent the spread of a contagious disease, and are therefore acts performed for the protection of the public, and equity would seem to require that the public should pay for the benefits which are received from such quarantine and fumigation. I am,

Yours very truly,

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

REGISTRATION FOR CITY ELECTION—EFFECT OF BIENNIAL ELECTION LAW ON.—The biennial election law made no change in the registration for city elections.

Des Moines, February 22, 1906.

CEDAR RAPIDS GAZETTE,
Cedar Rapids, Iowa.

DEAR SIR: I think the biennial election law has made no change in the registration for city elections. The registration book for the city election of 1906 should be made under the provisions of section 1084 of the code, by copying from the poll book of the last preceding general election, all names found therein, and adding thereto those of persons registered and voting at any subsequent election. An entire, new registration is not necessary. Persons whose names are not upon the poll book of the last preceding general election, or upon the poll book of a subsequent election, must of course appear before the board and be registered. I am,

Yours very truly,

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

BONDS FURNISHED BY DEPOSITARIES—LIABILITY OF SURETIES ON. Sureties will remain liable on bonds of depositaries and bond will remain in force so long as the premium is paid and the officer for whom or to whom it is given remains in office.

Des Moines, February 26, 1906.

HON. W. B. MARTIN,
Secretary of State.

DEAR SIR: In relation to the question of the liability of the sureties upon the bonds furnished by the depositaries designated by the treasurer of state, I beg leave to say:

First. The bonds of the form submitted to me, which is that executed by the Home Savings Bank of Des Moines and the Federal Union Surety Company to the state of Iowa, will, if the premium is paid as hereinafter suggested, continue and remain in force as long as the bank giving such bond is a state depositary and Mr. Gilbertson remains treasurer of state, and the sureties thereon are liable during the continuance of such bond. No renewal is required to fix their liability.

Second. Some of the recent law writers upon the subject of fidelity and guaranty insurance have advanced the theory that a failure on the part of the party furnishing the bond to pay the annual premium thereon, may be urged as a defense against liability on the part of the surety. I can see no logical reason for such theory. The bond is given to the state of Iowa by a bank designated as a state depositary, and, although the surety thereon becomes such for a consideration paid by the bank which furnishes the bond, which consideration is called a premium, I am unable to distinguish any difference so far as the liability of the surety to the state is concerned, that would exist in a case where a surety has undertaken to guarantee the good conduct of its principal, without receiving compensation for such undertaking.

It appears to me to be a logical proposition that, if the surety undertakes to guarantee the good conduct of his principal, it can make no difference, so far as its liability is concerned, whether it does or does not charge the principal a compensation for undertaking such liability.

Inasmuch, however, as some of the recent law writers have expressed the thought that a distinction does exist in such cases, and that the non-payment of the annual premium may be set up as a defense against liability on the part of the surety on the

bond, I think the state treasurer should furnish the executive council evidence each year that the annual premium on all bonds of state depositaries has been paid. The payment of such premium by the depositary, and evidence thereof furnished by the treasurer to the executive council, eliminates any question whatever as to the liability of the sureties upon such bond.

Yours very truly,

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

INCOMPATIBLE OFFICES—MAYOR OF A CITY AND MEMBER OF STATE BOARD OF HEALTH.—The office of mayor of a city and member of state board of health are incompatible offices, the mayor being ex-officio chairman of the local board of health and that body being governed by rules of state board of health.

Des Moines, February 27, 1906.

MR. A. E. MOERKE,
Burlington, Iowa.

DEAR SIR: I am in receipt of your favor of the 24th instant, and in answer will say that the rule as to what are and what are not incompatible offices is almost in chaotic condition. It is certainly not clearly defined, and it is sometimes difficult to determine whether one person is entitled to hold two separate offices.

I have, however, reached the conclusion in your case that it is extremely doubtful if you can hold the office of mayor of a city and that of a member of the state board of health. The mayor of a city is *ex-officio* a member of the local board of health, and acts as chairman of that board. The local board is subject to the rules and regulations of the state board, and must carry out and enforce such rules whenever required by the state board of health. The two boards should therefore, in my opinion, be independent boards and each act within its own powers and jurisdiction. In order that they may be independent bodies and each act within its own sphere, I think the personnel of the two boards should be different, and that for these reasons the office of mayor

of a city and that of a member of the state board of health are incompatible offices, and should not both be held by the same person. I am,

Yours very truly,

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

CONSTRUCTION OF SECTION 14 OF SUBSTITUTE AMENDMENT OF HOUSE FILE NO. 6.—Goods purchased or received by wholesale or retail dealer prior to July 1, 1906, shall be exempt from the provisions of the act to July 1, 1907.

Des Moines, March 3, 1906.

MR. H. R. WRIGHT,
Dairy Commissioner.

DEAR SIR: In compliance with your request for a construction of section 14 of substitute amendment to House File No. 6, I submit the following:

That section provides that all goods purchased or received by either wholesale or retail dealers of this state prior to July 1, 1906, shall be exempt from the provisions of the act to July 1, 1907.

The provisions of this section relate to the goods purchased, or received by wholesale or retail dealers within the time named, rather than to the dealers themselves. The goods described in the section are exempted from the operation of the law until July 1, 1907, whether in the hands of the retail or wholesale dealers. Such exempt goods may be sold by the wholesaler to the retail dealer at any time before July 1, 1907, and be, by the retail dealer, sold to the consumer at any time prior to that date.

I think this construction is the only one which can be given the section in question, and is clearly in accordance with the intent of the legislature. I am,

Very respectfully yours,

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

ESTABLISHMENT OF QUARANTINE—TOWNSHIP CLERK NOTIFIED.—Quarantine established by an order of local board of health. When established it may be enforced by any health officer or by township clerk.

Des Moines, March 3, 1906.

DR. D. C. SHIELDS,
Bernard, Iowa.

DEAR SIR: I am in receipt of your favor of the 2d instant. In answer will say that I doubt the propriety of my expressing an opinion in regard to all of the questions which are contained in your favor, unless they should be referred to me by one of the departments of the state.

As a member of the state board of health, however, I think I should answer your question relating to the establishment of a quarantine, and the notification of the township clerk. In townships outside of an incorporated city or town, a quarantine must be established by an order of the local board of health, which consists of the township trustees. When such quarantine is established, it may be enforced by a health officer appointed by the board or by the township clerk; and if the person referred to in your letter is the acting clerk of the township, he should be notified of any contagious disease existing in such township, and his acts, within the scope of his authority as such clerk, would be valid. I am,

Yours very truly,

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

PROPERTY SOLD FOR NON-PAYMENT OF MULCT TAX—PROCEDURE.—Property would be sold for non-payment of mulct tax under same procedure as for delinquent taxes.

Des Moines, March 3, 1906.

HON. C. C. UPTON,
Cresco, Iowa.

DEAR SIR: In answer to your favor of the 7th ultimo, I will say that I think the sale of property for the non-payment of what is ordinarily known as the mulct tax, and the redemption of such property from tax sale, must be governed substantially in all respects by the provisions of the statute relating to the sale of property for delinquent taxes, and the redemption of such property from the sale thereof.

The redemption of property from a tax sale must be, in all cases, made by the payment of all taxes which were due at the time the sale was made, together with interest, costs and penalty, and all subsequent taxes paid by the purchaser, with interest thereon. If the land was sold under the provisions of section 1425 of the code, for a less sum than amount of taxes, costs and penalty due thereon, the purchaser is entitled to receive, upon a redemption of such land from the tax sale thereof, only the amount paid by him and a ratable part of the penalty interest and costs. The remainder of the sum paid to redeem the land from such tax sale should be paid into the county treasury and ratably apportioned among the several funds.

I know of no rule that permits a redemption of land sold for taxes to be made by simply paying the amount bid by the purchaser with interest thereon, unless the amount so bid covers the entire amount of taxes, interest, costs and penalty charged as a lien upon such land. I am,

Yours very truly,

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

REGISTERS OF ELECTORS—TERM OF OFFICE—VACANCY.—Registers of electors are appointed for one year and not until successor is appointed and qualified. In case of vacancy mayor appoints.

Des Moines, March 5, 1906.

HON. W. J. MCDONALD,
Iowa City, Iowa.

DEAR SIR: I am in receipt of your favor of the 28th ultimo. Absence from my office has prevented me from answering the same before.

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 to you my views of the statute relating to the appointment and terms of office of registers of electors.

Section 1076 provides that the registers appointed by the city council under the provisions thereof shall hold office for the term of one year. There is no provision in the statute that they shall hold until their successors are appointed and qualified.

Their term of office expires at the end of the year for which they were appointed.

The section further provides:

"If for any cause such registers, or any of them, shall not be appointed at or before the time above mentioned, or if appointed shall be unable for any cause to discharge the duties of such office, the mayor of such city shall forthwith, on similar recommendation, make such appointments and fill all vacancies."

The terms of this provision are very broad. Registers were not appointed in the year 1905 by the city council, because there was no general election held that year. No appointment having then been made, a vacancy now exists which should be filled by the mayor under the provisions of the section from which the quotation is taken. I am,

Yours very truly,

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

SCHOOL ELECTIONS—SALOONS CLOSE.—Saloons should close on days of school elections.

Des Moines, March 6, 1906.

JAMISON & SMYTH,
Cedar Rapids, Iowa.

DEAR SIRS: I am in receipt of your favor of the 5th instant. In answer will say that I am not informed as to the practice of the saloons in Des Moines, and do not know whether they close on days of school elections. It has always been my understanding that subdivision 9 of section 2448 of the code requires saloons to close on all election days, whether general, special or school elections, and I think this is the construction which has been placed upon this section generally throughout the state. I am,

Yours very truly,

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

SALOON—CONSENT BY PROPERTY OWNER—CONSENT VOLUNTARY —MAY BE REVOKED.—The consent of a property owner for the establishment of a saloon within fifty feet of his property must be voluntary, and may be revoked at any time.

Des Moines, March 13, 1906.

HON. THOMAS LAMBERT,
Senate Chamber.

DEAR SIR: In answer to your question whether a property owner, who has given his consent for the establishment of a saloon within fifty feet of his property, may withdraw such consent at any time, and whether legal proceedings are necessary, I beg leave to say that, in my opinion, a property owner, who has given his consent to the establishment and operation of a saloon within fifty feet of his property, may withdraw his consent to the operation of such saloon at any time he may see fit.

The entire theory of the law is, that every saloon which is in operation is conducted and carried on with the consent of every person who owns real estate within fifty feet of the location of such saloon.

In Greer vs. Severson, 119 Iowa, 84, it was held that the consent of a property owner to the establishment and operation of a saloon within fifty feet of his property, was not the subject of barter or sale, and that a note, given in consideration of such consent, was void and uncollectible.

There can be, therefore, no consideration passing from the person who seeks to establish and conduct a saloon to the property owner for the consent given by such property owner. The consent must, therefore, be voluntary and without consideration, and in the nature of a license which is revocable at the pleasure of the person who gives it.

Under this conclusion no proceeding, in court or otherwise, is necessary for the revocation of such consent. It may be done by the property owner filing with the county auditor a written statement withdrawing his consent for the establishment and conduct of a saloon within fifty feet of the property owned by him.

I think such property owners should also notify the person carrying on the saloon of the withdrawal of his consent, although strictly speaking, perhaps such notice is not necessary.

I am, Yours very truly,

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

COUNTY MUTUAL INSURANCE COMPANIES—NOT LIABLE TO TAX.—County mutual insurance associations are exempt from taxation under the present law.

Des Moines, March 16, 1906.

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

DEAR SIR: Permit me to say that the decision of the supreme court in the case of the Iowa Mutual Tornado Insurance Association and seventeen other cases against Gilbert S. Gilbertson, treasurer of state, does not hold that county mutual insurance associations are required to pay a tax to the state under the provisions of section 1333-d of the supplement to the code, or under any other provision of the statute; nor has such court ever held in any case that county mutuals are liable for the payment of such tax.

Further than this I am of the opinion that all county mutual insurance associations are exempt from taxation under the present law, and that the auditor of state has no authority to require of such associations the payment of the tax required of other insurance associations and companies under the provisions of section 1333-d of the code. I am,

Very respectfully yours,

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

ASSESSMENT OF NATIONAL BANK STOCK—DEDUCTION OF INDEBTEDNESS.—National bank stock should be assessed as moneys and credits. Owner may deduct indebtedness therefrom.

Des Moines, March 19, 1906.

MR. J. ROSSITER,
Ruthven, Iowa.

DEAR SIR: I am in receipt of your favor of the 16th 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 stock of national banks should be assessed as moneys and credits, and that the holders thereof have the right

to deduct from the value thereof any actual *bona fide* indebtedness owing by them. I am,

Yours very truly,

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

CITIES AND TOWNS—POWER TO PROHIBIT GAMBLING.—Section 702 of the code gives cities and towns power to prohibit gambling games or devices.

Des Moines, April 6, 1906.

MR. C. W. REED,
Woodbine, Iowa.

DEAR SIR: I am in receipt of your favor of the 5th instant, and while the matter concerning which you write is not one upon which I can express an official opinion, I call your attention to the provisions of section 704 of the code as amended by the acts of the twenty-eighth general assembly. The section as amended appears upon page 64 of the supplement to the code.

The section as amended gives to cities and towns the power to prohibit gambling houses, and section 702 of the code confers the power to prohibit gambling games or devices. The power to prohibit may, I think, be enforced by punishment for violation of the provisions of the ordinance prohibiting such gambling houses or games. I am,

Yours very truly,

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

EXECUTION BY SUPREME COURT—GARNISHMENT THEREUNDER.—Section 4153 leaves no doubt right to have garnishment process under an execution by the supreme court.

Des Moines, April 6, 1906.

HON. JOHN C. CROCKETT,
Clerk Supreme Court.

DEAR SIR: In response to the inquiry contained in the letter of the sheriff of Linn county, as to whether a garnishment can be made upon an execution issued from the supreme court, which letter was referred to me by you, I beg leave to say:

Section 4153 of the code provides:

"Executions issued from the supreme court shall be like those from the district court, attended with the same consequences and returnable in the same time."

This section is embodied in the present rules of the supreme court as rule 77 thereof. Its provisions leave no doubt as to the right to enforce the collection of a debt by garnishment process under an execution issued from the supreme court. The procedure should be substantially the same as that upon an execution issued from the district court, except that the return should be made to the court from which the execution issues. I am,

Yours very truly,

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

COLLATERAL INHERITANCE TAX—WHEN COMPROMISE MAY BE MADE.

Compromise of the payment of collateral inheritance tax may be made, 1st when liability of estate is doubtful; 2d when value of estate cannot be ascertained.

Des Moines, April 9, 1906.

HON. A. L. CHANTRY,
Sidney, Iowa.

DEAR SIR: I am in receipt of your favor of the 6th instant.

Section 1478-b of the supplement of the code authorizes a compromise of the payment of the collateral inheritance tax to be made when one or both of two facts exist:

First. When an estate sought to be charged with the collateral inheritance tax is of such a nature or is so disposed that the liability of the estate is doubtful.

Second. When the value of such estate cannot with reasonable certainty be ascertained under the provisions of the law.

If either of these conditions exists, the state treasurer may, with the written approval of the attorney-general compromise with the beneficiaries or representatives of the estate and compound the tax thereon. The approval of the attorney-general must set forth the reason why the compromise is made, and such reason must be based upon the existence of one or the other or both of the facts referred to.

Does either of such facts exist as to the estate under consideration; that is, is the estate of such a nature, or is it so disposed, that its liability for the collateral inheritance tax is doubtful; or is it impossible to ascertain the reasonable value of the estate under the provisions of the law?

Both of these inquiries must, as it appears to me, be answered in the negative. There is no doubt about the liability of the estate for the collateral inheritance tax. Its value can easily be ascertained under the law. There is, therefore, no ground upon which a compromise as to the tax due the state can be made, and no reason could be given by the attorney-general why such compromise should be made.

Regretting that I cannot return you a favorable answer, I am,

Yours very truly,

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

RECORDER—WHEN MAY EMPLOY ASSISTANTS.—When there is no deputy recorder the recorder may temporarily employ assistants when the business of the office requires it.

MR. J. A. ROUSE,
Marengo, Iowa.

DEAR SIR: I am in receipt of your favor of the 10th instant.

Without expressing any opinion as to the duty of the board of supervisors, I will suggest that section 496 of the code provides that, in case no deputy recorder is appointed, and the pressure of business of the office requires the recorder temporarily to employ assistants, he may do so and file his bill for the cost of such assistance with the board of supervisors, and that they shall make a reasonable allowance therefor, not exceeding the amount of the fees of the office.

This statute appears, so far as the board is concerned, to be mandatory, and gives to the county recorder the right, without the consent of the board, to employ assistants when the business of the office compels him to do so. I am,

Yours very truly,

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

ROAD DRAGS—USE BY WHOM.—Road drags to be used on highways where they will be benefited by same. Abutting property owners to have preference in using same.

Des Moines, April 18, 1906.

MR. E. C. CARSON,
Woodburn, Iowa.

DEAR SIR: In answer to your favor of the 16th instant. I will say that the new road law provides that road drags shall be used upon the highways where, in the judgment of the road superintendent, the roads will be benefited by such use. In the choice of persons for using such drags, preference shall be given to abutting property owners who may be allowed not to exceed fifty cents per mile for work done by them with a drag. I am,

Yours very truly,

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

SCHOOLHOUSE TAX—LEVY OF TAX FOR BUILDING—WHAT STEPS NECESSARY.

Des Moines, April 25, 1906.

HON. J. I. NICHOLS,
West Liberty, Iowa.

DEAR SIR: I am in receipt of your favor of the 23d instant, in which you ask my opinion as to what steps shall be taken by the school corporation of Wapsinonoc to carry out the vote of the electors in voting a tax of $8,000 upon the taxable property of the corporation for the purpose of building a schoolhouse in the center of the township.

In answer thereto I will say that the act of the electors of the corporation in voting a tax of $8,000 to be levied upon the property of the school corporation, is sufficient authority for the board of directors to certify the amount of such tax to the board of supervisors to be levied upon the property of the district; and as the whole amount of the tax so voted is greater than can be levied in any one year, the board may divide it over two or more years and certify to the board of supervisors such proportion thereto as may be legally levied during each of the years, that is, the tax may be spread over a sufficient number of years so that the annual levy will not exceed ten mills on the dollar.

Section 2812 authorizes the board of directors of a school corporation to issue bonds to be known as school tax funding bonds to the extent of any uncollected lawful schoolhouse tax duly authorized by the voters, to be paid out of said tax when the same is collected. This provision of the statute clearly authorizes a board of directors of a school corporation to anticipate the collection of a schoolhouse tax, and to issue bonds therefor, when such tax has been lawfully voted by the electors of the corporation.

Were it not for the fact that at a special meeting of the electors of the school corporation it was voted that no bonds should be issued in anticipation of this tax, I should have said that it was clearly within the power of the board to issue such bonds under the authority given at the regular meeting of the corporation, and I now doubt whether the subsequent special election at which it was voted that bonds should not be issued, in anywise abridges the powers of the board of directors. Inasmuch, however, as the electors of the school corporation have voted that bonds should not be issued, I would suggest that, for the purpose of placing the power of the directors beyond any doubt, a special meeting of the electors be called, at which the question of issuing the bonds in anticipation of the tax be again voted upon.

The authority to call such meeting exists, I think, under the provisions of section 2812. I am,

Yours very truly,

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

HEALTH OFFICER—WHO MAY BE.—The health officer, under section 2568 of code, must be a competent physician.

Des Moines, May 15, 1906.

MR. T. B. LARRABEE,
Anita, Iowa.

DEAR SIR: In answer to your favor of the 11th 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.

I may, however, suggest, that section 2568 of the code provides that the health officer shall be a competent physician. A physician is defined to be a person skilled in the use of physics, that is medi-

cine. The statute prohibits osteopaths from using drugs in their practice. They are, therefore, not physicians within the meaning of the statute, nor eligible to appointment as health officers. I am,

Yours very truly,

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

BIENNIAL ELECTION—EXTENDED TERM OF OFFICERS ONE YEAR.

Des Moines, June 14, 1906.

MR. O. W. CARPENTER,
Central City, Iowa.

DEAR SIR: I am in receipt of your favor of the 10th instant. In answer I will say that 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, however, that the terms of office of county and township officers which would have expired on the first day of January, 1906, only, were extended for one year by the biennial election amendment to the constitution. The successors of such officers, as well as the successors of all officers whose terms will expire on the first day of January, 1907, must be elected at the general election in 1906. The thirtieth general assembly by an act fixed the time when the members of the boards of supervisors of the counties in the state should be elected, and I herewith enclose you a copy of that provision of the act. I am,

Yours very truly,

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

TREES GROWING WITHIN STREETS OF CITY.—The city has jurisdiction of all trees growing within its streets.

Des Moines, June 23, 1906.

MR. LOUIS J. SMITH,
Harlan, Iowa.

DEAR SIR: I am in 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 question should

be referred to me by one of the departments of the state, I will suggest that a city has jurisdiction over all trees growing within its streets, and may order the same to be removed or disposed of as the judgment of the city council may deem to the best interest of the city. I am,

Yours very truly,

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

CITY OFFICERS—BIENNIAL ELECTION LAW NOT APPLICABLE TO.

Des Moines, June 25, 1906.

HON. J. A. BRIDGES,
Mediapolis, Iowa.

DEAR SIR: I am in receipt of your favor of the 23d instant.

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 think it should be referred to your city solicitor as it is strictly within his jurisdiction and not within the jurisdiction of my office.

I will, however, make the following suggestions: That the biennial election amendment, so-called, is not applicable to city officers or city elections. That all vacancies in city offices should be filled in the manner provided by section 1272 of the code, as amended by chapter 41 of the acts of the Thirtieth General Assembly.

I call your attention to the provisions of the section referred to which is as follows:

"In the office of councilman or mayor of any city and all other elective city offices, the 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 such office until the qualification of the officer elected to fill such vacancy, who shall be elected at the next regular municipal election."

I am, Yours very truly,

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

ANTI-PASS LAW—APPLICATION OF.

Des Moines, June 27, 1906.

MR. M. L. BOYD,
Hudson, Iowa.

DEAR SIR: I am in receipt of your favor of the 25th instant. In answer will say that if your contract with the Chicago Great Western Railway Company is for $75 worth of advertising during the year in your paper at regular cash rates, which is to be paid for with $75 worth of first-class transportation at regular cash rates, such contract and transaction is not a violation of the anti-pass law, as you pay full price for the transportation which you receive, and it makes no difference whether the price paid is in labor, advertising or money. The prohibition of the statute is that certain officers and persons shall not use free transportation furnished by railways. I am,

Yours very truly,

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

MUNICIPAL CORPORATION—POWERS OF—SIDEWALKS.

Des Moines, June 29, 1906.

HON. J. C. JESSEN,
Zearing, Iowa.

DEAR SIR: I am in receipt of your favor of the 27th instant, asking my opinion as to the proper construction of section 779 of the code. In answer I will say that 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, however, suggest that a municipal corporation has no powers, except those which are expressly conferred by statute, and such as are incidental to the carrying out of the powers so conferred. The power to order sidewalks and assess the cost thereof against abutting property does not include the power to assess the cost of bringing that portion of the street where the sidewalk is to be constructed, to grade. If the city orders a permanent sidewalk constructed, it must improve that part of the property on which the sidewalk is to be built to grade. The cost of the walk can then be assessed against the abutting property owner.

The same rule applies to putting in drains or making other improvements in the street. I am,

Yours very truly,

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

CHILD LABOR LAW—CONSTRUCTION OF.

Des Moines, July 11, 1906.

MR. ED SWENEY,
State Inspector of Mines,
Des Moines, Iowa.

MY DEAR SIR: I am in receipt of your communication of the 10th instant in which you request an official opinion relative to the construction of section 2 of the child labor law as enacted by the thirty-first general assembly.

Section 2 reads as follows:

"No person under sixteen years of age shall be employed at any work or occupation by which by reason of its nature or the place of employment, the health of such person may be injured or his morals depraved, or at any work in which the handling or use of gunpowder, dynamite or other like explosives is required, and no female under sixteen years of age shall be employed in any capacity where the duties of such employment compel her to remain constantly standing."

Relative to that part of section 2 which reads, "or at any work in which the handling or use of gunpowder, dynamite, or other like explosives is required," the question arises, Does this prohibition as applied to coal mines mean the entire mine or the immediate room or working face?

A careful reading of the language in question leads me to believe that this restriction or limitation as to child labor under the provisions of said section, does not apply to the enter mine, but only to that part in which gunpowder, dynamite and other like explosives are handled and used.

The clear intent of the law is to prevent the child under the age of sixteen years from being employed in occupations where his health, life or limb may be in danger, and it is quite apparent that such person may be employed in a mine under such conditions and be surrounded by such environments in a particular work that

no danger or possible injury may result as contemplated by the statute.

I am not inclined to believe that the intent of the legislature was to exclude a child under the age of sixteen years from participating in any work connected with the coal mine or any other occupation, unless such work comes within the purview of the statute.

Yours very truly,

LAWRENCE DEGRAFF,
Assistant Attorney-General.

PURE FOOD LAW—CONSTRUCTION OF AS TO ADULTERATIONS.

Des Moines, July 25, 1906.

HON. H. R. WRIGHT,
State Food and Dairy Commissioner.

DEAR SIR: I am in receipt of your favor of the 17th instant, in which you ask my opinion—

(1) Whether certain syrup manufactured and sold under the name of "Maple and Cane Syrup," which is composed of maple syrup and cane syrup mixed, should be classed as adulterated, unless labeled and tagged as provided by chapter 166 of the acts of the thirty-first general assembly.

(2) Also whether an extract made from vanilla and tonka beans, which is sold under the name of "Extract of Vanilla and Tonka," must be classed as adulterated and labeled as required by section 9 of the act referred to.

In compliance with your request I submit the following:

First. Section 8 of the act provides:

"For the purpose of this act, an article of food shall be deemed to be adulterated:

First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity."

The mixing of cane syrup with maple syrup unquestionably affects the quality and purity of the maple syrup, and the product which is the result of mixing the two kinds of syrup must be classed as adulterated under the first subdivision of section 8 of the act referred to. Such product, therefore, can only be sold if labeled, branded or tagged in such manner as to bring it within the provisions of subdivision 8 of section 8 of the act. That subdivision provides:

"That an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated in the following cases: * * *

2. In the case of articles labeled, branded or tagged so as to plainly indicate that they are mixtures, compounds, combinations, imitations or blends, provided that the same shall be labeled, branded or tagged so as to show the exact character and constituents thereof."

The syrup in question is a mixture, combination or blend of maple and cane syrup, and in order to fall within the exception contained in the eighth subdivision of section 8 of the act, and not to be classed as adulterated food, it is necessary that it be labeled or branded so as to show the exact character of the constituent substances of which the mixture is composed.

The meaning of the provision of subdivision 2 of section 8 of the act which requires that such mixtures, compounds or blends shall be labeled and branded so as to show the exact character of the constituents thereof, is that the label or brand required by the act shall show the exact amount and character of each ingredient which composes the mixture, compound or blend.

The syrup in question should, in my opinion, be so labeled and branded as to show the exact amount of pure maple syrup and the exact amount of pure cane syrup contained in the mixture or combination. When so labeled it falls within the exception contained in subdivision 8 of section 8 and may be legally sold within this state.

Second. The ruling in regard to the maple and cane syrup applies with full force to the extract made from vanilla and tonka beans and sold under the name of "Vanilla and Tonka Extract."

The mixing of an extract of the vanilla bean with that obtained from the tonka bean clearly affects the strength and purity of the vanilla extract, and the product of the combination must be deemed adulterated under the provisions of subdivision 1 of section 8 of the act of the thirty-first general assembly, unless it is so labeled, branded or tagged as to fall within the exception contained in the eighth subdivision of the section referred to. That is, that the label, brand or tag must show the character and quantity of each ingredient entering into the compound. When so branded, labeled or tagged, such extract may be lawfully sold under the trade name of "Vanilla and Tonka Extract." I am,

Yours very truly,

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

DUTIES OF CHECKWEIGHMAN IN COAL MINE—CONSTRUCTION OF SECTION 2490.

Des Moines, August 10, 1906.

MR. JOHN VERNER,

Mine Inspector,

Des Moines, Iowa.

DEAR SIR: I am in receipt of your letter of the 30th ultimo, asking my interpretation of the provisions of section 2490 of the code, relating to the checkweighman in coal mines. In answer thereto I will say that the law does not appear to contemplate that I should furnish opinions to mine inspectors, but as a matter of courtesy to you will endeavor to answer your interrogatories briefly.

It is quite difficult to give a satisfactory legal opinion upon questions of this kind, unless the facts are submitted. There are so many varying circumstances which may change the application of the law to the facts that it is important that all of the facts upon which an opinion is asked be clearly stated.

I think section 2490 of the code clearly contemplates the right of the checkweighman in coal mine to judge and determine for himself whether the scales and machinery used for the purpose of weighing the coal produced from the mine are correct, accurate or in good working condition. If he finds from examination that such scales, machinery and apparatus are not in condition to weigh the output of the mine correctly, he should notify the mine owners at once of such fact and should keep an accurate record of the coal weighed and the difference between the actual weight of the coal and that shown by such defective scales or machinery.

No penalty is provided by statute for a violation of the provisions of the section referred to, but each miner is entitled to recover from the owner or operator of the mine the amount which he is damaged by reason of the failure of the operator or owner to correctly weigh the coal mined by such miner.

The apparent purpose of the statute in providing for such checkweighman is to furnish knowledge to the miners of the actual weight of the coal mined by them, and the weight as shown by the scales and machinery by which such coal is weighed by the owner or operator of the mine. Such knowledge will enable the miner to protect himself by an action against the mine owner or operator. I am,

Yours very truly,

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

LEGALITY OF VOTES CAST AT POLLING PLACE OUTSIDE THE BOUNDARIES OF ELECTION PRECINCT.

Des Moines, August 21, 1906.

MR. E. W. VIRDEN,
Cedar Rapids, Iowa.

MY DEAR SIR AND COUSIN: I am in receipt of your favor of the 17th instant, and 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 briefly state my views:

The question of the legality of votes cast at a polling place outside of the boundaries of the election precinct arose in *People v. Carson,* 155 N. Y., 491. The facts in the New York case are almost in all particulars identical with those stated in your letter. The township, or, as it is termed in New York, the town of Lockport, was an election precinct. Within its boundaries was the city of Lockport, New York. The authorities of the township fixed the polling place for the township outside of the town in the city of Lockport, and the electors had notice of the fact of the fixing of such polling place within the city and attended the election and voted at the place so fixed.

There was an attempt upon the part of one of the candidates to throw out all of the votes cast by the inhabitants of the town of Lockport because the polling place was outside the boundaries of the town. The supreme court of New York refused to declare the ballots cast by the electors of the town invalid, because they were deposited at a place beyond the boundaries of the town. In passing upon the question it was held that at most it was but a simple irregularity and in the absence of fraud had no effect upon the validity of the election.

The New York case has been accepted as a leading case and has been since followed by the state of Nebraska in the case of *Pard v. State,* 34 Neb., 372, in *Otis v. Lane,* 54 Atlantic (N. J.),442, and in *In re Petition of John D. Ammer,* 3 Ohio N. P. (N. S.), 329. The last named case being also in the Ohio Law Bulletin, Volume 50, No. 40, at page 356.

The courts of Pennsylvania and Texas have, in one or two cases, announced a rule slightly different from that of the New York court, but the holding is based either upon a constitutional provision or a statute of the state which requires the polling place to be within the election precinct. There is no such constitutional or

statutory provision in this state, and in its absence the rule may be stated as being that if, for the convenience of the electors of any precinct, the proper authorities fix the polling place outside of the boundaries of such precinct, and due notice thereof is given, and no fraud enters into the transaction, the election thus held outside the election precinct is valid.

Under this rule, if the township trustees of Cedar township fix the polling place of such township upon the island in the Cedar river within the corporate limits of the city of Cedar Rapids, and due notice is given of such voting place in the manner provided by law, there is no question about the legality of the proceeding.

I am, Yours very truly,

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

TAKING FISH FROM POND OR LAKE OWNED BY PRIVATE INTEREST MISDEMEANOR.

Des Moines, August 31, 1906.

JACQUES & JACQUES,
Ottumwa, Iowa.

DEAR SIRS: If the Chicago, Rock Island & Pacific Railway Company is the owner of the premises upon which the pond at Harvard exists, the taking of fish therefrom by other persons, without the consent of the Railway Company, is a misdemeanor under the provisions of section 2545 and a violation of the provisions of chapter 15 of the code.

Section 2539 authorizes and makes it the duty of the fish and game warden, sheriffs, constables and police officers of the state, without warrant or process, to take and destroy any seine, trap or contrivance used for taking fish in violation of the provisions of the chapter referred to. I am,

Yours very truly,

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

MEANDERED STREAMS—ERECTION OF DAM ACROSS.

Des Moines, September 5, 1906.

HON. J. B. PRICE,
Fort Dodge, Iowa.

DEAR SIR: I am in receipt of your favor of the 1st instant.

There is no provision of statute under which notice can be given to any state officer for the erection of a dam across a meandered stream. The question of the ownership of the bed of a non-navigable meandered stream in this state has never been determined by any court of authority, and the question is not wholly free from doubt. There are many respectable authorities which hold that the title to the bed of a stream which is not navigable, either in law or in fact, is in the riparian owners, and that their title extends to the thread of the stream, although the land they purchased was surveyed and platted by meander lines.

My view is that, if the parties desire to erect a dam for commercial purposes, they should proceed under the provisions of the statute, as the state will not be bound by any act, or its title in anywise interfered with, if it does not appear or become a party to the proceeding. I am,

Yours very truly,

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

PUBLICATION OF NOTICE IN DRAINAGE DISTRICT—FEES CHARGED.

Des Moines, September 11, 1906.

MR. J. H. LIGHTER,
Rolfe, Iowa.

DEAR SIR: I am in receipt of your favor of the 10th instant, enclosing copy of notice published by you setting forth the assessment of benefits to land owners in your drainage district.

While the question which you ask is not one upon which I can express an official opinion, I will suggest that section 4 of chapter 84 of the acts of the thirty-first general assembly appears to fix the amount of fees which may be charged for the publication of notices of this character; that is, such charges shall not exceed 33 1-3 cents for each ten lines of brevier type or its equivalent.

I am, Yours very truly,

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

REMITTING OF FINE.—The only person authorized by law to remit fine is governor.

Des Moines, September 19, 1906.

MR. T. F. SCHMITZ,
Ossian, Iowa.

DEAR SIR: I am in receipt of your favor of the 17th 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 governor of the state is the only person authorized by law to remit a fine which has been imposed by any court under the laws of Iowa.

I further suggest that if the case which you refer to is a meritorious one the wife might apply to the governor to have the fine which you imposed remitted, and he would probably do so upon your recommendation. I am,

Yours very truly,

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

RIGHT OF ELECTORS LIVING IN AN INCORPORATED TOWN WITHIN A TOWNSHIP—MAY VOTE FOR TOWNSHIP OFFICERS.

Des Moines, September 20, 1906.

HON. H. H. CARTER,
Corydon, Iowa.

DEAR SIR: I am in receipt of your favor of the 18th instant.

In answer I will say that the matter concerning which you write is not one upon which I can express an official opinion, unless referred to me by one of the departments of the state, and that it is a matter which is not otherwise within the jurisdiction of this office. I will, however, make the following suggestions:

A city located within a township is a part of the township. The fact that it is organized as a municipal corporation does not take the territory embraced by the boundaries of such corporation out of the township.

Section 552 of the code gives to the board of supervisors power to change the boundary lines of any township so as to make them conform to the boundaries of a city, where the boundary lines of the latter have been changed or extended.

Section 554 provides that when any township has within its limits a city or town with a population exceeding fifteen hundred, the electors of such township residing outside the limits of the city or town may petition for a division of the township and have the part of the township outside of the boundaries of the city or town set apart as a separate township.

These sections clearly recognize that any city or town located within the boundaries of a civil township is a part of the township, and electors residing within the limits of such city or town have the same right to vote for the election of township officers as the electors of such township residing outside of the boundaries of the city or town. Many of the duties of township trustees are required to be performed within the limits of a city or town existing within the boundaries of the corporation, and no reason can be suggested why the electors of such corporation should not be permitted to have a voice in the election of such officers. I am,

Yours very truly,

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

MARSHAL OR PEACE OFFICER—DUTIES.—A marshal or peace officer's duty is to go into a public place where there is a fight or disturbance and make arrests. Has no authority to go into private house and make arrest without warrant.

Des Moines, October 5, 1906.

HON. A. F. BONNEY,
Buck Grove, Iowa.

DEAR SIR: I am in receipt of your favor of the 4th 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 it is undoubtedly the duty of a marshal or other peace officer to go into any saloon, boarding house, storeroom or barber shop, if he hears or knows of a fight or disturbance in such place, and either arrest the parties at the time or file an information against them afterward. He may do either as in his judgment seems advisable. The parties are committing a public offense, and if done in the presence of the officer he has the right to arrest without warrant.

The question of going into a private house is entirely different. He has no authority to enter a private house and make an arrest without a warrant.

I will further suggest that these matters should be referred to some lawyer employed by your town to act for the authorities.

I am, Yours very truly,

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

ELECTORS OF THE STATE—QUALIFICATIONS.

Des Moines, October 6, 1906.

MR. J. C. COSTER,
Muscatine, Iowa.

DEAR SIR: Your letter of the 4th instant to Mr. Frank P. Woods, chairman of the republican state central committee, has been by him referred to me for answer.

The provisions of section 1 of article II of the constitution of the state of Iowa fix the qualifications of electors in this state. Every elector who is entitled to vote at a general election must have been a resident of this state for six months next preceding the election, and of the county in which he desires to vote sixty days prior thereto. If he has not been a resident of the county for sixty days prior to the day of the election, he is not entitled to vote. The provisions of the constitution are conclusive, and no other construction can be given them. I am,

Yours very truly,

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

VOTING MACHINES—MANNER OF VOTING.—Voting machine must be adopted and authorized by supervisors. Ballot may be cast for entire ticket with voting machine.

Des Moines, October 11, 1906.

MR. F. M. GRAHAM,
Rockford, Iowa.

DEAR SIR: I am in receipt of your favor of the 10th 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 section 4, of chapter 37 of the acts of the twenty-eighth general assembly provides that no form of voting machine can be used at any election unless the same has been approved by the commissioners appointed by the governor for the purpose of examining and reporting upon voting machines. Further, that before a voting machine can be legally used it must be adopted and authorized by the board of supervisors of the county, or by the city council of the city in which the election is held.

I suggest that the matter be referred to your county attorney for a careful examination before any action is taken in regard to the use of the machine.

As to voting the entire ticket by one movement of the lever of a voting machine, I have to say that I have advised the secretary of state that the ballots for the entire ticket may be so cast where a voting machine is legally used. The voter steps within the voting machine booth, arranges the ticket which he desires to vote, and the registration of his vote by a movement of the lever is substantially equivalent to depositing his ballot in the ordinary ballot box.

I am, Yours very truly,

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

ASSESSOR.—Electors of a township outside of an incorporated city or town may elect an assessor who resides in the corporate limits.

Des Moines, October 17, 1906.

HON. L. O. RUE,
Nora Springs, Iowa.

DEAR SIR: In answer to your favor of the 15th instant, I will say that I know of no statute requiring an assessor, elected by the voters residing outside of the limits of an incorporated city or town, to be a resident of the part of the township lying outside of such corporate limits. I think it is within the power of the electors residing outside of the corporate limits of the city or town, to elect an assessor who resides within such corporate limits. In any event,

such person so elected would be township assessor *de facto,* and all of his official acts would be legal and binding. I am,

Yours very truly,

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

MONEY IN CITY TREASURY—ONLY PAID ON WARRANTS.—Money in the city treasury should only be paid out on warrants drawn by the officer authorized by an action of the council to draw same.

Des Moines, Ocotober 22, 1906.

MR. F. T. TRUE,
Council Bluffs, Iowa.

DEAR SIR: I am in receipt of your favor of the 19th instant.

While there may be some questions as to the propriety of my expressing an opinion upon the questions contained in your letter, unless they should be referred to me by the auditor of state, I will suggest that it appears to me that no money should be paid from a city treasury for any purpose, except upon a warrant duly drawn by the proper officers authorized by an action of the city council, and that this rule should prevail as to bonds, coupons, paving and other certificates. That all claims should be presented to the council and orders in the nature of warrants directed to be drawn by the proper officers upon the proper funds to pay the same.

There can be no hardship or delay in such a rule, as the city council can anticipate the falling due of any bonds, coupons or certificates, and authorize the drawing of a warrant upon the proper fund to meet the same by the proper officers. I am,

Yours very truly,

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

SEINING.—Not permitted from lakes with natural outlet.

Des Moines, October 31, 1906.

MR. J. C. HENKAL,
Storm Lake, Iowa.

DEAR SIR: I am in receipt of your favor of the 25th instant.

In answer I will say that 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 the game warden or one of the departments of the state.

I will, however, suggest that section 2545 of the code does not permit the seining of fish from any lake which has a natural outlet. If the lakes referred to by you have natural outlets which connect with the public waters of the state, fish may not be taken from the same by means of a seine. I am,

Yours very truly,

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

STATE PHARMACY EXAMINATION.—Qualifications of applicant to take same.

Des Moines, November 10, 1906.

DR. O. H. LONGWELL,
Des Moines, Iowa.

MY DEAR SIR: Complying with your request of the 7th instant for a construction of the provisions of chapter 115 of the acts of the thirty-first general assembly relating to the examination and registration of pharmacists and assistants, I submit the following:

Upon passing a satisfactory examination before the state board of pharmacy, an applicant is entitled to registration as a pharmacist in Iowa provided he can qualify in one of the following classes:

1st. Graduates from a reputable college of pharmacy maintaining a course of study of seventy-two weeks. No drug store experience is required; or

2d. Those who have had three years' drug store experience and have completed the junior course of thirty-six weeks in a reputable college of pharmacy; or

3d. Those who have had four years' experience in a drug store.

The statute also provides for the registration of persons between the age of eighteen and twenty-one as assistants, and such applicants must offer proof, in addition to passing a satisfactory examination, that

1st. They have completed a course of study of seventy-two weeks in a reputable college of pharmacy; or

2d. Have had two years' drug store experience; or

3d. Have had one year's experience in a drug store and have completed the junior course of thirty-six weeks in a reputable college of pharmacy.

The law contemplates in any case that the actual time spent in a reputable college of pharmacy is equivalent to drug store experience and may be counted as such. Those who complete the junior course are entitled to credit of one full year's experience in a drug store, and graduates of a reputable college of pharmacy are eligible to examination without experience.

Yours very truly,

LAWRENCE DEGRAFF,
Assistant Attorney-General.

FRANCHISE OF CORPORATION—ACTION TO FORFEIT SAME.—An action to forfeit the franchise of a corporation must be in the name of the state.

Des Moines, November 15, 1906.

MR. S. C. HUBER,
Tama, Iowa.

DEAR SIR: I am in receipt of your favor of the 13th instant.

While I have some doubt about the propriety of my expressing an opinion upon the questions contained therein, I will call your attention to the provisions of chapter 9 title XXI of the code, and especially to sections 4315 and 4316. I think it is generally understood by the profession in this state that an action to forfeit a franchise granted to a corporation must be in the name of the state, either upon the relation of the county attorney or a private person under section 4316, and in either event upon the order of a judge of the district court to whom application should be made for leave to commence such action.

The statement which you refer to in McQuillan's Municipal Corporations is based upon a Wisconsin case which was decided strictly upon the statute of that state. It is, however, I think, applicable to the question under consideration, as the Wisconsin and Iowa statutes are very similar. I am,

Yours very truly,

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

MUNICIPAL CORPORATION—INDEBTEDNESS OF.—The indebtedness of a municipal corporation is fixed at five per cent of value of taxable property.

Des Moines, November 21, 1906.

MR. W. M. WILSON,
Ames, Iowa.

DEAR SIR: I am in receipt of your favor of the 20th instant. The constitutional limit of indebtedness of municipal corporations is fixed at five per centum of the actual value of the taxable property of the corporation. If it is proposed to construct your heating plant and to pay the cost thereof from an assessment upon property benefited thereby, I call your attention to the case of *Swanson v. City of Ottumwa,* which you will find in the 118th Iowa at page 161.

I doubt the advisability of my expressing any general opinion as to the equity of bonding an entire municipal corporation for the purpose of installing a heating plant which can only be of benefit to a few. That is a matter which must be determined by the local authorities. I am,

Yours very truly,

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

ASSESSMENT OF SHARES OF STATE AND SAVINGS BANKS—WHERE BANK HAS BEEN DISSOLVED.—Shares of stock of state and savings banks shall be assessed to the bank and to the individual shareholder. Where there has been a dissolution and the property omitted from taxation, the treasurer should enter it as omitted property.

Des Moines, November 21, 1906.

HON. L. W. OWEN,
Spirit Lake, Iowa.

DEAR SIR: I am in receipt of your favor of the 20th instant. While the matter concerning which you write is one upon which I cannot express an official opinion, unless it should be referred to me by one of the departments of the state, I will, as courtesy to you, give you my views upon the question.

Section 1322 of the code provides that the shares of stock of state and savings banks shall be assessed to the bank and not to

the individual shareholders. No assessment can, therefore, be made now against the shareholders of the bank, nor can the amount or value of the stock held by them on the first day of January preceding the dissolution of the bank be now entered upon the tax books by the treasurer as property omitted by the assessor, as the assessor of that district had no authority to list and assess such property against the stockholders in the first instance.

The only way, as it appears to me, of reaching the stockholders and collecting the tax is to have the treasurer enter upon the tax books the value of the stock of the bank as of the first day of January preceding its dissolution as omitted property, and then bring an action against the stockholders, setting forth the dissolution of the bank and the distribution of its assets among the stockholders without paying all of its liabilities, namely: The taxes then owing upon its stock, and asking an order compelling the stockholders to pay into court such pro rata share of the assets of the bank distributed to each stockholder as may be necessary to meet the amount of the taxes due.

Such a course would undoubtedly produce considerable litigation, but I think the unpaid tax could be recovered from the stockholders in such a proceeding under the rule that no corporation can dissolve and distribute its assets without paying its liabilities; and if it does so, such assets may be followed into the hands of the stockholders for the purpose of meeting the liabilities of the corporation. I am,

Your very truly,

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

QUARANTINE—LENGTH OF TIME IT MAY BE ENFORCED.—The length of time a quarantine may be enforced is governed by rule ten of the state board of health.

Des Moines, November 26, 1906.

DR. H. B. JENNINGS AND OTHERS,
Council Bluffs, Iowa.

DEAR SIRS: I am in receipt of your favor of the 22d instant, asking my opinion as to the time a quarantine should be enforced under the rules of the state board of health, and whether the microsopic findings of the state bacteriologist alone should be accepted

under the modification of rule 9 of the rules of the state board of health.

I will briefly answer these questions in the order stated:

Rule 10 should, in my opinion, be strictly enforced and no release of patients or family from the quarantine should be declared until the time fixed by rule 10 has fully elapsed. The modifications of rule 9 apply only to diphtheria and the cultures required by such modification should be by the state bacteriologist and not by any other person. It was never intended by the state board of health under the rules and modifications adopted by it that the examinations and cultures in cases of diphtheria should be made by any person other than the state bacteriologist, where such examination is made for the purpose of raising quarantine.

I think the local board of health has no power to establish a limited period of quarantine without the microscopic findings made by the state bacteriologist under the provisions of rule 9.

Your very truly,

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

ASSESSOR—COMPENSATION—FIXED BY BOARD.—The board of supervisors shall appropriate a sum not exceeding two dollars per day for compensation of assessors.

Des Moines, December 14, 1906.

MR. C. W. FENNER,
Montezuma, Iowa.

DEAR SIR: I am in receipt of your favor of the 13th instant.

In answer I 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 suggest, however, that the statute does not specify the manner in which the compensation of an assessor shall be fixed by the board of supervisors. It provides that the board shall appropriate a sum for that purpose, not exceeding two dollars a day for the time actually employed. I am,

Your very truly,

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

PRIVATE BANKS—INSOLVENCY.—The insolvency of private banks cannot be established until the individual or members of the co-partnership are declared insolvent.

Des Moines, December 15, 1906.

HON. EARL SMITH,
Mason City, Iowa.

DEAR SIR: I am in receipt of your favor of the 13th instant.

All of the property of the partners of a private bank is liable for debts of the bank, and I do not see how it would be possible to establish the insolvency of the bank without establishing the insolvency of the individual partners. A private bank is a business carried on by an individual or a co-partnership. It has no separate entity or existence apart from the individual owner of the members of the firm, if conducted by a partnership.

It, therefore, appears to be necessary to prove the insolvency of all of the partners, to make them liable under the statute prohibiting fraudulent banking. This is apparently the view taken by the supreme court as announced in the case of the *State v. Caldwell,* 79 Iowa, 432, 442, and I call your attention to division IV of the opinion in that case, the soundness of which has never been questioned since it was handed down by the court. I am,

Your very truly,

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

COUNTY ATTORNEY—COMPENSATION—EXPENSES WHEN ON OFFICIAL BUSINESS AWAY FROM COUNTY SEAT.—The compensation of the county attorney must be paid from the general fund of the county. His expenses when away from the county seat on official business to be audited by board of supervisors and paid from general fund.

Des Moines, December 22, 1906.

HON. B. A. GOODSPEED,
Atlantic, Iowa.

DEAR SIR: I am in receipt of your favor of the 21st instant.

I think the entire compensation of a county attorney must be paid from the general fund of the county, and not from the specific fines or school fund foreclosures for which he is allowed compensation in addition to the salary fixed by the board of supervisors.

The law requires that the entire amount of all fines collected shall go to the school fund and certainly the entire amount of a judgment collected upon a foreclosure of a school fund mortgage, or received from the sale of the property after such a foreclosure, must go to the school fund as it is a part of it, and such fund cannot be diminished by the payment of any of the expenses incurred in foreclosing the mortgage and collecting the amount due such fund.

I do not think the clerk of the court or any other county officer has the right to divert any part of a fine collected, or any part of the money received upon a foreclosure of a school fund mortgage, to any other purpose or use than that fixed by law, and that the entire amount of each received by the clerk must be paid to the county treasurer for the use of the school fund.

It is clear that the expenses incurred by a county attorney in attending upon his official duties at a place other than his residence and the county seat, which are required to be audited and allowed by the board of supervisors of the county, must be paid from the general fund, as there is no other fund from which such payment can be made. I am,

Your very truly,

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

SOLDIERS' EXEMPTION.—The soldiers' exemption law provides that property not to exceed eight hundred dollars shall be exempt from taxation.

Des Moines, January 4, 1907.

MR. GEO. F. LITTLE,
10 Cedar Street,
Beatrice, Nebraska.

DEAR SIR: The soldiers' exemption law is not published except in the code. It provides that the property, not to exceed eight hundred dollars, in value, of any honorably discharged Union soldier or sailor of the Mexican war or of the war of the rebellion, or of the widow remaining unmarried of such soldier or sailor, shall be exempt from taxation, and makes it the duty of every assessor to annually make a list of all such soldiers, sailors and widows, and to return such list to the county auditor.

I also enclose you a pamphlet which contains opinions given by me to the governor and auditor of state construing the statute providing for such exemption. I am,

Your very truly,

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

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