SECOND BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA.

HON. MILTON REMLEY,
ATTORNEY-GENERAL.

Transmitted to the Governor, January, 1900.

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REPORT

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

To Hon. Leslie M. Shaw, Governor of Iowa:

In compliance with the requirements of law, I hereby submit to you a report of the business transacted by this office during the years 1898 and 1899.

Schedule "A" is a complete list of all criminal appeals submitted to the supreme court, and the disposition made thereof.

Schedule "B" is a list of all the civil cases tried in the different courts of the state and of the United States, together with the results of such trials.

Schedule "C" is a statement of all criminal and civil cases pending on January 1, 1900.

Schedule "D" contains the official opinions; *i. e.*, the written opinions during the years 1898 and 1899.

CRIMINAL APPEALS.

The policy which was referred to in my last report, of insisting that all criminal appeals shall be submitted to the supreme court at as early a day as they can reasonably be, has been salutary. When it is understood that unnecessary delays in the determination of appeals in criminal cases cannot be obtained, very few appeals will be taken other than those which are thought to have real merit. Under the policy adopted there has been a material reduction in the number of appeals coming to the supreme court.

An examination of schedule "A" shows that in comparatively few cases the judgments of the district courts in criminal cases have been reversed. This is an evidence of the distinguished ability and the care with which the district courts of the state guard the interests of the people on the one hand, and the rights of persons charged with the commission of crime on the other. It is no less a tribute to the efficiency of the county attorneys of the state. The state is to be congratulated, upon the whole, upon the wise and faithful administration of its criminal laws. As a rule, the laws have been well enforced,

and the expense of their enforcement has been light as compared with many states. There are, without doubt, exceptions and exceptional cases, but the results which have come under my observation from the various counties of the state lead to the conclusion that the people have been faithfully served in the administration of the criminal laws of the state.

Several opinions have been filed and judgments rendered by the supreme court which suggests that in certain respects some changes ought to be made in the criminal code.

The case of State v. Fields, 106 Iowa, 406, is one in which the defendant was indicted for fraudulent banking. He was president of a national bank, and demurred to the indictment on the ground that the state could not enact a law to punish an officer of a national bank for any act done in connection therewith; that the bank was organized under an act of congress, and for that reason was not subject to the laws of the state. This view was adopted by the district court, and the demurrer was sustained and the defendant was discharged. The state appealed, and the judgment of the district court was reversed (98 Iowa, 748). Afterward, the defendant was again indicted, and upon trial was convicted and sentenced to imprisonment. On appeal, the judgment was reversed, the court holding that the judgment on the demurrer to the first indictment was final, and the defendant could not be tried for the offense of which he was undoubtedly guilty. There was plainly a miscarriage of justice through a defect in the law.

The case of State v. Spayde, 80 N. W. R., 1058, illustrates another defect in the law. The defendant was first indicted for forgery in Humboldt county. During the trial he testified that he signed the forged name in Webster county. The court, under the provisions of section 5389 *et seq.*, discharged the jury and required him to give bonds to appear and await the action of the grand jury in Webster county. He was indicted, tried and convicted in Webster county, and appealed to the supreme court. The judgment was reversed, the court holding that the Humboldt district court had no authority to discharge the jury, and its act in so doing amounted to an acquittal, and the defendant was improperly put upon trial in Webster county.

Whatever views may be entertained as to the correctness of the decisions of the court, they are now the law in this state. The effect of these decisions is apparent. Two persons, undeniably guilty of felony, go scot free. The counties are mulct

in costs for having attempted to bring them to justice. The door is left open for the escape of other offenders under similar circumstances. A few changes in the sections referred to in the opinions filed in these two cases would bring the law in the respects pointed out more in harmony with the policy of this state, concerning which it has been said by the supreme court: "The technical exactness of the common law, as enforced in criminal prosecutions, whereby many guilty persons escaped the just penalties due their crimes, and which justly became the reproach of that system of jurisprudence, has been wisely superseded in this state."

The constitution provides that "no person shall, after acquittal, be tried again for the same offense." Under this provision it cannot be claimed, as a constitutional right, that anything short of a genuine acquittal after a fair investigation into the merits of the accusation, may be urged as a bar to the trial. In cases like those to which reference has been made, there has been no trial; certainly no acquittal in a constitutional sense, yet persons indisputably guilty are, under the statute, permitted to escape the just penalties due to their crimes.

Section 254 of the code authorizes the district judge, after the defendant in a criminal case has perfected his appeal, upon being satisfied that the appellant is unable to pay for a reporter's transcript of the evidence, to order the same to be made at the expense of the county. The defendant has no constitutional right to demand that the expense of his appeal shall be paid by the public or the county. Whatever is given is gratuity. The provision is probably wise and humane, but rather extraordinary, and subject to abuse. The district judge is the one most capable of determining whether the case is one in which the county should pay for such transcript. I supposed the discretion was vested in the district judge alone, but in the case of State v. Wright, 82 N. W. R., 1013, the supreme court, by a majority of one, held otherwise.

In view of this decision, and the further fact that in most criminal prosecutions where parties can furnish bonds, and delay is sought, there may be expected two appeals in every case in which the judge refuses to make the order. The appeal in the main case cannot be heard until the appeal from the refusal of the judge to order a transcript at the expense of the county be determined. The length of time elapsing before the sentence is executed diminishes the deterrent effect upon

offenders. Beside this, additional costs are placed upon the county without a commensurate benefit in the safeguards against the innocent suffering punishment unjustly.

In my opinion, it would be wise for the legislature to amend section 254 so that the decision of the district judge should be final. There is very little danger of an injustice being done to anyone by so doing. He is better able to determine the matter correctly than the supreme court, from the nature of the case. The case referred to illustrates this. The supreme court can, and often does, waive the rule requiring the abstract and argument to be printed. There was no application in that case to waive the printing of the record. The abstract was printed and is certified to have cost $353. The argument will be an additional cost. The transcript did not probably cost half as much as printing the abstract and argument. It is absurd to say the defendant was unable to pay for a transcript when he was able to pay two or three times as much for printing which might have been waived.

The wisdom of the law is at best questionable. But when it leads to two appeals, with the attendant expense and the long delay in finally disposing of criminal cases, it should, in my opinion, be amended so as to avoid such consequences.

The case of the State of Iowa v. E. F. Waite is one of great interest. Waite was indicted for violating section 4767 of the code, by making threats to compel one to do an act against his will. At the time he was in the employ of the United States pension bureau. He urged, as a defense, that what he had done was in the line of duty as an officer of the United States, and hence the state court had no jurisdiction to try him for the offense. He was convicted in the district court and appealed to the supreme court, where the judgment of the district court was affirmed. He then surrendered himself to the sheriff and applied to United States District Judge Shiras for a writ of *habeas corpus*. The writ was granted, and on a hearing, Waite was discharged. The opinion of the learned judge held in substance that the state court had no jurisdiction to try a United States officer or agent "when the acts complained of were done in and about a subject matter within federal jurisdiction;" that even if he exceeded his authority under the laws of the United States, and the criminal act charged against him was in excess of such authority, yet he is amenable to the United States alone, and the state courts have no jurisdiction

to determine the question whether or not the act complained of as a violation of the criminal law of the state was outside of the line of his duty as a federal officer. This doctrine is so far reaching in its consequences that I cannot accept it as the true doctrine. Suppose a mail carrier, in his daily rounds about the city, should, without checking his gait, deal a vicious blow upon every person he meets; it can be affirmed of him that he "was acting under the authority of the United States when the acts complained of were done, in and about a subject matter within the federal jurisdiction." It is obvious that knocking people down was not in the line of his duty, but it was done when engaged "in and about a subject matter within federal jurisdiction." If the doctrine announced in the Waite case is true, then such a man could not be punished for his crimes. The state court has no jurisdiction to determine whether or not it was an excess of authority under the federal law. The United States courts could not punish him for violating the criminal law of the state. The state might be rendered helpless if the doctrine were carried to its logical conclusion.

I appealed from the judgment of the United States circuit court of appeals, affirming the judgment of Judge Shiras, to the United States supreme court, where the case is still pending.

CIVIL CASES.

Among the civil cases which have been in charge of this office have been several of no little importance.

An attempt was made to have the law imposing a tax upon insurance companies declared unconstitutional.

The first case was the Scottish Union and National Insurance Company v. John Herriott, treasurer of state. The plaintiff had paid to the treasurer the amount of tax found due under Sec. 1333 of the code, under protest, and brought an action to recover the amount paid, alleging that the law under which it was collected is unconstitutional. It was claimed that the law was obnoxious to several provisions, both of the state and of the United States constitutions. A demurrer filed by the defendant was sustained by the district court of Polk county, Judge C. P. Holmes presiding, and judgment was rendered against the plaintiff for costs. The plaintiff appealed to the supreme court of this state, where the judgment of the court

below was affirmed, sustaining the constitutionality of Sec. 1333 of the code, which requires a greater tax to be paid to the state by insurance companies incorporated under the laws of another state than is required of those incorporated under the laws of this state.

The same question in another form was raised in the case of Manchester Fire Insurance Company and Thirty-three Other Companies v. John Herriott, treasurer and C. G. McCarthy, auditor, in the United States circuit court for the southern district of Iowa. The complainants filed a bill for an injunction to restrain the state treasurer from collecting the tax and the auditor from revoking the certificate of authority of said companies to do business in the state, and alleged the statute to be in violation of the constitution of the state and of the United States, and also in contravention of the civil rights act of congress. A demurrer to this bill was filed by the defendants. In a very able opinion by Judge Shiras (91 Fed. Rep., 711), the demurrer was sustained, the court holding that it is within the power of the state to exclude foreign insurance companies from the state, and if they are admitted, the state may impose such conditions of admission as it may deem proper.

The complainants have appealed this case to the United States supreme court, where it is still pending.

The case of the Scottish Union and National Insurance Company v. Herriott, has been taken to the United States supreme court on writ of error, and has not yet been reached for hearing.

These cases reaffirm the doctrine announced by the United States supreme court, that it is in the power of a state to impose upon foreign corporations such terms and conditions as the legislature may deem proper as a pre-requisite for such companies doing business in the state. The only exception to the rule probably is such corporations as are engaged in interstate commerce, or used as agencies of the federal government for performing its proper functions.

THE COLLATERAL INHERITANCE TAX LAW

has been before the supreme court several times for the construction of its various provisions. In *re* McGhee Estate, 74 N. W. R., 695, the supreme court sustained the contention of the state that the so called exemption of $1,000 did not apply to each of the collateral heirs. Afterward the difficulty of applying the

law and harmonizing its provisions led to the conclusion that it was the intention of the legislature that no estate, the value of which did not exceed $1,000, should be subject to the collateral inheritance tax, and if the estate exceeded $,1000 in value, then such part thereof as passed to the collateral heirs was subject to the collateral inheritance tax.

This contention was presented in the case of Herriott v. Bacon, and the supreme court adopted this view of the law, the case being reported in the 81st N. W. R., 710. This decision has done much to simplify the collection of the collateral inheritance tax, and obviates many perplexing questions that were constantly arising under the view that section 1467 provided for an exemption of $1,000 to the collateral heirs.

A suit was brought entitled Ferry, *et al*, v. Campbell, administrator, and John Herriott, treasurer, in the district court of Pottawattamie county, to enjoin the collection of the tax. Judge Thornell held that chapter 28 of the acts of the Twenty-sixth General Assembly, imposing the collateral inheritance tax, to be unconstitutional, inasmuch as it did not provide for notice upon the heirs at the time of the appraisement of the property which was to be subjected to the payment of the tax. The state appealed from such judgment. After the judgment was rendered, chapter 37 of the acts of the Twenty-seventh General Assembly was enacted, which provided for the giving of notice. The supreme court adopted the views of Judge Thornell, that the original act was unconstitutional because of the absence of any provision requiring a notice to be given to the heirs of the proceedings to determine the amount of the tax, but the act of the Twenty-seventh General Assembly cured the defect. The case was reversed and remanded again to the district court of Pottawattamie county, it being left by the supreme court an open question whether the so-called curative act would subject the real estate of a testator which vested in the collateral heirs at the time of his death before the curative act was passed, to the tax imposed by the original act. The court held that as to the personal estate, which was not yet distributed, it was competent for the legislature, by the curative acts, to enforce the tax.

It has seemed to me on principle that there is no distinction to be made between the personal property and the real estate Both vest in the heirs or legatees immediately upon the death of the testator or deceased in the same sense. It is true that

the personal estate passes to the administrator or executor, as trustee for the heirs and the creditors, and such personal estate is subject to the claims of the creditors and the expense of administration. But the real estate is no less subject to the payment of debts in case the personal estate is not sufficient to pay the same. The nature of the tenure of both is the same, the distributees and devisees or heirs deriving their rights solely from the statute, and when their rights are ascertained in closing up the estate, the time at which their right attaches is referred back to the death of the deceased. Our statute seems to place the devisees of real estate and the legatees of personal estate upon the same basis, except that inasmuch as the personal estate is subject to waste and diminution, the administrator is required to take possession thereof as trustee for the parties interested therein; but since real estate cannot be spirited away, the law permits those who will probably be shown to be entitled thereto to take possession thereof, subject to the right of the administrator or executor to sell the same in case it be necessary so to do.

Only the estates of such persons as died between July 4, 1896, when the collateral inheritance tax law took effect, and April 8, 1898, when the curative act took effect, are affected by the question left unsettled in Ferry v. Campbell. But it so happenes that a number of valuable estates are affected, and the amount of tax involved is many thousands of dollars in the aggregate.

In view of the importance of the question, the case of Ferry v. Campbell will be tried in the court below upon the theory above suggested, and it is hoped that the state will be able to collect the tax imposed by the Twenty-eighth General Assembly upon all the real estate passing to collateral heirs after the date the act took effect. There is apparently no good reason why collateral heirs receiving a legacy from the personal estate should be required to pay a collateral inheritance tax to the state, when one receiving a devise of equal value in real estate is exempt therefrom.

CORPORATIONS.

The law requires the attorney-general to examine and approve the articles of incorporation of different kinds of insurance companies. This also includes the amendments that may be filed. The task thus imposed is one of no small

moment and responsibility. The laws of the state with reference to insurance, while containing many excellent features, are difficult of construction, and, as a whole, do not provide the protection to the people of the state that such Iowa laws were designed to secure.

It seems to have been the wish of different legislatures in the past to provide an easy means for the incorporation of various kinds of insurance companies, and to place them under the control of the state auditor. The prior statutes, many of which seem to have been enacted for the accommodation of some persons desiring to engage in some particular or peculiar kinds of insurance business, have been codified, and the result is that our present laws appear incongruous, indefinite and uncertain. To one who carefully studies the law, it appears like patchwork.

First, in regard to companies for insurance other than life.

The provisions for the incorporation of a mutual insurance company contemplate premium notes, which shall be liable for the losses of the company in an amount equal to the capital stock required of a stock company, and shall be obtained before the company shall be authorized to do business, the policy of the law being that no company, unless it has a capital, or an equivalent thereto, of $25 000 shall be authorized to do the insurance business authorized in chapter 4, title 9, of the code. Yet sections 1704 and 1707 permit the parties who put up such notes to withdraw the same or be released therefrom within one year upon the payment of all losses accruing during the year, notwithstanding the fact that great liability may be incurred by the company under policies still in force. Persons who insure become members of the company, and are bound for losses and necessary expenses accruing to the company during the time they are members in proportion to their premium notes. These notes are usually given payable in six yearly installments, as may be called for by the board of directors. It is comparatively easy for the persons who launch a mutual insurance company to withdraw what was intended as a guaranty for the payment of losses and to give stability to the company, and, by securing premium notes given for insurance, to put upon the persons thus insuring the expense and burden, not only of losses occurring during the time that they are insured, but the expense of the organization of the company.

Most insurance companies take a note for insurance running six years, 15 per cent thereof payable annually. The 15 per cent is supposed to be the limit of the premium which is to be paid annually during the six years. Instances have come to my knowledge where the company has failed a short time after such a note was given, and the maker thereof was compelled to pay the full amount without having received any practical benefit from the insurance, while those who launched the company have had their premium notes cancelled and escape with practically no loss. This is manifestly a wrong, but the condition of the law is such that there is no power in this office to prevent it.

The distinction to be made between mutual insurance companies subject to the provisions of chapter 4, of said title 9, and those mutual companies subject to the provisions of chapter 5 of said title of the code, is not very obvious. The law intended a distinction to be observed, but in their practical operation many companies subject to the provisions of said chapter 5 do the same class of business and in the same way as those organized to do the business referred to in said chapter 4. Some companies subject to said chapter 5 have taken premium notes and have assumed to do everything that might be done by a mutual company subject to the provisions of chapter 4. The control and supervision which the law gives to the auditor over companies subject to the provisions of chapter 5 is very light, and it is possible, because of the laxity of the law, to organize insurance companies the principal purpose of which is to raise a fund to pay the salaries of the promoters and officers, and afford as little protection as possible to the policy holders. Revoking the certificates of authority to do business of such a company when it is found to be in an unsound condition and does not pay its losses, does not meet the requirements of the case, or afford protection to those who have already taken policies and paid their money.

LIFE INSURANCE COMPANIES AND ASSOCIATIONS.

The law with reference to life insurance is in a worse condition. The statute does not make sufficient distinction between the different classes of life insurance companies. It provides for the incorporation of stock companies and of mutual companies on the level premium or natural premium plan. It provides for the incorporation of insurance companies

to do business on the stipulated premium or assessment plan. It also provides for fraternal, beneficiary societies and orders and associations which are, in fact, a kind of an assessment insurance company, many such fraternal societies, so called, being organized solely for the purpose of carrying assessment insurance.

It is contemplated in section 1798 that another kind of insurance association may be organized, which is wholly outside of the control of the law. It is thought, by the average man, that any corporation or association which insures the life of an individual is an insurance company. To the ordinary mind the excellent provisions of the statute requiring the valuation of the policies of level premium or natural premium companies to be made and securities equal thereto to be deposited with the auditor, applies to the class authorized to do business in the state. People fail to distinguish between an insurance company and an insurance association, and the different kinds of insurance organizations. The general claim made that Iowa's insurance laws are among the best and most rigid of any of the states for the protection of the policy holders, is based solely upon the provisions of section 1774 of the code. That section, however, applies to only one class of insurance incorporations, viz., level premium companies. Yet the broad assertion of the efficiency of the insurance laws of this state gives a popular confidence and a false sense of security in companies which have nothing of merit, and no ability to make good their contracts with persons insuring with them.

One company which I was called upon to wind up had not assets sufficient to pay the receiver's fees. Another company for which a receiver was appointed, which had been doing a large business in this and other states, will not be able to pay 10 per cent of the death claims which have accumulated, to say nothing of the loss to thousands who had paid premiums for years.

A few persons will organize a mutual insurance company, either life or fire. They retain the management thereof, and assume to acquire a property interest in such company because of their ability to secure re-election of themselves as officers of the company. It occasionally comes to my ears that the president or secretary of a mutual insurance company has sold out the company to some other person, receiving a monied consideration for resigning as president or secretary and turning over

the management to the purchaser. I am satisfied there are cases where persons have made a business of purchasing the management of stipulated premium or assessment companies and pretending to consolidate them with some other company for the profit there is in handling the assessments and wrecking the company or association. Because of the condition of our law, I have been compelled to approve as conformable to law many articles of incorporation against which my better judgment rebels. But I have used my limited discretion as far as possible to prevent the launching of insurance companies or associations which I was satisfied would prove a fraud and a deception upon the people who patronize them.

I am clearly of the opinion that our present laws in regard to insurance are insufficient to secure the end and the object of all laws controlling insurance.

OTHER CORPORATIONS.

Section 1640 of the code gives courts of equity full power, on good cause shown, to close up the business of any corporation, and authorizes the attorney-general to bring an action in the name of the state for such purpose. The power to bring such an action, to wind up the affairs of a corporation doing a fraudulent business, implies duty so to do. Banking corporations and insurance corporations and building and loan associations are, under different sections of the law, placed under the control of the auditor, and when he finds certain conditions exist, he is authorized to place the matter in the hands of the attorney-general, whose duty it is to bring an action to wind up the affairs of such corporation. I have thought these provisions precluded the attorney-general from taking any steps with reference to such corporations until he has been requested so to do by the auditor.

The duty, however, of the attorney-general, based upon the section above quoted, undoubtedly exists with reference to corporations other than the three kinds above named, provided such corporations are doing business contrary to law or in excess of their legal authority. While this duty is plainly to be inferred from the section above named, yet there is no provision of law by which the attorney-general or the public can readily ascertain what corporations are exceeding their corporate powers, or are defrauding the public. Other corporations than those above named are not required to make any report,

save and except they shall file annually, in January, with the secretary of state, a list of their officers and directors, and any change in the location of their place of business made by vote of the stockholders. (Code, Sec. 1612.)

This provision is practically ignored and there is no penalty provided for a failure to comply therewith. Corporations are organized; their articles of incorporation filed; business is done year after year, and unless the matter comes to the public notice by reason of the failure of the corporation or some internal quarrel, nothing is known by the public or any public officer of the character of the business that is being done or the financial standing of the corporation.

The law permits foreign corporations to enter the state and do business simply by filing their articles of incorporation with the secretary of state, and corporations engaged in mercantile or manufacturing business are not even required to do this much. If foreign corporations are engaged in doing an illegal business, there is no ready means provided by the statute for preventing it.

There is required to be kept no record of the corporations doing business in the state, or even the corporations organized under the laws of the state.

While articles of incorporation are required to be filed with the secretary of state, there is nothing to show when the corporation ceases to exist, or what its standing may be. Under these conditions it is practically impossible for this office to perform any duty which seems to be imposed by section 1640, except in cases where an injured party brings the necessary information to the notice of the attorney-general and submits facts to him which show a good cause for winding up the affairs of the company. This, however, is never done except in case of a disagreement among the managers, or until some creditor finds he is without other recourse.

Not infrequently, residents of Iowa will incorporate under the laws of New Jersey or Delaware, the laws of which states are framed apparently on purpose to attract people to the state for the purpose of securing of corporate charters for the sake of the revenue which is brought to the state thereby. Tneir artices provide, as a rule, that the corporation may engage in any and all kinds of business which a natural person may engage in. Some companies are thus organized whose sole purpose is to sell stock therein and gather in the earnings of the unwary, with no possible expectation of ever returning

an equivalent therefor, but solely for the purpose of enriching the incorporators. It comes to my knowledge that the agents of incorporations of other states, with their principal places of business in other states, and possibly the agents of associations unincorporated, are engaged in different parts of the state in selling so-called stock or soliciting membership in the organization which is, in fact, nothing more nor less than a gigantic confidence game.

The questions are often asked: Why does the state permit these things? Does not the state control the corporations created under its laws, and has it not the power to prevent foreign corporations doing business within the state which are injurious to the people? Is it not the duty of the officers of the state to weed out the corporations which are preying upon the people?

These inquiries, which are often heard, indicate the popular belief that the policy of the state is to permit none but legitimate corporations doing a legitimate business to have an existence in the state. Some few sections seem to justify this belief. I am constrained to think that the legislature has intended that power should be lodged somewhere in the administration of the state's affairs to thoroughly stamp out any corporation which is doing an illegitimate business. The law, however, falls far short of securing these results. The secretary of state has no power to withhold a certificate of incorporation in case the fees are paid, and his power so to do is challenged on every hand. While he may arbitrarily, in case of a palpably fraudulent scheme being presented, refuse a certificate of incorporation, yet he does so without any express provision of the statute to sustain him.

This office has no means of obtaining authentic information as to the transactions of any corporation, and if such information could be obtained from reports, or other official sources, with the vast amount of work imposed upon this office, with only one assistant, it would be practically impossible to undertake the vast amount of work involved in performing the duties implied in section 1640.

The laws of some states require all foreign corporations to file their articles of corporation in the state, and to comply fully with the laws of the state with reference to reporting. Reports are required annually, showing the condition of the companies and the nature of their business. Some states

require affidavits that the corporation is not a party to any agreement or trust, and the failure to file such reports and affidavits works a forfeiture of their authority to do buisness in the state, and suitable penalties are provided for doing business in the state without having a certificate of authority so to do. Such a law weeds out, without action on the part of the state officers, many obnoxious corporations, and furnishes a basis for prosecutions of those corporations which are doing an illegal or a fraudulent business.

Information has come to me of many instances where an agent of some foreign corporation or association has visited a community, selling stock in the corporation or association, the plans of which, if closely analyzed, are, to all intents and purposes, a lottery—diamond schemes, or schemes which promise immense returns, but have, in fact, nothing of merit and no ability to fulfill the promises held out to the people. The agents themselves may be innocent of any intent to defraud, they, themselves, being misled as to the merits of their schemes. I have heard of instances where many thousands of dollars have been taken out of a community, with never a dollar of equivalent rendered therefor. Some corporations which are, under our law, permitted to do business in the state with no let or hindrance, take advantage of the situation and advise an open violation of the law, and agree to hold harmless from all loss such persons as will deal with them.

I may specify an instance of this, by way of illustration. The American Tobacco company is a foreign corporation, incorporated, I understand, under the laws of New Jersey. It is capitalized at many millions of dollars. It manufactures and sells tobacco in its various forms. It is authorized to do business in this state without even filing a copy of its articles of incorporation. It has the benefits of the markets of this state, and pays not one dollar of tax. It not only violates the laws of the state with reference to the sale of cigarettes, but has given certain printed and written guarantees to our own citizens that it will hold them harmless from all fines, costs and expenses if they will sell, in violation of law, cigarettes manufactured by said company. Its wealth and immense business enables it to make special contracts with the express companies by which the express companies carry, or pretend to carry, each little five-cent paper box of cigarettes as a separate package for shipment, the tobacco company pretending that

each little paper box of cigarettes is an "original package," and its sale is protected by the commercial clause of the United States constitution. On such a shallow pretense and transparent evasion, because of the wealth and power derived therefrom, not only the law prohibiting the sale of cigarettes, but also the law imposing a tax thereon, have been dead letters. Respectable dealers in tobacco who, as good citizens, declined to violate the laws of the state, have been threatened with an unfair competition unless they would sell the cigarettes of the American Tobacco company. The result is that a foreign corporation has, in effect, set at naught the laws of the state, and has induced or forced hundreds of our citizens to become chronic law-breakers, and the counties and municipal corporations of the state are deprived of the revenue provided for by section 5007 of the code. It is unquestionably true that a determined and persistent prosecution of all offenders by the local authorities would be successful in securing obedience to the law, but it seems to have been assumed, from the bold defiance of a powerful corporation, backed up by its guaranty to the law-breakers, that it has solid ground to stand upon, and the local officers have hesitated to involve their counties in the costs of making what they thought would most probably be a losing contest. Hence, no regard seems to have been paid to the law throughout the state.

It ought not to be in the power of any corporation, however wealthy and powerful, to thus set at defiance the state, while it is reaping a rich harvest from its markets. Other instances could be named where foreign corporations have pursued a similar course in utter disregard of the law of the state. Under existing laws it is impossible for this department to remedy the evil. The law gives no adequate remedy, nor are the facilities at the disposal of the attorney-general sufficient to enable him to take any steps to correct the evil.

It would, in my judgment, be wise to enact a law requiring all corporations organized under the laws of any other state, as a prerequisite to their doing business in this state, to file their articles of incorporation with the secretary of state, and pay a fixed fee therefor, and if the business sought to be done be legitimate and in accord with the policy of the state, that a certificate of authority to do business be issued; also requiring foreign as well as state corporations to file a report annually showing the nature of the business transacted, where the busi-

ness is conducted, the financial standing of the company, and such other facts as may be deemed best; also to file an affidavit by the proper officers showing whether or not the corporation was engaged in any pool, trust or combination, or in any manner violating the laws of the state. Provision should be made for the service of process upon all corporations doing business in this state. Proper punishment should be provided for any corporation or agent thereof doing business in the state without authority has first been obtained therefor. Legislation along this line would accomplish much to enable the attorney-general to discharge the duty that seems to be imposed upon him by section 1640, as well as the duties imposed upon him by section 5067. Imposing duties upon the attorney-general and providing no adequate means for the performance of those duties is certainly unjust. There should be either additional legislation to enable him to discharge the duties, or the sections of the statute imposing the duties should be repealed.

MONEY RECEIVED.

The only money collected by me for the state during the two years covered by this report has been the sum of $104.50, collected March 10, 1898, from the estate of George Ridinger, insane, for his support in the Mt. Pleasant hospital as a state patient. This sum was paid immediately to the treasurer of state, I holding his receipt therefor.

COSTS IN CRIMINAL CASES.

As a rule, the persons charged with crime who appeal to the supreme court have no property or estate from which the costs incurred by the state in the supreme court can be collected. The exceptions to this statement are so few that apparently no effort has ever been made to collect the costs to which the state has been put in printing abstracts and arguments in the supreme court. There are exceptions, however, and I am satisfied that judgments for costs have been rendered in the supreme court in many cases, which, if they were investigated, could now be collected. In many instances parties who were worthless at the time have undoubtedly become the owners of property. The aggregate amount paid by the state in years past for printed abstracts and arguments is no inconsiderable sum. A systematic attempt to collect all the outstanding costs, or as much as possible in such cases, I am satisfied would result

in the recovery of many thousands of dollars to the state of Iowa.

The labor of collecting cannot be undertaken by this office with the limited force at its disposal. If additional assistants were provided for this office as hereinafter suggested, the interests of the state in this respect could be better protected.

PRINTING OF ABSTRACTS AND ARGUMENTS.

In criminal appeals where the appeal has been taken by the state, and in all cases where additional abstracts are required, such abstracts and additional abstracts are required to be prepared by the county attorney. Many times it is very desirable to have an argument in a criminal appeal furnished by the county attorney who tried the case. The abstracts and additional abstracts which are furnished by the county attorneys are now sent to this office and the printing thereof is done by the state printer. It is generally better for one who prepares an abstract to proof read his own abstract. There is no reason why the printing of abstracts and additional abstracts in appeals should not be printed in the county from which the case is appealed. It is far more convenient for all parties connected with this office to have such printing done where the proof may be readily read by the county attorney who prepares the abstract.

Occasionally, because of the press of work with the state printer, or other causes, an argument or a brief which is required at a certain time cannot be printed in time, and a few instances have arisen where cases have been continued because thereof. In one instance the court refused to hear a petition for rehearing where the printing thereof delayed the service beyond the required time one day. The annoyance of this has been as little, possibly, as could be hoped for where the work must necessarily be done at one office, and that office under equal obligations to other officers who are equally insistent. I am satisfied that if more latitude were given to the attorney-general with reference to the printing of abstracts, briefs and arguments, it would be better for the service of this department, and would be less expensive to the state.

SHALL THE STATE PERMIT ITSELF TO BE SUED?

In my last biennial report I called attention to the hardship which often occurs to citizens because of the fact that there is

no provision of law authorizing the state to be made a party in any civil suit. Very frequently cases arise where a judgment is obtained or a fine imposed or a bail bond given which become an inferior lien upon real estate covered by a mortgage previously given by the judgment debtor or surety on the bond. In the foreclosure of such mortgages there is no provision for foreclosing as against the state. The judgment or claim of the state remains as a cloud upon the title. The state is not called upon to redeem. Its lien never becomes barred by the statute of limitations, and the result is that a cloud remains upon the title of real estate through no fault of the mortgagee thereof, and no method is devised for removing such cloud. Many cases of this nature occur, some of which have elements of real hardship. Wherever the state has no substantial interest to be protected, no good reason exists for preserving a lien upon real estate which affords it no benefit and is a positive injury to the owner of such real estate.

I, therefore, renew my recommendation that where the title of real estate is involved, and the question is one of priority of liens, that a law be enacted authorizing the attorney-general to appear in behalf of the state to the end that its claims in the real estate may be cut off by foreclosure, in proper cases, the same as if it were a private party.

NEEDS OF THIS OFFICE.

The duties imposed upon this office have increased yearly for a number of years. The increase of population and wealth of the state naturally augments the work of this office. Nearly every legislature creates some new board or commission or establishes some state institution, which adds somewhat to the labors imposed upon this office. The help supplied and the facilities for performing the work have not kept pace with the increased responsibilities and duties.

There is urgent need for a regular deputy, and such a salary should be paid as would secure the services of a competent attorney and justify him in devoting his entire time and energies to the work of the state. An experience of five years in this office, to which I have devoted all my time and best energies, justifies me in saying that the best services cannot be rendered the state with the limited help furnished this office. Many important questions must be determined without time to make a careful research of all the authorities and give the

matters the deliberative, careful thought which they deserve. From the necessities of the case, too much routine work is imposed upon the head of the department, taking his time and attention away from the more important matters and difficult problems which are ever arising. One occupying this position and trying to perform the duties imposed must, in a large measure, cut himself loose from social and political duties, and often deny himself vacations and recreations imperatively demanded by the laws of health. I do not think it the best policy for the state to demand so much of any of its officers or agents. There should be, in my judgment, sufficient assistance furnished to this office so that the attorney general may be relieved of much of the details and minor matters, and more time and care be given to the more important questions which are constantly presented to him.

There is now allowed by law for an assistant for this office $1,200 per year, and no more. The salary of $1,200 per year is wholly insufficient. If a comparison is made with other departments of this state, we find that some clerks without a professional training or education are receiving $1,500. A deputy is provided for most of the state officers with a salary of $1,500. It is just that a deputy attorney-general or an assistant, who in addition to the education demanded in other departments, must have a legal education and an experience in order to be efficient, should receive not less than is paid in other departments. Under the present conditions, there is an unjust discrimination against this department. No other department of state government has so little help, and in none is the entire force kept so constantly engaged in the strenuous effort to perform the duties imposed upon them. I can speak freely in regard to this because I personally would reap no benefit from any changes which I recommend.

Other states deal more fairly with the attorney-general's office. Minnesota, with a population of only about two-thirds of this state, furnishes an assistant attorney-general at a salary of $2,000, and two law clerks at a salary of $1,800 and $1,500 respectively. Michigan, with but little more population, furnishes an assistant at a salary of $3,000 and such extra help as the board of auditors may allow. Nebraska, with a population of less than two-thirds that of our state, pays the deputy attorney-general $1,800 per annum. Colorado, with less than one-third the population of this state, pays the deputy attorney-

general $2,250 per annum and an assistant the same salary. Indiana pays the attorney-general a salary of $7,000 and the deputy and assistants to the attorney-general $4,200 per annum.

The secretaries of certain boards and commissions of this state are allowed by law $1,500 and one $2,000. Two thousand dollars is the smallest salary that should be paid to an assistant attorney-general. With such a salary a competent man could be obtained who would devote his entire energies and time to the labor, which is imperatively needed to secure the best results for the state.

There are at present no fees authorized to be collected by this office. In examining and approving articles of incorporation, in many instances, the attorney-general is required to perform services which are beneficial to the incorporators, for which lawyers in practice would charge a fee of $50. If he refuses to approve the articles of incorporation he must inform the parties of his objections thereto, and give the reasons for such objections. In many instances the articles are then re-written, and come to him again for his examination and approval. Some articles are long and complicated, and require a great deal of time in order to give them a careful examination. If a law were enacted authorizing a fee of $5 or $10 to be collected for the examination of articles of incorporation, and paid into the treasury of the state, an income would be provided more than sufficient to pay the deputy, or an assistant, the reasonable salary above suggested.

Again, the attorney-general is required to bring action to wind up the affiairs of banks, insurance companies and building and loan associations when the matter is placed in his hands by the auditor of state. Private parties receive the benefit of such service. There is no good reason why a reasonable fee for such services should not be taxed by the court before whom the case is tried, for the benefit of the state. If such services were rendered at the instance of a stock holder or a creditor, a fee would be taxed and made a charge upon the property of the company for which a receiver is appointed. It is no hardship upon any interests to have taxed in behalf of the state such reasonable fee as would be otherwise taxed if like services had been rendered by an attorney employed by parties interested.

But whether the suggestions in regard to fees to be charged in behalf of the state be wise or unwise, the fact remains that there is imperative need of a permanent deputy in the office of the attorney-general, who should be paid a salary commensurate with the labor and responsibility imposed upon him.

The office is also in need of a set of United States supreme court reports. The high authority of the court, and the wide range of subjects covered by said reports, make them indispensible in the office of every practicing lawyer. They should be near at hand for ready reference in the investigation of questions of law. The small cost of the United States reports does not justify the inconvenience of being obliged to go or send to the state library whenever a reference to the reports is needed. They are needed at times when access to the state library cannot be had, or the particular report wanted is in use elsewhere. I have found it very inconvenient and at times annoying to be deprived of such reports.

During the period covered by this report my assistants have been, first, Mr. W. H. Redman, and afterward, and at the present time, Mr. Chas. A. Van Vleck, to both of whom I, as well as the people of the state, are indebted for faithful and efficient service. Respectfully,

MILTON REMLEY,
Attorney-General.

SCHEDULE "A"

The following is a list of criminal cases submitted to the supreme court, and also rehearings asked during the years 1898 and 1899 and the final disposition of the cases.

State v. Henry Abley, appellant.

Defendant was convicted of burglary; appealed from Franklin county. Modified and affirmed October 3, 1899.

State v. Mary Aiken, appellant.

Defendant was convicted of abortion; appealed from Poweshiek county. Reversed December 12, 1899.

State, appellant, v. E. E. Alverson.

Defendant was convicted of embezzlement; appealed from Iowa county. Reversed April 8, 1898.

State v. Charles Austin, appellant.

Defendant was convicted of assault with intent to commit rape; appealed from Polk county. Reversed October 5, 1899.

State v. John Baker, appellant.

Defendant was convicted of assault with intent to commit rape; appealed from Story county. Affirmed October 4th, 1898.

State v. A. M. Bauguess, appellant.

Defendant was convicted of indecent exposure of person; appealed from Lee county. Affirmed October 4, 1898.

State, appellant, v. Wm. Beardsley.

Defendant was indicted for using mill-dam without fish-way; and was acquitted by the district court of Mahaska county. The state appealed and the judgment of the court below was reversed May 16, 1899. Law held valid.

State v. Adolphus Beasley, appellant.

Defendant was convicted of breaking and entering; appealed from Ringgold county. Affirmed October 27, 1898.

State v. Christina Behrens, et al, appellants.

Defendant was convicted of murder by poison; appealed from Scott county. Affirmed May 27, 1899.

State v. Theodore Bertocli, appellant.

Defendant was convicted of murder by poison; appealed from Clinton county. Reversed May 27, 1899. Petition for rehearing submitted October 6, 1899, but not decided January 1, 1900.

State v. Geo. Bess, appellant.

Defendant was convicted of seduction; appealed from Dallas county. Reversed December 14, 1899.

State v. Edward Burke, appellant.

Defendant was convicted of assault with intent to commit great bodily injury; appealed from Benton county. Affirmed April 5, 1899.

State v. W. H. Burling, appellant.

Defendant was convicted of forgery; appealed from Fayette county. Reversed October 6, 1897. Petition for rehearing was filed January 23, 1898, and overruled February 3, 1898.

State v. D. W. Burns, appellant.

Defendant was convicted of perjury; appealed from Sioux county. Affirmed October 27, 1898.

State v. Joseph Burns, appellant.

Defendant was convicted of seduction; appealed from Dubuque county. Affirmed April 5, 1899. Petition for rehearing was filed April 28, 1899, and granted October 14, 1899. Case still pending on petition.

State v. Wm. Burns, et al, appellants.

Defendants were convicted of burglary; appealed from Buena Vista county. Affirmed October 20, 1899.

State v. J. H. Bussamus, appellant.

Defendant was convicted of nuisance; appealed from Sioux county. Affirmed April 6, 1899.

State v. F. L. Butts, appellant.

Defendant was convicted of adultery; appealed from Fremont county. Affirmed April 5, 1899.

State v. Charles Carnagy, appellant.

Defendant was convicted of assault with intent to commit rape; appealed from Linn county. Reversed October 20, 1898.

State v. John H. Cater, appellant.

Defendant appealed from order of district court of Winneshiek county refusing to order transcript, abstract and argument at the expense of the county. Affirmed October 3, 1899.

State v. John H. Cater, appellant.

Defendant was convicted of murder in the second degree; appealed from Fayette county. Affirmed October 28, 1899.

State v. certain intoxicating liquors and Anton Gordon, et al, appellants.

Verdict was rendered to the effect that the liquor was owned or kept for the purpose of being sold in violation of law, and should be destroyed; appealed from Worth county. Affirmed October 6, 1899.

State v. Marion Chaney, appellant.

Defendant was convicted of adultery; appealed from Dallas county. Submitted October 3, 1899, but not decided January 1, 1900.

State v. E. J. Chingren, appellant.

Defendant was convicted of obtaining money under false pretenses; appealed from Webster county. Affirmed April 8, 1898.

State v. Ike Cohen, appellant.

Defendant was convicted of the crime of arson; appealed from Black Hawk county. Reversed April 8, 1899.

State v. Fred Congrove, appellant.

Defendant was convicted of larceny; appealed from Louisa county. Reversed October 3, 1899.

State v. Jake Copeland, appellant.

Defendant was convicted of manslaughter; appealed from Fremont county. Affirmed October 4, 1898.

State v. George O. Daggett, appellant.

Defendant was convicted of incest; appealed from Dubuque county. Dismissed April 5, 1899.

State, appellant, v. Charles A. Dale.

Defendant was charged with common theft. A demurrer to the indictment was sustained by the district court of Butler county, from which ruling the state appeals. Case submitted May 18, 1899. Reversed.

State v. E. T. Dankwardt, appellent.

Defendant was convicted of tampering with the jury; appealed from Des Moines county. Affirmed December 15, 1898. Petition for rehearing was filed January, 1899, and overruled May 19, 1899.

State v. Chris Denlinger, appellant.

Defendant was convicted of seduction; appealed from Jackson county. Affirmed October 28, 1899.

State v. C. H. Desmond, appellant.

Defendant was convicted of assault with intent to commit rape; appealed from Poweshiek county. Reversed October 3, 1899.

State v. Bert DeWald, appellant.

Defendant was convicted of conspiracy; appealed from Buchanan county. Dismissed by appellant February 10, 1898.

State v. John L. Dixon, appellant.

Defendant was convicted of keeping a nuisance; appealed from Cerro Gordo county. Affirmed April 6, 1898.

State v. D. W. Doss, appellant

Defendant was convicted of keeping a gambling house; appealed from Clarke county. Affirmed December 12, 1899.

State v. Elias Doty, appellant.

Defendant was indicted for libel, to which indictment he interposed a demurrer which was overruled by the district court of Linn county. Appeal was dismissed by the supreme court October 21, 1899.

State v. John W. Dunn, appellant.

Defendant was convicted of larceny; appealed from Page county. Affirmed December 13, 1899.

State v. William Field, appellant.

Defendant was convicted of fraudulent banking; appealed from Buchanan county. Reversed October 17, 1898.

State v. John Fisher, appellant.

Defendant was convicted of larceny from the person; appealed from Woodbury county. Affirmed December 14, 1898.

State v. Con Fogarty, appellant.

Defendant was convicted of grand larceny; appealed from Palo Alto county. Affirmed April 7, 1898.

State v. Lawrence Fountain, appellant.

Defendant was convicted of rape; appealed from Johnson county. Reversed December 15, 1899.

State v. David Foust, appellant.

Defendant was convicted of breaking and entering; appealed from Linn county. Affirmed December 15, 1898.

State v. O. Garbroski, appellant.

Defendant was convicted of peddling outside of city; appealed from Mahaska county. Submitted May 23, 1899. No decision January 1, 1900.

State v. Jacob Geiers, appellant.

Defendant was convicted of murder; appealed from Keokuk county. Submitted October 6, 1899, but not decided January 1, 1900.

State v. Wm. F. Goering, appellant.

Defendant was convicted of assault with intent to commit great bodily injury; appealed from Marion county. Reversed December 14, 1898.

State, appellant, v. J. A. Gunn and R. J. Boatman.

Defendants were indicted for murder in the second degree and acquitted; appealed from Mahaska county. Reversed October 4, 1898.

State v. Mark Hallinan, et al, appellants.

Defendants were convicted of murder in the first degree; appealed from Clinton county. Case dismissed by appellants. Defendant pardoned by governor.

State v. Gustav Hamann, appellant.

Defendant was convicted of seduction; appealed from Lyon county. Reversed December 12, 1899.

State v. Bert Haney, appellant.

Defendant was convicted of burglary; appealed from Pottawattamie county. Affirmed December 15, 1899.

State v. J. T. Hayes, appellant.

Defendant was convicted of seduction; appealed from Scott county. Affirmed April 7, 1898.

State v. C. C. Heacock, appellant.

Defendant was convicted of libel; appealed from Washington county. Affirmed October 7, 1898. Petition for rehearing filed December 1, 1898; overruled February 6, 1899.

State v. L. W. Healey, appellant.

Defendant was convicted of murder in the first degree; appealed from Dubuque county. Affirmed April 8, 1898.

State v. N. J. Hengen, appellant.

Defendant was convicted of embezzlement; appealed from Polk county. Affirmed December 15, 1898.

State v. Harl Hoskins, et al, appellants.

Defendants were convicted of rape; appealed from Monroe county. Affirmed December 12, 1899.

State v. James M. Hoskins, appellant.

Defendant was convicted of criminal libel; appealed from Buena Vista county. Affirmed December 13, 1899.

State v. Henry A. House, appellant.

Defendant was convicted of grand larceny; appealed from Dubuque county. Affirmed April 7, 1899.

State v. John Hudson, appellant.

Defendant was convicted of murder in the first degree; appealed from Clinton county. Affirmed October 3, 1899. Petition for rehearing filed November 3, 1899. Not decided January 1, 1900.

State v. Zelmer Hughes, appellant.

Defendant was convicted of seduction; appealed from Pottawattamie county. Affirmed October 5, 1898.

State v. Huxford, et al, appellants.

Defendants were convicted of rape; appealed from Monroe county. Affirmed December 12, 1899.

State v. G. C. Jamison, A. A. Smith, et al, appellants.

Defendants were convicted for using false weights; appealed from Franklin county. Submitted October 25, 1899, but not decided January 1, 1900.

State v. William Jamison, appellant.

Defendant was convicted of assault; appealed from Butler county. Affirmed January 19, 1898.

State, appellant, v. Chris Johnson, et al.

Defendants were indicted for maintaining a public hall in which minors were permitted to remain and take part in playing billiards. The state appealed from the judgment of the district court of Palo Alto county. Reversed May 9, 1899.

State v. James Kennedy, appellant.

Defendant was convicted of assault with intent to commit murder; appealed from Polk county. Affirmed December 14, 1898.

State v. Charles L. King, appellant.

Defendant was convicted of conspiracy; appealed from Buchanan county. Reversed April 6, 1898.

State v. Frank Klony, appellant.

Defendant was convicted of murder in the second degree; appealed from Polk county. Affirmed February 8, 1899.

State v. Harry Lash, appellant.

Defendant was convicted of assault with intent to commit rape; appealed from Keokuk county. Affirmed October 28, 1899.

State v. William Lightfoot, appellant.

Defendant was convicted of malicious mischief; appealed from Cedar county. Reversed January 26, 1899.

State v. Amsey Lindley, Jr., appellant.

Defendant was convicted of uttering forged paper; appealed from Jones county. Affirmed October 28, 1899.

State v. James Lorraine, appellant.

Defendant was convicted of burglary; appealed from Tama county. Affirmed April 7, 1899.

State v. Charles McAllister, et al, appellants.

Defendants were convicted of assault with intent to inflict great bodily injury; appealed from Dubuque county. Reversed April 5, 1899.

State v. Peter McGinn, appellant.

Defendant was convicted of seduction; appealed from Monroe county. Reversed December 12, 1899.

State v. J. T. McIntosh, et al, appellants.

Defendants were convicted of conspiracy; appealed from Madison county. Submitted on abstract October 7, 1898. Submission set aside and case continued. Affirmed October 10, 1899.

State v. Wm. M. Keavitt, et al, appellants.

Defendants were convicted of larceny; appealed from Linn county. Reversed December 15, 1898.

State v. James McDonough, appellant.

Defendant was convicted of rape; appealed from Johnson county. Affirmed December 15, 1897. Petition for rehearing was filed December 18, 1897; overruled February 10, 1898.

State v. H. M. Marshall, appellant.

Defendant was convicted of burglary; appealed from Benton county. Affirmed April 7, 1898.

State v. Frank Mikota, appellant.

Defendant was convicted of maintaining a liquor nuisance; appealed from Howard county. Reversed October 4, 1899.

State v. James Minor, et al, appellants.

Defendants were convicted of grand larceny; appealed from Harrison county. Affirmed December 14, 1898.

State v. William Minor, appellant.

Defendant was convicted of larceny; appealed from Harrison county. Reversed April 5, 1899.

State v. J. C. Moats, appellant.

Defendant was convicted of obtaining a deed under false pretense; appealed from Wright county. Affirmed April 6, 1899.

State v. M. C. Moore, appellant.

Defendant was convicted of larceny; appealed from Woodbury county. Affirmed February 11, 1898.

State v. Harry Moothart, appellant.

Defendant was convicted of abortion; appealed from Washington county. Affirmed October 6, 1899.

State v. Thomas Murphy, appellant.

Defendant was convicted of assault with intent to commit murder; appealed from Polk county. Affirmed October 5, 1899.

State v. W. F. Nine, appellant.

Defendant was convicted of obtaining property under false pretenses; appealed from Polk county. Reversed April 8, 1898.

State v. Frank Novak, appellant.

Defendant was convicted of murder in the first degree; appealed from Benton county. Affirmed at the May term, 1899. Petition for rehearing overruled.

State v. J. K. Olds, appellant.

Defendant was convicted of forgery; appealed from Dallas county. Affirmed October 4, 1898.

State, appellant, v. Peter Olinger.

Defendant was indicted for violation of public duty; the state appealed from the judgment of the district court of Dubuque county, and the case was reversed October 11, 1897. Petition for rehearing was filed December 8, 1897. Case affirmed on rehearing December 13, 1899.

State v. Ole Olson, appellant.

Defendant was convicted of seduction; appealed from Montgomery county. Affirmed December 14, 1898. Petition for rehearing was filed January 5, 1899, and overruled.

State v. Clay Owens, appellant.

Defendant was convicted of larceny; appealed from Davis county. Reversed May 26, 1899.

State v. Jesse Palmer, appellant.

Defendant was convicted of larceny; appealed from Monroe county. Affirmed May 27, 1899.

State v. J. L. Perry, appellant.

Defendant was convicted for resisting an officer; appealed from Hardin county. Reversed October 17, 1899.

State v. J. N. Porter, appellant.

Defendant was convicted of subornation of perjury; appealed from Guthrie county. Reversed October, 1897. Opinion withdrawn and submission set aside. Submitted February 8, 1898, and affirmed May 23, 1898.

State v. Fred Reid, appellant.

Defendant was convicted of manslaughter; appealed from Polk county. Affirmed February 11, 1898.

State v. Eugene Reilly, appellant.

Defendant was convicted of maintaining a liquor nuisance; appealed from Winnebago county. Affirmed April 5, 1899. Petition for rehearing submitted and overruled October 14, 1899.

State v. M. P. Reinheimer, appellant.

Defendant was convicted of seduction; appealed from Linn county. Reversed October 28, 1899.

State v. Victor Repp, appellant.

Defendant was convicted of larceny; appealed from Monroe county. Affirmed January 18, 1898.

State v. Alonzo Robbins, appellant.

Defendant was convicted of murder in the first degree; appealed from Lee county. Reversed December 13, 1899.

State v. Richard Rowe, appellant.

Defendant was convicted of embezzlement; appealed from Poweshiek county. Affirmed January 18, 1898.

State v. Jos. Russell, appellant.

Defendant was convicted for resisting an officer; appealed from Woodbury county. Affirmed October 6, 1898.

State v. John V. Schuler, appellant.

Defendant was convicted of maintaining a liquor nuisance; appealed from Howard county. Reversed October 4, 1899.

State v. T. Shea, appellant.

Defendant was convicted of assault to commit great bodily injury; appealed from Wapello county. Reversed April 6, 1898.

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

Defendant was indicted for violation of official duty. The state appealed from the judgment of the district court of Dubuque county. The case was reversed October 8, 1897. Petition for rehearing filed December 8, 1898, and overruled February 8, 1899.

State v. Frank Sherman, appellant.

Defendant was convicted of rape; appealed from Cass county. Affirmed December 15, 1898.

State v. Betsy Smith, appellant.

Defendant was convicted of murder by poison; appealed from Polk county. Affirmed December 15, 1898.

State v. Frank Z. Smith, appellant.

Defendant was convicted of adultery; appealed from Warren county. Affirmed May 17, 1899.

State v. J. F. Smith, appellant.

Defendant was convicted of embezzlement; appealed from Lee county. Reversed February 1, 1899.

State v. Geo. S. Smith, appellant.

Defendant was convicted of manslaughter; appealed from Johnson county. Appeal abated by death of defendant.

State v. M. Snyder, appellant.

Defendant was convicted of maintaining a liquor nuisance; appealed from Poweshiek county. Affirmed April 8, 1899.

State v. M. Snyder, appellant.

Defendant was convicted of maintaining a liquor nuisance; appealed from Poweshiek county. Affirmed April 8, 1899.

State v. J. M. Spayde, appellant.

Defendant was convicted of forgery; appealed from Webster county. Reversed December 13, 1899.

State v. E. Stanley, appellant.

Defendant was convicted of robbery; appealed from Woodbury county. Affirmed October 6, 1899.

State v. John G. Steele, appellant.

Defendant was convicted of murder; appealed from Monroe county. Affirmed February 12, 1898.

State v. Nels Tham, appellant.

Defendant was convicted of adultery; appealed from Polk county. Affirmed October 27, 1898. Petition for rehearing filed October 31, 1898, and overruled.

State v. Charles Trauger, appellant.

Defendant was convicted of burglary; appealed from Monona county. Reversed December 14, 1898. Petition for rehearing by the state submitted October 12, 1899, granted and case affirmed January 16, 1900.

State v. Robert Willey, appellant.

Defendant was convicted of assault with intent to commit great bodily injury; appealed from Ringgold county. Affirmed October 27, 1898.

State v. Mary Whitcomb, appellant.

Defendant was convicted of conspiracy; appealed from Polk county. Affirmed December 15, 1899.

State v. Joe Wolverton, appellant.

Defendant was convicted of murder by shooting; appealed from Clarke county. Case dismissed October 3, 1899.

State v. George Wrand, et al, appellants.

Defendants were convicted of burglary; appealed from Tama county. Affirmed April 7, 1899.

State v. James Wycoff, appellant.

Defendant was convicted of adultery; appealed from Wapello county. Dismissed by appellant.

State v. William Young, appellant.

Defendant was convicted of murder in the first degree; appealed from Woodbury county. Affirmed April 6, 1898.

SCHEDULE "B."

The following is a list of civil cases, in which the state was interested, for the years 1898 and 1899:

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

This was a probate matter pending in the district court of Scott county. The state of Iowa intervened and instituted proceedings to fix the amount of collateral inheritance tax due the state. The decision of the district court was in favor of the state. The administrator appealed from the judgment of the district court. The appeal from the judgment of the lower court was affirmed April 6, 1898.

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

Action was brought in mandamus in the district court of Polk county, Iowa, by the plaintiff, claiming that he was elected brigadier-general of the First brigade of the Iowa National guards, to require the defendants to declare plaintiff elected, and to issue a commission accordingly. The case was tried in January, 1897, and judgment was rendered against the defendants, ordering the issuance of a commission to the plaintiff. An appeal was taken to the supreme court of the state, and the judgment of the lower court was affirmed by operation of law May 28, 1898, the court standing three for affirmance and three for reversal.

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

This action was commenced in the district court of Polk county, Iowa, in October, 1893, to recover from the defendant, an ex-deputy oil inspector, and his official bondsmen, Simon Casady and J. H. Holland, $100 retained by said Dyer at the time of his vacating his office. February 10, 1897, judgment was rendered against the said defendant and his bondsmen for $122.15 and costs of suit. Thereafter the defendants appealed from the said judgment, and the case was affirmed December 14, 1898. Said judgment and costs were paid February 1, 1900.

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

Action was brought in the district court of Polk county in certiorari, to review the action of the so-called election board in overruling the objections to permitting the people's party ticket appearing on the official ballot, and the use of the name People's party over the ticket headed by Charles A. Lloyd, candidate for governor. An order was made by the district court setting aside the action of the board in overruling the objections, and the board was ordered not to permit such ticket to appear upon

the ballot. The defendants appealed, and filed a supersedeas bond, but the case was settled by state paying costs.

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

Action was brought in the district court of Polk county, in certiorari, against the superintendent of public instruction, to review his action in a case which came before him upon appeal, in which the teacher's certificate held by the plaintiff had been revoked. The state filed a demurrer to plaintiff's petition, which was sustained and the case dismissed.

Wilson L. Meade, et al, copartners under the firm name of Callaghan & Co., complainants, v. Emlin McClain. In the circuit court of the United States for the Northern District of Iowa.

Wilson L. Meade, et al, copartners under the firm name of Callaghan & Co., complainants, v. Emlin McClain, Freeman R. Conaway and A. B. Shaw, respondents. In the circuit court of the United States for the Southern District of Iowa.

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

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

In November, 1895, the state intervened in the above entitled actions, pending in the district court of Humboldt county, claiming the title to a tract of land which was formerly known as Owl lake, the same having been meandered by the surveyors of the general government. The plaintiffs claimed under the swamp land grants. The state intervened to recover possession of the land and to have the title of the lake beds of Iowa settled by the courts. The cases were tried in November, 1896. Judgment was rendered February 11, 1897, dismissing the intervenor's petition, from which judgment the state appealed. Upon appeal, the judgment of the lower courts was affirmed May 26, 1899, from which decision the state has taken a writ of error to the supreme court of the United States, where the case is still pending.

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

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

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

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

State of Iowa Ex. Rel. Attorney-General v. William Beardsley.

This action was brought in the district court of Mahaska county by the fish commissioner, to compel the building of a fish-way in a dam across Skunk river. The case was tried below, and judgment was rendered against the state in April, 1897, from which an appeal was taken to the supreme court, where the judgment of the lower court was reversed May 16, 1899, the court holding the law requiring fish-ways to be put in dams across rivers, to be constitutional.

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

An action in the district court of Pottawattamie county, to enjoin defendants from collecting an inheritance tax upon the property of the estate of Frank C. Stewart, on the ground that chapter 28 of the acts of the Twenty-sixth General Assembly, and the reenactment thereof in the code of 1897, are in contravention of the fourteenth amendment to the constitution of the United States, and of section 9, article 1, of the constitution of this state. Defendants demurred to the petition but their demurrer was overruled and decree was entered for plaintiff as prayed. Defendants appeal to the supreme court where the judgment of the lower court was reversed January 22, 1900.

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

The plaintiff, whose certificate to practice medicine was revoked, filed a petition in certiorari in the district court of Polk county. The cause was heard in the district court and judgment was rendered for the defendant. The plaintiff appealed to the supreme court, where the judgment of the lower court was affirmed October 24, 1898.

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

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

In the matter of the estate of Stanton H. McCammon, deceased. I. A. McCammon, appellant, v. State of Iowa, John Herriott, Treasurer of State.

On the 6th day of December, 1898, the parties to this action, by their attorneys, filed with the district court of Iowa in and for Polk county, a

stipulation for the purpose of hearing and determining the question of the liability of the estate of said McCammon, deceased, for collateral inheritance tax on the four thousand dollars insurance money collected by the administrator of said estate on policies of said insurance payable to said estate at the time of death of deceased. On the 19th day of October, 1898, the court in and for Polk county, found under the stipulation filed herein, that said four thousand dollars life insurance money in the hands of the administrator of said estate, is subject to the collateral inheritance tax. An appeal was taken to the supreme court from the above judgment, and the same was dismissed for want of prosecution, February 6, 1900.

Ed. Travis, appellant, v. W. A. Hunter, Warden of the Penitentiary at Anamosa, Iowa.

This was a habeas corpus proceeding to secure the release of the plaintiff from the state penitentiary at Anamosa. There was a trial and a judgment which denied the writ of habeas corpus and remanded the plaintiff to the custody of the defendant, who is warden of the penitentiary at Anamosa. From this judgment the plaintiff appealed to the supreme court wherein the judgment of the lower court was affirmed October 27, 1899.

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

A suit in equity, in the United States circuit court for the Southern district of Iowa, Central division, praying for a preliminary injunction to restrain the inforcement of the provisions of section 1333 of the code of Iowa, and to test the constitutionality thereof. To the bill filed the defendants interposed a demurrer. Demurrer sustained and bill dismissed.

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

An action at law brought in the district court of Polk county, Iowa, to recover taxes paid defendant as treasurer of the state. Defendant in his individual capacity filed a motion to be dismissed from the case, which motion was sustained. In his capacity as treasurer, he filed a demurrer to the petition, which was also sustained. From the decision of the court on the motion, and demurrer, the plaintiff appealed to the supreme court, where the judgment of the district court was affirmed October 27, 1899, from which decision plaintiffs have taken a writ of error to the supreme court of the United States, where the case is still pending.

Hawkeye Insurance Company and five other Insurance Companies v. F. A. French, Assessor of the City of Des Moines, Iowa.

Suit in equity brought in the district court of Polk county, Iowa, to enjoin defendant, who is an assessor for the city of Des Moines, from listing and assessing the property and capital stock of plaintiffs, who are corporations organized under the laws of this state for the purpose of doing business of fire insurance. The trial court denied the relief asked, and from this judgment the plaintiffs appealed to the supreme court, where the judgment of the trial court was affirmed October 26, 1899.

State of Iowa on the relation of Milton Remley, Attorney-General, v. Byron F. Meek, et al.

An action in equity to abate a nuisance created by using a dam across the Des Moines river at Bonaparte, Iowa, without providing a suitable

fish-way as required by law. To the petition an answer was filed averring the unconstitutionality of the law in question, and also the fact that there had been a former adjudication of the case. The prayer of the petition was denied, and plaintiff appealed to the supreme court, where the case is now pending.

State of Iowa, plaintiff, v. Sioux County.

An action at law to recover a balance due the State from said county, for board of patients at the Hospital for the Inaane, at Independence, Iowa. A change of venue was taken from defendant county to the county of Plymouth, where the case is still pending, and will be tried as soon as the same can be reached for trial.

The State of Iowa on relation of Attorney-General, plaintiff, v. W. A. Smith, defendant.

An action in equity asking for an injunction to restrain defendant from draining Noble lake in Pottawattamie county. Said lake is a permanent body of water and belongs to the plaintiff herein, and constitutes one of the principal waters of the state. The case is still pending in the district court.

John Herriott, Treasurer of the State of Iowa, appellant, v. Sheldon Bacon, Executor of the Estate of Sarah F. Ransom.

Sarah F. Ransom died testate January 9, 1897, leaving a will, bequeathing the sum of five thousand eight hundred and seventy-four ($5,874) dollars in value to collateral heirs, and eight thousand ($8,000) dollars to her grandsons. The defendant, as executor under the will, paid the plaintiff, as treasurer of state, two hundred and forty-three dollars and seventy cents ($243.70), being 5 per centum of the amount passing to the collateral heirs, less a thousand dollars, and this action was brought in the district court of Johnson county for the recovery of the inheritance tax on the remaining thousand dollars. A demurrer was filed by the executor of the estate, which was sustained, and the state failing to further plead its petition was dismissed. From the order of the court dismissing plaintiff's petition, an appeal was taken to the supreme court. Upon this appeal the supreme court reversed the decision of the lower court on January 25, 1900.

In the matter of the estate of John Clark Weaver, deceased.

The administrator in the above entitled estate made an application to the district court of Lee county for an order directing him as to his duty in regard to paying an inheritance tax upon the proceeds of a sale of 428 head of cattle belonging to the estate, and which were then upon a farm belonging to a brother of the decedent in the state of Missouri. From an order holding that the administrator was not required to pay the tax the state appealed. The judgment of the lower court was affirmed January 24, 1900.

State of Iowa on relation of Milton Remley, Attorney-General, v. The Equitable Mutual Life Association of Waterloo.

A suit in equity in the district court of the state of Iowa, in and for Black Hawk county, praying that a receiver be appointed to take charge of the property and affairs of the defendant. Also a restraining order preventing the defendant, its officers, agents and employes from removing

from the office of the company any books, papers or property of said company, or from disposing of any of its assets, and that the company be wound up and the corporation be dissolved. The prayer of the petition was granted and the company is now in the hands of a receiver.

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

A suit in equity brought in the district court of the state of Iowa in and for Dubuque county, praying that a receiver be appointed to take charge of all books, assets, and property of said association, and that a restraining order be granted, prohibiting any of said parties therein named, or any one having the assets of the said company in their hands, from transferring the same or removing the same out of the jurisdiction of the court, or making any assignment or distribution of the same, and that the Home Savings & Trust company be restrained from filing of record any deed or deeds which they may have in their possession, or from transferring any of the property for which they have unrecorded deeds. Upon full argument and final hearing of the case, the prayer of the petition was granted. The above association is now in the hands of a receiver.

Joseph Brown, et al, v. Margaret Bell, the State of Iowa, et al.

A suit in equity brought in Iowa county September 23, 1899, to quiet the title to certain lands in which it is claimed the state has some interest. The attorney-general was asked to accept service of notice in order that the state might be made a party hereto. This he refused to do. The action is still pending in said court.

P. Farrington v. State of Iowa.

An action at law begun in the district court of Cedar county, Iowa, by the filing of a petition September 4, 1899, asking damages in the sum of $175,000 for false and illegal imprisonment of plaintiff. No service of the notice has been made on either the attorney-general or the state of Iowa. It is probable that nothing will come of this action. It is still pending in the district court.

William L. Ogden v. Leslie M. Shaw, Governor of State of Iowa.

An action in the district court of Polk county, Iowa, asking that an order of mandamus issue from said court, directed to the governor of the state of Iowa, commanding him to report the selection of land in Woodbury county, commonly known as "Sand Hill lake bed," as swamp and over-flow land to the commissioner of the general land office at Washington, and commanding that the said governor take such steps as he may deem expedient to secure to the state of Iowa the title to said land as swamp land, and that he cause to be issued and delivered to Woodbury county, Iowa, a state swamp land patent to said land. The case is still pending in the district court.

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

This action was brought in the district court of Polk county at the September term of court, 1897, upon the official bond of the defendant, to recover damages for the violation of his official duties as secretary of state. The case was tried to a jury at the March term, 1899, and a verdict for $1,219, money misappropriated, and $362.35 as costs in said action was rendered in favor of the state. On this verdict judgment was rendered,

from which the state appealed to the supreme court. Defendants served notice of cross-appeal. The case is now being prepared for hearing in the supreme court.

State of Iowa, plaintiff, v. I. M. Earl, the estate of Geo. G. Wright, deceased, and the estate of Mary H. Wright, deceased, defendants.

Action in the district court of Polk county, Iowa, to quiet title to certain real estate. Decreed as prayed.

R. R. Currier, plaintiff, v. J. E. Henderson, and the State of Iowa, defendants.

A special proceeding in the district court of Lee county, Iowa, asking to have a surveyor appointed to establish a boundary line. The court refused to entertain jurisdiction as to the State, for the reason that the State could not be made a party defendant in a civil action without it consent.

SCHEDULE "C."

The following is a list of criminal cases pending in the supreme court of Iowa on January 1, 1900:

TITLE OF CASE.	APPEALED FROM.	OFFENSE.
State v. Wm. Baughman, appellant	Cass	Incest.
State v. Wm. Boone, appellant	Johnson	Assault with intent to commit murder.
State v. Jos. Burns, appellant	Dubuque	Seduction.
State v. S. E. Carter, appellant	Warren	Obtaining property under false pretenses.
State v. Marion Chaney, appellant	Dallas	Adultery.
State v. James Chapman, appellant	Jones	Burglary.
State v. S. D. Clough, appellant	Warren	Perjury.
State v. Earl Coffman, appellant	Keokuk	Seduction.
State v. James Cunningham, appellant	Audubon	Murder.
State v. Jas. H. Easton, appellant	Fayette	Fraudulent banking.
State v. J H Engle, appellant	Clay	Larceny by embezzlement
State v. M. Evans, appellant	Hardin	Keeping gambling-house.
State, appellant, v Ted Evans	Mahaska	Liquor nuisance.
State v. O. Garbroski, appellant	Mahaska	Peddling without license.
State v. Jacob Geier, appellant	Keokuk	Murder.
State v. Wm. Glover, appellant	Des Moines	Robbery.
State v. F. W. Gregory, appellant	Hardin	Liquor nuisance.
State v. Chas. Hart, appellant	Appanoose	Burglary.
State v. John Hudson, appellant	Clinton	Murder.
State v. G. O. Jamison, appellant	Franklin	Using false weights.
State v. O. S. Keenan, appellant	Page	Libel.
State v. Simon Klepper, appellant	Allamakee	Arson.
State v John McGarry, appellant	Dubuque	Murder.
State v Clarence Mills, appellant	Davis	Murder in first degree.
State v. Harve Owens, appellant	Davis	Larceny.
State v. Will Owens, appellant	Hardin	Keeping gambling-house.
State v. Frank Peterson, appellant	Clinton	Rape.
State E. A. Pinckney, appellant	Winnebago	Liquor nuisance.
State appellant, v. O F. Santee	Polk	Using gasoline for illuminating a building.
State v. J. M. Spayde, appellant	Webster	Forgery.
State v. Frederick Stahley, appellant	Louisa	Incest.
State v. R. R. Swallum, appellant	Hardin	Liquor nuisance.
State v. August Swanson, appellant	Winnebago	Nuisance.
State v. Clark Todd, appellant	Benton	Committing a felony.
State v. R. Tripp, appellant	Dallas	Obtaining signature by false pretense.
State v. Frank Ward, appellant	Des Moines	Larceny.
State v Owen Worthen, appellant	Benton	Burglary.
State v. David R. Wright, appellant	Appanoose	Murder.
State v. Leonard Wycoff, appellant	Shelby	Seduction.
State v. Joe Zimmerman, appellant	Linn	Keeping gambling-house.

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

In the supreme court of the United States:

A. C. Campbell, appellant, v. Edward F. Waite. Appeal from the circuit court of appeals of the United States.

In the district court of the United States for the Southern district of Iowa:

State of Iowa v. Charles A. Spiegel, alias Charles Cohn, petitioner. Application for writ of habeas corpus.

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

John Herriott, treasurer of state, v. Seldon Bacon, as executor of the estate of Sara F. Ransom. Appeal from Johnson county district court.

State of Iowa, appellant, v. W. M. McFarland, *et al*, appellees. Appeal from Polk district court.

In the matter of the estate of John Clark Weaver, deceased. Appeal from Lee county district court.

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

Joseph Brown, *et al*, v. Margaret Bell, the state of Iowa, *et al.* Pending in the district court of Iowa county.

P. Farrington v. the state of Iowa. Pending in the district court of Cedar county.

William L. Ogden v. Leslie M. Shaw, governor of Iowa. Pending in the district court of Polk county.

State of Iowa on relation of Milton Remley, attorney-general, v. Byron F. Meeks, *et al.* Pending in the the district court of Van Buren county.

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

State of Iowa v. Sioux county. Pending in the district court of Plymouth county.

State of Iowa on relation of the attorney-general v. W. A. Smith. Pending in the district court of Pottawattamie county.

State of Iowa on relation of the attorney-general v. The Equitable Mutual Life Association of Waterloo. Pending in the district court of Black Hawk county.

State of Iowa on relation of the attorney-general v. The Iowa Mutual Building and Loan Association, *et al.* Pending in the district court of Dubuque county.

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SECOND BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA.

HON. MILTON REMLEY,
ATTORNEY-GENERAL.

Transmitted to the Governor, January, 1900.

PRINTED BY ORDER OF THE GENERAL ASSEMBLY.

DES MOINES
F. R. CONAWAY, STATE PRINTER
1900

REPORT

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

To Hon. Leslie M. Shaw, Governor of Iowa:

In compliance with the requirements of law, I hereby submit to you a report of the business transacted by this office during the years 1898 and 1899.

Schedule "A" is a complete list of all criminal appeals submitted to the supreme court, and the disposition made thereof.

Schedule "B" is a list of all the civil cases tried in the different courts of the state and of the United States, together with the results of such trials.

Schedule "C" is a statement of all criminal and civil cases pending on January 1, 1900.

Schedule "D" contains the official opinions; *i. e.*, the written opinions during the years 1898 and 1899.

CRIMINAL APPEALS.

The policy which was referred to in my last report, of insisting that all criminal appeals shall be submitted to the supreme court at as early a day as they can reasonably be, has been salutary. When it is understood that unnecessary delays in the determination of appeals in criminal cases cannot be obtained, very few appeals will be taken other than those which are thought to have real merit. Under the policy adopted there has been a material reduction in the number of appeals coming to the supreme court.

An examination of schedule "A" shows that in comparatively few cases the judgments of the district courts in criminal cases have been reversed. This is an evidence of the distinguished ability and the care with which the district courts of the state guard the interests of the people on the one hand, and the rights of persons charged with the commission of crime on the other. It is no less a tribute to the efficiency of the county attorneys of the state. The state is to be congratulated, upon the whole, upon the wise and faithful administration of its criminal laws. As a rule, the laws have been well enforced,

and the expense of their enforcement has been light as compared with many states. There are, without doubt, exceptions and exceptional cases, but the results which have come under my observation from the various counties of the state lead to the conclusion that the people have been faithfully served in the administration of the criminal laws of the state.

Several opinions have been filed and judgments rendered by the supreme court which suggests that in certain respects some changes ought to be made in the criminal code.

The case of State v. Fields, 106 Iowa, 406, is one in which the defendant was indicted for fraudulent banking. He was president of a national bank, and demurred to the indictment on the ground that the state could not enact a law to punish an officer of a national bank for any act done in connection therewith; that the bank was organized under an act of congress, and for that reason was not subject to the laws of the state. This view was adopted by the district court, and the demurrer was sustained and the defendant was discharged. The state appealed, and the judgment of the district court was reversed (98 Iowa, 748). Afterward, the defendant was again indicted, and upon trial was convicted and sentenced to imprisonment. On appeal, the judgment was reversed, the court holding that the judgment on the demurrer to the first indictment was final, and the defendant could not be tried for the offense of which he was undoubtedly guilty. There was plainly a miscarriage of justice through a defect in the law.

The case of State v. Spayde, 80 N. W. R., 1058, illustrates another defect in the law. The defendant was first indicted for forgery in Humboldt county. During the trial he testified that he signed the forged name in Webster county. The court, under the provisions of section 5389 *et seq.*, discharged the jury and required him to give bonds to appear and await the action of the grand jury in Webster county. He was indicted, tried and convicted in Webster county, and appealed to the supreme court. The judgment was reversed, the court holding that the Humboldt district court had no authority to discharge the jury, and its act in so doing amounted to an acquittal, and the defendant was improperly put upon trial in Webster county.

Whatever views may be entertained as to the correctness of the decisions of the court, they are now the law in this state. The effect of these decisions is apparent. Two persons, undeniably guilty of felony, go scot free. The counties are mulct

in costs for having attempted to bring them to justice. The door is left open for the escape of other offenders under similar circumstances. A few changes in the sections referred to in the opinions filed in these two cases would bring the law in the respects pointed out more in harmony with the policy of this state, concerning which it has been said by the supreme court: "The technical exactness of the common law, as enforced in criminal prosecutions, whereby many guilty persons escaped the just penalties due their crimes, and which justly became the reproach of that system of jurisprudence, has been wisely superseded in this state."

The constitution provides that "no person shall, after acquittal, be tried again for the same offense." Under this provision it cannot be claimed, as a constitutional right, that anything short of a genuine acquittal after a fair investigation into the merits of the accusation, may be urged as a bar to the trial. In cases like those to which reference has been made, there has been no trial; certainly no acquittal in a constitutional sense, yet persons indisputably guilty are, under the statute, permitted to escape the just penalties due to their crimes.

Section 254 of the code authorizes the district judge, after the defendant in a criminal case has perfected his appeal, upon being satisfied that the appellant is unable to pay for a reporter's transcript of the evidence, to order the same to be made at the expense of the county. The defendant has no constitutional right to demand that the expense of his appeal shall be paid by the public or the county. Whatever is given is gratuity. The provision is probably wise and humane, but rather extraordinary, and subject to abuse. The district judge is the one most capable of determining whether the case is one in which the county should pay for such transcript. I supposed the discretion was vested in the district judge alone, but in the case of State v. Wright, 82 N. W. R., 1013, the supreme court, by a majority of one, held otherwise.

In view of this decision, and the further fact that in most criminal prosecutions where parties can furnish bonds, and delay is sought, there may be expected two appeals in every case in which the judge refuses to make the order. The appeal in the main case cannot be heard until the appeal from the refusal of the judge to order a transcript at the expense of the county be determined. The length of time elapsing before the sentence is executed diminishes the deterrent effect upon

offenders. Beside this, additional costs are placed upon the county without a commensurate benefit in the safeguards against the innocent suffering punishment unjustly.

In my opinion, it would be wise for the legislature to amend section 254 so that the decision of the district judge should be final. There is very little danger of an injustice being done to anyone by so doing. He is better able to determine the matter correctly than the supreme court, from the nature of the case. The case referred to illustrates this. The supreme court can, and often does, waive the rule requiring the abstract and argument to be printed. There was no application in that case to waive the printing of the record. The abstract was printed and is certified to have cost $353. The argument will be an additional cost. The transcript did not probably cost half as much as printing the abstract and argument. It is absurd to say the defendant was unable to pay for a transcript when he was able to pay two or three times as much for printing which might have been waived.

The wisdom of the law is at best questionable. But when it leads to two appeals, with the attendant expense and the long delay in finally disposing of criminal cases, it should, in my opinion, be amended so as to avoid such consequences.

The case of the State of Iowa v. E. F. Waite is one of great interest. Waite was indicted for violating section 4767 of the code, by making threats to compel one to do an act against his will. At the time he was in the employ of the United States pension bureau. He urged, as a defense, that what he had done was in the line of duty as an officer of the United States, and hence the state court had no jurisdiction to try him for the offense. He was convicted in the district court and appealed to the supreme court, where the judgment of the district court was affirmed. He then surrendered himself to the sheriff and applied to United States District Judge Shiras for a writ of *habeas corpus*. The writ was granted, and on a hearing, Waite was discharged. The opinion of the learned judge held in substance that the state court had no jurisdiction to try a United States officer or agent "when the acts complained of were done in and about a subject matter within federal jurisdiction;" that even if he exceeded his authority under the laws of the United States, and the criminal act charged against him was in excess of such authority, yet he is amenable to the United States alone, and the state courts have no jurisdiction

to determine the question whether or not the act complained of as a violation of the criminal law of the state was outside of the line of his duty as a federal officer. This doctrine is so far reaching in its consequences that I cannot accept it as the true doctrine. Suppose a mail carrier, in his daily rounds about the city, should, without checking his gait, deal a vicious blow upon every person he meets; it can be affirmed of him that he "was acting under the authority of the United States when the acts complained of were done, in and about a subject matter within the federal jurisdiction." It is obvious that knocking people down was not in the line of his duty, but it was done when engaged "in and about a subject matter within federal jurisdiction." If the doctrine announced in the Waite case is true, then such a man could not be punished for his crimes. The state court has no jurisdiction to determine whether or not it was an excess of authority under the federal law. The United States courts could not punish him for violating the criminal law of the state. The state might be rendered helpless if the doctrine were carried to its logical conclusion.

I appealed from the judgment of the United States circuit court of appeals, affirming the judgment of Judge Shiras, to the United States supreme court, where the case is still pending.

CIVIL CASES.

Among the civil cases which have been in charge of this office have been several of no little importance.

An attempt was made to have the law imposing a tax upon insurance companies declared unconstitutional.

The first case was the Scottish Union and National Insurance Company v. John Herriott, treasurer of state. The plaintiff had paid to the treasurer the amount of tax found due under Sec. 1333 of the code, under protest, and brought an action to recover the amount paid, alleging that the law under which it was collected is unconstitutional. It was claimed that the law was obnoxious to several provisions, both of the state and of the United States constitutions. A demurrer filed by the defendant was sustained by the district court of Polk county, Judge C. P. Holmes presiding, and judgment was rendered against the plaintiff for costs. The plaintiff appealed to the supreme court of this state, where the judgment of the court

below was affirmed, sustaining the constitutionality of Sec. 1333 of the code, which requires a greater tax to be paid to the state by insurance companies incorporated under the laws of another state than is required of those incorporated under the laws of this state.

The same question in another form was raised in the case of Manchester Fire Insurance Company and Thirty-three Other Companies v. John Herriott, treasurer and C. G. McCarthy, auditor, in the United States circuit court for the southern district of Iowa. The complainants filed a bill for an injunction to restrain the state treasurer from collecting the tax and the auditor from revoking the certificate of authority of said companies to do business in the state, and alleged the statute to be in violation of the constitution of the state and of the United States, and also in contravention of the civil rights act of congress. A demurrer to this bill was filed by the defendants. In a very able opinion by Judge Shiras (91 Fed. Rep., 711), the demurrer was sustained, the court holding that it is within the power of the state to exclude foreign insurance companies from the state, and if they are admitted, the state may impose such conditions of admission as it may deem proper.

The complainants have appealed this case to the United States supreme court, where it is still pending.

The case of the Scottish Union and National Insurance Company v. Herriott, has been taken to the United States supreme court on writ of error, and has not yet been reached for hearing.

These cases reaffirm the doctrine announced by the United States supreme court, that it is in the power of a state to impose upon foreign corporations such terms and conditions as the legislature may deem proper as a pre-requisite for such companies doing business in the state. The only exception to the rule probably is such corporations as are engaged in interstate commerce, or used as agencies of the federal government for performing its proper functions.

THE COLLATERAL INHERITANCE TAX LAW

has been before the supreme court several times for the construction of its various provisions. In *re* McGhee Estate, 74 N. W. R., 695, the supreme court sustained the contention of the state that the so called exemption of $1,000 did not apply to each of the collateral heirs. Afterward the difficulty of applying the

law and harmonizing its provisions led to the conclusion that it was the intention of the legislature that no estate, the value of which did not exceed $1,000, should be subject to the collateral inheritance tax, and if the estate exceeded $,1000 in value, then such part thereof as passed to the collateral heirs was subject to the collateral inheritance tax.

This contention was presented in the case of Herriott v. Bacon, and the supreme court adopted this view of the law, the case being reported in the 81st N. W. R., 710. This decision has done much to simplify the collection of the collateral inheritance tax, and obviates many perplexing questions that were constantly arising under the view that section 1467 provided for an exemption of $1,000 to the collateral heirs.

A suit was brought entitled Ferry, *et al*, v. Campbell, administrator, and John Herriott, treasurer, in the district court of Pottawattamie county, to enjoin the collection of the tax. Judge Thornell held that chapter 28 of the acts of the Twenty-sixth General Assembly, imposing the collateral inheritance tax, to be unconstitutional, inasmuch as it did not provide for notice upon the heirs at the time of the appraisement of the property which was to be subjected to the payment of the tax. The state appealed from such judgment. After the judgment was rendered, chapter 37 of the acts of the Twenty-seventh General Assembly was enacted, which provided for the giving of notice. The supreme court adopted the views of Judge Thornell, that the original act was unconstitutional because of the absence of any provision requiring a notice to be given to the heirs of the proceedings to determine the amount of the tax, but the act of the Twenty-seventh General Assembly cured the defect. The case was reversed and remanded again to the district court of Pottawattamie county, it being left by the supreme court an open question whether the so-called curative act would subject the real estate of a testator which vested in the collateral heirs at the time of his death before the curative act was passed, to the tax imposed by the original act. The court held that as to the personal estate, which was not yet distributed, it was competent for the legislature, by the curative acts, to enforce the tax.

It has seemed to me on principle that there is no distinction to be made between the personal property and the real estate Both vest in the heirs or legatees immediately upon the death of the testator or deceased in the same sense. It is true that

the personal estate passes to the administrator or executor, as trustee for the heirs and the creditors, and such personal estate is subject to the claims of the creditors and the expense of administration. But the real estate is no less subject to the payment of debts in case the personal estate is not sufficient to pay the same. The nature of the tenure of both is the same, the distributees and devisees or heirs deriving their rights solely from the statute, and when their rights are ascertained in closing up the estate, the time at which their right attaches is referred back to the death of the deceased. Our statute seems to place the devisees of real estate and the legatees of personal estate upon the same basis, except that inasmuch as the personal estate is subject to waste and diminution, the administrator is required to take possession thereof as trustee for the parties interested therein; but since real estate cannot be spirited away, the law permits those who will probably be shown to be entitled thereto to take possession thereof, subject to the right of the administrator or executor to sell the same in case it be necessary so to do.

Only the estates of such persons as died between July 4, 1896, when the collateral inheritance tax law took effect, and April 8, 1898, when the curative act took effect, are affected by the question left unsettled in Ferry v. Campbell. But it so happenes that a number of valuable estates are affected, and the amount of tax involved is many thousands of dollars in the aggregate.

In view of the importance of the question, the case of Ferry v. Campbell will be tried in the court below upon the theory above suggested, and it is hoped that the state will be able to collect the tax imposed by the Twenty-eighth General Assembly upon all the real estate passing to collateral heirs after the date the act took effect. There is apparently no good reason why collateral heirs receiving a legacy from the personal estate should be required to pay a collateral inheritance tax to the state, when one receiving a devise of equal value in real estate is exempt therefrom.

CORPORATIONS.

The law requires the attorney-general to examine and approve the articles of incorporation of different kinds of insurance companies. This also includes the amendments that may be filed. The task thus imposed is one of no small

moment and responsibility. The laws of the state with reference to insurance, while containing many excellent features, are difficult of construction, and, as a whole, do not provide the protection to the people of the state that such Iowa laws were designed to secure.

It seems to have been the wish of different legislatures in the past to provide an easy means for the incorporation of various kinds of insurance companies, and to place them under the control of the state auditor. The prior statutes, many of which seem to have been enacted for the accommodation of some persons desiring to engage in some particular or peculiar kinds of insurance business, have been codified, and the result is that our present laws appear incongruous, indefinite and uncertain. To one who carefully studies the law, it appears like patchwork.

First, in regard to companies for insurance other than life.

The provisions for the incorporation of a mutual insurance company contemplate premium notes, which shall be liable for the losses of the company in an amount equal to the capital stock required of a stock company, and shall be obtained before the company shall be authorized to do business, the policy of the law being that no company, unless it has a capital, or an equivalent thereto, of $25 000 shall be authorized to do the insurance business authorized in chapter 4, title 9, of the code. Yet sections 1704 and 1707 permit the parties who put up such notes to withdraw the same or be released therefrom within one year upon the payment of all losses accruing during the year, notwithstanding the fact that great liability may be incurred by the company under policies still in force. Persons who insure become members of the company, and are bound for losses and necessary expenses accruing to the company during the time they are members in proportion to their premium notes. These notes are usually given payable in six yearly installments, as may be called for by the board of directors. It is comparatively easy for the persons who launch a mutual insurance company to withdraw what was intended as a guaranty for the payment of losses and to give stability to the company, and, by securing premium notes given for insurance, to put upon the persons thus insuring the expense and burden, not only of losses occurring during the time that they are insured, but the expense of the organization of the company.

Most insurance companies take a note for insurance running six years, 15 per cent thereof payable annually. The 15 per cent is supposed to be the limit of the premium which is to be paid annually during the six years. Instances have come to my knowledge where the company has failed a short time after such a note was given, and the maker thereof was compelled to pay the full amount without having received any practical benefit from the insurance, while those who launched the company have had their premium notes cancelled and escape with practically no loss. This is manifestly a wrong, but the condition of the law is such that there is no power in this office to prevent it.

The distinction to be made between mutual insurance companies subject to the provisions of chapter 4, of said title 9, and those mutual companies subject to the provisions of chapter 5 of said title of the code, is not very obvious. The law intended a distinction to be observed, but in their practical operation many companies subject to the provisions of said chapter 5 do the same class of business and in the same way as those organized to do the business referred to in said chapter 4. Some companies subject to said chapter 5 have taken premium notes and have assumed to do everything that might be done by a mutual company subject to the provisions of chapter 4. The control and supervision which the law gives to the auditor over companies subject to the provisions of chapter 5 is very light, and it is possible, because of the laxity of the law, to organize insurance companies the principal purpose of which is to raise a fund to pay the salaries of the promoters and officers, and afford as little protection as possible to the policy holders. Revoking the certificates of authority to do business of such a company when it is found to be in an unsound condition and does not pay its losses, does not meet the requirements of the case, or afford protection to those who have already taken policies and paid their money.

LIFE INSURANCE COMPANIES AND ASSOCIATIONS.

The law with reference to life insurance is in a worse condition. The statute does not make sufficient distinction between the different classes of life insurance companies. It provides for the incorporation of stock companies and of mutual companies on the level premium or natural premium plan. It provides for the incorporation of insurance companies

to do business on the stipulated premium or assessment plan. It also provides for fraternal, beneficiary societies and orders and associations which are, in fact, a kind of an assessment insurance company, many such fraternal societies, so called, being organized solely for the purpose of carrying assessment insurance.

It is contemplated in section 1798 that another kind of insurance association may be organized, which is wholly outside of the control of the law. It is thought, by the average man, that any corporation or association which insures the life of an individual is an insurance company. To the ordinary mind the excellent provisions of the statute requiring the valuation of the policies of level premium or natural premium companies to be made and securities equal thereto to be deposited with the auditor, applies to the class authorized to do business in the state. People fail to distinguish between an insurance company and an insurance association, and the different kinds of insurance organizations. The general claim made that Iowa's insurance laws are among the best and most rigid of any of the states for the protection of the policy holders, is based solely upon the provisions of section 1774 of the code. That section, however, applies to only one class of insurance incorporations, viz., level premium companies. Yet the broad assertion of the efficiency of the insurance laws of this state gives a popular confidence and a false sense of security in companies which have nothing of merit, and no ability to make good their contracts with persons insuring with them.

One company which I was called upon to wind up had not assets sufficient to pay the receiver's fees. Another company for which a receiver was appointed, which had been doing a large business in this and other states, will not be able to pay 10 per cent of the death claims which have accumulated, to say nothing of the loss to thousands who had paid premiums for years.

A few persons will organize a mutual insurance company, either life or fire. They retain the management thereof, and assume to acquire a property interest in such company because of their ability to secure re-election of themselves as officers of the company. It occasionally comes to my ears that the president or secretary of a mutual insurance company has sold out the company to some other person, receiving a monied consideration for resigning as president or secretary and turning over

the management to the purchaser. I am satisfied there are cases where persons have made a business of purchasing the management of stipulated premium or assessment companies and pretending to consolidate them with some other company for the profit there is in handling the assessments and wrecking the company or association. Because of the condition of our law, I have been compelled to approve as conformable to law many articles of incorporation against which my better judgment rebels. But I have used my limited discretion as far as possible to prevent the launching of insurance companies or associations which I was satisfied would prove a fraud and a deception upon the people who patronize them.

I am clearly of the opinion that our present laws in regard to insurance are insufficient to secure the end and the object of all laws controlling insurance.

OTHER CORPORATIONS.

Section 1640 of the code gives courts of equity full power, on good cause shown, to close up the business of any corporation, and authorizes the attorney-general to bring an action in the name of the state for such purpose. The power to bring such an action, to wind up the affairs of a corporation doing a fraudulent business, implies duty so to do. Banking corporations and insurance corporations and building and loan associations are, under different sections of the law, placed under the control of the auditor, and when he finds certain conditions exist, he is authorized to place the matter in the hands of the attorney-general, whose duty it is to bring an action to wind up the affairs of such corporation. I have thought these provisions precluded the attorney-general from taking any steps with reference to such corporations until he has been requested so to do by the auditor.

The duty, however, of the attorney-general, based upon the section above quoted, undoubtedly exists with reference to corporations other than the three kinds above named, provided such corporations are doing business contrary to law or in excess of their legal authority. While this duty is plainly to be inferred from the section above named, yet there is no provision of law by which the attorney-general or the public can readily ascertain what corporations are exceeding their corporate powers, or are defrauding the public. Other corporations than those above named are not required to make any report,

save and except they shall file annually, in January, with the secretary of state, a list of their officers and directors, and any change in the location of their place of business made by vote of the stockholders. (Code, Sec. 1612.)

This provision is practically ignored and there is no penalty provided for a failure to comply therewith. Corporations are organized; their articles of incorporation filed; business is done year after year, and unless the matter comes to the public notice by reason of the failure of the corporation or some internal quarrel, nothing is known by the public or any public officer of the character of the business that is being done or the financial standing of the corporation.

The law permits foreign corporations to enter the state and do business simply by filing their articles of incorporation with the secretary of state, and corporations engaged in mercantile or manufacturing business are not even required to do this much. If foreign corporations are engaged in doing an illegal business, there is no ready means provided by the statute for preventing it.

There is required to be kept no record of the corporations doing business in the state, or even the corporations organized under the laws of the state.

While articles of incorporation are required to be filed with the secretary of state, there is nothing to show when the corporation ceases to exist, or what its standing may be. Under these conditions it is practically impossible for this office to perform any duty which seems to be imposed by section 1640, except in cases where an injured party brings the necessary information to the notice of the attorney-general and submits facts to him which show a good cause for winding up the affairs of the company. This, however, is never done except in case of a disagreement among the managers, or until some creditor finds he is without other recourse.

Not infrequently, residents of Iowa will incorporate under the laws of New Jersey or Delaware, the laws of which states are framed apparently on purpose to attract people to the state for the purpose of securing of corporate charters for the sake of the revenue which is brought to the state thereby. Tneir artices provide, as a rule, that the corporation may engage in any and all kinds of business which a natural person may engage in. Some companies are thus organized whose sole purpose is to sell stock therein and gather in the earnings of the unwary, with no possible expectation of ever returning

an equivalent therefor, but solely for the purpose of enriching the incorporators. It comes to my knowledge that the agents of incorporations of other states, with their principal places of business in other states, and possibly the agents of associations unincorporated, are engaged in different parts of the state in selling so-called stock or soliciting membership in the organization which is, in fact, nothing more nor less than a gigantic confidence game.

The questions are often asked: Why does the state permit these things? Does not the state control the corporations created under its laws, and has it not the power to prevent foreign corporations doing business within the state which are injurious to the people? Is it not the duty of the officers of the state to weed out the corporations which are preying upon the people?

These inquiries, which are often heard, indicate the popular belief that the policy of the state is to permit none but legitimate corporations doing a legitimate business to have an existence in the state. Some few sections seem to justify this belief. I am constrained to think that the legislature has intended that power should be lodged somewhere in the administration of the state's affairs to thoroughly stamp out any corporation which is doing an illegitimate business. The law, however, falls far short of securing these results. The secretary of state has no power to withhold a certificate of incorporation in case the fees are paid, and his power so to do is challenged on every hand. While he may arbitrarily, in case of a palpably fraudulent scheme being presented, refuse a certificate of incorporation, yet he does so without any express provision of the statute to sustain him.

This office has no means of obtaining authentic information as to the transactions of any corporation, and if such information could be obtained from reports, or other official sources, with the vast amount of work imposed upon this office, with only one assistant, it would be practically impossible to undertake the vast amount of work involved in performing the duties implied in section 1640.

The laws of some states require all foreign corporations to file their articles of corporation in the state, and to comply fully with the laws of the state with reference to reporting. Reports are required annually, showing the condition of the companies and the nature of their business. Some states

require affidavits that the corporation is not a party to any agreement or trust, and the failure to file such reports and affidavits works a forfeiture of their authority to do buisness in the state, and suitable penalties are provided for doing business in the state without having a certificate of authority so to do. Such a law weeds out, without action on the part of the state officers, many obnoxious corporations, and furnishes a basis for prosecutions of those corporations which are doing an illegal or a fraudulent business.

Information has come to me of many instances where an agent of some foreign corporation or association has visited a community, selling stock in the corporation or association, the plans of which, if closely analyzed, are, to all intents and purposes, a lottery—diamond schemes, or schemes which promise immense returns, but have, in fact, nothing of merit and no ability to fulfill the promises held out to the people. The agents themselves may be innocent of any intent to defraud, they, themselves, being misled as to the merits of their schemes. I have heard of instances where many thousands of dollars have been taken out of a community, with never a dollar of equivalent rendered therefor. Some corporations which are, under our law, permitted to do business in the state with no let or hindrance, take advantage of the situation and advise an open violation of the law, and agree to hold harmless from all loss such persons as will deal with them.

I may specify an instance of this, by way of illustration. The American Tobacco company is a foreign corporation, incorporated, I understand, under the laws of New Jersey. It is capitalized at many millions of dollars. It manufactures and sells tobacco in its various forms. It is authorized to do business in this state without even filing a copy of its articles of incorporation. It has the benefits of the markets of this state, and pays not one dollar of tax. It not only violates the laws of the state with reference to the sale of cigarettes, but has given certain printed and written guarantees to our own citizens that it will hold them harmless from all fines, costs and expenses if they will sell, in violation of law, cigarettes manufactured by said company. Its wealth and immense business enables it to make special contracts with the express companies by which the express companies carry, or pretend to carry, each little five-cent paper box of cigarettes as a separate package for shipment, the tobacco company pretending that

each little paper box of cigarettes is an "original package," and its sale is protected by the commercial clause of the United States constitution. On such a shallow pretense and transparent evasion, because of the wealth and power derived therefrom, not only the law prohibiting the sale of cigarettes, but also the law imposing a tax thereon, have been dead letters. Respectable dealers in tobacco who, as good citizens, declined to violate the laws of the state, have been threatened with an unfair competition unless they would sell the cigarettes of the American Tobacco company. The result is that a foreign corporation has, in effect, set at naught the laws of the state, and has induced or forced hundreds of our citizens to become chronic law-breakers, and the counties and municipal corporations of the state are deprived of the revenue provided for by section 5007 of the code. It is unquestionably true that a determined and persistent prosecution of all offenders by the local authorities would be successful in securing obedience to the law, but it seems to have been assumed, from the bold defiance of a powerful corporation, backed up by its guaranty to the law-breakers, that it has solid ground to stand upon, and the local officers have hesitated to involve their counties in the costs of making what they thought would most probably be a losing contest. Hence, no regard seems to have been paid to the law throughout the state.

It ought not to be in the power of any corporation, however wealthy and powerful, to thus set at defiance the state, while it is reaping a rich harvest from its markets. Other instances could be named where foreign corporations have pursued a similar course in utter disregard of the law of the state. Under existing laws it is impossible for this department to remedy the evil. The law gives no adequate remedy, nor are the facilities at the disposal of the attorney-general sufficient to enable him to take any steps to correct the evil.

It would, in my judgment, be wise to enact a law requiring all corporations organized under the laws of any other state, as a prerequisite to their doing business in this state, to file their articles of incorporation with the secretary of state, and pay a fixed fee therefor, and if the business sought to be done be legitimate and in accord with the policy of the state, that a certificate of authority to do business be issued; also requiring foreign as well as state corporations to file a report annually showing the nature of the business transacted, where the busi-

ness is conducted, the financial standing of the company, and such other facts as may be deemed best; also to file an affidavit by the proper officers showing whether or not the corporation was engaged in any pool, trust or combination, or in any manner violating the laws of the state. Provision should be made for the service of process upon all corporations doing business in this state. Proper punishment should be provided for any corporation or agent thereof doing business in the state without authority has first been obtained therefor. Legislation along this line would accomplish much to enable the attorney-general to discharge the duty that seems to be imposed upon him by section 1640, as well as the duties imposed upon him by section 5067. Imposing duties upon the attorney-general and providing no adequate means for the performance of those duties is certainly unjust. There should be either additional legislation to enable him to discharge the duties, or the sections of the statute imposing the duties should be repealed.

MONEY RECEIVED.

The only money collected by me for the state during the two years covered by this report has been the sum of $104.50, collected March 10, 1898, from the estate of George Ridinger, insane, for his support in the Mt. Pleasant hospital as a state patient. This sum was paid immediately to the treasurer of state, I holding his receipt therefor.

COSTS IN CRIMINAL CASES.

As a rule, the persons charged with crime who appeal to the supreme court have no property or estate from which the costs incurred by the state in the supreme court can be collected. The exceptions to this statement are so few that apparently no effort has ever been made to collect the costs to which the state has been put in printing abstracts and arguments in the supreme court. There are exceptions, however, and I am satisfied that judgments for costs have been rendered in the supreme court in many cases, which, if they were investigated, could now be collected. In many instances parties who were worthless at the time have undoubtedly become the owners of property. The aggregate amount paid by the state in years past for printed abstracts and arguments is no inconsiderable sum. A systematic attempt to collect all the outstanding costs, or as much as possible in such cases, I am satisfied would result

in the recovery of many thousands of dollars to the state of Iowa.

The labor of collecting cannot be undertaken by this office with the limited force at its disposal. If additional assistants were provided for this office as hereinafter suggested, the interests of the state in this respect could be better protected.

PRINTING OF ABSTRACTS AND ARGUMENTS.

In criminal appeals where the appeal has been taken by the state, and in all cases where additional abstracts are required, such abstracts and additional abstracts are required to be prepared by the county attorney. Many times it is very desirable to have an argument in a criminal appeal furnished by the county attorney who tried the case. The abstracts and additional abstracts which are furnished by the county attorneys are now sent to this office and the printing thereof is done by the state printer. It is generally better for one who prepares an abstract to proof read his own abstract. There is no reason why the printing of abstracts and additional abstracts in appeals should not be printed in the county from which the case is appealed. It is far more convenient for all parties connected with this office to have such printing done where the proof may be readily read by the county attorney who prepares the abstract.

Occasionally, because of the press of work with the state printer, or other causes, an argument or a brief which is required at a certain time cannot be printed in time, and a few instances have arisen where cases have been continued because thereof. In one instance the court refused to hear a petition for rehearing where the printing thereof delayed the service beyond the required time one day. The annoyance of this has been as little, possibly, as could be hoped for where the work must necessarily be done at one office, and that office under equal obligations to other officers who are equally insistent. I am satisfied that if more latitude were given to the attorney-general with reference to the printing of abstracts, briefs and arguments, it would be better for the service of this department, and would be less expensive to the state.

SHALL THE STATE PERMIT ITSELF TO BE SUED?

In my last biennial report I called attention to the hardship which often occurs to citizens because of the fact that there is

no provision of law authorizing the state to be made a party in any civil suit. Very frequently cases arise where a judgment is obtained or a fine imposed or a bail bond given which become an inferior lien upon real estate covered by a mortgage previously given by the judgment debtor or surety on the bond. In the foreclosure of such mortgages there is no provision for foreclosing as against the state. The judgment or claim of the state remains as a cloud upon the title. The state is not called upon to redeem. Its lien never becomes barred by the statute of limitations, and the result is that a cloud remains upon the title of real estate through no fault of the mortgagee thereof, and no method is devised for removing such cloud. Many cases of this nature occur, some of which have elements of real hardship. Wherever the state has no substantial interest to be protected, no good reason exists for preserving a lien upon real estate which affords it no benefit and is a positive injury to the owner of such real estate.

I, therefore, renew my recommendation that where the title of real estate is involved, and the question is one of priority of liens, that a law be enacted authorizing the attorney-general to appear in behalf of the state to the end that its claims in the real estate may be cut off by foreclosure, in proper cases, the same as if it were a private party.

NEEDS OF THIS OFFICE.

The duties imposed upon this office have increased yearly for a number of years. The increase of population and wealth of the state naturally augments the work of this office. Nearly every legislature creates some new board or commission or establishes some state institution, which adds somewhat to the labors imposed upon this office. The help supplied and the facilities for performing the work have not kept pace with the increased responsibilities and duties.

There is urgent need for a regular deputy, and such a salary should be paid as would secure the services of a competent attorney and justify him in devoting his entire time and energies to the work of the state. An experience of five years in this office, to which I have devoted all my time and best energies, justifies me in saying that the best services cannot be rendered the state with the limited help furnished this office. Many important questions must be determined without time to make a careful research of all the authorities and give the

matters the deliberative, careful thought which they deserve. From the necessities of the case, too much routine work is imposed upon the head of the department, taking his time and attention away from the more important matters and difficult problems which are ever arising. One occupying this position and trying to perform the duties imposed must, in a large measure, cut himself loose from social and political duties, and often deny himself vacations and recreations imperatively demanded by the laws of health. I do not think it the best policy for the state to demand so much of any of its officers or agents. There should be, in my judgment, sufficient assistance furnished to this office so that the attorney general may be relieved of much of the details and minor matters, and more time and care be given to the more important questions which are constantly presented to him.

There is now allowed by law for an assistant for this office $1,200 per year, and no more. The salary of $1,200 per year is wholly insufficient. If a comparison is made with other departments of this state, we find that some clerks without a professional training or education are receiving $1,500. A deputy is provided for most of the state officers with a salary of $1,500. It is just that a deputy attorney-general or an assistant, who in addition to the education demanded in other departments, must have a legal education and an experience in order to be efficient, should receive not less than is paid in other departments. Under the present conditions, there is an unjust discrimination against this department. No other department of state government has so little help, and in none is the entire force kept so constantly engaged in the strenuous effort to perform the duties imposed upon them. I can speak freely in regard to this because I personally would reap no benefit from any changes which I recommend.

Other states deal more fairly with the attorney-general's office. Minnesota, with a population of only about two-thirds of this state, furnishes an assistant attorney-general at a salary of $2,000, and two law clerks at a salary of $1,800 and $1,500 respectively. Michigan, with but little more population, furnishes an assistant at a salary of $3,000 and such extra help as the board of auditors may allow. Nebraska, with a population of less than two-thirds that of our state, pays the deputy attorney-general $1,800 per annum. Colorado, with less than one-third the population of this state, pays the deputy attorney-

general $2,250 per annum and an assistant the same salary. Indiana pays the attorney-general a salary of $7,000 and the deputy and assistants to the attorney-general $4,200 per annum.

The secretaries of certain boards and commissions of this state are allowed by law $1,500 and one $2,000. Two thousand dollars is the smallest salary that should be paid to an assistant attorney-general. With such a salary a competent man could be obtained who would devote his entire energies and time to the labor, which is imperatively needed to secure the best results for the state.

There are at present no fees authorized to be collected by this office. In examining and approving articles of incorporation, in many instances, the attorney-general is required to perform services which are beneficial to the incorporators, for which lawyers in practice would charge a fee of $50. If he refuses to approve the articles of incorporation he must inform the parties of his objections thereto, and give the reasons for such objections. In many instances the articles are then re-written, and come to him again for his examination and approval. Some articles are long and complicated, and require a great deal of time in order to give them a careful examination. If a law were enacted authorizing a fee of $5 or $10 to be collected for the examination of articles of incorporation, and paid into the treasury of the state, an income would be provided more than sufficient to pay the deputy, or an assistant, the reasonable salary above suggested.

Again, the attorney-general is required to bring action to wind up the affiairs of banks, insurance companies and building and loan associations when the matter is placed in his hands by the auditor of state. Private parties receive the benefit of such service. There is no good reason why a reasonable fee for such services should not be taxed by the court before whom the case is tried, for the benefit of the state. If such services were rendered at the instance of a stock holder or a creditor, a fee would be taxed and made a charge upon the property of the company for which a receiver is appointed. It is no hardship upon any interests to have taxed in behalf of the state such reasonable fee as would be otherwise taxed if like services had been rendered by an attorney employed by parties interested.

But whether the suggestions in regard to fees to be charged in behalf of the state be wise or unwise, the fact remains that there is imperative need of a permanent deputy in the office of the attorney-general, who should be paid a salary commensurate with the labor and responsibility imposed upon him.

The office is also in need of a set of United States supreme court reports. The high authority of the court, and the wide range of subjects covered by said reports, make them indispensible in the office of every practicing lawyer. They should be near at hand for ready reference in the investigation of questions of law. The small cost of the United States reports does not justify the inconvenience of being obliged to go or send to the state library whenever a reference to the reports is needed. They are needed at times when access to the state library cannot be had, or the particular report wanted is in use elsewhere. I have found it very inconvenient and at times annoying to be deprived of such reports.

During the period covered by this report my assistants have been, first, Mr. W. H. Redman, and afterward, and at the present time, Mr. Chas. A. Van Vleck, to both of whom I, as well as the people of the state, are indebted for faithful and efficient service. Respectfully,

MILTON REMLEY,
Attorney-General.

SCHEDULE "D."

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

Private and special acts not repealed by the code of 1897.

DES MOINES, Iowa, January 6, 1898.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—In regard to your inquiry as to whether chapter 107, of the laws of the Fourteenth General Assembly, as amended by chapter 117, of the laws of the Sixteenth General Assembly, making an annual appropriation for the relief of Joseph Metz, and chapter 129, laws of the Twenty-fifth General Assembly, making an annual appropriation for Frederick M. Hull, have been repealed by the adoption of the new code, I will say that the acts referred to belong to the class known as private and special acts, and do not come within any of the classes of statutes repealed by section 49, of the code of 1897.

In my opinion, they are still valid laws authorizing the payment of the money as therein specified. Yours respectfully,

MILTON REMLEY,
Attorney-General.

CORPORATION FEE—An amendment to the articles of incorporation diminishing the authorized capital filed with the secretary of state at the same time the original articles are filed, is the basis upon which to charge the corporation fee.

DES MOINES, Iowa, January 7, 1898.

Hon. G. L. Dobson, Secretary of State, Des Moines, Iowa:

DEAR SIR—Your favor of to-day at hand, enclosing the articles of incorporation of the Mississippi, Colesburg & Manchester Railway Co., executed December 17, 1894, and filed for record with the recorder of Delaware county December 27, 1894, the capital stock as fixed in the articles being $200,000; and also enclosing an amendment to the said articles reducing the capital stock to $100,000, both the amendment and the original articles having been presented to you for filing at the same time. You ask: "Upon what authorized capital stock would I be justified in computing the corporation fee, the $200,000, as fixed in the original articles, or the authorized capital stock as fixed by the amendment?"

The two instruments, the original articles of incorporation and the amendment thereto, having been presented to you for filing and recording at one time, must both be considered as one instrument. The articles of

incorporation as amended which you are asked to file and record, fix the capital stock at $100,000 and no more. The said company, under the articles of incorporation as amended, is not authorized to issue more than $100,000 of stock. The amendment has the effect of erasing from article No. 14, of the articles of incorporation, the figures $200,000, and inserting in lieu thereof the sum of $100,000. Had this erasure been actually made in the original articles, there could have been no serious question as to the basis for computing the corporation fee to be paid. The effect, however, is exactly the same as if the erasure had actually been made and the words $100,000 written in lieu thereof.

In my judgment, you are authorized to collect a fee on the basis of $100,000 of authorized capital stock. Yours respectfully,

MILTON REMLEY,
Attorney-General.

PUBLIC LIBRARIES—Those to which the public has free access, with the right to use, are public libraries within the meaning of section 16 of the acts of the special session of the Twenty-sixth General Assembly, providing for the publication and distribution of the code.

DES MOINES, Iowa, January 8, 1898.

Hon. G. L. Dobson, Secretary of State:

DEAR SIR—Yours of the 7th inst. at hand requesting my opinion upon the question, "What is a public library within the meaning of the statute giving to public libraries a copy of the code of 1897?"

The first definition of public is "pertaining to or belonging to the public." All libraries, then, which belong to the state, counties, or any municipal corporation, which are for the use of the public generally, certainly come within the definition of public libraries.

I think also that where a library is established by a private corporation and managed by a board elected by the corporation, when it is provided in the articles that it is for the use of the public generally, and is accessible to the public, and is not maintained for private profit, it should be considered a public library. It has been so held by the courts of New York.

But where a library is owned by a library corporation or company, and the use of it is confined to the stockholders or their immediate families, or persons to whom the privilege therefor is granted, it has been held in Rhode Island that such a library is not a public library.

In my opinion all libraries owned by the public, and all libraries, although owned and managed by private parties, to which the public has free access with the right to use, the members of the company managing the library having no special privileges not accorded to the public, should be considered public libraries within the meaning of the term as used in section 16 of the act to provide for the annotation, indexing, publication and distribution and sale of the code, etc., enacted by the extra session of the Twenty-sixth General Assembly. But all libraries owned by private parties, corporations or voluntary associations in which the members of

the company or association have special privileges and rights not accorded to the public generally, cannot be considered public libraries.

Yours respectfully, MILTON REMLEY,
Attorney-General.

Laches may be imputed to the state by failing to collect a claim for twenty-eight years. All parties having knowledge thereof having in the meantime died, and circumstances existing tending to show payment, it is inequitable to enforce the payment.

DES MOINES, Iowa, January 12, 1898.

To the Executive Council of the State of Iowa:

GENTLEMEN—In accordance with your request as conveyed by the secretary of the executive council under date of the 5th inst., I have investigated the matter of the claim of the state of Iowa against Thomas F. Withrow, now deceased.

The facts developed are very meagre indeed. It appears from the records of Polk county that there is recorded a mortgage by Thomas F. Withrow and wife to the state of Iowa, securing a note of $1,512. The mortgage bears the date of December 23, 1867, and the note was due January 1, 1870. I am unable to find either the note or the mortgage in question. In the auditor's office I was shown a memorandum on a page of an old book, which does not have the appearance of being an account book but simply a general memorandum book, some accounts or statements being contained therein. One statement is as follows: "Swamp land indemnity fund. Orwig notes. December 23, 1867. Thos. F. Withrow, due January 1, 1870, 8 per cent, amount, $1,512." Written in ink obliquely across the line is the word "paid," without date or signature.

I have been told that there is no record of this money having been paid into the state treasury. The note and mortgage cannot be found in the auditor's office, and none of the present force in the office know anything about it. If the treasurer received the money on the note, there should be a duplicate receipt on file in the auditor's office for the receipt of the money, as is required by section 85 of the revision of 1860.

I find no provision of law authorizing the auditor to receive money due the state at that time. Paragraph 6, of section 71, of the revision of 1860, empowered the auditor to direct and superintend the collection of all money payable into the state treasury, and to cause to be instituted and prosecuted all proper actions for the recovery of debts and other money so payable.

It is very questionable whether, in the absence of some record or receipt from the treasurer, a payment of the money to the auditor would be a discharge of the debt.

The statute of limitations has not run against the mortgage or the indebtedness, as the statute of limitations does not run against the state I doubt very much whether the payment of the money in question could ever be proved. In case an action were brought, the burden would be upon the defendants to prove payment.

There is nothing to indicate by whom the word "paid" was written across the memorandum of the note and mortgage in the auditor's office—whether it was by anyone connected with the office or authorized to make such entry.

I find nothing to satisfy me that the said note was ever paid to anyone authorized to receive it, or that the state ever received the benefit of the payment if it was made.

The note and mortgage having become due more than twenty-eight years ago, and nothing having been done toward collecting the same, the makers of the note and mortgage having died, and also the immediate grantees of the mortgagors having died, and all persons immediately connected with the transaction having passed away, it appears to be inequitable to attempt to enforce the claim after such flagrant laches on the part of the state. I am inclined to the opinion that if action were brought, a court would hold, in view of all the facts, that the laches of the state would prevent its recovery. But I am frank to say just how far laches can be imputed to the state, I have not had time to investigate thoroughly, and give the above as my present impression. At all events the uncanceled mortgage stands as a cloud upon the title, and justice to the present owners of the property requires that it should be removed, either by an action brought to foreclose the mortgage, or by an act of the legislature authorizing the auditor to cancel the same of record.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

NOTE.—Suit was brought to foreclose the mortgage and the district court held that even if the mortgage had not been paid, the evidence of which was not clear, the state was estopped by its laches.

ASSESSMENT OF REAL ESTATE IN 1898 NOT REQUIRED—The repeal of a statute does not affect a complete act lawfully done thereunder.—When statutes are repealed by an act which retains the provisions of the old law, there is no suspension or interruption in the binding force of such provisions.

DES MOINES, Iowa, January 20, 1898.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Your favor of the 19th inst. at hand, in which you say:

"In some counties of this state the opinion prevails that real estate should be assessed by the assessors in making the assessment of 1898, and I desire your official opinion as to the proper construction of our revenue laws relative to the proper time for making the real estate assessment of this state."

Section 1350 of the code provides that real estate shall be listed and valued in each odd-numbered year, etc. This is substantially the provision of section 812 of the code of 1873, it providing, "real estate shall be listed and valued in the year 1873 and each second year thereafter."

Real estate having been assessed in the year 1897, and that assessment having been completed, it continues to be the basis for taxation until such time as the law authorizes a new assessment to be made. On general principles, the repeal of a statute does not affect an act completed before the repeal took effect. Section 51 of the code says: "This repeal of existing statutes shall not affect any act done, any right accruing or which has accrued or been established, nor any suit or proceeding had or commenced in any civil cause before the time when such repeal took effect." So far as this section relates to an act done, it is simply a statement of the law recognized without a statute.

Not only this, the provision for the assessment of real estate being substantially the same as the old law, it comes within the rule recognized by many courts, which may be stated as follows: "When statutes are repealed by acts which substantially retain the provisions of the old law, the latter are held not to have been destroyed or interrupted in their binding force. In practical operation and effect, they are rather to be considered as a continuance and modification of old laws than as the abrogation of those old and the re-enactment of new laws." This language was approved by the supreme court in Hancock v. District Township of Perry, 78 Iowa, 550. For list of cases sustaining the doctrine, see 23 Am. & Eng. Enc. of Law, pp. 515, 516.

The provisions of the old law relating to the time of assessment of real estate being retained in the new law, the new law must be considered as a continuation of the old. On no principle of law with which I am familiar can it be said that the assessment of real estate in the year 1897 was set aside because of the enactment of the new code. I find nothing in the code anywhere that authorizes the assessment of real estate in the year 1898, except such as was omitted from the assessment of the previous year.

It may be said that the basis of the assessment of real estate in 1897 is different from the basis for the assessment of personal property for this year. Be that as it may, it is competent for the legislature to enact a law assessing property of a certain class and exempting property of another class, or to provide a different basis for the assessment of different classes of property. It was entirely competent for the legislature to direct the assessment of one class of property on one basis and another class upon another basis, so that the law be of general application.

In my opinion, the assessment of 1897 is a valid assessment until a new assessment of real estate can be made in 1899, and an assessment of real estate this year would be without warrant of law.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

Tax on insurance companies under section 1333 of code for the year 1898 is to be based upon the amount of premium receipts for the entire year of 1897, and not for the part of the year after the code took effect.—The tax imposed is a condition upon which insurance companies may do business in this state.

DES MOINES, Iowa, January 21, 1899.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Your favor came duly to hand, in which you request my opinion upon the following question:

"In determining the amount of tax to be paid into the state treasury by the insurance companies or associations referred to in section 1333, the code (third sentence), should the said tax be computed by taking 1 per cent of the gross amount of premium receipts from the business in this state of each company or association since the law went into effect, or by taking 1 per cent of the gross premium receipts from the business in this state of each company or association during the preceding year? In each case amounts paid for losses and return premiums to be first deducted."

The paragraph referred to provides that insurance companies or associations organized under the laws of this state and doing business herein, not including county mutuals and fraternal associations, "shall, at the time of making the annual statement required by law, pay into the state treasury, as taxes, 1 per cent of the gross amount received by it on assessments, fees, dues or premiums from business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year, after deducting amounts actually paid for losses and the amount of premiums returned."

This law went into effect the first of October, 1897. It will be noticed that the section further provides, "the taxes provided in this section shall be in full of all taxes, state and local, against such corporations or associations, except taxes on real estate and special assessments."

I have no doubt that it is competent for the legislature to change the basis of taxation, providing always that the property or persons of a specific class be taxed upon the same basis and in the same manner. It may also change the time for the payment of taxes. "Any particular class of property belonging to all corporations of the same character, and which possesses the same rights and privileges, may be assessed in the same manner and by the same tribunal, and the property of individuals and other corporations may be assessed by other officers and at different times." Central Iowa Railroad Co. v. Board of Supervisors, 67 Iowa, 199. In the matter of McPherson, 104 N. Y., 306.

The legislature, by the adoption of the provision above quoted, determined that the basis for ascertaining the amount which should be paid as taxes by insurance companies should be the amount of the receipts of such companies from the business done within the state, less certain deductions specified by the statute. The tax, then, for the year 1898 is based upon the amount of business done within the state during the year 1897. The tax demanded during this year as a condition of doing business during the year 1898, is not a tax upon the business of 1897, nor in any just sense an income tax; but the data for ascertaining the amount which should be paid as taxes during the year 1898, are obtained from an examination of the business of the company during last year.

This is no new principle in our law. Under section 815 of the code of 1878, a merchant was assessed, not upon the amount of property he had on the first of January, as other people were, but the average value of such property in his possession or under his control during the next year pre-

vious to the time of assessing. The same was true of a manufacturer. Stocks generally were assessed at their market value, which is based upon the known earning capacity of the corporation during previous years.

The language of the statute makes no exception in regard to the payment that shall be made during the year 1898. If an insurance company were doing business during the year preceding the time for making the payment of their taxes in 1898, then the language of the statute would require the amonnt of tax to be paid to be determined by the amount of receipts of the company during the preceding year.

Anocher view leads to the same conlusion. It is competent for the legislature to impose conditions upon which any corporation may do business in the state. A Maryland case holds that a tax on the gross receipts of a railroad company was not a direct tax upon property, but a tax upon the franchise of the corporation measured by the extent of business. The tax in question is not a tax upon property. An insurance company may have little or no property and yet do a very large business and receive large sums as premiums or dues. The statute provides that the sum, which is called a tax, shall be paid before a certificate is issued by the auditor authorizing it to do business within the state. The fact that the property of a company which pays the tax provided for in this section is exempt from other taxes, makes this tax no less a tax upon the franchise or the right to do business. The receipts from business during the preceding year furnish the data for determining the amount that should be paid as a condition precedent for being authorized to do business during the year 1898.

It may be claimed that this is double taxation because the companies must pay their tax for the year 1897, which come due on the first of January, 1898, which were assessed under the old law. The fallacy of this claim is apparent when we consider that the taxes paid to the state during the present month are in lieu of all taxes during the year 1898, and are separate and distinct from those levied during the year 1897, although the payment of the 1897 taxes is deferred until the first of January.

Whether the law places an unjust burden upon the insurance companies is a matter for the legislature to determine. It is presumed that the tax imposed upon the receipts for the preceding year was an equitable provision for distributing the burden of taxation for public uses. If, because the code did not go into effect until the first of October, the receipts of the companies since such date should be taken as a basis, then such companies would be paying only one-fourth as much as the legislature intended they should, and only one-fourth as much as they shall be required to pay in the years succeeding the present one.

I see no principle which requires you, in determining the amount of tax that shall be paid as a condition for doing business during the year 1898, to take into consideration only the amount of the receipts of the companies from and after the first of October last. In my judgment the receipts for the whole year should be considered.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

A stipulated premium or assessment insurance associations must have 250 *bona fide* applications for membership before it can issue policies.—Applications to another association cannot be counted as part of the 250.—Whether such associations have power to reinsure the risks of another association *quere*?

DES MOINES, Iowa, February 1, 1898.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Your favor of the 28th inst. at hand, in which you ask my opinion upon the following question:

"Shall I consider as actual applications for membership under the provisions of section 1787 of the code, a list of members of an association organized and operated in Nebraska, that have, by resolution, decided to reinsure the risks or policies of the members in the association to be organized and incorporated under the laws of this state for the purpose of transacting business in accordance with the provisions of chapters 7 and 8? In other words, does a resolution of an association deciding to reinsure its risks in an association of this state, constitute all or part of the applications upon at least 250 lives required for an association to be in possession of before it can be granted a certificate of authority to do business?"

I do not think such applications in the Nebraska company can be considered by you as a part of the 250 applications required by section 1787 of the code to be made before you are authorized to issue a certificate, for the following reasons:

First—Such applications are made to the Nebraska company and are not applications made to the company to be organized under the laws of this state.

Second—The Iowa company is not yet organized, and having no certificate authorizing them to do business, cannot make a contract to reinsure the risks taken by the Nebraska company.

Third—You have no authority under section 1796 of the code, to issue a certificate authorizing the company to do business until 250 applications have been actually made to the company about to be organized.

I do not wish to be understood as implying by the above that any company organized under chapter 7, title 9 of the code, has any authority in law to make a contract for reinsuring the risks of any other company. In regard to this there may be doubt, and I express no opinion upon the subject. Yours respectfully,

MILTON REMLEY,
Attorney-General.

Assessment of real estate in 1897 was not affected by the enactment of the code.—The county auditor, because of the repeal of exemptions allowed for forest or fruit tree culture, has no power to change the assessment of 1897, by adding to it the amount supposed to have been allowed as exemption when the assessment was made.

DES MOINES, Iowa, February 2, 1898.

Hon. C. G. McCarthy, Auditor of State:

DEAR SIR—Your favor at hand in which you ask whether or not the provisions of section 1304 of the code in reference to the exemption of property from taxation, are applicable this year to the real estate assessments made last year. "Does the omission from the new code of section 1272 of McClain's code, in reference to exemptions on account of forest and fruit trees, prevent the granting of such exemptions this year on the real estate assessment made last year?"

I think it is undoubtedly true that the assessment of real estate made last year in accordance with the law then in force, remains unchanged as the basis for taxation until a new assessment can be made in 1899, which will be made under the provisions of the new code. Under section 1272 of McClain's code, the exemption because of forest and fruit trees planted and cultivated, was made by the assessor at the time of the annual assessment. If the assessment thus made is unchanged by the board of equalization, it becomes a fixed fact and no person has authority to change such assessment thereafter. The assessment returned by the assessor must have stated the aggregate sum upon which the land owner should be taxed after the deduction of all exemptions. This sum can neither be increased nor diminished by the county auditors or the treasurers, nor by the assessors themselves after the assessment return has been made. No officer other than the assessor at the time has any right to grant exemptions, nor in case of the repeal of the law authorizing such exemptions, to add to the assessed value of the real estate the exemptions which the assessor deducted from the value of the land. I know of no statute which authorizes any one to either increase or diminish the assessed value of the real estate as returned to the auditor after the board of equalization has made its changes. Any change in the assessed value of the real estate not authorized by law affects the integrity of all proceedings to enforce the collection of the tax.

The language of your inquiry implies that exemptions must be granted year by year. If such is the thought, it is erroneous. Exemptions are deducted only at the time of the assessment, and at no other time, and this year the question of exemptions on account of forest or fruit trees planted does not arise, but such questions were settled last year when the assessment was made.

Of course, if real estate omitted from last year's assessment is assessed this year, under the provisions of section 1350 of the code, such real estate falls within the provisions of the code and no exceptions could be claimed on account of the planting of forest and fruit trees.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PARDONS.—The action of the general assembly with reference thereto is only advisory.—An immaterial defect in the publication of notice of the application should be disregarded—Such notice is not necessary to give the general assembly jurisdiction.

DES MOINES, Iowa, February 4, 1898.

Hon. John Parker, Chairman Committee on Pardons, House of Representatives:

DEAR SIR—I have made an examination of the question which you submitted to me yesterday, it being whether, in a pardon case pending before the general assembly, the fact that a notice required by section 5626 was published for three successive weeks then for some cause was omitted the fourth week, but was published the fifth week, the last publication being only eighteen days before the commencement of the general assembly, would deprive the general assembly of jurisdiction and prevent it from taking any action thereon?

The action to be taken by the general assembly is at best only advisory. The constitution provides: "The governor shall have power to grant reprieves, commutation and pardon after conviction for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law." The regulation provided by law is contained in section 5626 of the code, which provides: "After conviction of murder in the first degree, no pardon shall be granted by the governor until he shall have presented the matter to and obtained the advice of the general assembly thereon." It further provides: "Before presenting the matter to the general assembly for its action, he shall cause a notice containing the reasons for granting the pardon to be published in two newspapers of general circulation, one of which shall be at the capital, and the other in the county where the conviction was had, for four successive weeks, the last publication to be at least twenty days prior to the commencement of the session of the general assembly."

Whether the notice has been published in substantial compliance with the law is for the governor to determine. That fact must be determined before the matter is presented to the general assembly. When the governor presents the matter to the general assembly for its advice, the matter is before the general assembly to take such action as it deems proper. It is the act of presenting the matter to the general assembly that gives it jurisdiction.

I do not think that the irregularity in the publication of the notice was such that the governor was not justified in presenting the matter to the general assembly. It is not every irregularity or slight deviation from the law that invalidates the act done. Where there has been a subtantial compliance with the law, when a jurisdictional question is not involved, a mere irregularity does not render the act invalid, especially when there has been no prejudice to anyone shown by reason of the irregularity. The governor asking the advice of the general assembly presents the matter before the general assembly for action, and unless there is some evidence of some person being prevented from making a protest because of the irregularity, or some fraud attempted, I do not think the general assembly would be justified in ignoring the matter.

Of course, if the general assembly obtained information that there was no notice published, or that the irregularity in its publication was so great that parties who would be likely to make a protest have been deterred from so doing, it would be proper and right for the general assembly to take no action. But, without some showing of prejudice to somebody, I am inclined to the opinion that the general assembly may rest upon the find-

ing of the executive that there was a substantial compliance with the law.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

In the absence of constitutional inhibitions, salaries of public officers may be reduced during the term for which they are elected.—Trustees of state institutions have no power to enter into a contract with an officer thereof so as to preclude the legislature from by law controlling the salary to be paid.

DES MOINES, Iowa, February 8, 1898.

Hon. A. B. Funk, Chairman on Retrenchment and Reform, Senate Chamber:

DEAR SIR—Your favor of the 3d inst. at hand, in which you ask my opinion as to whether an officer appointed or elected by the trustees of a state institution or any board, a contract having been entered into between the trustees and such officer prior to the taking effect of the new code, fixing his compensation in a sum greater than the code authorizes to be paid to him, can legally draw the salary according to the terms of the contract, notwithstanding the fact that the salary to be paid him is limited by the code to a sum less than the alleged contract price.

The law relating to the several institutions of the state differed very materially, but I assume the inquiry relates to some officer whom the trustees are required to appoint by statute.

Where the statute expressly provides for the appointment of an officer of an institution, whether the term of the office is stated in the statute or whether the term is left to the discretion of the managing board, I think it follows necessarily that such officer is to be considered as standing on the same plane as an officer of the state. A person accepting such an appointment or election must be considered as doing so with the full knowledge that it is within the power of the legislature to change the term of office or abolish the office or limit the salary which may be paid. An examination of the statutes relating to our state institutions, to generalize, leads to the conclusion that the board of trustees of any institution has no power given it by the statute to enter into a contract with an officer of such institution which would limit the power of the legislature to reduce the salary or to determine what it shall be. Certainly one accepting an appointment from a board of trustees does not hold his office by a tenure more secure than a public officer elected by the people, nor than the trustees themselves, who made the appointment. The trustees have no authority except that given them by statute. Where the statute authorizes the trustees to appoint an officer of the institution, there being no express provision authorizing a contract to be made for a fixed term with a fixed salary, I think the making of such a contract would be *ultra vires.* If there are no constitutional inhibitions, the legislature has power to abolish every office or institution in the state, and it would be absurd to contend that boards created by acts of the legislature, themselves subject to legislative control, can by contract place their appointees beyond legislative control. I know of no statute which authorized any board of trustees to make such a contract.

The supreme court of this state in Bryan v. Cattell, 15 Iowa, 538, said: "That it is competent for the legislature to abolish an office, increase or decrease the duties devolving upon the incumbent, add to or take from his salary, not inhibited by the constitution, we entertain no doubt."

The officers referred to in the inquiry being public officers, come within the well-settled rule that it is within the power of the legislature to reduce the salaries. There are so many decisions upon this point that it is no longer a mooted question. See Throop on Public Officers, sections 19-20; Cooley on Constitutional Limitations, 334.

It is, I think, also well settled that a public officer is entitled to receive compensation according to the law in force at the time the services are rendered, and no other. My conclusion, therefore, is that an officer appointed by the trustees of a public institution cannot legally receive more than the sum authorized by statute, notwithstanding any alleged contract made with the governing board.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

The executive council has no control of the electrotype plates upon which the code was printed.—The secretary of state has no authority to permit them to be used in printing leaflets.

DES MOINES, Iowa, February 14, 1898.

Hon. A. E. Shipley, Secretary Executive Council:

DEAR SIR—Your favor of the 10th inst. at hand, in which you say the executive council requests my opinion upon the right or authority of the executive council to authorize the secretary of state to permit the use of certain electrotype plates upon which certain pages of the code were printed, to be used by the state printer to print in leaflet form the laws relating to the state board of health.

In regard to this I beg to state that I find no provision of law which in any way, even inferentially, consigns the said plates to the care and custody of the executive council. Under section 168, the executive council has charge of all property purchased under the provisions of chapter 8, title 2, of the code. The provision of section 120 of the code of 1873, that the executive council shall have charge, care and custody of the property of the state when no other provision is made, nowhere that I have been able to find, appears in the code. Section 12 of the act relating to the code, found on page 3 of the code, provides: "The code supervising committee shall procure the pages of the code to be electrotyped, the state to furnish the metal and own the electrotypes, which shall be in the custody of the secretary of state, and be carefully preserved by him."

Unless there were some provisions of law giving to the executive council some direction or authority over the plates, or authority to direct the secretary of state with reference thereto, then I am of the opinion that they can make no valid order in regard to the same. I find no such provision. The secretary of state is made responsible for the care and the custody of the electrotypes referred to. His only duty in regard to them is

to carefully preserve them. To permit a number of the plates to be used more than others, subjecting them to greater wear and risk of damage by accident, by which a less clear impression would be made in case a new edition of the code is published, would, in my judgment, be an excess of his authority. Yours respectfully,

MILTON REMLEY,
Attorney-General.

No bonds can be lawfully issued by a school corporation except as authorized by a vote of the electors.—A school corporation bond, payable at a fixed time with an option to pay at an earlier date, must be considered matured if the option of earlier payment is exercised.—The limit of 5 mills in section 2813 of the code, is a limitation on the amount of tax to be levied to pay interest on the bonds, and hence a limitation on the amount of bonds which may be issued.

DES MOINES, Iowa, February 14, 1898.

Hon. J. H. Trewin, Chairman Senate Committee on Schools, Senate Chamber:

DEAR SIR—Your favor of the 12th inst. at hand, in which you desire my opinion upon the following questions arising under sections 2812 and 2813 of the code:

First.—"Is any refunding issue of the school bonds good without the vote of the electors, although the original issue was authorized by such vote?"

I am inclined to think that under the provisions of section 2812, the board of directors has no authority to issue bonds for any of the purposes named therein until a vote of the electors of the district has been taken authorizing the same to be done. The clause, "when authorized by the voters at the regular meeting or a special meeting called for that purpose," applies to every issue of bonds by the board of directors of any school corporation. The meaning would be more perspicuous if the clause quoted had been inserted after the word "directors" in the first line, and also after the word "district" in the fourth line of the section; but to save repeating the language, it was placed after the purposes for which bonds could be issued were enumerated, and is applicable to both the directors of any school corporation and to the board of any independent city or town district. I think that the grammatical construction of the sentence requires it to be so considered.

In other words, every issue of bonds hereafter must be authorized by vote of the electors before the same is issued, and in no event can bonds be issued for any other purpose than those enumerated in the first six lines of said section. Even the vote of the electors cannot authorize bonds to be issued for any other purpose, it being provided further down in the section that "bonds shall not be disposed of for less than par nor issued for other purposes than in this section provided."

I do not think there could be any very serious doubt about the correctness of this interpretation, were it not for the last clause of section 2823, which is as follows: "But school boards shall not incur original indebted-

ness by the issuances of bonds until authorized by the voters of the school corporation." Some might draw an inference from this language that bonds could be issued for any indebtedness not original by the board of directors without being authorized by vote of the electors; but it does not so state. Under sections 1821 and 1822 of the code of 1873, bonds could be issued for erecting and completing school houses only after a vote of the people of the district. This was amended by the Sixteenth General Assembly, authorizing the independent districts to issue bonds for the purpose of redeeming outstanding bonds. This also required a vote of the people. Chapter 132 of the Eighteenth General Assembly, authorized the issuance of bonds to refund outstanding upon an indebtedness of school districts by a resolution of the board of directors, and chapter 51 of the Eighteenth General Assembly authorized the issuance of bonds to pay any judgments remaining unsatisfied, both by school districts and district townships.

I do not recall any other instance where, under the old law, directors of district townships or independent districts were authorized to issue bonds except by vote of the electors. The provisions of section 2823 make the provisions of chapter 14, title 13, applicable to all school corporations, except when otherwise clearly stated. Hence, I have no doubt that section 2749 is applicable to independent districts as well as to school townships. The electors at the annual meeting, under said section, shall have the power to vote a tax for the payment of debts contracted for the erection of school houses, and under section 2813 the board must fix the amount of taxes necessary to be levied to pay any amount of principal and interest due or to become due during the next year on the lawful bonded indebtedness, and certify the same to the board of supervisors. This being their duty, then they can only be relieved of such duty by a vote of the people authorizing bonds to be issued. I cannot think that the legislature intended to place it in the power of the board of directors to continue an indebtedness indefinitely by renewing the bonds without the consent of the electors. The inference which some might attempt to draw from the last clause of section 2823, I do not think is tenable when the history of previous legislation is examined.

Referring to the clause "when authorized by the voters at the regular meeting or a special meeting called for that purpose," let me say that the use of the word "when" in that connection refers to a time after; it cannot refer to a completed act of borrowing money for the erection or completion of school houses. Webster's definition of when is, "What time, at, during, after the time that at or just after the moment that; used relatively."

The use of "when" then, signifies that the power of the board cannot be called in requisition until the time that a vote has been taken. Had it referred to the clause which immediately precedes it, different language would surely have been used. We would naturally have expected the clause to read, "or for money borrowed for the erection or completion of school houses which had been authorized by the voters," etc., or which was duly authorized to be borrowed by the voters. There are other considerations which lead me to the conclusions stated.

Second.—You ask, "Can a bond that is optional for payment be considered as mature for the purpose of refunding?"

I am inclined to the view that it may be. That is, if a bond is issued payable in ten years with the option of the payor to pay the same in five years, then when that option is exercised it is to be treated as mature. That is, if a school district announce to the holder of a bond that it will pay the bond which it has the option of paying, it is to be considered then a matured bond, and may be refunded if the vote of the electors so directs.

Third.—"To what does the limit of 5 mills belong in the latter part of section 2813?"

The meaning is possibly somewhat obscure. I think, however, it is a limitation on the amount that shall be levied to pay the interest on bonds for money borrowed for improvements. That is, even with the vote of the people of the district, no bonds shall be issued for improvements, the interest of which will exceed 5 mills on the dollar of the assessed valuation of the property of the district. Yours respectfully,

MILTON REMLEY,
Attorney-General.

NEW ORLEANS EXPOSITION CLAIMS—The executive council may in its discretion fix a date at which it will consider the claims filed, after giving reasonable notice, and pay preferred claims *pro rata* or in full, and any balance remaining may be paid on the claims of counties.

DES MOINES, Iowa, February 16, 1898.

Hon. A. E. Shipley, Secretary Executive Council:

DEAR SIR—Yours of the 15th inst. at hand, in which you say you are directed by the executive council to ask for my opinion "relative to the legal right of the council to name April 1, 1898, as a time when the New Orleans claims account shall be permanently closed, whether all claims are filed at that date or not."

The appropriation was made by chapter 151, laws of the Twenty-sixth General Assembly. It provides: "All money is to be paid in the manner herein provided." The second section attempts to provide how it shall be paid, but it is so indefinite that it is difficult to say what is the legislative intent. It has been assumed that it was intended that, in case claims were filed which amounted to more than $12,000, they should be paid *pro rata*, yet I find nothing in the statute from which such an idea is obtained.

The first sentence of the second section implies that only those claims which are named in the report of the commissioner and treasurer of the Iowa commission at such exposition shall be considered. If it were not for the provision that claims for actual cash furnished by individuals shall take precedence over appropriations made by counties, I would be inclined to the opinion that claims could be allowed and paid in full in the order in which they were filed until the appropriation was exhausted; but this provision defers the claims of counties until the other claims are paid. It is evident, however, that counties do not have to wait beyond a reasonable time for private parties to file their claims.

There is a rule of law well recognized that where a statute imposes a duty upon a board or commission or tribunal, and does not provide the method of procedure for the performance of that duty, that such board or

commission or tribunal may adopt such method as it in its discretion deems best. In accordance with this rule, I think it would be competent for the executive council to fix a time at which it will consider the claims on file, and give such notice to claimants as it may think best, and ascertain the amount which will be required to pay the private claims, and then pay the balance on the claims made by the counties.

If the council deem the 1st of April, 1898, as a proper date for determining the claims before it, and to pass upon the private claims on file at that date, and at that date pay the balance of the appropriation to the counties, if claims to that extent were filed by counties, I see no reason why they would not have discharged the duties imposed by the statute.

If, on the other hand, after passing upon the claims which were filed on the 1st of April, if that date were named, there still remains part of the appropriation not disbursed, and after the 1st of April claims were filed by those entitled to participate in the appropriation, I do not think the council could refuse to consider them and pay the valid claims to the extent of the appropriation. In other words, the council cannot fix a date at which they will say all claims filed thereafter shall be barred and the claimholders shall not participate in the appropriation if there is money on hand to pay the same, but they can fix a date at which they will dispose of all claims on file, and on that date may pay the preferred claims in full and the balance of the appropriation to the second-class claimants, and no private claimholder whose claim has not been filed can have any reason to complain of the action of the council. Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSURANCE—MUTUAL COMPANIES—(1) The company cannot use the premium notes given by persons insured who are not organizers of the company. They may withdraw at any time. Different liability attaches to makers of such notes. (2) Non-residents may become members of a mutual corporation organizde in this state.

Des Moines, Iowa, February 18, 1898.

Hon. C. G. McCarthy, Auditor of State:

Dear Sir—In regard to the questions submitted to me in connection with the statements made by the National Church Mutual Insurance Company, I will say that it does not appear that the notes referred to in said statements were such notes as are required by section 1692 of the code. They appear to be premium notes given by persons who applied for insurance in the usual manner after the insurance companies are organized and authorized to do business. There are two classes of premium notes given to mutual companies; the first are those given at the organization of the company, which must amount, together with the cash paid thereon, to not less than $25,000. These notes stand as the security for the payment of losses, etc., until the accumulations of profits from investments shall equal the amount of cash capital required to be possessed by stock companies. (See section 1704 of the code). This is intended to make the organizers of a company put up security equal to

$25,000 for the payment of losses and claims against the company, and this shall be kept good until the accumulations of profits equal $25,000.

Where a person insures in a mutual company without being one of the organizers, he is only liable on his premium note for the amount of his assessments, and can withdraw the same upon having his policy cancelled, and can only be required to pay his proportion of the losses and expenses according to the rules of the company. Notes taken of the latter kind cannot be made to take the place of the notes required in section 1692. The latter class of notes does not stand as security beyond the terms and conditions stated in the note.

In regard to the other question, I will say that I see nothing in sections 1692 and 1693 of the code which necessarily requires the makers of the notes therein referred to to be residents of the State of Iowa. Non-residents may become members of a mutual corporation organized in this state. The same care should be taken to be assured of the financial solvency of the makers of the notes, as is taken in regard to the residents of the state.

The first question, however, is the principal one, to my mind. I do not think the company can use the premium notes given by persons insured who are not organizers of the company, and which may be withdrawn at any time at the option of the makers, in lieu of the notes required to be given by section 1692 by the organizers of the company, as a different liability attaches to the makers of such notes than that attaching to the makers of ordinary premium notes given for insurance. Yours truly,

MILTON REMLEY,
Attorney-General.

ASSESSMENTS—Exemptions from—Duty of Auditor as to—County Auditors are not authorized to change or alter assessment of real estate except where there has been an omission on the part of the assessor to act. Exemptions shall be made by the assessor and not by the auditor. After assessment lists have been corrected the auditor has no authority to change the same.

Des Moines, Iowa, February 28, 1898.

Hon. C. G. McCarthy, Auditor of State:

Dear Sir—Your favor of the 21st inst. I find on my return this morning from Washington, enclosing a letter from Auditor Cunningham of Ft. Dodge, for which I am much obliged.

Mr. Cunningham, however, overlooks the fact that the auditor has no duty to do in regard to assessments or exemptions save and except that given him by the statute, and there is no statute anywhere authorizing the county auditor to perform any duty whatsoever in regard to the assessment of real estate, or increasing or diminishing the amount of such assessment after allowing all exemptions, and, in fact, he has nothing whatever to do with the assessments except in cases where there has been a total omission on the part of the assessors to act. The exemp-

tion shall be made by the assessor, and not by the auditor. The total amount of the assessment of the land is stated by the assessor in his return, and it cannot be changed by the auditor without invalidating the entire assessment. I recognize that the use of the words "annual assessments" is unfortunate, but the rules for the construction of statutes would not permit the use of the word "annual" in that connection to give to the auditor or the assessor even, an excess of power which is at variance with all decisions in regard to the assessments for taxation.

The difficulty which Mr. Cunningham refers to can be obviated by the assessor returning the net assessment which has been made against the persons claiming the exemption for each of the two years. For instance, if the time expires at the end of one year, say 1897, for which the exemption could be claimed, he should return the assessment of the land for 1897 at the amount remaining after deducting the exemption given and for the assessable value, without deducting the exemptions for the year 1898. If the assessor has not done this, it is no fault of the auditor's. After the assessment lists have been passed upon by the board of equalization, corrected by the assessor and returned to the auditor, such lists cannot be changed, or tampered with, by the county auditor or any officer.

I am very clear upon this, and am strengthened in my views by a re-examination of the question, and by the opinions of a number of attorneys of high standing. I would not wish to change my opinion. The contrary opinion, I am sure, would not stand in the courts.

Yours truly, MILTON REMLEY,
Attorney General.

Authority of the Governor to remove the treasurer of the Institution for Feeble Minded Children. The constitution gives him no authority to do so. "State officers" referred to in Sec. 1259 of Statute does not include such treasurer. Governor not authorized to suspend or remove such treasurer.

Des Moines, Iowa, March 2, 1898.

Hon. L. M. Shaw, Governor of Iowa:

Dear Sir—Your favor of the 24th ult. came duly to hand, asking my opinion upon the question whether you have authority to remove the treasurer of the Institution for Feeble Minded Children at Glenwood in case, after investigation, you find sufficient cause therefor.

Authority to remove an officer by the governor must be based upon the constitution or the statute. The constitution gives no such authority. There is no statute expressly giving the governor authority to remove an officer connected with the Institution for Feeble Minded Children as there is in regard to the wardens of the penitentaries. The only statute from which such authority could be claimed is section 1259 of the code. This section provides: "The governor shall, when of the opinion that public service requires it, appoint a commission of three competent accountants who shall examine the papers, vouchers, moneys, credits and

other documents in the possession or under the control of any state officers," and in section 1261, if an adverse report of the commission is made, it is provided: "The governor shall forthwith suspend such officer from the exercise of his office."

If the treasurer of the Institution for Feeble Minded Children is included within the term "state officers" in section 1259, the power of the governor would only extend to suspending and not to permanently removing the officer. Before an officer is permanently removed from office, he is entitled to notice and an opportunity to be heard in his defense.

The question arises whether the term "state officers," as it occurs in section 1259, includes such an officer as the treasurer of said institution. It will be noticed that in section 2693, the management and control of the institution is committed to three trustees. The trustees elect a treasurer. The term of office is not fixed by statute. The compensation is not fixed, nor is the amount of bond. It is fairly inferable from the language of said section that the treasurer holds his office during the pleasure of the trustees. Such treasurer has no duty to perform with the public generally. In the sense that he is appointed under and by authority of the state, he may be called a state officer. The term "state officers" occurs in section 20, article 3, of the constitution, relating to who may be impeached, but the latter part of the section clearly shows that it is not intended to embrace all officers who receive their authority from the laws of the state.

The term "state officers" has been defined br the Missouri supreme court in State ex rel Holmes vs. Dillon, 90 Mo., 229, to mean "only such officers whose official duties and functions are co-extensive with the boundaries of the state." In State ex rel Hitchcock vs. Hewitt, the South Dakota supreme court says: "We are of the opinion that the term 'state officers' as used in said section includes only such general officers as immediately belong to one of the three constituent branches of the government." (52 N. W. R., 875).

I am inclined to the view that the term "state officers" as it occurs in section 1259 of the code, refers only to such officers as are understood to be state officers in the popular sense; that is, to those who are elected by the people of the state or appointed under the provisions of the general statutes, whose official duties and functions are co-extensive with the boundaries of the state.

I have no serious question that the treasurer of said institution is a public officer, although some of the elements necessary to make him a public officer as laid down by the supreme court in State vs. Spaulding, 92 N. W. R., 288, are wanting. But be that as it may, I do not think that he comes within the class of officers referred to in section 1259 as state officers.

Hence, I do not think you would be authorized to even suspend him, much less remove him from office, but I have no question that the board of trustees have plenary power in the mater. Yours respectfully,

MILTON REMLEY,
Attorney General.

vSchool districts. Independent school districts for a city or incorporated town or village of over 100 inhabitants forming a part thereof, are not rural independent districts. The growing population in a village may change the class of school corporation.

Des Moines, Iowa, March 12, 1898.

Hon. R. C. Barrett, Superintendent of Public Instruction:

Dear Sir—Your favor of the 3rd inst. at hand, in which you ask my opinion upon several questions, all of which involve the construction of section 2743 and section 2744, with reference to the effect of said sections upon the legal status of rural independent districts in which villages or incorporated towns have sprung up since the organization of such independent districts.

Section 2743 provides: "Each school district now existing shall continue a body politic as a school corporation unless hereafter changed as provided by law, and as such, may sue and be sued, hold property and exercise all the powers granted by law."

I apprehend that the misconception of the meaning and effect of this section causes all the doubts as to the legal status of the independent districts. It by no means is contemplated by said section that all school districts existing at the time the code took effect should continue to be governed by the same laws, or remain in the same class of school corporations that had theretofore existed. The existence of the school districts as a body politic, as a corporation with power to sue and be sued, and to hold property, remain unchanged, and unquestionably the boundaries of the several school districts were, by the said section, to continue unchanged unless the same were changed by some other provision.

By section 2744 as amended by the present legislature, a new classification of school corporations was made. All school corporations, then, are divided into three classes; first, school townships; second, independent school districts of cities, incorporated towns or villages; and third, rural independent school districts. All independent districts come within the second or third classes of school corporations. While all classes of school corporations have certain powers in common, yet certain laws are applicable only to the school corporations of a specified class. The condition existing at the time the code took ecect determines the class to which a given school corporation belongs. It is competent for the legislature to provide that all school corporations in the state which contain an incorporated town or village of over 100 inhabitants, shall be called the independent district of such city, town or village, and shall be governed by the laws provided for districts of that class, and to assign other corporations to another class and to prescribe different laws for its management.

This may be done by the legislature without reference to the law under which such school corporations were originally organized, or the name by which they have been heretofore known. As an illustration, it has been held by the supreme court in Russell, et al., vs. District Township of Cleveland, 97 Iowa, 573, that the enactment of section 1713 of the

code of 1873 had the effect of dividing sub-districts then existing which included territory in two townships, except those sub-districts organized by attaching territory from one township to that of another for school purposes in cases where, by reason of streams or other natural obstacles, any portion of the inhabitants of any school district cannot, in the opinion of the county superintendent, with reasonable facility enjoy the advantages of any school in their township.

The status or classification of the school districts depends not upon the law under which they were oranized, or the manner in which they became independent districts, but upon the nature and condition of the district itself. The amendment to section 2744 enacted by the present legislature, makes the independent school district of a villege belong to the same class as the independent school district of a city or incorporated town. If, then, a village of over 100 inhabitants has grown up in an independent district which had been previously organized under the provisions of the law for organizing what are now called rural inde pendent districts, then such district becomes, under section 2744, an independent district of a village or town, and belongs to the school corporations of that class, and ceases to be a rural independent district. The code defining the classes, all districts take their places in the class to which, by their existing conditions, they belong. I am quite clear that all independent districts which contain a village of over 100 inhabitants, under section 2744 as amended, cease to be rural districts. I am also inclined to the opinion that a rural district organized under the provisions of section 2797, by the growth of a village of over 100 inhabitants within its boundary, becomes ipso facto an independent district of a city, town or village.

There seems to be no provision for organizing a district of a city, town or village out of an independent district already existing. Section 2794 provides for the organization of an independent district of a city, town or village of over 100 inhabitants from a school township, but does not contemplate that such independent district of a city, town or village should be formed from an independent district already existing. It is true that section 2798 provides for the sub-division of rural independent districts, but this can hardly be said to apply to the formation of independent districts of towns or villages.

I am quite clear that it was the intent of the legislature that all independent districts, irrespective of the manner of their original organization, which contain a city, town or village of over 100 inhabitants, should come within the second class as above stated, and be governed by the laws applicable to independent districts of that class; and I am inclined to the view that when a village in an independent district increases in population to exceed 100, that it becomes ipso facto a member of the class of independent districts of the cities, towns and villages and ceases to belong to the class known as rural independent districts. An incorporated town, when it increases in population to 2,000 or upwards, becomes a city of the second class, and must change its organization accordingly; it has no volition in the matter.

In like manner, the growth of population in a village within a rural independent district may change the class of school corporations to

which the district belongs. I see no good end to be gained in view of the changes in the law, in attempting to classify the school corporations of the state according to the laws under which they were originally organized. The evident intent of the legislature was to simplify the matter and place the school corporations of the state in the three classes, the class to which each belongs depending not upon the manner of its organization, but upon tho existing circumstances and conditions of the district itself.

My conclusion is that independent districts having a city or an incorporated town or a village of over 100 inhabitants forming a part thereof, are not rural independent districts. Yours respectfully,

MILTON REMLEY,
Attorney General.

Game—Artificial ambush erected on shore or in open water. —Construction of statute. Any artificial ambush of any kind erected on the shore or elsewhere is prohibited by Sec. 2551 of the code. Any artifice which conceals the hunter is an ambush.

Des Moines, Iowa, March 15, 1898.

Hon. Geo. E. Dalavan, Fish Commissioner, Estherville, Iowa:

Dear Sir—Your favor of the 14th inst. at hand, enclosing a letter from Mr. C. C. Clark, county attorney at Burlington, asking my construction of that part of section 2551 commencing with the words "no person" in the third line from the top of page 887 of the code. The language is as follows: "No person shall kill any of the birds mentioned in this section from any artificial ambush of any kind, or with the aid or use of any sneak boat or sink box or other devise used for concealment in the open water, nor use any artificial light, battery, or any other deception, contrivance or device whatever with ambush to attract or deceive any of the birds mentioned in this chapter, except that decoys may be used in shooting wild geese and ducks," etc. The controversy seems to be whether an artificial ambush erected on the shore and used to conceal the shooter, is a violation of the law, some contending that the statute only prohibits the use of an ambush in the open water.

I do not think the language would bear that construction. The first clause is general; "no person shall kill any birds mentioned in this chapter from any artificial ambush of any kind." To do so is a violation of the statute. The next clause is: "Or with the aid of any sneak boat or sink box or other devise used for concealment in open water." There is no warrant for saying the clause for concealment in open water is a limitation or qualification of the first clause of the sentence. The use of a sneak boat or sink box is recognized as being for the purpose of concealment in open water, but lest some other devise may be used which is not embraced within the term "sneak boat or sink box," and statute specifies the use of any other device used for the purpose of concealment in the open water is prohibited. I have no doubt that an arti-

gcial ambush of any kind, erected on the shore or elsewhere, is prohibited by this section.

Mr. Clark also asks the question whether the use of grass suits is prohibited.

I have no doubt that the term "artificial ambush," as it occurs in the section, means a barrier or hiding place artificially prepared, behind which the shooter is concealed from the birds. Any artifice, then, which conceals the hunter is an ambush. The fact that the ambush is carried along with the person does not make it any the less an ambush.

But whether this be true or not, such a suit would come within the clause which prohibits the use of "any other deception or contrivance or device whatever with intent to attract or deceive any of the birds mentioned in this chapter." This part of the section under consideration is evidently intended to give the birds a fair chance for their lives, and to prevent any contrivance by which they may be slaughtered by an unseen foe.

In my opinion, the use of an ambush of any kind, on the shore or elsewhere, or the use of any grass suits which prevents the birds from recognizing their enemy when they see him, is a violation of this statute.

Yours truly,

MILTON REMLEY,
Attorney General.

Agricultural College—Financial agent thereof—Compensation—He is entitled to salary and personal expenses necessary to or connected with the discharge of his duties. He is entitled to draw $800.00 as a compensation for assistant and sub-agents. Necessary expenses are not to be deducted therefrom. Said $800.00 is in the nature of an appropriation to such assistants and sub-agents as he may employ, only to be paid out of the treasurer on the voucher of financial agent. It cannot be paid out for anything except services rendered by assistants or sub-agents.

Des Moines, Iowa, April 8, 1898.

Hon. John Herriott, Treasurer of State:

Dear Sir—Your favor of recent date duly at hand, in which you refer to section 2669 of the code, and ask my opinion upon the following points:

1. "Does the eight hundred dollars in addition for assistants and sub-agents and all necessary expenses connected with the discharge of his duties include the necessary expenses of the financial agent, or is he entitled to his necessary expenses beside the eight hundred dollars?"

2. "Is the financial agent entitled to the eight hundred dollars for assistants and sub-agents absolutely, or only so much of it in any one year as he pays out? In other words, suppose in one year

he should not require all of the eight hundred dollars for assistants and sub-agents, but the next year should be such a year that the eight hundred dollars would not be sufficient to meet this expense; could he draw the whole eight hundred dollars the first year so that he could have any surplus to use in years when the eight hundred dollars was not enough to meet the requirements of the office?"

The entire section is as follows: "The financial agent shall receive a compensation to be fixed by the board of trustees, not exceeding the sum of twelve hundred dollars annually, and eight hundred dollars annually in addition for assistants and sub-agents and all necessary expenses connected with the discharge of his duties, to be paid as that of other officers, out of the state treasury."

I think the fair construction of this section is that the financial agent shall receive as his compensation the salary to be fixed by the board of trustees, not exceeding twelve hundred dollars, and all personal expenses necessary to or connected with the discharge of his duties. He is also authorized to draw as compensation for assistants and sub-agents, eight hundred dollars. That is, necessary expenses are not to be deducted from the eight hundred dollars which is allowed for assistants and sub-agents. The appropriation of eight hundred dollars for assistants and sub-agents is the amount that may be paid for such assistants and sub-agents.

In regard to the second question, I do not think that the appropriation of eight hundred dollars for assistants and sub-agents is an appropriation to the financial agent ,in any sense. It is in the nature of an appropriation to such assistants and sub-agents as he may employ. This sum should be paid as that of othe officers, out of the treasury of the state upon the voucher or certificate of the financial agent that services have been rendered, and I find no warrant for the payment to the financial agent of eight hundred dollars annually, whether any assistants or sub-agents have been employed or not, or whether there is need of drawing that sum from the treasury.

If no assistants or sub-agents are employed in any one year, no sum should be drawn from the treasury during that year, and the fact that nothing was drawn in one year, would not authorize any more than eight hundred dollars to be drawn during the years following. The amount that may be drawn for assistants and sub-agents is limited to eight hundred dollars annually. If there is no one who renders services as assistant or sub-agent, then there is no one authorized to receive the compensation. The salary or compensation of a public position belongs to the one who renders the services in that position, and if no services are rendered, then no part of the salary should be drawn for that period.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Bonds of civil officers—Regents of the State University and trustees of the Agricultural College and Normal School do not come within the definition of civil officers which are required to give official bonds.

It was not the intent of the legislature to require members of the Board of Health, of the Pharmacy Commission and of Dental Examiners to give official bonds.

Des Moines, Iowa, April 9, 1898.

Hon. L. M. Shaw, Governor of Iowa:

Dear Sir—Your favor of the 7th inst. at hand, in which you request my opinion upon the question, whether the regents of the University, trustees of the Agricultural College and the Normal School, and members of the State Board of Health, of the Pharmacy Commission, and of the Board of Dental Examiners are required to give bonds under section 1183 of the code

The provision of section 1183 is as follows: "All other civil officers except as specially otherwise provided, shall give bonds with the condition in substance as follows:" stating the form of the bond.

There is no suggestion anywhere in the code, that I am able to find, that would indicate that the officers named are required to give bond, unless they are embraced within the term "civil officers" contained in said section 1183. The reason for requiring the officers to give bonds fails in regard to the officers named in your inquiry. The statute nowhere either fixes the amount for which such officers should give bond, nor does it authorize any officers or person to fix the amount of the bond that should be given. Further than this, if a bond should be required of such officers, under existing rules of law, it would be practically impossible to show a breach of the bond. The officers in question actually handle no funds belonging to the state. The treasurers of the differents institutions named and the boards receive and pay out public money, and provision is made for their giving bonds. These considerations are at least suggestive, but of course not conclusive.

Possibly in a very general and popular sense, the persons named in the inquiry may be considered officers, and I think properly so. The question still remains, are they to be considered civil officers within the legislative intent of the section quoted. In a certain sense, civil officers embrace all officers in contradistinction to military or naval officers, but there is a very respectable line of authorities holding that the term "civil officers" embraces only such officers as in whom no part of the sovereignty or municipal regulations or general interest of society are vested. United States vs. Hatch, 1 Wis., 182, and authorities cited.

It is evident that the regents of the University, trustees of the Agricultural College and Normal School have vested in them no part of the sovereignty of municipal regulations or general interest of society. They clearly do not come within this definition of civil officers. That this was the legislative intent is very evident from section 2612. It is provided therein that each regent, trustee, president, secretary and treasurer of

the University and each state institution, and all other officers thereof required to give bonds, shall, before entering upon his duties, take the oath of office required of civil officers in the chapter upon qualifications for office. If it were the legislative intent that such regents and trustees should be included within the term "civil officers" in sections 1180 and 1183, then section 2612 was wholly unnecessary, and the distinction made between such officers and civil officers would not have been made. Regents and trustees are simply agents of the state for a local purpose, having entrusted to them no part of the sovereignty of the state, and I am clearly of the opinion that they do not come within the definition of civil officers as it occurs in section 1183.

The members of the Board of Health, of the Pharmacy Commission and Board of Dental Examiners do not stand upon exactly the same plane as the other officers referred to in the inquiry. In a very material sense, a certain part of the sovereignty of the state is vested in them, but a careful examination of the different provisions of the statute fails to show to my mind any intention on the part of the legislature that even they should be required to give bonds.

Title 6 of the code treats of elections and officers. Section 1183 is a part of title 6, and the term "civil officers" as it occurs in section 1183, I think refers primarily and especially to the officers provided for in said title. Commissions and boards being general agencies of the state for a specific purpose or duty, cannot, I think, be classed as civil officers in the sense in which the legislature used the term.

It would unduly lengthen this opinion to state the various reasons, other than as above stated, which lead me to this conclusion.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Fees to be charged corporations for filing amendments to their articles increasing its capital stock. A fee of $1.00 for each $1000 of such increase must be paid regardless of whether the original amount of stock was less than $10,000.

Des Moines, Iowa, April 19, 1898.

Hon. G. L. Dobson, Secretary of State:

Dear Sir—Your favor of the 16th inst. at hand, requesting my opinion as to the amount of corporation fee which should be paid in a case where the capital stock of the corporation was fixed at $2,000, and a fee of $25 was paid under section 1610 of the code, the company wishing now to amend its articles increasing its capital stock to $10,000 or $15,000.

The section above referred to contains the following language: "Should any corporation thereafter increase its capital stock, it shall pay a fee to the secretary of state of $1 for each $1,000 of such increase, but in no event shall a fee in excess of $350 be charged under the provisions of this section."

The fact that the company might have fixed the amount of their capital stock at $10,000 without paying any more fee than $25, does not re-

lease the company from the obligation to pay for the increase which it now made. The $25 which was paid was a fee authorized to be charged, whether the capital stock was $1,000 or $10,000. Upon amending their articles of incorporation and increasing the amount of capital stock, the statute provides that a fee of $1 for each $1,000 of increased stock shall be paid. This is another fee, and from the language of the entire section, I do not think you have any discretion about collecting it. The statute is obligatory.

I return you the letter you enclosed.

Yours respectfully,
MILTON REMLEY,
Attorney General.

Repeals—Act of May 12, 1890 does not repeal previous acts but only such acts or parts of acts as are in conflict with that act. Rule to be adopted in computing good time earned by a prisoner in the penitentiary.

Des Moines, Iowa, April 19, 1898.

Hon. Z. H. Gurley, Deputy Warden, Anamosa, Iowa:

Dear Sir—Yours of the 15th inst. at hand, in which you say the "Act of May 12, 1890, 'repeals the acts, etc.' Now does this law apply to all prisoners alike, i. e., to those committed years ago, or would it apply prior to its enactment?"

The act in question does not repeal previous acts, but only such acts or parts of acts as are in conflict with that act. Under section 4754 of the code of 1873, convicts were allowed good time on a certain schedule. Chapter 154 of the Eighteenth General Assembly made a new schedule and provided that nothing in the act should be considered to increase the good time earned by prisoners in the penitentiaries prior to the taking effect of the act. Chapter 57 of the laws of the Twenty-third General Assembly again made a new schedule more beneficial for the prisoners, and it contains a like provision, that it should not be considered to increase the good time earned by prisoners before the act took effect.

I think that the proper course to adopt would be to compute the good time earned by a prisoner from September 1, 1873, up to April 2, 1880, when the act of 1880 took effect. Then compute his good time earned under the act of 1880 up to the act of May 12, 1890; since then, compute his good time under the schedule of 1890, allowing the prisoner the sum total of all he has earned under the several acts herein referred to. The law does apply to all prisoners alike, computed in the manner above designated. I think the language and purpose of the act clearly implies it is intended that all prisoners, irrespective of when confined, should have the benefit thereof after the passage of the different acts.

Yours respectfully,
MILTON REMLEY,
Attorney General.

Service of time of prisoner in penitentary—He must actually serve in the penitetary the time for which he is sentenced. Prisoner escaping and at liberty is not so serving his time. The time he is at liberty should be deducted from the good time earned, or if good time is forfeited, should extend the date from which he would be discharged, just that period of time which he was absent.

Des Moines, Iowa, April 25, 1898.

Hon. Wm. A. Hunter, Warden Penitentiary, Anamosa, Iowa:

Dear Sir—I am in receipt of your favors of the 22nd and 23rd inst., in which you ask my opinions upon the following:

First: "When a prisoner escapes and is recaptured, does he, in addition to the loss of good time, have to serve for the same number of days that he was absent from the prison?"

Replying to this question I will say that, in my opinion, the prisoner must actually serve in the penitentiary the time for which he is sentenced. He is sentenced for a definite time, and not until such and such a date. If the prisoner escapes and is at liberty, he is not serving time in the penitentiary, and is, therefore, extending the date on which he will be discharged. It may be said, therefore, that the time that the prisoner is at liberty should be deducted from the good time earned, or if the good time is forfeited, it should extend the date at which the prisoner would be discharged had he not been at liberty just what period of time which he was absent. If this were not the correct rule, the escape of a prisoner sentenced for five years on the day after his commitment, and his remaining at liberty for five years would entitle a prisoner to immunity from arrest. The rule is the same, whether he remains at liberty for five years or one day.

Second: You state that you wish to make an example of prisoners who are so persistent in their attempts to escape, and ask if section 4897 of the code would apply to the case of one who had escaped, but was recaptured.

In reply to this question I will say that this section will only apply in cases where the escaped prisoner has been indicted, tried for the offense named in the section and sentenced by the district court for imprisonment. You will notice, however, that section 5704 of the code permits you, with the approval of the governor, to deprive the convict of any portion or all of the good time that the convict may have earned. He may also be indicted and tried under section 4897. Yours truly,

MILTON REMLEY,
Attorney General.

Independent school districts—Boundary thereof—1. Code, Sec. 2794 is mandatory requiring the boundaries to be established by the directors. It is mandatory on the board to give notice of the meetieng at which the people may vote.

2. Board has discretionary power to establish boundaries so as to include contiguous territory not described in the petition. Has no direction in regard to omitting any land named in the petition, except that a line fixed in the petition divides a 40 acres of land, in which case the board might omit said 40 acres.
3. In case of an appeal to the county superintendent, he should be governed by the rules above stated. He can exercise no power not given by statute to the Board of Directors.

Des Moines, Iowa, May 20, 1898.

Hon. R. C. Barrett, Superintendent Public Instruction:

Dear Sir—Your favor at hand, in which you ask my opinion upon the following questions:

> "First—Under the provisions of section 2794 of the code, relating to the formation of independent school districts, may the board refuse to establish the boundaries of a district, or is the statute mandatory?
>
> "Second—In determining the boundary lines, has the board discretionary power or is it restricted to the boundaries petitioned for by a majority of the resident electors of the contiguous territory proposed to be included?
>
> "Third—In case an appeal is taken to the county superintendent from the action of the board in refusing to establish boundaries, should the county superintendent consider both the convenience of the people and the petition presented by the majority of the electors, or is he limited to the petition alone?"

First, the evident purpose of section 2794 is to provide the means by which the wish of the voters of any city, town or village, and also the voters residing on contiguous territory thereto, in regard to forming an independent district, may be carried into effect.

It will be noticed that a petition signed by ten voters of the city, town or village, residing in that portion of the city, town or village having the largest number of voters, is sufficient to require the board of directors of the school township to call an election to determine the question when the boundaries of the proposed independent district are co-extensive with the city, town or village. If it be proposed to include the contiguous territory therein, then a petition of the majority of the voters residing on such contiguous territory must also be presented.

The language of the section relating to the duties of the board is as follows: "Such board shall establish the boundaries of a proposed independent district, including therein all of the city, town or village, and also such contiguous territory as authorized by a written petition of a majority of the resident electors of the contiguous territory proposed to be included in said district in not smaller sub-divisions than entire forties of land in the same or in an adjoining school township, as may best subserve the convenience of the people for school purposes, and

shall give the same notice of the meeting as is required in other cases.

The board of directors of the school township is elected by the people of the entire township. They may have interests antagonistic to the formation of an independent district. There seems to be but little left to the discretion of the board. They are required to include therein all of the contiguous territory proposed to be included in said district in not smaller sub-divisions than forty acres of land. It seems to be obligatory upon them to include the territory petitioned for, except where the proposed boundary line would divide forty acres of land, according to the government survey. They might, however, in case the convenience of the people of some sub-district left out of the proposed independent district demanded it, include more territory than was described in the petition. The circumstances might be such that a few families, after the proposed independent district was carved out of the school township, would be practically left without school privileges. The law seems to require, in fixing the boundaries, that all of the contiguous territory petitioned for shall be included, but does not even inferentially prevent the board of directors, in fixing the boundaries, from including some not petitioned for.

I think the statute is mandatory, requiring the boundaries to be established by the directors, which boundaries shall include all territory provided for, and as much more as the judgment of the board of directors shall deem necessary to subserve the convenience of the people for school purposes. It is also mandatory upon the board to give notice of the meeting at which the people may vote.

Second—In regard to the second question, in my judgment the board has a discretionary power to establish the boundaries so as to include contiguous territory not described in the petition, but has no discretion in regard to omitting from the proposed independent district, any description of land named in the petition, except in case the line as fixed in the petition divides forty acres of land, in which case, the board might, in its discretion, omit the part of the forty acres included within the proposed boundaries of the independent district.

It evidently was never intended by the legislature that the wish of the people of a city, town, or village, or of territory contiguous thereto in regard to the formation of an independent district, should be thwarted by the board of directors of a school township. The power to include in the boundaries established by the board of directors, territory not described in the petition, enables the board to prevent a few families with not enough school population to maintain a school, from being cut off from school privileges by the creation of an independent district in the exact form petitioned for.

Third—In case of an appeal to the county superintendent, he should be governed by the rules above stated. He can exercise no power not given by statute to the board of directors, and can make such order as the board of directors should have made. In adding any territory not embraced within the petition, he should certainly consider the convenience of the people, both in the proposed independent district, and also the convenience of any who are left in a school township; but like

the board of district township, he would not be authorized to omit any of the territory included within the petition from the proposed independent district. He is not, however, limited any more than the board would be by the petition in regard to adding to the proposed independent district land not included in the petition. Yours respectfully,

MILTON REMLEY,
Attorney General.

Building and Loan Associations. 1.—Two or more building associations cannot lawfully be consolidated.—The directors cannot legally speculate with the stockholder's savings, nor invest them in any other manner than that authorized by law.—The law does not authorize one building association to invest its money in the stock of another.—The law does not authorize the entering into a contract for consolidation, of two or more building associations.

2.—Every member has the right to withdraw on the terms prescribed in the articles.—Any by-law in conflict with the articles is void.—A company has no authority to do business under a by-law which has not been approved by the executive council.

3.—One association cannot purchase the stock of another association either for cash or as consideration for issuing its own stock.

Des Moines, Iowa, May 25, 1898.

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

Dear Sir—I have made a careful examination of the articles of incorporation and by-laws of the Northwestern Savings and Loan Association, and of the Home Savings and Trust Company, which you have submitted to me, with the communication of Mr. C. E. Walters, examiner of Building and Loan Association, as well as the law relating to the question upon which you desire my opinion. Your inquiry embraces several questions, and without re-stating them in your exact language, I will endeavor to state my conclusions as briefly as possible.

First—In regard to whether two building associations may be lawfully consolidated.

While the provisions of the general incorporation laws of the state must be observed in regard to the manner of incorporating a building and loan association, yet the business to be transacted, and the manner of transacting that business, is limited by chapter 13, title IX of the code. A corporation organized to do the business therein authorized, and enjoying the privileges therein conferred, (exemption from the usury laws, for instance), is most certainly bound by all the provisions of chapter 13, and cannot go further and do business of a kind and in a

manner not authorized by said chapter. The whole theory of said chapter is that building and loan associations shall receive from the stockholders, payments of stated sums at stated periods and loan the money thus received to the members, and when the stock is matured or withdrawn, pay the same with accumulated profits to the members. The powers of building and loan associations are very limited. The directors of such associations are simply trustees to receive the money paid in by the stockholders; invest the same according to law, and return it with profits to thestock holders in the manner provided by the articles of incorporation.

The articles of incorporation of the two institutions above named, adopted by the incorporators and approved by the executive council, were formed and fashioned for the one purpose. The directors cannot legally speculate with the stockholders' savings, nor invest them in any other manner than that authorized by law. The law does not authorize one building association to invest its money in the stock of another, nor do the articles of incorporation submitted to me so authorize. Neither do the law or the articles in question authorize entering into any contract for consolidating the association with any other association, or the issuing of stock for any other consideration than the payment of actual cash to the company therefor in the sums and the manner provided by the articles of incorporation.

The plan of consolidation proposed has not been stated, but every consolidation of two companies involves either a re-organization, the new company taking the assets and assuming the liabilities of both the old companies, or one company taking the assets and assuming the liabilities of the other company.

Upon the statement of facts, it appears that the Home Savings and Trust Company receives from the stockholders in the Northwestern Savings and Loan Association, the stock, and issues to such stock holders its own certificates of stock with riders attached, thus making special contracts, and giving to such stockholders credit on the books of the company for the amount paid in to the Northwestern, subject to any claims which the Northwestern Savings and Loan Association may have against the stock thus transferred to the Home Savings and Trust Company.

There are many objections to this plan. Stock is issued by the Home Savings and Trust Company in a manner not authorized by its articles of incorporation for something other than cash paid in accordance with the articles of incorporation. The amount credited to the holder of this new stock is indefinite and uncertain, and I find no warrant for such proceedings in the law or in the articles of incorporation. Such a course is likely to lead to litigation and loss to the institution, to say nothing of the facility offered for deceiving the stockholders who thus become stockholders of the Home Savings and Trust Company, instead of the Northwestern Savings and Loan Association. The rights of the Home Savings and Trust Company, and its liabilities, become, in some measure, dependent upon the articles of incorporation of the Northwestern Savings and Loan Association. I think it is self evident that the trustees of the

savings of the members of the Home Savings and Trust Company have no right to jeopardize the funds committed to their care by any such contracts, or the issuing of stock not authorized or warranted by the law or their articles of incorporation.

Of course, a member of the Northwestern Savings and Loan Association may withdraw his stock in the manner provided by its articles of incorporation, and he may take stock in the Home Savings and Trust Company, if he desires, in the same manner and upon the same terms as any other person, but this is a very different proposition from the Home Savings and Trust Company taking its stock in the Northwestern Savings and Loan Association and holding it as an asset and issuing him stock in the Home Savings and Trust Company.

Second—You say that the Northwestern Savings and Loan Association has been charging members withdrawing two per cent on the par value of the stock for the first year, which you say is not permitted by the articles of incorporation and by-laws approved by the executive council, the company claiming the right to make this charge under the provisions of a by-law under which they were operating prior to the organization of the company made under the provisions of chapter 85, laws of the Twenty-sixth General Assembly. You ask whether this may legally be done.

There is room for no two opinions upon this point. Every member has a right to withdraw upon the terms prescribed in the articles of incorporation. The directors have no authority to enact a by-law which deprives a member of his legal rights under the articles of incorporation, nor has the company authority to do business under a by-law which has not been approved by the executive council. A charge of such a fee, amounting to twenty dollars per thousand dollars of stock, is unjustifiable, and a wrong upon the withdrawing member.

Third—It appears from your letter that the Home Savings and Trust Company, in issuing its stock to the members of the Northwestern Savings and Loan Association, has credited on the pass book given to the member, the amount of cash paid by such member to the loan fund of the Northwestern Savings and Loan Association, without crediting any portion of the dividends earned by the Northwestern Savings and Loan Association, subject to any amount due the expense account or the losses of the Northwestern Savings and Loan Association. You ask my opinion as to the legality of the Home Savings and Trust Company's action in creating a liability against the corporation for the credit so placed upon its pass books, and also whether it would have the right to impose the two per cent expense on the withdrawing members that is now imposed by the Northwestern Savings and Loan Association on withdrawing members.

The effect of this action of the Home Savings and Trust Company is this: It issues its stock, receiving the stock of the Northwestern Savins and Loan Association as an asset, and gives credit to the stockholder of an uncertain amount, less, presumably, than the par value of the stock of the Northwestern Savings and Loan Association which it takes, and subject to any charges that may be made against the stock under the

articles of incorporation and by-laws of the Northwestern Savings and Loan Association.

I have already stated that, in my judgment, one building and loan association cannot purchase the stock of another building and loan association, either for cash, or as a consideration for issuing its own stock; and when stock which the Home Savings and Trust Company receives as an asset is of such uncertain and indefinite value that no certain sum can be credited upon the stock account or the pass book of the stockholder, it becomes evident that the transaction is not only illegal, but highly improper and detrimental to the members of the Home Savings and Trust Company who have paid in honest dollars for the stock that has been issued to them.

I can conceive of no theory upon which the Home Savings and Trust Company can claim the right to charge members withdrawing two per cent of the par value of the stock. I do not think it can be legally done.

The facts and evidence submitted to me make it plain that both of said associations are conducting their business illegally, and in view of the serious consequences to the stockholders of said companies, in my judgment, the directors of each company should be notified to put their affairs upon a safe basis and retrace, as far as possible, illegal steps taken. Section 1907 of the code gives you ample authority to require this to be done.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Liability of stockholders of bank stock to assessment of stock.—Enforcing payment of assessment.—The statutory remedy under Sec. 1879 is exclusive, and the bank has no cause of action against the stockholder refusing to pay the assessment.—Under the law, every stockholder risks the amount paid for his stock and a sum equal thereto.

Des Moines, Iowa, May 25, 1898.

Hon. C. G. McCarthy, Auditor of State:

Dear Sir—Your favor at hand, in which you ask my opinion upon the question, whether or not a state or a savings bank whose board of directors has made an assessment upon the stockholders under the provisions of section 1878 to make good an impairment of the capital, is limited to the method of enforcing the payment of such assessment by the provisions of section 1879 of the code, or in case the stock does not sell for enough to pay such assessment, whether recovery for the balance may be had in an action brought against the stockholder.

In regard to this I will say that section 1878 gives to the bank a statutory right; viz., the right to make an assessment against the stockholders to make good any impairment of the capital of the bank. For the enforcement of this right, section 1879 authorizes the sale of the stock of any stockholder who fails to pay the same after due notice. The statute does not give the right of action to the bank against the

stockholder to recover a personal judgment against him for a failure to pay the assessment.

It is a familiar rule of law that where the statute gives a new right, and provides a remedy for the enforcement of that right, such remedy is exclusive and must be strictly pursued. The statute having failed to give a right of action to the bank, no action could be maintained against the stockholder.

Section 1882 makes the stockholders of a savings or state bank liable to the creditors of such banks over and above the amount of their stock held therein and any amount paid thereon for an amount equal to the respective shares. The right of a creditor to recover under this section is not affected by the previous sections which authorize the bank to make an assessment upon the stock. After paying the assessment made by the bank upon the stockholder, the stockholder would be held liable to the creditors in a sum equal to the amount of stock held by him. Under the law, every stockholder risks the amount paid for his stock and a sum equal thereto, under section 1882.

Any other construction than that given above would involve not only the stock held by the stockholder, but twice as much more, which would be unwarranted. The statutory remedy, under section 1879, is exclusive, and the bank has no cause of action against the stockholder refusing to pay the assessment.

Yours respectfully.

MILTON REMLEY,
Attorney General.

Creamery.—1.—Manager thereof, incorrectly recording the result of test of patrons for purpose of deception.—Remedy thereof.—Liable to the patrons in civil damages.—Might be liable under Sec. 5053 for false pretenses.

2.—Making test in careless and negligent manner.—Punishment of offender.—Offender liable in damages to patron injured

Des Moines, Iowa, May 26, 1898.

Hon. L. S. Gates, Dairy Commissioner, Des Moines, Iowa:

Dear Sir—Yours of the 25th inst at hand, asking: "What is the law and the manner of procedure when a creamery manager incorrectly records the result of the test of the patrons' milk for the purpose of deception?"

I do not know that the law gives to the dairy commissioner any authority in such a case. Certainly incorrectly recording the test of the patrons' milk, and using the record as a means of cheating the patron, would be a violation of the criminal law. The creamery manager would also be liable to the patron for damages in a civil action. Not having the facts before me showing in what manner the cheating and defrauding is done, I am unable to point out any specific section that would be of general application.

Section 5053 of the code is as follows: "Every person who is convicted of any gross fraud or cheat at common law, shall be fined not more than $200, or imprisonment in the county jail not more than one year, or both." If false representations were made to the patron as the result of the test, by which the patron received less for his milk than he would had the truth been told, it is possible that the creamery manager could be convicted for obtaining property upon false pretenses. He is certainly liable for civil damages in whatever sum may be proved.

Second—You also ask as to what can be done with the man who makes the test in so careless and negligent a manner that incorrect results are obtained.

Such a man is liable to the person injured for all damages he has sustained. The difficulty is to prove such damages. The patron, in either case, must pursue his own remedy. If a person makes a mistake, either carelessly or negligently, in making the test, but has no intent to defraud, he would not be criminally liable, but is liagle civilly for all damages sustained by the patron of the creamery.

The proper method to be pursued depends so much upon the facts of each case, that the only safe way is for a person who thinks he has been wronged to lay all the facts before a competent attorney and act upon his advice.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Collateral Inheritance Tax.—The law applies only to property which shall pass after the law takes effect.—The law does not indicate that it was the intent of the legislature to give the statute a retroactive effect.

Des Moines, Iowa, May 28, 1898.

Hon. John Herriott, Treasurer of State:

Dear Sir—I have examined the question which you submitted to me, viz., whether the collateral inheritance tax imposed by chapter 28 of the laws of the Twenty-sixth General Assembly, can be collected from the estates of persons who died before the said act took effect, and do not find any authority to justify the conclusion that the law applies to the estates of persons who died prior to the time the law took effect.

The exact question has been several times before the supreme court of the state of New York. In the matter of Miller, 110 N. Y., 216, the court says: "The rule is considered settled in this state that neither original statutes nor amendments have any retroactive force unless, in exceptional cases, the legislature so declares. The act before us contains no such declaration, and there seems no reason to give the amendment any other force than would be due to the provisions of an independent statute."

"Although retrospective acts are often passed and sustained as valid, yet they are viewed with disfavor, and will not be considered by the court to be such except from a necessary and unavoidable implication,

or they are made so by the express terms of the law itself." Rosier vs. Hale, et al., 10 Iowa, 470.

Such laws or retrospective laws are looked upon with disfavor and are regarded generally as unjust. Sutherland on Statutory Construction, section 463.

In Carpenter, et al., vs. Pennsylvania, 17 How., 456, it was held that the law of the decedent's domicile attaches to the property until the period for distribution arrives, and the rights of the donee are subordinate to the conditions, formalities, and administrative control, prescriged by the state in the interest of its public order, and are only irrevocably established upon its abdication of this control, at the period of distribution. If the state, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the construction and laws of the United States to prevent it."

While it would be competent for the legislature to pass a law imposing a tax upon all estates which had not been fully administered upon, yet that question need not be examined now because, in my judgment, the statute does not have any retroactive effect. In a certain sense, property passing from the decedent, or by will or the intestate laws of the state, passes at the time of the death of the decedent. This passing of the title at the time of the death fixes the status of the property. The law in force at the time of the decease determines the interest which the devisees or heirs have in the property which thus passes. The first section of chapter 28 subjects to the tax all property of a certain kind "which shall pass by will or the intestate laws of the state," etc. This language strikes the mind as applying only to property which shall pass in the future; that is, after the law takes effect.

The further provisions of the statute relating to the duties of the administrator or executor, and what the courts shall do, all have reference to the estates which shall, in the future, be affected by the statute in question, and there is no provision or suggestion that it shall apply to estates which remain unsettled. I see nothing in the entire statute which indicates that it was the intention of the legislature to give the statute a retroactive effect.

Hence, I do not think a tax can be legally collected from estates of persons who died before the taking effect of the statute.

Yours respectfully,

MILTON REMLEY,

Attorney General.

Board of Control Act.—1.—Sec. 35 repealed all acts and parts of acts in conflict or inconsistent with the act.—All powers of the several Boards of Trustees or managers of the several state institutions, except so far as they may be repealed or modified by the act becoming vested in the board of control.—This act did not limit the power of the trustees or managers before going out of office.

2.—Th above applies to wardens of the penitentiaries.

3.—Products from the farm or garden of an institution can properly be used for the support of the institution and the surplus thereof, if any, may be sold and proceeds used to purchase other supplies.—The proceeds of sale of stock, hides on manufactured articles when paid into the state treasury on surplus fund account should not be considered a part of the per capita allowance provided by law.

4.—It is the duty of the board to keep constantly on hand supplies for the use of the institution.

5.—The law implies that the board may keep constantly in the hands of the managing officer, $250.00, and when it falls below that, they can increase the amount in a like sum.

6.—It is the duty of the board to cause a supplemental estimate to be furnished in case there should be a rise in the price of goods, or in case articles are needed which are not provided for in the estimates already made.

7.—"Ordinary expenses" and "current expenses" distinguished.

8.—Monthly statements must be made and supplies purchased and paid for in each month.

Des Moines, Iowa, June 2, 1898.

Hon. William Larrabee, Chairman Board of Control, Des Moines, Iowa:

Dear Sir—Your board having desired my opinion upon the questions herein stated, let me premise my views by stating that no legislature in enacting a law making radical changes in existing affairs, can foresee every contingency and provide in detail for everything which the future may develop. In launching into active operation any new law, there is, and must be of necessity, much left, and intended to be left, to the wise discretion of those having the matter in charge.

The board of control act, section 35, only repeals all acts and parts of acts in conflict or inconsistent with the act, and expressly says: "Existing laws relating to the institutions referred to in this act which are not inconsistent with the provisions of this act, shall remain in force." In section 9 of the act it is provided: "The powers possessed by the governor and executive council with reference to the management and control of the state penitentiaries, shall, on July 1st, 1898, cease to exist in the governor and executive council and shall become vested in the board of control, and said board is, on July 1st, 1898, and without further process of law, authorized and directed to assume and exercise all the powers heretofore vested in or exercised by the several boards of trustees, the governor or the excutive council with reference to the several institutions of the state herein named."

All the powers, then, of the several boards of trustees or managers of the several state institutions, except so far as they may be repealed or

modified by the act creating the board of control, become vested in the board of control. With but few exceptions, the powers given to the several managing boards of the state institutions were general powers; the manner of exercising the powers was left to their sound discretion. They were authorized to do whatever was necessary to be done to carry out the purposes of the founding of the institutions within the limit of their appropriations, and subject only to a very few limitations.

The board of control, then, succeeding to these powers, has a broader and more general authority than is to be found in the act creating the board of control. In some particulars, the act creating the board of control, points out the manner in which these powers shall be exercised, but in the absence of some specific direction, the board is vested with all the powers which have heretofore been exercised by the various trustees and managers of the institutions.

1. "Can the trustees of institutions under control of this board appropriate and use prior to July 1st, 1898, of funds remaining in the hands of their local treasurers, a sum or sums sufficient to purchase and pay for supplies required for use and consumption during the month of July, 1898?"

Section 9 of the act contains the following: "All trustees now in office shall continue in office until July 1st, 1898." I find nothing in the act creating the board of control to limit their power in any respect whatsoever until they go out of office July 1st.

There is nothing in the act to suggest to my mind that the legislature intended the trustees of the institutions to clear out the offices and store houses and pantries as if the institutions were to be closed the 1st of July. The funds in the hands of the local treasurers is subject to the payment of warrants duly drawn by order of the trustees. They have authority to purchase supplies for the use and consumption of the institutions in such amounts as the good of the institution demands. The legislature never intended there should be a break in the operation of the institutions simply because the management changes, nor was it the intention of the legislature that during the month of July, the institutions should be deprived of the usual supplies, and if, as appears to be the case, there was a lapse of legislation in providing for the month of July, I would say the trustees have not only the power, but it would be their duty to provide supplies of all kinds necessary for the use of the institution during the month of July, as far as the funds in their local treasury will permit it to be done.

2. "Can the wardens of the penitentiaries at Ft. Madison and Anamosa make use of such funds in their hands for a like purpose?"

The views which I have expressed in regard to the first point are equally applicable to the second. The suggestion that no provision was made for the expenses of the institutions during the month of July will be noticed in the consideration of the sixth question.

3. "What will be the status of these institutions after July 1st, 1898, as to money by them turned into the state treasury, which may be derived from sales of surplus products from their farms or from sales of stock, hides, or of articles manufactured

by said institutions or otherwise, except that derived from appropriations, either general or special?

"Will such sum be placed to the credit of the institution remitting it, and can the institution have the benefit of it in addition to the per capita prescribed by law?"

By section 38 of the act, the treasurers of the institutions placed under the management of the board of control will be relieved of their duties July 1st. The funds in their hands must be sent to the state treasurer, and it is made his duty to receive such funds. As is well known, the treasurers of the state institutions have separate funds under their control; for instance, the support fund, the contingent fund, the repair fund, the building fund, and different funds appropriated for special purposes. Not that the treasurers of all institutions have each of these separate funds, but they are to be found in the appropriations of the different institutions. Generally, each fund can be used only for the purpose for which it was appropriated. The duties of the treasurers of these different institutions are imposed now upon the treasurer of state. He becomes the treasurer for each institution, and in my judgment, it will be necessary for him to keep an account with each fund which belongs to the several institutions of which he is treasurer. The monthly or quarterly appropriations, called the support fund, are used in the general support of the institutions to which they belong.

I do not think it can be questioned that the products from the farm or garden belonging to an institution can properly be used for the support of the institution, and if more of one kind of produce is realized than is needed, it may be sold and the proceeds thereof used to purchase other supplies necessary for the support of the institutions. So if live animals are purchased to be slaughtered, they are paid for out of the support fund and the proceeds of the sales of the hides, or any part thereof not used in the institution, could be used for the support fund. So of articles manufactured for sale by the institutions; as for instance, the industrial home for the blind; they can be sold and the proceeds used for the support of the institution.

If the proceeds of such sales are paid into the treasury of the state, they should be credited to the proper account, viz., the support fund, just as they would have been by the local treasurer. When money is paid out for an institution in the manner provided in section 42 of the act creating the board of control, it should be charged to the support fund or its appropriate fund.

In section 42 we find the following: "Upon such certificate the auditor of state shall, if the institution named has sufficient funds, issue his warrant upon the treasurer of state for the gross amount as shown by such certified abstract." The appropriation of given sums monthly or quarterly, under the old system, is a limitation on the net amount appropriated by the state for the institutions respectively. It cannot be imagined that the legislature ever supposed that the cost of furnishing food and clothing for the inmates of an institution would uniformly, month by month, be the same. It is apparent that the cost of support in the winter time, when more clothing and fuel are needed, will be greater than in summer months. The custom has been for the trustees

to draw from the state treasury during the months when less is needed, the full amount, so as to keep in the local treasury sufficient to cover the expenses during the months when the actual expenses would exceed the statutory limit. The act creating the board of control does not make plain how the auditor may determine whether the institution has sufficient unds. It is evident that the auditor's warrant must be drawn for all funds that are paid out by the state treasurer. It is customary and proper for the auditor, in his account with the several institutions, to credit such institutions with the appropriation and charge the same with the warrants drawn. In like manner, the auditor, in his accounts with the institutions, can credit their accounts with the amount they are entitled to under the law, making an appropriation, and also credit such accounts with the amount paid by such institutions into the state treasury belonging to that fund, and then charge the institutions with all the warrants issued upon that fund, and at the end of the year, any unexpended balance of these appropriations can be charged off, as is done with reference to unexpended general appropriations on the 1st of April.

I do not think that the proceeds of the sale of surplus products from the farms, or the proceeds of the sale of stock, hides, or manufactured articles, when paid into the state treasury on the support fund account, should be considered a part of the per capita allowance provided by law. The plan above suggested is only a suggestion. It appears to me to be clearly within the spirit and the letter of the law. It may be some other plan accomplishing the same end may be better, but certainly the legislature never intended, when, for instance, a beef is bought and paid for out of the support fund, the parts that cannot be used being sold and the money put into the state treasury, that that same money should be again charged to the institution as a part of the per capita allowance.

4. "Can the full amount per capita per month be drawn by an institution, if needed, and any further sum which may be to its credit as suggested in No. 3 above, if needed, regardless of the fact whether such institution may have on hand at the close of the year in supplies a sum in amount or value less than it had at the beginning of the year?"

Considering the various acts together, and sections of the code, I think it was intended by the legislature that the institutions should be conducted on good, sound business principles. The permanent appropriation per capita for the inmates of an institution is intended for its general support fund. It is an annual appropriation. It is a limitation on the amount that may be used year after year. If less is needed to meet the wants of the institution, less should be drawn. It was never contemplated, to my mind, that the supplies on hand at the beginning of any year should be charged to the per capita allowance of that year, or included therein. There is no more reason for saying a different rule should prevail under the board of control than there was for so saying under the former system. I regard the appropriation of so much per capita as a limitation on the amount that may be drawn from the state

treasury in any year, and the managament, whether the board of control or trustees, have the power and it is their duty to keep constantly on hand such supplies for the use of the institution as good business principles would dictate.

5. "Under section 43 of the board of control act, has this board the power to make a requisition upon the auditor of state whenever said contingent fund shall be reduced below $250, for an amount sufficient to leave $250 in the hands of the managing officer of each institution?"

The language of section 43 gives the board of control authority to permit to remain in the hands of the managing officer of such institution, a sum not to exceed $250. Provision is made for the accounting of this fund. The board passes upon the expenditures made therefrom. I am of the opinion that the language implies that the board may keep constantly in the hands of such managing officer, $250, and when expenditures are made therefrom and it falls below that sum, if in the judgment of the board it is advisable, they can increase the amount to $250.

6. "If an institution has made an estimate for a certain month, and by reason of rising prices the goods cannot be procured at the prices named in such estimate, or in case articles are needed which might not be provided for in the estimate already made, or are not contemplated by section 43, would it be lawful to allow a supplemental estimate to be made for the same month, to cover such articles?"

Sections 40, 41 and 42 provide the plan for the purchase and payment for the necessary supplies for the institutions. The estimate of the amount needed and prices, shall be furnished be ore the fifteenth day of each month. It does not expressly provide for more than one estimate per month from each institution.

"Provisions regulating the duties of public officers and specifying the time of their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer."

(Sutherland Statutory Construction, Sec. 448. See also Sec. 451.)

I regard the direction as to the time within which the estimates must be made as directory. In fact, nearly all of the two ections must be considered directory. A failure, then, to furnish the estimate at the time; or a failure by some oversight or event unforeseen, as a rise in prices, to furnish an estimate which embraces all that may be needed for an institution would not, in my judgment, prevent the board from receiving a new estimate and making a supplemental order for additional purchases. I cannot conceive of a construction of the law which would justify the bord, because of some unforeseen event or some

oversight in preparing the estimate, to permit the inmates of an institution to suffer for want of things which the state clearly intended to provide for them. I think it would clearly be their duty to cause a supplemental estimate to be furnished.

7. "Under code section 2718, as amended by the last General Assembly, provision is made for 'ordinary expenses,' which are defined to include 'furniture, books, maps, compensation of the principal, teachers and other employes, and to provide for contingencies,' ten thousand dollars. The same section provides a per capita of $35.00 to meet 'current expenses.'

"Does not the term 'current expenses' necessarily embrace any necessary expense which may accrue? Does not the peculiar reading of this statute warrant our treating either of these funds as applicable to any expenses of the institution, so far as necessary? You will notice under section 2727, relating to the deaf, the fund appropriated is for 'current and ordinary expenses.'

"A construction which limits the use of $35 per capita to the actual support of pupils only, will materially cripple this institution, and result in our being compelled to cut off teachers and employes whose services seem to be absolutely necessary for properly and efficiently conducting the institution."

It is somewhat difficult to distinguish between the meaning of "ordinary expenses" and "current expenses." "Ordinary" means common; usual. "Current" means running expenses. Whatever, then, is necessary to maintain the institution in carrying out the purposes of its organization may be called "current expenses," and yet it is difficult to see wherein ordinary expenses are distinguishable therefrom. Yet these terms have been used in the law for more than forty years, and have acquired a different meaning. The act creating the college for the blind appropriated funds for the "ordinary expenses" in language almost identical with the first part of section 2718. At that time, however, it was expected that each pupil would pay $35 per quarter for the expense of the support of such pupil in the institution, or in case of his inability to do so, the county should pay for him. It was afterwards provided that residents of the state should be entitled to an education at the expense of the state, and persons not residents of the state should be entitled to receive the benefits of the institution on paying to the treasurer thereof the sum of $35 a quarter in advance. (Sections 5 and 6, chapter 56, acts of the Seventh General Assembly.) The money paid by the pupils was expended for what was called the current expenses, having especial reference to supplying the table from which they were fed. The appropriations made with especial reference to supplying the table have been, ever since, called "current expenses," and the same language has been used with reference to other institutions.

But whatever distinction it may be that the legislature intended to make, it is evident to my mind that the clause, "including furniture, books, maps, compensation of principal, teachers and employes," clearly indicates that for these purposes at least the legislature intended the expenses should not exceed the sum thereby appropriated. It is evident

to my mind that many expenses of the institution would come under the term "current expenses," and also under he term, "ordinary expenses," and were it not for the clause above quoted I would be inclined to the opinion, from the language alone, that both could be treated as one fund from which to pay the expenses necessary to maintain the institution. But I do not think, in view of the past legislation, and the definition in part of what is meant by "ordinary expenses," that more than ten thousand dollars could be used for those purposes. I regret exceedingly that such is the law, in view of the statement of your inquiry, but can give it no other construction.

> 8. "We understand that the state auditor and yourself have construed section 2718 of the code as preventing the drawing of the per capita for one quarter, as the school is not in session during all of that quarter. We suppose this ruling is based upon the construction of the words, 'quarterly for each resident pupil.' Do you think your construction is warranted in view of the previous legislation? Is not that phrase used simply to prohibit drawing per capita for pupils who may attend the institution and who reside outside of the state?"

The only opinion which I have given the auditor directly upon the question presented above is found in the Attorney General's Report, 1898, page 351. It is probably true that the word, "resident," as it occurs in the section, was intended to refer to those pupils who have a residence in the state of Iowa. The language of section 2763 of McClain's Code is: "Not to exceed forty dollars per quarter for each pupil in said institution except non-residents at the time of their reception." No statute prevented the board of trustees from charging for the support of pupils not resident in the state.

But if the word, "resident," had been omitted from section 2718, would the language have warranted the drawing of money for pupils who were not in attendance? Forty dollars is appropriated per quarter. I see no way in which the fair intendment of the legislature can be carried into effect except by taking the average attendance per month as a basis for determining the amount to be drawn. Substantially the same results are arrived at as those suggested in my opinion to Auditor McCarthy, November 5th, 1897. The requisition under section 2416 was required to be presented at the middle of the quarter, and there would ordinarily be but little, if any, difference between the attendance taken on that date and the average attendance per month.

In accordance with your request of June 1st, I will add that the last sentence of section 24of the act creating the board of control provides: "When the appropriation is based upon the number of inmates or persons at an institution, the board shall require a daily record to be kept of all persons actually residing at and domiciled in said institution."

This is evidently a direction in regard to the manner of determining the basis for determining the number of inmates for which the per capita appropriation may be drawn. The manner, too, of paying the expenses of the institutions monthly is inconsistent with the drawing of what is called the "current expenses"

quarterly. In my judgment, a fair construction of the different sections authorizes the board to take the average attendance per month as the basis for determining the amount that may be expended in the support of the college for the blind. The appropriation at thirty-five dollars per quarter amounts to eleven and two-thirds dollars per month, and it would be carrying out the spirit of the act creating the board of control to credit to the institution such sum, or as much thereof as may be necessary, monthly, and to pay for the supplies upon the estimates and in the same manner as the supplies for other institutions are paid for. I do not think there is any doubt that under the act creating the board of control, there must be monthly estimates made, and the supplies purchased and paid for in the manner provided in sections 40, 41 and 42 of said act.

The inquiry is further made: "During the third quarter of the year, in which there is school only in a part of September, what shall be the basis for figuring the per capita?"

For July and August, when there are no pupils in the school, there is nothing to be drawn from this fund, but for the month of September, by divinding the aggregate daily attendance by thirty, the average daily attendance for the month is ascertained, and upon this quotient, the per capita allowance is based.

The opinion to Auditor McCarthy above referred to was based upon the law as it then stood, and had no reference to any modifications made by the act creating the board of control.

MILTON REMLEY,
Attorney General.

Board of Control Act.—Construction of Sec. 4.—This section was only intended to meet the salaries and expenses of the board in performing the duties of their offices.—It does not supplement any provision of law for the support of the several institutions.—It must be limited to the subject treated of in said section.

Des Moines, June 3, 1898.

Hon. William Larrabee, Chairman Board of Control, Des Moines, Iowa:

Dear Sir—I have the honor ot acknowledge the receipt of your request of June 1st, for my opinion upon the following question:

> "Section 4 of the board of control act makes a general appropriation to pay the salaries and expenditures authorized by the act. Under this section are we or not warranted in making requisition upon the proper state officers for paying all expenditdres which may be necessary and authorized under the act for books, blanks, etc., which we are requireo to furnish state institutions instead of charging it up to the institutions themselves."

In my judgment, the appropriations made by section 4 are intended to cover the salaries and all the expenses of the board as such, including of course, salaries of employes, necessary books for the use of the office of the board of control, stationery, office supplies, and everything

necesssry or proper to be expended to enable the board to perform the duties imposed upon it by law. But I do not think such appropriation was intended to cover or include therein any expense which belongs distinctively to the different institutions.

In other words, section 4 was not intended, directly or indirectly, to make an additional appropriation for any state institution. If it should be held that books and blanks which are necessary in the administrative office of the institution, and which have heretofore been purchased by such institutions, can now be bought by the board of control and paid for under the appropriations made in section 4, then section 4 in effect increases by so much the appropriations allowed by law for the support of such institutions. If it can be applied to furnishing books, blanks, etc., which have heretofore been purchased out of the appropriations made for the institutions respectively, then why could it not with equal propriety be expended for other things which must be purchased by the board for the several institutions.

I do not think that section 4 should or can properly be considered as in any way supplementing any provisions of law for the support of the several institutions. The first seven sections of the act relate alone to the appointment, organization, compensation, of the board of control, and providing means for the payment of the appropriate expenses of the board in performing the duties which the act imposes upon it; and while the term, "expenditures hereby authorized," may appear to be general, yet I think, from the connection in which it is used, it must be limited to the subject treated of in said sections.

The board is authorized by the act to expend the appropriations made by law for the several institutions, but it certainly would not be claimed that such expenditures were included in those named in section 4 for which an appropriation is made. It is very clear to my mind that section 4 was only itnended to meet the salaries and expenses of the board in performing the duties of their offices. Yours respectfully, ,

MILTON REMLEY,
Attorney General.

Corporations.—Expiration of life thereof.—Fee charged for renewal of certificate.—Corporation fee not required unless there is a reorganization of the company.—When not reorganized recording fee only, necessary.

Des Moines, Iowa, June 4, 1898.

Hon. G. L. Dobson, Secretary of State:

Dear Sir—Your favor of May 11th came duly to hand, in which you desire my opinion upon the following question:

> "When the time for which a corporation is organized has expired, what fee shall be charged by me for a renewal of its certificate?"

The difficulty in determining this question arises from the uncertainty in regard to what is meant by a renewal. Section 1610 of the code as amended requires, "the payment to the secretary of state, before

a certificate of incorporation is issued, a fee of twenty-five dollars, and for all shares of stock in excess of $10,000, an additional fee of one dollar per thousand," the subsequent act limiting the total fee that shall be required to $2,000.

Section 1609 provides that among the powers of such corporations are the following: "To have perpetual succession."

Section 1618 provides that certain corporations may be formed to endure fifty years; certain others not to exceed twenty years; "but in either case they may be renewed from time to time for the same or shorter periods * * * if a majority of the votes cast at a regular election, or special election called for that purpose, be in favor of such renewal, and if those wishing such renewal will purchase the stock of those opposed to it at its real value."

The statute is quite explicit in regard to the acts necessary to form a corporation, but is entirely silent upon what is necessary to renew the same. Any corporation renewed, so far as the title to its property is concerned, and its liabilities after the renewal for its contracts prior thereto, and in all respects, is treated as the same corporation. The word "renew" means: "To make new again; to restore to freshness, perfection or vigor; to rejuvenate; to establish, to recreate."

Having in mind the definition of the word, and the purpose of the act requiring the fee to be paid, viz., to procure revenue for the state, it would appear that the same fee should be paid upon a renewal of a corporation as upon its first organization. But there are other principles which I think must control. The law does not require new articles of incorporation to be formed and filed. There is not one syllable in the statute defining what is necessary to be done to extend the duration of a corporation. The United States law which required stamps to be placed upon insurance policies, for instance, specified that for each renewal thereof a like tax shall be paid. So in regard to leases, and no analogy can be drawn therefrom to construe a statute which does not so require. It is well settled that statutes for the taxation of a person or property which places a burden upon a citizen, are to be construed strictly.

In United States vs. Wigglesworth, II. Story, 369, it is said: "Statutes levying taxes or duties upon subjects or citizens are to be construed most strongly against the government and in favor of the subjects or citizens, and their provisions are not to be extended by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy."

So in Powers vs. Barney, 5 Blatchford, 202, Justice Nelson says: "Duties are never imposed upon a citizen upon vague or doubtful interpretations."

If it should be held that corporations, upon extending the time of their corporate existence, should pay the fee provided for in section 1610 of the code, it would be based only upon analogy and by implication. This would be contrary to a long line of precedents and well established rules of law. If the legislature intended, upon the renewal of a

corporation, that the tax should be paid, it should have so stated and left nothing to implication.

I am of the opinion that the corporation fee is not required to be paid unless there is such a reorganization of the company as to make necessary the issuing from the office of the secretary of state what is called the certificate of incorporation. If a certificate of incorporation is required, then the fee should be paid before the same is issued.

But if simply an instrument in the nature of an amendment to the articles of incorporation extending the time is filed with the secretary of state, then the only fee to be paid by the corporation is the usual fee for recording the same. Yours respectfully,

MILTON REMLEY,
Attorney General.

Collateral Inheritance Tax.—Sec. 7 construed.—Fee of county attorney for reporting.—He is not entitled to fee for reporting an estate which he knew had already been reported.

Des Moines, Iowa, June 4, 1898.

Hon. John Herriott, Treasurer of State:

Dear Sir—Yours at hand, enclosing correspondence with Mr. W. L. Smith, county attorney of Humboldt county, and you ask my construction of the law with reference to the compensation to be paid to county attorneys for reporting to the treasurer of state the death of all persons whose estates are liable to the payment of the collateral inheritance tax, etc., under an act amending chapter 4, title VII. of the code, approved April 7th, 1898, with respect to those estates which had been previously reported to you.

Section 7 of the act referred to makes it "the duty of the county attorney of the county to report to the treasurer of state the death of all persons whose estates are liable to the payment of the collateral inheritance tax, and the description of any property located in the county, liable to such tax. * * * For reporting such estates and property, the county attorney shall receive a compensation of 10 per cent of the tax payable to the state, but not to exceed the sum of $20 for any one estate." It further provides for the payment of the fee for reporting when the treasurer is satisfied that the estate is liable for the tax.

It is not to be supposed that the legislature intended the estates which had theretofore been reported to the treasurer of state, to be reported again, but the law is general; it is made the duty of the county attorney to report all estates liable for the tax, and unless the county attorney had knowledge that certain estates had theretofore been reported, he could not, in compliance with the law, omit any. I do not think the county attorney would be entitled to the fees for reporting an estate which he knew had already been reported.

In your circular letter to the county attorneys, of April 15th, a copy of which you enclosed me, is the folowing: "Where estates have already been reported from your county, I will communicate with you in respect to them later." You also reminded the county attorneys, "to

carefully inspect the probate records in the county from July, 1896, and all parties recorded as receiving property as collateral heirs or devisees, together with the administrator of such estates, should be reported to the treasury deparment."

This is in harmony with the statute imposing the duty upon the county attorneys. If the county attorney had been informed that certain estates had been reported previously, he would have had no duty to do in examining the records of the estates to see whether they would be liable to the collateral inheritance tax. But in the absence of information in regard to what estates had been previously reported, I think the county attorney was not only justified in making a report, but to fail to make the report in regard to every estate that he found liable would be failing to perform a statutory duty, and for performing this duty, I am of the opinion hat he is entitled to the compensation fixed by said section 7.

In those cases where your department had informed the county attorneys that certain estates had been reported, I do not think they were entitled to any compensation for again reporting them to you. It cannot be said that the law contemplates that the estates shall be reported more than once to the treasurer. The purpose is to give information to the treasurer as to what estates are liable to the tax, for which the state, under the new law, expects to pay; but it should not be expected to pay for information which it alerady has.

There is no more reason for saying that the present county attorney should receive compensation for reporting an estate which had been reported by other parties before the law was passed, than there is for saying that the county attorney who goes into office say next January shall receive compensation for reporting all the unsettled estates which have been reported by his predecessor. But wherever the county attorney had no knowledge of what estates in his county had been reported, if he reports them, I think he is entitled under the law to the fee provided by statute.

I return you the correspondence as requested. Yours respectfully,

MILTON REMLEY,
Attorney General.

Appropriation.—Under Sec. 17 of House File No. 295 laws of 27 G. A., the appropriation is unconditionally made.

Des Moines, Iowa, June 15, 1898.

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

Dear Sir—In response to your request for my opinion upon section 17 of House File No. 295, laws of the Twenty-seventh General Assembly, I will say that the appropriation there made is unconditional, and nothing is required by the act to be done to entitle Dr. Gibson to receive a warrant for the amount therein named.

I have no doubt that you are authorized to issue a warrant for the amount appropriated to Dr. Gibson, upon the treasurer of state.

MILTON REMLEY,
Attorney General.

Warrants.—1.—Warrant drawn by auditor of state upon treasurer of state, payable to John Herriott, treasurer, for the use of an institution named.—Treasurer of state is also treasurer for the several institutions.—The warrant cancelled by the treasurer is proper voucher for settlement between the auditor and treasurer.

2.—Money received by a state institution and paid into the state treasury belongs to its support fund and can be properly paid out again without an act making a special appropriation therefor.—A warrant naming the act under which it is drawn and giving the section thereof, fully complies with the law.

Des Moines, Iowa, June 15, 1898.

Hon. C. G. McCarthy, Auditor of State:

Dear Sir—Your favor of the 8th inst. duly at hand, in which you refer to section 42 of the act creating the board of control, of the Twenty-sevent General Assembly, and request my opinion upon the following points:

> 1. "Does this section contemplate that the warrants to be issued by the auditor of state should direct the treasurer of state to pay to John Herriott, treasurer of state, the amount of money authorized to be drawn by the requisition of the board of control? If these warrants cannot be drawn payable to the order of John Herriott, treasurer of state, to whose order should they be drawn?"

I think the provisions of this sections contemplate that a warrant shall be drawn by the auditor upon the state treasurer, payable to John Herriott, treasurer, etc., for the use of the institution, naming it, for which the warrant is drawn. The amount of this warrant is the aggregate amount stated in the requisition. The treasurer being furnished with a list of persons entitled to pay, and the amount due each, is required to send his check to such persons. The amount of the pay roll of each institution can be paid in a single check, and the steward, clerk, or other officer designated by the board of control to be paid by him to the different employes.

The state treasurer is also the treasurer for the several institutions. The warrant of the auditor authorizes the treasurer of state to pay the amount of money named therein for the benefit of the institution in accordance with the requisition made by the board of control, and having paid the same in the manner required by statute, the warrant being canceled by the treasurer of state, is a proper voucher for settlement between the auditor and the treasurer of state.

> 2. "Is it a sufficient compliance with law, after drawing said warrants payable to John Herriott, treasurer of state, that the warrants thus drawn be in the same form as those now used in this office, which warrants, in addition to the amount for which they are drawn, specify the chapter and section of the code, or of the session law, by virtue of which the warrant is drawn, or

does the act in question require, or contemplate, that any additional statement should be made upon the face of said warrants?"

Paragraph 8 of section 89 of the code, requires warrants to bear on the face thereof, the number, date, amount, name of payee, and a reference to the law under which they are drawn. The act creating the board of control does not repeal the laws making appropriations for the several state institutions, and were it not for the fact that said act requires all moneys received by the institutions to be paid into the state treasury on the first of every month, there would be no difficulty in referring to the specific section of the code or session law under which the warrant is drawn, as is now the custom. Section 42 authorizes the auditor to draw a warrant, "if the institution named has sufficient funds." Money which has been received by the institutions and paid into the state treasury belonging to the support fund, should be credited by the treasurer to the support fund. This money can, in my judgment, be properly paid out again without an act making a special appropriation therefor. In this connection, permit me to call attention to an opinion that I gave to the board of control on the 2nd day of June, 1898. In order, however, to authorize the state treasurer to pay out this money again, a warrant must be furnished as required by section 42 of the act creating the board of control.

Whenever, then, money has been paid in by a state institution, and is credited to the support fund or other appropriate fund of such institution, and a warrant is drawn authorizing the payment from such fund, I think it would be a strict compliance with the law for the auditor to state, on the face of the warrant, that is drawn under the provisions of said section 42 of the act creating the board of control. When, however, the warrant includes money which is appropriated by any section of the code or session law, and also funds which have been paid into the state treasury by the said institution, then a reference to the section by which the appropriation is made and said section 42 of the board of control act would be sufficient.

It is very likely that when the act creating the board of control is put in full operation, many institutions will have some funds standing continually to their credit by reason of the payment of money into the state treasury as required by Sec. 39 of the act creating the board of control, and in drawing warrants for said institutions as directed by Sec. 42 of said act, it will rarely happen that the amount of the warrant will be the exact amount that was paid into the state treasury by the institution.

Practically, then, every warrant will include the money thus paid into the state treasury, and also some appropriated by some section of the code or a session law for the support of the institution. This being true, I see no objection to the warrant stating on its face that it was drawn under some section of the code, naming it, and under Sec. 42 of the act creating the board of control. The form of warrant now used by the Auditor provides for naming the act of the legislature which makes the appropriation. If, then, in addition to naming the act as has been the custom heretofore, reference is also made in the warrant to

Sec. 42 of the act creating the board of control, it occurs to me that the provision of law would be fully complied with. Yours respectfully,

MILTON REMLEY,
Attorney General.

Imprisonment in the penitentiary.—Certified copy of execution is the only authority for the detention of the prisoner.—The warden has no authority to detain prisoner longer than date fixed in judgment of sentence.—The commitment is evidence of the judgment.

Des Moines, Iowa, June 29, 1898.

Hon. W. A. Hunter, Warden Penitentiary, Anamosa, Iowa.:

Dear Sir—Yours of the 28th inst. at hand, in which you say you find many commitment papers, especially from the western part of the state, that read something like the following: "——years from this date," and you also state the practice has been to discharge men committed for one year rom the date of the sentence, disregarding the date of entrring the prison; also calling attention to Sec. 5682 of the code, which provides that no convict shall be discharged from the penitentary until he has remained the full term for which he was sentenced, to be computed from and including the day on which he was received in the same. You ask, in substance, what your duty is in regard to the discharge of prisoners.

In reply to this I will say that Sec. 5443 of the code provides "A copy of the entry of the judgment must be furnished to the officer whose duty it is to execute the same, and no other warrant or authority is necessary to justify or require its execution." Sec. 5444 provides: "The sheriff shall delivered a certified copy of the execution with the body of the defendant to the keeper of the jail or penitetary in which the defendant is to beimprisoned in execution of the judgment, and take his receipt therefor."

The certified copy which is furnished to the warden is his authority for the detention of the prisoner, and his only authority. If it appears therefrom that the sentence was for one year from the date of the sentence, then, as a matter of fact, the sentence was for less than a year from the time that he arrives at the penitentary, unless he is taken to the penitentiary the same day he is sentenced. While, as you suggest, it may be erroneous for the court to enter the sentence in that manner, and it may lead to embarrassments in case there is long delay in conveying the prisoner to the penitentary, yet it is a matter which can be corrected only by the district court imposing the sentence. The warden has no authority to detain the prisoner longer than the date fixed in the judgment or sentence. I do not see how you can do otherwise than to discharge the prisoner on the date that he is entitled to the discharge, as shown by the commitment which is given to the warden when the prisoner is surrendered by the sheriff.

Possibly I snould qualiy this. In case of an appeal having been taken, and the prisoner released on bail, the execution is suspended until the appeal is determined. Upon an affirmance of the judgment by the

Supreme Court, the original judgment is to be carried into effect as the court shall direct. (Code Sec. 5465.) If any of the commitments issued after an appeal has been taken fail to show the appeal and an affirmance in the Supreme Court, or the order of the Supreme Court, or if for any reason it appears on the face of the commitment papers that the term for which the sentence was imposed has expired before the prisoner is brought to the penitentary, or will expire sooner than it was evidently intended by the court that it should, I would suggest that you take the prisoner and immediately communicate with the proper county attorney or the district judge, and give the state a reasonable time to furnish you with proper authority for holding the prisoner. But you cannot legally detain a prisoner in the penitetary longer than authorized by the judgment. Sec. 5682 applies literally when a fixed term is named in the judgment without stating when the term is to begin.

Of course it would be better, and lead to less complications for the courts to fix a definate term, without stating when it shall begin, but you cannot change or modify the judgment that is actually entered. The commitment is the only official evidence you have of what the judgment actually is, and except as above stated, you should be governed thereby.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Penitentiaries are agencies of the state, and its maintainance is a function of the government.—Expense of providing stamps to be put on warrants or checks must be borne by the state.

Iowa City, Iowa, July 9, 1898.

Hon. W. A. Hunter, Warden Penitentary, Anamosa, Iowa:

Dear Sir—Your favor of the 2nd inst. at hand, in which you ask whether the exemptions referred to in Sec. 17 of the War Revenue Law of 1898, apply to state institutions.

In regard to this I will say that such state institutions as the penitentiaries are simply agencies of the state for the enforcement of the criminal laws, and the maintainance of such institutions is among the proper functions of government.

Any expense of providing stamps to be put upon warrants or checks, must be born by the state. The purpose of Sec. 17 appears to be to exempt the state, county, town, or other municipal corporation, from the payment of the stamp tax.

In my judgment, the officers of the penitentary, in transacting the ordinary business of the state with reference to their institution, are not required to place revenue estamps upon their warrants, checks, etc.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Board of Control.—1.—Duties of to visit Industrial School.—Sec. 2705 does not impose the duty upon the board to visit

the industrial school once each month.—There is nothing in the act which created the board, to prevent the board from visiting the industrial school once each month or oftener, if in their judgment it is necessary or would be beneficial.

2.—The same rule applies to required visit at the penitentiaries. —If anything arises, which in the judgment of the board requires more frequent visits, then it would be their duty to make such visits.

Des Moines, Iowa, July 13, 1898.

Hon. Wm. Larabee, Chairman Board of Control, Des Moines, Iowa:

Dear Sir—Yours of the 11th inst. at hand, asking my opinion upon the following question:

> 1. "Under existing laws, is it the duty of this board, or some member of it, to visit the industrial schools once each month, as required by code, section 2705, or is the board's duty discharged by a visit by itself, or by a committee, once every six months, as provided by section 10 of the board of control act?"

Section 9 of the board of control act contains the following: "And the said board is, on July 1, 1898, and without further proceedings of law, authorized and directed to assume and exercise all of the powers heretofore vested in or exercised by the several boards of trustees, the governor, or the executive council, with reference to the several institutions named therein. This clause refers to the powers and the authority that shall be exercised, and does not relate to the manner in which these powers are to be exercised."

Section 55 of the act is as follows: "Existing laws relating to the institutions referred to in this act, which are not inconsistent with the provisions of this act, shall remain in force, and all acts or parts of acts in conflict with, or inconsistent with this act, are hereby repealed."

It may be said that there is nothing inconsistent in section 2705 in regard to visiting the industrial schools once in each month, with the provisions of section 10 of the act creating the board of control. ,

By section 10, it is made the duty of the board of control to visit each institution under its control at least once in six months. There is no prohibition against visiting the institutions oftener, and if these were the only sections, it would be apparent that section 2705 is not necessarily repealed.

The general scope and purpose of the law creating the board of control has changed the entire manner and method of the management of the institutions mentioned therein; new officers are created to take charge of such institutions, and very little of the old law, relating to the manner of managing, is applicable to the conditions arising under the act creating the board of control.

I find nothing in the entire act which justifies the conclusion that it was the intent of the legislature that the methods of managing and controlling the institutions therein named authorized by the prior law, shall

be retained by the board of control. The discretion given to the board is broad and ample. and except where the manner of discharging the duties imposed upon the board is specified by the act, it is evident to my mind that the legislature intended the board to exercise its wise discretion in regard to the manner and time in which those duties shall be discharged. The legislature, by the adoption of the act creating the board of control, adopted the scheme and plan therein set forth, and there is a unity and singleness of means employed to carry it into effect. It cannot be considered as an amendment to each chapter relating to the several institutions entrusted to the management of the board of control, but whatever is found in the different chapters relating to the several institutions, which breaks into, or interrupts the scheme or plan adopted by the legislature for the management of these institutions, would be considered by a proper construction of law as being inconsistent with the act creating the board of control. Hence, I do not consider that section 2705 imposes the duty upon the board of control to visit the industrial schools once each month. There is nothing in the act which prevents the board from visiting the industrial schools once each month, or oftener, if in their judgment, it is necessary, or would be beneficial.

2. "Is this board required to visit the penitentiaries each quarter. (Code, section 5697), or is a visit once each six months all that is required?"

What I have said in reply to the first question, is equally applicable to this. The board is directed to visit the penitentiaries once each six months. The legislature has wisely left it to the discretion of the board whether these visits shall be more frequent. If anything arises which in the judgment of the board requires more frequent visits, then it would be their duty to make such visits.

Sections 10 and 11 of the act creating the board of control, show plainly that the legislature did not overlook the matter of the board visiting the several institutions, and has legislated anew upon the subject. Under the rules for statutory construction, this new legislation must be considered and treated as superceding the former law, with reference thereto. Yours respectfully,

MILTON REMLEY,
Attorney General.

Executive Council. Acting as State Board of Review. The law authorizes the Board of Review to prepare instructions so as to secure uniform methods of making the assessment rolls and returns. The Board also has power to require the county auditors to make report of such facts as may be required for the purpose of enabling it to perform its duties intelligently.

Des Moines, Iowa, July 13, 1898.

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

Dear Sir—In response to your request for my official opinion as to

whether the executive council, as a state board of review, has authority to adjust and equalize the valuation of personal property, and to raise or lower the assessment, with reference to classification or otherwise.

It is very clear that prior to the adoption of the code of 1897, the board of equalization or board of review, as it is now called, had nothing to do with the equalization of assessments of personal property. It could only equalize assessments of real estate.

Section 1379 of the code contains provisions which were not found in the corresponding section of the code of 1873. It is as follows: "It shall adjust the valuation of property of the several counties, by adding to or deducting from the valuation of each kind or class of property, a certain percentage in each case, as will bring the same to its taxable value as fixed in this chapter."

The taxable value as fixed by law is 25 per cent of the actual value. The statute provides for the classification of property. It authorizes the board of review to prepare instructions so as to secure uniform methods of making the assessment rolls and returns. It also has power to require the county auditors to make report of such facts as may be required for the purpose of enabling the board to perform its duties intelligently.

The language of section 1379 unmistakably gives to the board of review authority, and imposes upon it the same duty of equalizing the taxable valuation of all classes and kinds of property, which, under the old law, the state board of equalization had with reference to real estate. The enlarged powers of the board of review, with reference to procuring additional returns from the county auditors of the state, and giving instructions which in their judgment shall secure uniform assessments, were evidently given because of the additional duty imposed upon the board of equalizing between the several counties the value of each kind and class of property. A careful examination of the different acts and decisions of the court can, in my judgment, lead to no other conclusion.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Extradition—Indictment charging grand larceny. Under the proofs submitted a warrant of extradition should be issued for the apprehension and surrender of the defendant therein named.

Des Moines, Iowa, July 20, 1898.

Hon. Wm. H. Fleming, Private Secretary, Des Moines. Iowa:

Dear Sir—Your communication, which reads as follows, is received:

> "Under instructions from the governor, I have the honor to submit the enclosed papers, and to ask your judgment as to their sufficiency under the law of the United States and of this state, for the issuance of a rendition warrant."

I have carefully examined the papers enclosed in your letter. On July 13, the governor of Illinois issued a requisition for the extradition of Wm. H. Brown. Attached to the requisition is a copy of the indictment charg-

ing Brown with the crime of grand larceny, committed on June 1, at Cook County, Illinois. It is certified by the clerk of the criminal court of Cook County, Illinois, to be a true, perfect, and complete copy of the indictment entered of record in his office, and that the said cause is pending against said Brown in said court. Also the sworn petition of Peter J. Joyce, praying for the issuance of said requisition, is attached. The petitioner swears that said Brown, on or about the 1st day of June, fled from the state of Illinois, and is now, as he verily believes, in the county of Clinton, Iowa, a fugitive from the justice of the state of Illinois. Petitioner says that he is advised that said Brown is in custody under arrest at Clinton and being held pending extradition. The governor in his requisition certifies that these papers are authentic and duly authenticated in accordance with the laws of Illinois.

You also enclose affidavit made by Peter J. Joyce, on July 18, in which he says he is the same Peter J. Joyce who made the application attached to the requisition; that said Brown committed the crime between the 10th of February and the 1st of March, 1898, in Cook County, Illinois, while he was actually and in person in said county and state; that the charge in said indictment, as to the time of the commission of said offense, is simply formal and as provided by the laws of Illinois; that after the commission of the said crime, said Brown actually and in person fled from the state of Illinois to Clinton County, Iowa, for the purpose of evading and escaping justice and preventing his being brought to trial on said indictment; that he is now a fugitive from justice; that he has carefully investigated all the circumstances relating to the commission of said crime by said Brown, and bases his statement upon his own personal knowledge thereof. A duly authenticated and an exact counterpart of the copy of the indictment attached to the requisition is attached to and made part of this affidavit; the signature to the affidavit is undoubtedly made by the same person who signed the petition which accompanied the requisition; the affidavit is made before the same officer.

Accompanying this last affidavit is still another affidavit made by L. P. Collerton. Affiant says he is chief of detectives of Chicago, Illinois; that said Brown is under indictment for grand larceny as set forth by Peter J. Joyce; that the crime was committed in Cook County, Illinois, while said Brown was personally in body and actually present in Cook County, Illinois; and that after committing said crime, and for the purpose of evading a trial on said indictment, said Brown actually fled from the state of Illinois to the state of Iowa.

These two affidavits are duly authenticated, as judicial records of another state are required to be attested by section 4645 of the code, and in my judgment should be considered by the governor. In my opinion the papers submitted are sufficient and a warrant of extradition should issue for the apprehension and surrender of said Wm. H. Brown to the agent of the state of Illinois. Very respectfully yours,

W. H. REDMAN,
Assistant Attorney General.

Collateral Inheritance Tax—Time when remainder should be appraised. The law does not require it to be appraised before the determination of the estate for life or for years.

Iowa City, Iowa, August 22, 1898.

Hon. John Herriott, Treasurer of State, Des Moines, Iowa:

Dear Sir—In reply to your request asking my opinion as to the time when the remainder of an estate devised after the determination of a life estate to collateral heirs should be appraised; whether at the time the the estate is turned over to the life tenant, or at the determination of the life estate, I will say that in my judgment section 1470 of the code leaves no room for controversy. It provides: "Upon the determination of such estate for life or years, the court shall, upon its own motion, or on the application of the treasurer of state, cause such estate to be appraised at its then actual market value, from which shall be deducted the value of any improvements thereon or betterments thereto, if any, made by the remainder man during the time of the prior estate, to be ascertained and determined by the appraisor, and the tax on euch remainder shall be paid by the remainderman within sixty days from the approval by the court of the report to the appraisers."

This plainly fixes the time for the appraisement of such remainder at the determination of the estate for life, or for years. There is no provision requiring it to be appraised before that time. Yours respectfully,

MILTON REMLEY,
Attorney General.

Polling places for precincts outside of limits of a city under given facts. A polling place within the limits of the city within that township.

Iowa City, Iowa, September 5, 1898.

M. W. Herrick, Esq., Care of W. S. Barker Co., Auditor, Anamosa, Iowa:

Dear Sir—Your favor of the 3rd inst. at hand, in which the following facts are stated:

Monticello township, as originally constituted, included the city of Monticello and the territory outside of the city within the congressional township. A year ago a portion of the territory outside of the city limits of Monticello was set off as an independent township and named Lovell township. Lovell township as now constituted surrounds Monticello township, the latter being the territory embraced within the corporate limits of Monticello. Upon these facts you ask: "Can the board of supervisors, under the provisions of sections 1090 and 1091 of the code, fix the polling place of Lovell township within the corporate limits of Monticello?"

While it is no part of my duties to give opinions to any but certain state officers, I will, out of courtesy, state my views.

Section 566 of the code makes it the duty of the township trustees to designate the place where elections shall be held. This is the rule throughout the state, but section 1091, in the case therein stated, au-

thorizes the board of supervisors to fix the polling places. It provides: "Polling places for precincts outside of the limits of a city, but within the township in which the city is in whole or in part situated, may, for the convenience of voters, be fixed in some room or rooms in the court house, or in some other building within the city limits as the board of supervisors may provide."

You will see that no part of the city of Monticello is now within the township of Lovell, and the facts stated do not bring the case presented within the exception of the rule laid down in section 566. Before the creation of Lovell township while Monticello township included the entire congressional township in which the city of Monticello is situated, it would certainly have come under section 1091 and authorize the board of supervisors to act, but under the new order of things the city of Monticello is not situated in Lovell township, and although surrounded by Lovell township, it constitutes no part thereof and it does not seem to me to come within the exception to the general rule above noted.

The reason for fixing the polling place within the limits of the city I grant is just as strong in the case as now presented as it would be in case Monticello constituted a part of Lovell township, but the law is thus written and I do not think it gives the supervisors any authority to make a change. The only safe way is to have the trustees of Lovell township fix the polling place within Lovell township. The statute might well be changed to meet such a case as is now presented, but it does not appear to do so in its present form.

You refer to section 1090. You will notice that relates to the formation of precincts, but does not refer to the fixing of the polling places for the precincts. Yours very truly,

MILTON REMLEY,
Attorney General.

Official ballot—Placing of a candidates name. Under Chapter 11, Acts of the Twenty-seventh General Assembly, the name of a candidate for the first or short term, and also the name of a candidate for the full term, which begins on the first Monday of January thereafter, should be placed on the ballot.

Des Moines, Iowa, September 9, 1898.

Hon. G. L. Dobson, Secretary of State:

Dear Sir—In regard to your request for my opinion upon the construction of chapter 11, acts of the Twenty-seventh General Assembly, with especial reference to the question whether or not you should place upon the official ballot a candidate for an additional judge of the Eighteenth judicial district for a short term which shall expire on the first Monday in January, 1899,I will say that the first section of said chapter creates the office of judge of said district, increasing the number of judges from two to three. This law took effect on the 4th day of July last. The second section of the said chapter provides for the election of a judge to fill the office thus created, the entire section being as follows: "At the general election in the year 1898, a judge of the district court shall be elected

in said district, whose first term of office shall expire at the same time as do the present judges of said district, and thereafter the term of office of said judge shall be four years."

The term of office of the present judges expires on the first Monday of January, 1899. It becomes evident, then, that the first term of this additional judge shall also expire on the first Monday of January, 1899. This language makes a distinction between the first term and subsequent terms of the said judge. Under section 1060, the term of all officers chosen at the general election for a full term shall commence on the first Monday of January next thereafter, and it is unquestionably right and proper for the electors at the next general election to elect a judge for the full term, commencing on the first Monday of January, 1899. There is no direct provision stating when the first term of the judge to be chosen at the general election shall commence, but the office being created, and it being such an office as is to be filled by an election by the people, I am of the opinion that it is the right of the electors to elect a judge to fill the first term, which, under the language of chapter 11, is not the full term, and a person so elected may qualify immediately after receiving his certificate of election.

There is nothing in the language of said chapter 11 to indicate that the legislature intended that the judge elected should not begin his term until the commencement of the full term. The language very explicitly states that the first term shall expire at the same time as do the terms of the present judges of said district, and the last clause of the section shows that all terms after the first term shall be four years.

In view of this, I am of the opinion that you would be authorized to place upon the ballot the name of a candidate for the first or short term, and also the name of a candidate for the full term, which, under section 1060, begins on the first Monday of January, 1899. Yours respectfully,

MILTON REMLEY,
Attorney General.

Collateral Inheritance Tax. Manner of Imposing Same—An estate to be subject to the tax must exceed the sum of $1,000.00 after the payment of all debts against the estate. All of the estate, above the amount of debts, and the sum of $1,000.00 which goes to collateral heirs, is required by law to pay the tax. If only a part of the estate in excess of $1,000.00 above the debts passes to collateral heirs, only that part should pay the tax.

Des Moines, Iowa, September 10, 1898.

Hon. John Herriott, Treasurer of State:

Dear Sir—Yours of the 9th inst. at hand, asking my official opinion in regard to the manner of computing the collateral inheritance tax imposed by section 1467 of the code, in a case where a part of the estate passes to the widow or heirs not liable to the payment of the tax, and a part passes to collateral heirs.

The construction given to the language of the said section by the supreme court in McGhee estate, 74 N. W. R., 695, removes some doubt as to the meaning of the statute. In order for the estate to be subject to the tax, it must exceed in value the sum of $1,000 after the payment of all debts against the estate. In re estate McGhee, the court held that the so-called exemption of $1,000 from the payment of the tax did not apply to each collateral heir. In other words, after the payment of the debts, the sum of $1,000 should be deducted from the value of the estate remaining, and the amount of such remainder going to the different collateral heirs under the provisions of the will or the law of descent, should be ascertained. Having thus ascertained the amount, 5 per cent of the amounts going to the several collateral heirs should be computed as the amount of tax due the state.

To illustrate, take an estate valued at $10,000, against which there are debts amounting to $3,000, the widow being entitled to one-third and the rest going to collateral heirs. In my judgment, the proper way would be to deduct $3,000 from the total amount of the estate, leaving $7,000. From this sum then deduct the $1,000, the so-called exemption. Of the remaining $6,000 the widow would receive $2,000. The other $4,000 going to collateral heirs should be taxed. This division is solely for the purpose of ascertaining the amount of the tax. The collateral heirs would have the right to insist upon their share of the $1,000 exemption, and the amount, under the supposed facts, going to the collateral heirs would be $4,666.67, but they would be required to pay the collateral inheritance tax on only $4,000 of such amount.

There is no doubt in my mind that all of the estate above the amount of debts, and the sum of $1,000, which goes to collateral heirs, is required by law to pay the tax. The $1,000 referred to in the fourth line from the top of page 551 of the code, is not in fact an exemption, but is a part of the terms used to define the estates which shall be liable to the tax. An estate of less value than $1,000 passes to the heirs without the payment of any tax whatsoever. An estate of greater value than $1,000, after the payment of debts, is liable to the tax, in excess of $1,000, if it passes to collateral heirs. If only a part of the estate in excess of $1,000 above the debts passes to collateral heirs, only that part should pay the tax. If any other rule is adopted, it leads to confusion and does violence to the language of the statute.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Collateral Inheritance Tax. Proceeds of life insurance. Passing to collateral heirs. Proceeds of life insurance passing to the administrator or executor and by him distributed to collateral heirs, is subject to the payment of the tax.

Des Moines, Iowa, September 10, 1898

Hon. John Herriott, Treasurer of State, Des Moines, Iowa:

Dear Sir—In regard to your request for my opinion upon the question whether the proceeds of a life insurance which passes to the collateral

heirs of the decedent is subject to the collateral inheritance tax, I will say that in my opinion it depends upon the terms of the policy itself under which the money is collected.

A policy made payable to a beneficiary therein named is not considered a part of the estate. The beneficiary's interest in the proceeds of the policy is derived from the contract made between the decedent and the company. In such a case, the money is paid directly to the beneficiary without the intervention of the administrator or executor, and the administrator or executor has nothing whatever to do with the collection of the policy or the disposal of the funds.

In saying this, however, I would not overlook the fact that the statute subjects to the tax "a gift made or intended to take effect in possession or in enjoyment after the death of the grantor or donee." A case might arise where insurance made payable to a collateral heir would be considered as a gift which would be subject to the tax, but without some such circumstances, I think without question the rule above stated would obtain.

Where the insurance policy is made payable to the decedent or his legal representatives, or his administrator or executor, then the proceeds of such policy become the property of the estate, and as such property, in my judgment, is subject to the payment of the tax in case it passes to collateral heirs. The right of the heirs to the property arises not by virtue of contract, but under the intestate laws of the state, or under the will, as the case may be. The right to succeed to the property of a decedent depends entirely upon the law of the state. The collateral inheritance tax law is only a condition placed upon the right of succession. When the proceeds of an insurance policy pass to the administrator, they must be disposed of in accordance with the law, and one of the provisions of the law is that if property of the intestate passes to collateral heirs, the collateral inheritance tax must be paid.

That section 1805 of the code provides that policies of insurance on the life of an individual, "in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of such individual independently of his creditors," does not, in my judgment, change the rule. Persons liable to pay the collateral inheritance tax cannot claim the benefits of provisions made for the widow and children of the deceased. The provisions of said section are for the sole benefit of the widow and children, who under no circumstances are required to pay the collateral inheritance tax; nor is the state a creditor in the sense in which the term is used in said section. The section in question only provides a rule for the disposal of the proceeds of a policy of insurance in case there be a husband or wife and children of the deceased. Where the proceeds of a life insurance policy are paid to the administrator, and there is no husband or wife and children to take the same, under the provisions of section 1805 such funds are disposed of under the law as other property of the estate. Code, section 3313; Kelley vs. Mann, 56 Iowa, 625.

The supreme court of New York, in the matter of the estate of Knoedler, 140 N. Y., 377, held that the proceeds of policies of insurance

payable to the decedent or his administrators, executors, or legal representatives, were subject to the collateral inheritance tax when such proceeds were distributed to collateral heirs. Same case, 68 Hun, 156.

I am of the opinion that where the proceeds of life insurance legally pass to the administrator or executor, and by him are distributed to colloateral heirs, that they are subject to the payment of the collateral inheritance tax, the same as other property of the estate.

Yours respectfully,

MILTON REMLEY,
Attorney General.

State University Library Tax—Under Section 2 of Chapter 75, Acts of Twenty-seventh General Assembly, the auditor is authorized to issue warrants at a present time upon proper requests of University authorities, payable when said tax, authorized by said section, shall be collected.

Des Moines, Iowa, September 14, 1898.

Hon. C. G. McCarthy, Auditor of State:

Dear Sir—Yours of the 12th inst. at hand, requesting my opinion as to whether or not section 2, of chapter 75, acts of the Twenty-seventh General Assembly, authorizes you, as auditor of state, to issue warrants at this time payable when the special state university library tax is collected; also asking if such warrants are issued, whether they should not bear this endorsement: "Payable July 10, 1902, without interest."

It will be noticed that the board of regents or managing board of the state university is authorized by said section 2 to expend from time to time, in the purchase of books for the university library, not to exceed $41,900, "and warrants shall issue therefor payable when the additional tax herein authorized is collected."

The tax referred to in said section 2 is to be levied by the executive council in the year 1901, and such special tax will be collected in the year 1902 at the time that other taxes are collected. It was, to my mind, the intent of the legislature that warrants should issue at the present time, payable when such additional tax is collected. The evident purpose is to provide a fund which may be used at the present time, or from time to time as in the judgment of the board of regents it may be needed in the purchase of books for the university library. In order to anticipate the payment of such tax, and to enable the board of regents to supply the library with books from time to time as the same may be needed, it expressly provides that the warrants shall be issued therefor, payable when the additional tax herein authorized is collected. While this section does not expressly provide by whom the warrants shall issue, yet taken in connection with the law authorizing the issuance of warrants upon the state treasury, it is plainly the duty of the auditor to issue the warrants, and that such warrants shall be issued upon the requisition of the board of regents or managing board of the university in the usual manner.

I think without question you are authorized to issue warrants at the present time upon the proper requisition of the university authorities, in the aggregate sum of $41,900, payable when said tax authorized by said chapter shall be collected. It being reasonably certain that $2,000 of said tax will be collected by July 10, I see no special objection to making the same payable at that time, but suggest that in issuing additional warrants, the date of the payment be fixed so as to make due allowance for part of the tax being paid in October. The warrants issued should undoubtedly be made payable when the special tax authorized by said chapter 75 shall be collected.

Endorsing the words, "without interest," would be surplusage, as an obligation to pay a given sum at a future date does not bear interest unless it is so stated in the instrument. It would do no harm to insert the said words, "without interest," but the legal effect of the instrument is the same with such words omitted.

You call my attention to the fact that upon the books of your office, and the state treasurer's office, an account is opened known as The Special University Tax, and the warrants issued thereon are designated as Special University Tax Warrants. The special tax for the purchase of books for the library is different from the special university tax that now appears on your books. The last special tax authorized might properly be designated as The Special University Library Tax, and this would avoid any confusion of your accounts. Yours respectfully,

MILTON REMLEY,
Attorney General.

Claims Against the State. Proclamation of the Governor—Expense incurred in furnishing Iowa quota of troops to the general government should be paid out of the fund appropriated to be used in case of war. Governor has authority to pay claims shown by the facts to be meritorious and such as equity and good conscience require the State to liquidate.

Des Moines, Iowa, September 15, 1898.

General M. H. Byers, Adjutant General:

Dear Sir—Your favor of the 7th inst. duly at hand, in which you enclose a claim of Mr. F. D. Reed, of Oskaloosa, a copy of the governor's proclamation of April 26, 1898, and by the direction of the governor, request my official opinion as to whether the state of Iowa is liable for claims of that character. The proclamation of the governor referred to is one calling for the enlistment of persons of suitable age and fitness to complete Iowa's quota of troops required for the service of the United States. Persons desiring to enlist were directed to apply at once to the sheriffs of their counties. It states: "Transportation will be forwarded as required."

It seems that under this proclamation, Lieutentant W. H. Point, of Company F, Third regiment, Iowa National Guards, under instruction from Col. Loper and W. H. Keating, captain of said company, then at Camp McKinley, proceeded to enroll men and to hold the same in or-

ganization to report at Camp McKinley under the governor's call for troops. He enrolled thirty drilled men and proceeded to drill them, awaiting orders for transportation to Des Moines. These men were enrolled from various vocations and callings in different parts of the county. They were subsisted for several days, expecting transportation under the governor's call. Mr. Reed, it seems, paid, or became personally liable for their subsistence, and also for their transportation to Camp McKinley.

From the facts presented, it appears that Mr. Reed as a patriotic citizen, paid money, or became liable for the payments of money, expended in accordance with the spirit and intent of proclamation of the governor, relying on the good faith of the state to reimburse him. If these recruits had paid their own expenses while waiting for transportation, and their own transportation, it appears that they would have had a just claim against the state for reimbursement of such expenses. Mr. Reed, in equity and common honesty, assuming the facts to be true, stands as an equitable assignee of their claims, he having advanced the money to pay the same. Section 32 of chapter 131, acts of the Twenty-seventh General Assembly, makes an appropriation of the sum of $500,000, or so much thereof as may be necessary, to be at the disposal of the governor, and to be used in the defense of the state and in aid of the national government in case of war. The manner of expending this fund is left to the sound discretion of the governor. It is a special appropriation to aid the state in supplying promptly all the troops which the state may be called upon to furnish the general government in case of war. There being no limitation on the manner in which this may be expended, I am of the opinion that any expense incurred in furnishing Iowa's quota of troops to the general government should be paid out of this fund.

It is possible that a claim of this kind, if paid by the state, would not be repaid to the state by the general government, but the legislature evidently did not intend that the governor should expend this money for only such purposes as the United States government would pay for, else some language limiting the use of the money to such purposes would have been incorporated in the statute.

When private citizens, in a laudable effort to aid in the raising of troops for the defense of the government, advance their own money to pay such expenses as are proper for the state to pay, I can see no reason in ethics or law why they should not be reimbursed. In regard to such claims, I am of the opinion that the governor is authorized to pay all such as may be shown by the facts to be meritorious, and such as equity and good conscience requires the state to liquidate. The state can, no more than a private individual, afford to stand upon technicalities and refuse to meet its moral obligation. Yours respectfully,

MILTON REMLEY,
Attorney General.

1. Loss of residence in county. A minor becoming an inmate of the industrial home still retains the settlement of his parents. If an adult becomes a resident at such home voluntarily

with intent to remain, making the county his residence with no intention of returning to former place, acquires a settlement in the county in which the home for the blind is situated.

2. A person involuntarily sent, or an adult going to an educational institution for a temporary purpose of acquiring an education, does not acquire a residence. Persons sent to an insane hospital do not acquire a residence.

3. A member of a soldier's home discharged therefrom, or leaves voluntarily, has gained no residence.

Des Moines, Iowa, September 15, 1898.

Hon. W. H. Fleming, Private Secretary:

Dear Sir—Your favor of the 14th inst. at hand, in which you state the governor desires my official opinion in regard to the place of legal residence of an inmate of the Industrial Home for the Blind, and you ask:

> "Does a person by becoming an inmate of that institution necessarily lose his residence in the county which was, prior to that time, his home? Does any length of residence at the home make any difference as to the legal residence?"

You state the question arises because of a dispute as to the proper county to care for one who becomes, or is likely to become, a public charge.

"Residence is the place where one resides with no present intention of removing therefrom." The liability of a county for the support of the poor depends upon the question whether such a person has a settlement within the county. The place of settlement of a minor is where the parents or guardian reside. Section 2224 provides: "A legal settlement once acquired continues until lost by acquiring a new one, and may be acquired as follows: First, a person having attained majority and residing in this state one year without being warned as hereinafter provided, gains a settlement in the county of his residence."

A minor becoming an inmate of the Industrial Home still retains the settlement of his parents. If an adult becomes a resident at said home voluntarily, and has gone there with the intention of remaining or making the county his residence, with no intention of returning to the place from which he came, under the provisions of the section referred to he acquires a settlement in the county in which the Home for the Blind is situated. A person sent involuntarily to a penal institution, or sent by parents to an educational institution, or an adult going to an educational institution for the temporary purpose of acquiring an education, does not thereby acquire a residence, and his settlement would be unchanged. Persons sent to an insane hospital for confinement do not thereby acquire a residence. But the rule is different where an adult takes up his abode at an institution like the Industrial Home for the Blind, relinquishing his former residence and having no present intention of going elsewhere. He then becomes a resident of the county where such Industrial Home is situated, and if he resides there a year, acquires a settlement

and is entitled to all the rights which the law attaches to such settlement.

Recognizing this rule of law, the Twenty-fourth General Assembly, chapter 24, provided that when a member of the Soldiers' Home is discharged therefrom, or voluntarily leaves the same, or is adjudged insane, his residence shall be the same as when admitted to the home. (See code, section 2605.) But no such law having been enacted in favor of the Industrial Home at Knoxville, in my judgment the general rule above stated obtains.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Board of Medical Examiners. Resolution thereof. Application of Dr. Carl Dalcher for certificate to practice medicine—The deceit practiced in securing a certificate not justified. Board not bound to grant examination upon the fee being tendered. Duty of board to pass on moral character.

Des Moines, Iowa, September, 24, 1898.

Dr. J. F. Kennedy, Secretary State Board of Medical Examiners:

Dear Sir—Yours of the 21st inst. at hand, enclosing a resolution of the board of medical examiners, and also the original application of Dr. Carl Dalcher for a certificate to practice medicine, and also the application for examination, made July 13, 1898, in regard to which you say the board requests my opinion as to the right and duty of the board to admit Mr. Dalcher to examination under the circumstances.

The facts which I need notice may be briefly stated. In November, 1896, Carl Dalcher made a sworn statement for a certificate to practice medicine, stating therein that he had been granted a diploma as a graduate by the University of Zurich, Switzerland, on the 30th day of December, 1895, and that he was the original person to whom the certificate was granted. It also appears that A. Hollinger, the Swiss consul at Chicago, wrote a letter to the secretary of the board, saying that he positively knew that Dr. Dalcher had received his said license, as well as his doctor's diploma, but that he had failed to bring his license of Switzerland and his diploma as doctor to this country, and on such representation a certificate to practice was issued to Mr. Dalcher to practice medicine in this state.

It appeared afterward, from letters from the medical faculty of the University of Zurich, that it was not true that the doctor had received his diploma; that he had failed to take the required oral and written examinations, although his thesis had been accepted and published. Upon being satisfied that no diploma had ever been issued to Dr. Dalcher, the board, under authority of section 2578 of the code, revoked his certificate to practice. Dr. Dalcher then filed an application to be admitted to examination, in due form.

The question having arisen as to his moral character because of the fraud and deceit in procuring the certificate in 1896, affidavits and cer-

tificates of prominent citizens of Burlington are presented to the board, testifying to his good moral character. These affidavits and certificates have also been submitted to me. Among those testifying to his good moral character are ministers, public officers, bankers, members of the school board, and, in fact, many prominent citizens.

The question, then, is as to what is the duty of the board under the circumstances stated. No one can justify the deceit and falsity of the doctor in procuring his first certificate. It is contended that the board must give to every person who presents his application for examination in due form, an examination, if the fees have been paid. This may be technically correct. The board, however, has the right to inquire into the moral character of every applicant before a certificate is issued, and it is a matter of no moment whether that inquiry is made before the examination or afterward. Technically speaking, I think the applicant would be entitled to take the examination, but after such examination the board may properly determine that he is not possessed of good moral character, if the facts warrant such conclusion, and refuse a certificate. If the board is satisfied, however, that he is lacking in good moral character, I see no objection to the board frankly so stating to the applicant and saving him the expense and loss of time in taking the examination. But if the applicant insists upon taking the examination, it would be better for the board to give such examination and determine the status of the moral character afterward.

This, however, is merely technical. The real question is whether, under the facts and circumstances, the board is justified in concluding that Mr. Dalcher is not possessed of good moral character.

Character, in the sense in which it is used in the statute, means the moral qualities; the general principles and motives which control a man's life. It is recognized in law and in ethics that one act does not determine a man's character. The best men at times are tempted, and commit acts which are not in harmony with their general principles and motives which control their lives. The act of Dr. Dalcher in making a false affidavit and procuring his certificate two years ago, is one circumstance in determining his moral character at that time, but it is not conclusive, by any means. We cannot, from the brief statement of facts, know the circumstances under which such affidavit was made, or his exact situation. Personal or pecuniary conditions may have been such as to produce a tremendous pressure upon him as he then viewed it. His own humiliation and self-reproach since may have been distressing, for all that we know. Suppose his falsity and deceit were treated as proof of his bad moral character two years ago. He may have reformed. The purposes and motives which controled his life may have been changed since then. Judging from the hearty and full statements of those who have known him during the last two years, I cannot personally escape the conclusion that at the present time, notwithstanding his fault before, he would be considered as a man of good moral character.

"Character is a fact which is proved by another fact, viz., general reputation. It cannot be shown by evidence of a particular or specific case." This is a recognized rule of law, and applying that rule, the tes-

timony is overwhelming, in fact, uncontradicted, that at the present time Dr. Dalcher is of good moral character.

The determination of this question, however, rests solely with the board. The board is the sole judge. My own judgment cannot be substituted for the judgment of the board, but the determination of the question of moral character should be made upon the evidence, and without attaching undue importance to one act.

My conclusion is that if Dr. Dalcher insists upon it, upon the showing made, he is entitled to take the examination. If that examination is satisfactory, such as to entitle him to be admitted, the board then should determine the question whether he is of good moral character, and unless they can, on their conscience, say the one act committed two years ago is so heinous as to stamp him as an incorrigible, I see no way, under the evidence in regard to his subsequent life, in which a certificate can properly be refused him. Yours respectfully,

MILTON REMLEY,
Attorney General.

Industrial schools Terms of commitment of inmates—1. The only order authorized is that person be committed until he attains his majority unless paroled because of good conduct or bound out with the consent of parents.

2. Fixing a definite time in a judgment is an excess of power. So much of the order is valid as the judge authorized is to make. All in excess is void. The power of the court over the child ends when the order of committment is made. Said schools may retain the custody of all boys and girls committed to said schools until they attain their majority, unless discharged for the above reasons.

Des Moines, Iowa, September 26, 1898.

Hon. William Larrabee, Chairman Board of Control:

Dear Sir—In your request of the 22nd inst. for my opinion, you say:

> "Some courts of the state, through inadvertance or intentionally, make orders committing boys and girls to the industrial schools for a definite time;—for instance, six months, one year, three years, and in some instances, for five or six years. Have the courts the right to fix a definite time of confinement of boys and girls in industrial schools, and should the board of control, and superintendents of such schools comply with such orders when made?"

The general idea of chapter 5 of title 13 of the code, is that the industrial schools are not penal institutions, but educational and reformatory. The power of committing boys and girls to said schools by a court of record, or the judge thereof, found in sections 2708 and 2709 of the code, it stated in the following language: "He may commit him or her to said school until he or she arrives at majority, by warrant," etc.

The power to commit for a period less than the age at which he or she attains his or her majority, does not seem to be given. While it may be said that the greater includes the less, yet other provisions of the chapter which must be considered, negative the idea that the court has authority to enter an order fixing the time during which the child shall be kept in the industrial school.

Section 2704 provides: "Boys and girls committed to the schools may be bound out in writing, with the consent of the parents or guardians, to the end of their term, or for less time." Section 2711 provides: "No one shall be committed to the industrial schools for a longer term than until he or she attains the age of majority, and the board of trustees may, at any time after one year's service, order the discharge or parole of any inmate as the reward of good conduct."

A careful examination of the entire statute leads me to the conclusion that the only order which a court of record, or judge thereof, is authorized to make, is the order committing the child to the industrial home, and unless discharged or paroled because of good conduct, or bound out with the consent of the parents or guardian, such child must be retained until it attains its majority. In other words, the only authority given by statute to the courts or judges in such a case is to order the commitment until the child attains its majority.

The next inquiry is:

> "Orders having been made by the courts in some instances committing a boy or a girl to an institution for a definite time, what is the duty of the board of control, or the superintendents of the schools, in regard thereto."

Fixing a definite time is, in my judgment, an excess of the power. So much of the order is valid as the court or judge was authorized to make, and all of the order in excess of its jurisdiction or power is void. Such an order may be considered a valid order, and sufficient authority to the superintendents of the schools to receive the boy or girl, but that part of said order releasing said child before he attains his majority, being in excess of the power of a court to make, is void and not binding upon the officers of the schools. The order may be considered void to the extent that it is in excess of the power of the judge to make. The duties and powers of the officers of the schools are derived directly from the statute. The general purpose of the statute creating the industrial homes is to provide places for the reformation and education of persons committed to their keeping. The courts of record, and judges thereof, are the agencies of the state to determine who shall be committed to the keeping of the industrial schools. The order having been made committing a child to the custody of an industrial school, the power of the court over such child ends. The officers of the schools are not under the control of the courts. They were not party to any proceedings in which the orders in excess of the court's authority were made, and hence could not appeal to have the improper order corrected in an appellate court, nor are they bound by a void order in a proceedings to which they are in no way a party.

Hence, my conclusion is that the said schools may retain the custody of all boys and girls committed to said schools until they attain their ma-

jority, unless they are discharged under the provisions of sections 2704 and 2711 of the code.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Term of office. Filling unexpired term. Time of election of successors.

Des Moines, Iowa, September 30, 1898.

Hon. L. M. Shaw, Governor of Iowa:

Dear Sir—Your request for my opinion, based upon the following facts, was duly received:

"Chapter 121 of the acts of the Twenty-sixth General Assembly, (1896) enacts that the district judge in and for the First judicial district shall be elected 'at the general election in the year 1899,' and 'shall enter upon the discharge of the duties of his office on the 1st day of January, 1900.'

"Section 227 of the code of 1897, along with many other provisions, enacts: 'Each judge shall hold his office until the expiration of the term for which he has been heretofore elected.'

"It appears that Henry Bank, the incumbent of the judgeship in the First judicial district, was at the time of his election in 1895 chosen for the remainder of the term that would expire on December 31st of the present year; the effect of the act of 1896 being therefore to give Judge Bank a full term of four years. Kindly give me your official opinion as to whether the act of the Twenty-sixth General Assembly is affected by the provision of the code cited, and hence, whether there is to be a judge elected in the First judicial district at the ensuing general election."

No good purpose is to be gained by considering the question whether the figures "1899" and "1900," as they occur in section 5, chapter 121, acts of the Twenty-sixth General Assembly, appear therein because of a mistake or clerical error, or what construction should be placed upon said section 5, because said chapter 121 is a public and special act, the subject of which is revised by the code of 1897, and hence, by section 49 of the code, is repealed.

We have, then, this state of facts: Judge Casey's term of office, for which he was elected, would expire the first Monday of January, 1899. Judge Bank having been elected to fill the vacancy, under section 6, article 11, of the constitution, should only hold for the residue of the unexpired term, viz., until the first Monday of January, 1899. (See also section 1277 of the code). Under section 227 of the code, he would hold until the expiration of the term for which he has been heretofore elected. Then, by law, his term expires on the first Monday of January, 1899.

Under the provisions of section 1059 of the code, which reads: "At the general election next preceding the expiration of the term of any officer, his successor shall be elected," it seems quite plain to me that

Judge Bank's successor as judge of the First judicial district should be chosen at the general election in November. Yours very truly,

MILTON REMLEY,
Attorney General.

Pay roll of employees. Not required to be furnished by the Board of Control to Auditor. The board may state in the abstract the aggregate amount of the pay roll, and name the person to whom the check shall be drawn.

Des Moines, Iowa, November 2, 1898.

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

Dear Sir—In compliance with your request, I will state that I have examined chapter 118, laws of the Twenty-seventh General Assembly, with reference to the question whether or not it is necessary for the board of control to furnish to the auditor and the treasurer an itemized pay roll of tne employes of the different state institutions, and will say briefly at this time that in my opinion the law does not contemplate that the pay roll of each institution shall be furnished to the auditor and the treasurer, but it is sufficient to state in the abstract the aggregate amount of the pay roll, and the name and residence of the person to whom the check therefor shall be drawn by the state treasurer.

I state my conclusion, and at a future date, will state the reasons which lead me to the above conclusion. Yours very truly,

MILTON REMLEY,
Attorney General.

Inmate of Soldier's Home. Books of the home showing credit to inmate of money. The court of the county in which the residence of the deceased was at the time of his death as conclusive jurisdiction to issue loss of administration upon his estate. Residence a question of fact to be determined by the court.

Des Moines, Iowa, November 11, 1898.

Hon. L. G. Kinne, Board of Control:

Dear Sir—Your favor of the 9th inst. at hand, enclosing a letter from Col. Horton, commandant of the Soldiers' Home. The letter of Col. Horton states that Jeremiah Wade, an inmate of the home, died the latter part of last April. The books of the home show a credit to him of some $200. In his valise was a draft or check for $250, drawn last April by the First National Bank of Cherokee. An administrator for his estate was appointed by the district court of Cherokee county. An application for an administrator has been made to the district court of Marshall county. It appears that the deceased had been an inmate of the home for two years prior to his death. Col. Horton being in doubt as to whom the assets of the estate should be paid, asks for my opinion, which you request me to give.

In regard to this I will say that there is no doubt whatsoever that the district court of the county in which the residence of the deceased was at the time of his death has exclusive jurisdiction to issue letters of administration upon his estate. (Section 225 of the code; In re King estate, 75 N. W. R., 187).

The only other question remaining is a question of fact, viz., where was the residence of Jeremiah Wade at the time of his death? The acts stated are not sufficient to determine this question intelligently.

It is the general rule that persons who are inmates of public institutions to which they are sent or go for educational, reformatory or penal purposes, or for treatment or care, do not acquire a residence at each place. Chapter 34 of the laws of the Twenty-fourth General Assembly, is in part declaratory of this rule, but it seems to have been drafted upon the idea that except for this statute, an inmate of the Soldiers' Home would acquire a residence and settlement in Marshall county. This act is carried forward into the code of 1897, under section 2605.

If an inmate of the home acquires a residence in Marshall county because he is there cared for by the state, such residence becomes a fact, and it is doubtful how far the legislature can, by statutory enactment, change that fact, or by special act declare the residence of a certain class of persons to be where, as a matter of fact, it is not. It is doubtful whether section 2605 of the code could be sustained except upon the theory that it is simply declaratory of the common law as stated in the rule above given. I think the better rule to be that inmates of the Soldiers' Home retain the residence that they had at the time they became inmates of the home during the entire time that they live at the home.

I recognize, however, that there may be exceptions. Persons may, on coming to the home, never intend, whether they remain at the home or not, to return to the place from whence they came, and may intend to make their home permanently in Marshall county, and actually residing in Marshall county, may become residents thereof, thus being an exception to the general rule above stated. Whether the late Jeremiah Wade had any such intention and actually became a resident of Marshall county or not, I have no means of determining.

Under the circumstances, I think Col. Horton will be justified in refusing to pay the money to either administrator until he is ordered so to do. It is a matter in which he has no personal interest, nor has the state. Hence, either administrator should be willing to have a judicial determination of the question as to where the residence of the late Mr. Jeremiah Wade was, and this being settled, to obtain an order of the court for Col. Horton to pay the money to such administrator. This will protect him and place no unnecessary burden upon the administrator.

Yours respectfully,

MILTON REMLEY

Attorney General.

Sale of school lands. Board of Supervisors must strictly comply with the law—Executive Council entitled to know the judg-

ment of the Board of Supervisors as to division of land into tracts and its appraisement.

Des Moines, Iowa, November 12, 1898.

Hon. A. E. Shipley, Secretary Executive Council:

Dear Sir—Yours of the 12th inst. at hand, enclosing a letter and a copy of the proceedings of the board of supervisors of Allamakee county with reference to the sale of certain school lands in said county, in which you state the executive council desires me to formulate the needed legal instructions in the matter.

I beg to say that the proceedings relative to the west half of the southwest quarter, and lots numbered 1 to 6 inclusive in section 16, township 99, range 3, west of the 5th P. M., do not, in my judgment, present a case in which the executive council should take any action whatever. Section 2840 of the code provides, among other things: "Said division and appraisement (made by the township trustees), shall be approved or disapproved by said board at its first meeting after such report, and in case it disapproves the same, it shall at once order another division and appraisement."

There is nothing in the copy of the proceedings to show that the board of supervisors has at any time either approved or disapproved of the appraisement made. The law contemplates that before the executive council shall take any action, it shall have the benefit of the judgment of the board of supervisors as to the real value of the land about to be sold. The documents submitted to me do not show that the board of supervisors has ever approved or disapproved of the appraisement made. The failure of such board to do so may have deterred persons from bidding when the land was offered for sale. If the board of supervisors is satisfied that the appraisement is too high, and more than the land will possibly bring in the market, then it would be their duty to disapprove the appraisement and order a new appraisement to be made, as provided in section 2840. Possibly a change in the division of the land might secure better results, or an offer of partial credit, as may be made under section 2843.

I make these suggestions not because I have any opinion as to whether the land could really be sold for the appraised value, as stated in the copy of the proceedings, or is worth more, but before the executive council takes any action therein authorizing a sale for a less sum, I am clearly of the opinion that every step required by law should first have been taken by the board of supervisors, and the council is entitled to know the judgment of the board of supervisors, whether the division of the land into tracts and the appraisement are such as they approve of. I accordingly return the copy of the proceedings of the board, and recommend that the executive council inform the county auditor that it is not justified in taking any action thereon until the board of supervisors approve or disapprove the appraisement. Yours respectfully,

MILTON REMLEY,
Attorney General.

Soldier's Home—The amount over and above $6.00 per month of an inmate's pension payable to the institution should be credited to the contingent fund of the institution. Such fund cannot be used to furnish Old People's Building, as that expenditure is not in the nature of a contingency.

Des Moines, Iowa, November 14, 1898.

Board of Control of State Institutions:

Gentlemen—Yours of the 2nd inst. at hand, in which you quote rule 24, adopted by the trustees of the Soldiers' Home at Marshalltown, as follows: "Any person admitted to the home having a pension exceeding $6 per month, shall pay to the commandant a sum equal to the excess of his pension over $6 per month. If such person has dependent relatives (parents, wife or minor children), the amounts thus paid over to the commandant shall be sent by him to such dependent relatives; but if he has none, then the said sum shall be credited to the contingent fund of the home."

Collections under this rule are made and remitted monthly to the state treasurer. You ask my opinion,

First—"Whether these funds should go into the general revenue of the state, or should they be credited to the institution?"

Second—"If credited to the institution, would it be proper to use the funds to furnish the new building provided for by chapter 144, laws of the Twenty-seventh General Assembly?"

You further state that you learn sufficient funds have not been reserved out of the appropriation made under that chapter to furnish the new building.

The rule in question has been held by the supreme court to be such as it is competent for the board of trustees of the Soldiers' Home to make. The latter part of the rule, directing in certain cases money thus received to be credited to the contingent fund of the home, is an appropriation by the trustees of the money to that fund. Several sessions of the General Assembly have been held since the adoption of such rule. With the exception of an appropriation of $1,500 for the contingent fund by chapter 130, laws of the Twenty-sixth General Assembly, there seems to have been made no appropriation for contingent expenses of the Soldiers' Home since the adoption of said rule. It will be presumed that the legislature intended what is known as "contingent expenses" to be paid from this fund which was created by the rule above quoted. The failure of the legislature to change the rule, and appropriations having been made with the knowledge of the existence of such rule, would clearly indicate the approval of the legislature that the said fund should be used as a contingent fund. In my judgment, the payments thus made should be credited to the contingent fund of the institution by the treasurer of state.

Chapter 144, laws of the Twenty-seventh General Assembly, appropriates for old people's building, and furnishing the same, $15,000. I think it is a well settled rule that an appropriation by a legislature for a specific purpose is a limitation upon the power and authority of the

agents of the state to use more money for that purpose than was appropriated. Contingent means "possible; liable, but not certain to occur; incidental; casual." In law it is generally understood to mean "depending for effect upon something that may or may not occur." A contingency is: "A fortuitous event which comes without design, foresight, or expectation."

The furnishing of the old people's building is not in any sense a contingency; nor could the expense of the same be properly called a contingent expense. The legislature knew such building must be furnished, and provided therefor by appropriating a gross sum for the building and the foruishing of the same. Neither did the trustees of the Soldiers' Home, nor their successors, the board of control, have authority to use more money of the state for the purpose of building and furnishing the old people's building than was appropriated by the General Assembly; nor can the expense of furnishing such building be considered as a contingent expense.

The suggestion has been made that the money received from pensioners at the home is not money belonging to the state, and hence a discretion exists in regard to its expenditure which does not attach to appropriations made by the state. I cannot see the force of this suggestion. The trustees of the home, and now the board of control, are the agents of the state. The money is lawfully received, not for the use of the agents, but for the use of the principal; i. e., the state. It rightfully belongs to the state and cannot be paid out any more than other funds of the state, except in a manner sanctioned by law. Yours respectfully,

MILTON REMLEY,
Attorney General.

CONTRACT OF STATE OFFICERS—The warden of a penitentiary cannot enter into a contract on behalf of the State with a railroad company to operate a motor on the company's line to the quarries of the penitentiary.

Des Moines, Iowa, November 15, 1898.

Board of Control of State Institutions:

Gentlemen—It appears from the correspondence between Hon. Wm. A. Hunter, warden of the Anamosa penitentiary, and the Chicago, Northwestern Railway Company, that the said company is willing to grant a license to the warden to operate a motor on the company's railway from the penitentiary to the state quarry, provided the said company can be held harmless from all liability for damage or loss done by the motor to any person who is being transported over the said railway, and also for loss or damage or injury to other persons which may be occasioned by the operation of the motor.

The general attorney of the Northwestern says, in his letter of September 20th: "While I think you may safely deal with the state as with any individual or corporation in granting to the state the license asked and may surround the grant of the license with such restrictions, limitations and conditions as you see fit, the state cannot be bound by any sub-

stantive contract of this character entered into on its behalf by any of its officers or agents. And were such contract actually authorized by competent legislation, there exists no method of enforcing the contract as against the state or of collecting damages for its breach."

In the conclusion above stated I concur. There is no statute authorizing the warden of the penitentiary or other person to enter into such a contract on behalf of the state. The state cannot be sued. In case a contract were authorized, the state cannot be made party defendant for any breach of the contract.

Further than this, there is no authority given the warden to purchase and operate a motor, and I know of no appropriation from which the purchase of such motor and the cars necessary could be made.

I return you herewith the correspondence. Yours truly,

MILTON REMLEY,
Attorney General.

Board of Control—Under the various laws passed by the legislature the Board has authority to authorize the cells in the north cell house of the penitentiary to be built of steel instead of stone as a matter of economy.

Des Moines, Iowa, November 15, 1898.

Board of Control of State Institutions:

Gentlemen—You request my opinion upon the question:

> "Whether this board has authority to build the cells of the north cell house of the penitentiary at Anamosa of steel instead of using stone." You say: "Our architect informs us it would be much more economical to use steel."

The acts appropriating money for the construction of the Anamosa penitentiary nowhere definitely state the material that shall be used in such construction. Chapter 134, acts of the Twenty-sixth General Assembly, appropriated $23,000 "for the foundation of the north wing of the cell house." Chapter 149, acts of the Twenty-fifth General Assembly, appropriated $1,400 "for cell house roof." Chapter 150 of the Twenty-seventh General Assembly, appropriates, to continue work on north cell house, "for iron grating and hinges, $400; for freight on stone, $4,500," and so on through the different items. Section 3 of said act is as follows: "Any sum remaining after the specified object for which it is appropriated shall have been completed, may be used, so far as it may be necessary, for any other item, subject, however, to the approval of the executive council."

It may be assumed that while the acts do not specify that the cells shall be made of stone, the appropriations were made by the legislature based upon the plans which had been adopted theretofore for the erection of a penitentiary, and were it not for section 3 of chapter 150, acts of the Twenty-seventh General Assembly, above quoted, I would have no question whatever that no part of the money appropriated in said chapter could be used for any other purpose than that specified in the act. Said section indicates the intent on the part of the legislature that the

total sum of $42,825 appropriated shall be used for the purpose of repairing and erecting the buildings therein named at the Anamosa penitentiary; i. e., what is not used for the item specified may be used for other purposes in such building.

Section 23 of chapter 118, acts of the Twenty-seventh General Assembly, provides for the employment of a state architect. Section 17 of said chapter provides: "When an appropriation for any amount has been made, there shall be no expenditure thereon until the board has secured suitable plans and specifications prepared by a competent architect and accompanied by a detailed statement of the amount, quality and description of all material, and labor required for the completion of said structure."

The use of steel in constructing buildings, especially in the building of cells of prisons, has largely come into general use since the plans of the Anamosa penitentiary were made, and the cost of structural steel has greatly decreased. I think the fair intent and purpose of the provision of sections 17 and 23 of said chapter 118 is that the board of control shall have power to ascertain from a competent architect the best method of construction, the best material to be used, for any public building for which an appropriation has been made, and be governed by the advice of such architect as far as possible, subject, however, to the limitations placed upon the expenditure of the money by the act appropriating the same.

There being, as noted above, no provision in any act of the legislature requiring the cells to be made of stone, and said section 3 permitting the use of the appropriation unexpended for the specific item named in the act, I am of the opinion that if by purchasing steel cells enough is saved from the items named in said chapter 150, laws of the Twenty-seventh General Assembly, to pay for such cells, or if the aggregate unexpended balances of the appropriations made for items named be sufficient to cover the expense of such steel cells, the board of control has full power and authority so to do.

Making such changes in the plans of buildings or the materials to be used, as is suggested in your letter, seems to have been in the legislative mind when sections 17 and 23 of chapter 118, laws of the Twenty-seventh General Assembly, were enacted.

Yours respectfully,

MILTON REMLEY,
Attorney General.

CONVICTS—Persons confined in penitentiary under a judgment of federal court. Pardon by the governor. Governor has no authority to pardon a person convicted by federal court of a crime against the laws of the United States. Without the right to pardon the right to restore to citizenship does not exist. A person convicted of an infamous crime is prevented from exercising the elective franchise.

Des Moines, Iowa, November 17, 1898.

Maj. W. H. Fleming, Private Secretary:

Dear Sir—Your favor duly at hand, in which you are

> "Instructed by the governor to ask your opinion as to his power to exercise the authority conferred by section 5706 of the code in the case of one who has been confined in the penitentiary under a judgment of the courts of the United States."

I have no doubt that the legislature had in mind persons convicted under the laws of the state of Iowa, and the law as passed does not have reference to convicts in the penitentiaries of this state under a sentence of the courts of the United States. The convicts received by the wardens of the penitentiaries under the authority given in section 5676 of the code, may come from some other state than the state of Iowa. It goes without saying that the governor would not have authority to pardon a person convicted by a United States court of a crime against the laws of the United States. The so-called restoration to citizenship is generally considered as an incident to the pardoning, and without the right to pardon, I do not think the right to restore to citizenship could be exercised.

I do not wish to be understood, by what I have said, as giving any opinion as to the effect of a certificate of restoration to all of the rights of citizenship. The elective franchise is a political right, and is not necessarily a right of citizenship. A person convicted of an infamous crime, (and felonies are usually considered infamous crimes), under our statute forfeits no rights of citizenship save the privileges of an elector. He is not prevented from being a witness in a court, but if he is a witness, the fact of his having been convicted of a felony may be introduced to impeach him. Section 5 of article 2 of the constitution is as follows: "No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector." A person, then, convicted of an infamous crime, by such conviction is, under the constitution, prevented from exercising the elective franchise.

In view of this constitutional provision, it seems that the legislature could not by law authorize an idiot or an insane person to vote, or give power to the governor to give them a certificate that would entitle them to vote. By what process of reasoning it can be maintained that the legislature could authorize the other prohibited class to vote, viz., persons convicted of infamous crimes, or authorize the governor to give a certificate that would entitle them so to do, is not, to my mind, very apparent.

Hence, in expressing the opinion that the governor has no authority conferred by section 5706 of the code with reference to what are called federal prisoners, I do not wish to be understood as implying that the governor may restore any person convicted under the laws of the state to his rights of citizenship, including the right of suffrage. Yours truly,

MILTON REMLEY,
Attorney General.

EXEMPTION—Homestead of honorably discharged Union soldier or sailor unable to perform manual labor and depending

thereon for support of himself and family, is exempt to the amount of $800 only. The amount in excess of that is assessable.

Des Moines, Iowa, November 17, 1898.

D. W. Telford, Esq., County Attorney, Mason City, Iowa:

Dear Sir—Yours of the 16th inst. at hand, containing your question, which is as follows:

> "Is the homestead of an honorably discharged union soldier or sailor who is unable to perform manual labor and depending thereon for the support of himself and family, who is the owner of a homestead to the value of $2,000, assessable on said homestead on the excess over and above $800, as provided in the seventh clause of section 1384 of the code of 1897?"

In reply I will say that in my judgment he is. In arriving at the amount of assessment in such a case, allowing an exemption of $800, the value of the property to be assessed would be $1,200. This should be assessed on the bases of 25 per cent., as provided in section 1305, or $300.

This answer, however, presupposes that he has no other real estate. If he has other real estate, say to the value of $400, then deducting that from the $800 exemption, there would be left but $400, and the assessment should then be made on 25 per cent. of $1,600.

The rule is that all property is listed for assessment. The exemption is the exception. The first clause of par. 7 is: "The homestead not to exceed $800 in value" is not to be taxed. All in value above the sum of $800 becomes subject, therefore, to the general rule. That rule is that property shall be taxed.

Yours truly,

MILTON REMLEY,
Attorney General.

LABOR ON CAPITAL GROUNDS—Construction of Section 3, Chapter 131, and joint resolution No. 5 of the Laws of the Twenty-seventh General Assembly. The legislature intended that the laborers on the capitol grounds should receive pay at the rate of $50.00 per month, and that the number should not exceed three for more than eight months in the year.

Des Moines, Iowa, November 29, 1898.

Hon. L. M. Shaw, Governor of Iowa:

Dear Sir—In regard to the construction to be placed upon section 3, chapter 131, and joint resolution No. 5, of the laws of the Twenty-seventh General Assembly, concerning which you requested my opinion, I will say that the appropriation made for the custodian under said section 3 is for employes under the custodian for the biennial period as per joint resolution No. 5, $35,870.00. Joint resolution No. 5 then limits the amount that may be expended for the different purposes therein stated. The item to which you call attention is as follows: "Three laborers for state grounds eight months in year at rate of $600 per annum."

The resolution does not specify what eight months, or whether they shall be consecutive months. We must construe this clause with reference to the known facts; that the grounds at certain seasons of the year would require more attention and labor than at other seasons, and that the grounds in every season of the year would require some attention and labor.

I think it is a fair construction of the clause in question to say the legislature intended that the laborers on the ground should receive pay at the rate of $50 per month, and the amount of labor spent on the grounds should not exceed three laborers for more than eight months in the year; that the custodian is authorized to employ the force necessary to take care of the state grounds not to exceed three men, and the aggregate number of months for each shall not exceed eight during the year, and that he is authorized to determine when three may be needed, when two, or when one, so that the aggregate employment does not exceed twenty-four months in the year at $50 per month for the time employed.

Yours truly,

MILTON REMLEY,
Attorney General.

Gasoline lamps. Use of—The law prohibits the use of gasoline lamps for illuminating purposes except the Wellsbach hydrocarbon incandescant lamp. The exception to the law if it creates a monopoly is unconstitutional.

Des Moines, Iowa, Nov. 30, 1898.

Hon. Leslie M. Shaw, Governor of Iowa:

Dear Sir—Your favor of the 16th inst. duly received, in which you say:

> "There are being sold within the state of Iowa certain gasoline lamps with reservoir attachments directly or nearly over the burner. These lamps and reservoirs attached are of course portable. Is the sale of these lamps and their use permissible under the statutes?"

Section 2508 is a long and cumbersome section, consisting of one sentence of forty-two lines in the code, and it is by no means easy to determine exactly what is meant by some of the provisions. Let me say first that there is no provision of the law preventing the sale of any kinds of lamps in the state, or the use of any particular kinds of lamps as such. The inhibition of the law relates to the use of all products of petroleum of certain kinds.

Among other things, the said section, as amended by chapter 62, laws of the Twenty-seventh General Assembly, provides: "If any person * * * shall sell or offer to sell or use any product of petroleum for illuminating purposes which will emit a combustible vapor at a temperature of less than 105 degrees standard Farenheit thermometer, closed test, except as otherwise provided in this section, for illuminating railway cars, boats and public conveyances, and except the gas or vapor thereof shall be generated in closed reservoirs outside the building to be

lighted thereby, and except the lighter products of petroleum when used in the Welsbach hydro-carbon incandescent lamp, and for street light by street lamps, shall be fined not less than $10, nor more than $50."

The general law stated is that the use of any product of petroleum of the prohibited kind is unlawful. What are the exceptions? First, except as otherwise provided in this section for illuminating railway cars, boats and public conveyances; second, except that the gas or vapor thereof shall be generated in closed reservoirs outside the building to be lighted thereby; the third exception being all the lighter products of petroleum when used in the Welsbach hydro-carbon incandescent lamp; and fourth, for street light by street lamps.

While the meaning is not altogether plain, I think the exceptions above given are a fair statement of the legislative intent. We have, then, a general law forbidding the use of the lighter products of petroleum, to which there is an exception that such lighter products may be used when used in a Welsbach hydro-carbon incandescent lamp.

Your inquiry does not state whether the gasoline lamps which are being sold are the Welsbach hydro-carbon incandescent lamps, or not. If they are not, it follows that the use of gasoline in the lamps which you refer to is not excepted from the general law forbidding the use of the lighter products of petroleum for illuminating purposes; hence, the use of the lighter products of petroleum, among which is gasoline, in the lamps referred to, is prohibited by law.

If, however, your inquiry relates to the Welsbach hydro-carbon incandescent lamp, a very different question is presented. Assume that my statement of the exceptions to the general law prohibiting the use of the products of petroleum for illuminating purposes, which will emit a combustible vapor at a temperature of less than 105 degrees standard Farenheit thermometer, closed test, to be correct; then it is evident that the legislature intended to permit the use of the lighter products which would not stand the test above stated, in Welsbach hydro-carbon incandescent lamps, and to prohibit the use of all other kinds of lamps.

The effect of this is to give the manufacturer of the Welsbach hydro-carbon incandescent lamps a monopoly on furnishing the lamps in the state of Iowa for the use of the lighter products of petroleum. If the giving of such a monopoly had been incorporated in a statute by itself, I do not think any lawyer would doubt that it was obnoxious to section 6, article I., of the constitution, which provides: "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not apply equally to all citizens."

How different is the case when the special privileges are granted by indirection by an exception to the general law? I do not think there is any difference. This, to my mind, is as plain an infraction of the constitution as if the legislature had by law provided that no kinds of lamps for the use of gasoline for illuminating purposes should be used in the state of Iowa other than the Welsbach hydro-carbon incandescent lamps. In view of the fact that there are other lamps which are claimed to be equally as safe as the lamp named in the statute, there is a determination by the statute that no such lamps can be used. While the law does not,

in direct terms, prohibit the sale of lamps of any kind, yet it prohibits the use of the lighter products of petroleum except in lamps of the specified kind. There is no ground in public policy for holding that gasoline shall not be used in a lamp equally as safe as the Welsbach hydro-carbon incandescent lamp, and the palpable effect is to give the manufacturers of the Welsbach lamp a monopoly of the sale of lamps for burning gasoline in the state of Iowa. This cannot, in my judgment, be upheld.

Believing that that part of section 2508 embraced in the following clause: "and except the lighter products of petroleum when used in a Welsbach hydro-carbon incandescent lamp," to be unconstitutional, the question arises: What is the effect of this upon the entire section? The rule of law governing such cases has been well stated as follows: "The fact that part of a statute is unconstitutional, does not authorize the court to adjudge the remainder void unless the provisions are so interdependent that one cannot operate without the other, or so related in substance as to preclude the supposition that the legislature would have passed one without the other. The question is not whether valid and invalid portions are closely related in a particular clause or section, but whether they are essentially and inseparably connected in substance."

This rule has received the sanction of many judicial decisions of the courts of nearly all the states, including our own. Section 2508, without the exception referred to, was enacted in 1884. The exception was inserted for the first time by the extra session of the Twenty-sixth General Assembly, when the code was enacted. The valid and invalid portions of the section are not interdependent the one upon the other. The valid portion can operate without the other, and did for many years. The history of the legislation precludes any supposition that the legislature would not have enacted the valid portion without the invalid, and in my opinion, the remainder of the section is unaffected by the view that the clause above quoted is unconstitutional.

I have been reluctant to adopt the views herein expressed, and hesitate to express the view that any act of the legislature is unconstitutional, but having given the matter careful thought, and having examined the decisions of different courts bearing upon the subject, I cannot get the consent of my judgment to express any other conclusion.

It is my opinion that the use of gasoline, or any other lighter products of petroleum, in the state of Iowa for illuminating purposes in the lamps inquired about, is prohibited by law. Yours truly,

MILTON REMLEY,
Attorney General.

Land Patents—Land withheld from market, being reserved as a military reservation, being abandoned and placed on the market, has been shown to be swamp land. Under the facts an application for patenting this land to the State might be made.

Des Moines, Iowa, December 2, 1898.

Hon. L. M. Shaw, Governor of Iowa:

Dear Sir—In regard to the matter of the application for a patent to certain lands in Fremont county described in the communication of Mr. B. S. Walker, of December 1, which you have referred to me, I will say it appears that the land described was surveyed at the time of the general survey of the lands of Fremont county. It was, however, withheld from the market, being reserved as a military reservation. The reservation was abandoned and the land placed in the market. This particular land has been selected, as shown by the record, as swamp land. No patent has been issued therefor, and I understand that no patents have been issued to other persons, so that there is apparently no conflicting claims with reference to this land. I have been informed that on the records of the register of the land office, it is noted as swamp land, but have not learned whether such notation was made because of information furnished by the surveyor or not.

There appears to be nothing in the way of making an application for the patenting of this land to the state, but in the absence of further information, I would suggest that you require evidence to be furnished, either that the surveyor general noted this land as swamp land, or affidavits to show that at the time of the act of September 28, 1850, such lands was in fact swamp land. Upon the furnishing of such additional evidence, I think it would be proper to comply with the request of Mr. Walker.

Yours very truly,

MILTON REMLEY,
Attorney General.

Building and Loans. In Investment in Real Estate Mortgages—

1. The law does not authorize the loaning of the association money to persons who are not members thereof. Neither has the association authority to purchase mortgages of the kind named herein.
2. Expense funds over drawn. Unless the articles authorize the use of the loan fund for payment of expenses, the officers have no authority to use such fund.
3. Purchase of real estate. The law does not authorize the investment of the funds of a building association in real estate to be sold again at a profit or loss, as the case may be.

Des Moines, Iowa, December 3, 1898.

Hon. C. G. McCarthy, Auditor of State:

Dear Sir—In your letter of November 30, it is said the building and loan association examiner in his report shows that the Equitable Loan Company, of Ottumwa, Iowa, by its officers, has invested funds of the association to the amount of $59,003.73, or more, in the purchase of real estate mortgages taken by the Western Loan and Trust Company, of Ottumwa, and you desire my official opinion as to the legality of such investments.

From an opinion given to you May 25, 1898. I quote the following: 'While the provisions of the general incorporation laws of the state must be observed in regard to the manner of incorporating a building and loan association, yet the business to be transacted, and the manner of transacting that business, is limited by chapter 13, title IX. of the code. A corporation organized to do the business therein authorized, and enjoying the privileges therein conferred, (exemption from the usury laws, for instance) is most certainly bound by all the provisions of said chapter, and cannot go further and do business of a kind and in a manner not authorized by said chapter. The whole theory of said chapter is that building and loan associations shall receive from the stockholders payments of stated sums at stated periods, and loan the money thus received to the members, and when the stock is matured or withdrawn, pay the same with accumulated profits to the members. The powers of building and loans association are very limited. The directors of such associations are simply trustees to receive the money paid in by the stockholders, invest the same according to law, and return with profits to the stockholders, in the manner proficed by the articles of incorporation."

I have no reason to change the views then expressed. There is nothing in the law authorizing the loaning of money of an association to persons who are not members thereof, and it is equally true that such associations have no authority or power to purchase mortgages of the kind named in your inquiry.

I do not wish to be understood, however, that if in some way the association acquires a second lien upon real estate, that to secure themselves in the money already invested they might not take an assignment of the first mortgage; but the investment of the funds as stated above I have no question is unwarranted and wholly without the sanction of law.

> Second, you further state: "The examiner also reports that the officers of the association have overdrawn the expense fund in the payment of the expenses of the association. I desire your official opinion in regard to the legality of this practice."

The statute (section 1893 of the code) requires the articles of incorporation to show the plan of providing the payment of expenses. Section 1902 of the code places a limit upon the amount of the expenses that shall be paid. The plan and manner of providing for the expenses as stated in the articles of incorporation becomes the rule. The officers of the association have no power to set aside or change it. The amount of expense required to be paid into the expense fund being fixed, it thereby bcomes a limitation upon the right or power of the officers to use more than is thus provided for, and the expenses must be kept within such limit.

I will say, therefore, unless the articles of incorporation authorize the use of the loan fund or guaranty fund for the payment of expenses, the officers have no authority whatsoever to use any of such funds. I do not think any one would contend that the officers can consume for expenses the entire amount of the expense fund provided by the articles of incorporation, and then draw on other funds which under the articles of incorporation, are kept for other purposes.

Third, you further state: "The examiner also reports that some $1,500 of the association's money has been used to purchase real estate on which to erect buildings, ostensibly for the purpose of selling the same when completed for occupancy. I desire your official opinion in regard to the legality of such investment by the Equitable Loan Company."

Among the powers given to building and loan associations, by chapter 13, title IX., we do not find the power to speculate in real estate, on building houses for sale, or purchasing land on which to build houses for sale. Power is given to "acquire, hold, incumber, and convey such real estate and personal property as may be necessary for the transaction of their business." What real estate is necessary for the transaction their business? Possibly the conditions may be such that it may be necessary to build an office in which to transact their business. In case of the non-payment of a loan made to a member, it might be necessary to foreclose a mortgage, and necessary to purchase the real estate by foreclosure sale. Their business being principally to receive the money paid in on stock by the members, and loaning the same to the members, it seems absurd to claim that under this clause they are authorized to purchase land and build houses thereon for sale. The clause above quoted also includes personal property.

With equal propriety it might be contended that such association could purchase a stock of merchandise and conduct a mrcantile business. Such clause, in my judgment, gives to building associations no such power, nor do I find anything in the law which warrants the investment of the funds of a building association in real estate to be sold again at a profit, or loss, as the case may be.

Yours truly,

MILTON REMLEY,

Attorney General.

Insurance Company. Policies—Law does not authorize the issuing of such a policy as is herein contemplated.

Des Moines, Iowa, December 9, 1898.

Hon. C. G. McCarthy, Auditor of State:

Dear Sir—You have submitted to me a certain blank policy of the Equitable Mutual Life Insurance Company, of the kind called "ten-year cash surrender certificate, with three years life option;" also a copy of their articles of incorporation and by-laws, and you ask my opinion as to whether such policy of insurance or certificate of membership as this can be issued by the association under the insurance laws of the state applicable to such associations, or under the articles of incorporation of the association.

I beg to say that I have examined the same, and in my judgment, neither the law nor the articles of incorporation contemplate the issuance of such a policy. There are so many objections that it would extend this opinion too long to specify all of them.

I will say, first, that the following clause in the policy of the Equitable Mutual Life Association: "Does hereby accept ———— as a joint

partner and member in said association to the extent of ——— shares of its combination ten-year indemnity and accumulative cash surrender value securities, limited to an aggregate benefit value of $100 per share, and upon the payment, while this contract shall remain in force, of the sum of $——— per month for each of said shares, on account of premiums as provided in the conditions stated on the second page hereof, does hereby assume risks and agree to pay indemnities hereinafter specified prior to ten full years from the date hereof, viz.: $——— for the total and permanent disability or death, as per terms herein specified, which sum in the event of the death of the member named herein, shall accrue and be paid to ———, beneficiary of said member, if living," etc., attempts, in connection with the conditions and provisions on the back of the policy, to pay to the member indemnity for disability and sick benefits, and possibly lurking in the verbose language and conditions, may be found an obligation to pay some endowment at the expiration of a term.

This makes the insured the beneficiary, to some extent at least. This company is organized to do the business referred to in chapter 7, title IX. of the code. There is no authority conferred by law upon such associations to either pay disability benefits, unless it be an accident insurance association, nor sick benefits, nor any endowment. Section 1789 provides that: "No policy shall issue unless the beneficiary named in the certificate is the husband, wife, relative, legal representative, heir, creditor or legatee of the insured member." Naming the wife or some such person as beneficiary in case of death, does not authorize the payment of an endowment or sick benefit to the insured himself. I find nothing in the articles of incorporation whatsoever which authorizes a policy to be issued as accident indemnity.

Second—Condition No. 1 on the back of the policy, if it means anything, means that all of the first year's premium not used in paying claims or expenses for the current year, shall be judiciously used in opening up new fields; that is, procuring new business in places where the association has now none, which is in direct violation of sections 5 and 12 of the articles of incorporation.

Third—It attempts to make the articles of incorporation and by-laws a part of the contract, and the same do not appear upon the policy or certificate of membership, as is required by section 1782 of the code, as amended by chapter 46, laws of the Twenty-seventh General Assembly.

Fourth—The policy provides for the payment of a fixed sum monthly on account of premiums. This is an attempt to limit the liability of the member. At least, it makes the member receiving the certificate believe his liability is limited to the sum named. But section 1784 provides that in such associations, "the liability of the insured to contribute to the payment of policy claims is not limited to a fixed amount."

Fifth—Many of the conditions and provisions on the back of the policy are such as cannot legally be fulfilled. For instance, in No. 12 is the following: "The funds of this association will, as far as practicable, be invested in interest bearing securities, in strict conformity with the laws of the several states under which the contracts are made."

The funds of an association must be invested in strict conformity to the laws of the state under which it is incorporated. It is doubtful whether such association has any power to carry out the provisions of No. 5.

Other serious objections could be specified, but the foregoing are sufficient. In my judgment, the association has no legal authority to issue such a policy, neither under the law, nor its articles of incorporation. Yours respectfully,

MILTON REMLEY,
Attorney General.

Fraternal, Benevolent Societies—To secure the privileges and benefits, such societies or associations must keep themselves strictly within the line of business authorized by Chapter 9 Title ix of the Code.

Des Moines, Iowa, December 13, 1898.

Hon. C. G. McCarthy, Auditor of State:

Dear Sir—In regard to your request of December 8th for my opinion "as to whether or not fraternal, beneficial societies, orders or associations operating under chapter 9, title ix. of the code, are authorized under that chapter to make provision for old age benefits, or to pay old age benefits when a member has arrived at the age of seventy, unless there actually exists a physical disability on account of old age,"

I will say that such organizations, in order to secure the privileges and benefits of said chapter 9, must keep themselves strictly within the line of business that said chapter 9 authorizes. The nature of the insurance which may be done is set forth in section 1822 in the following language: "Such associations shall make provision for the payment of benefits in case of death, and may make provision for the payment of benefits in case of sickness, temporary or permanent physical disability, either as the result of disease, accident or old age, provided the period of life at which the payment of physical disability benefits on account of old age shall not commence under seventy years, subject to the compliance by members with the constitution and by-laws."

It is competent for such associations to provide for disability benefits on account of old age after a member has attained the age of seventy years, but the statute does not contemplate that such association may provide for the payment of benefits to a member who attains the age of seventy years, irrespective of his disability.

For such a company to pay stated benefits to one who is suffering from no disability or infirmity upon his arrival at the age of seventy, is, to all intents and purposes, the payment of an endowment. This the statute nowhere authorizes. Hence, in my opinion, such associations are not authorized, and cannot legally enter into a contract to pay benefits

to a person upon his arriving at the age of seventy, unless there exists a physicial disability as the result of disease, accident or old age.

Yours respectfully,

MILTON REMLEY,

Attorney General.

Exemption to Soldier's Widow—1. The widow of a Union soldier is entitled to have property to the amount of $800 exempt from taxation.

2. The law allowing enlarged exemption took effect when the Code was adopted and applies to future assessments, but is not retroactive.

3. Change of law did not affect the assessment made in 1897.

4. To be entitled to the exemption, the Union soldier must be unable to perform manual labor and must be dependent thereon for the support of himself and family. Under this rule any excess of the $800 exemption is liable to taxation.

Des Moines, Iowa, December 31, 1898.

Hon. C. G. McCarthy, Auditor of State:

Dear Sir—You have referred me to sub-division 7 of section 1304 of the code, relative to the exemption from taxation of homesteads of widows of Union soldiers and sailors, and certain Union soldiers and sailors, and ask my opinion upon the following questions:

> First—"Are the widows of Union soldiers entitled to the $800 exemption without regard to their financial standing or circumstances?"

The conditions under which a person may claim the exemption under the first clause of said paragraph are, first, "that she be a widow of a Union soldier or sailor who died during the late war while in service, or has died since." If the claimant is a widow of a Union soldier or sailor, then she is entitled to the exemption, irrespective of what may be her financial standing, or what other property she has. This enlarges the class entitled to the exemption very materially from the prior law.

> Second—"Does the $800 exemption referred to affect the assessment for the years 1897 and 1898, or does said exemption become operative when the real estate is assessed in 1899?"

The assessment of real estate for the years 1897 and 1898 had been made prior to the time the new code took effect. Such assessment formed the basis for taxation during said years. The assessment was legal at the time it was made. The exemption which the prior law allowed was presumed to be made in accordance with the law in force at the time the assessment was made. The change in the law, or the adoption of the new code and the repeal of the previous laws, did not undo any act legally done prior thereto. There was no provision of the law authorizing any person whomsoever to reduce the amount of the assessment legally

made prior to the adoption of the code. Hence, the assessment made in the year 1897 properly stood as the basis for determining the amount of tax which should be paid on such real estate during the years 1897 and 1898, and the enlarged exemption does not benefit the persons entitled thereto until a new assessment is made under the present law, which takes place during the year 1899. The law allowing enlarged exemptions took effect when the code was adopted, it is true, and it applies to all future assessments, but it was not retroactive.

Third—"If the $800 exemption does not affect the 1897 and 1898 taxes, are the provisions of chapter 97, laws of the Twenty-first General Assembly, which provides for a $500 exemption, still applicable to those years?"

This must be answered in the affirmative. The assessment of the real estate being made in 1897, the law then allowing to certain persons named in the code a $500 exemption, such exemption was taken into account by the assessor or the board of equalization at the time the assessment was made, and the change in the law did not affect the assessment thus made.

Fourth—"Under the present law providing for the exemption of a soldier's homestead not to exceed $800 in value, can a soldier having a homestead worth more than $800 have this amount deducted and pay taxes only on the excess?"

The entire clause relating to the homestead of the soldier or sailor, reads as follows: "Also the homestead not to exceed $800 in value of any honorably discharged Union soldier or sailor unable to perform manual labor and dependent thereon for the support of himself and family, but the value of any other real estate owned by him shall be deducted from such exemption."

It is not every Union soldier or sailor who is entitled to the exemption. In order to be entitled to it, he must be unable to perform manual labor, and must be dependent thereon for the support of himself and family. If he has other property which produces him an income sufficient for the support of himself and family, he would not be entitled to the exemption, even if he were unable to perform manual labor. And under the last clause, if he were unable to perform manual labor, and dependent thereon for the support of himself and family, and had other real estate than the homestead of a value equal to $800, he would still not be in the class entitled to such exemption. It is my opinion that the soldier who comes within the class entitled to the exemption, is entitled to have $800 deducted from the value of his homestead, and the balance should be assessed to him.

For example, if his homestead is worth $2,000, and he is entitled to the full amount of $800 exemption, deducting $800 from $2,000 leaves $1,200, which is the basis upon which to assess him, the actual assessment being one-fourth thereof, or $3,000. If, however, he should have $400 worth of real estate other than the homestead, deducting $400 from the amount of the exemption, there would be left only $400 of exemption to which he would be entitled. This exemption taken from the $2,000

would leave $1,600 as the basis for his assessment, he being assessed one-fourth thereof, viz., $400.

I have no doubt that such was the legislative intent. Yours truly,

MILTON REMLEY,
Attorney General.

WAR APPROPRIATION—An appropriation in defense of State and in aid of national government in case of war. How used. The manner of expending this fund is left to the sound discretion of the governor. His discretion is limited by the direct provision of the law.

Des Moines, Iowa, December 31, 1898.

Hon. M. H. Byers, Adjutant General:

Dear Sir—Under the direction of the governor, you have submitted to me the following state of facts, and ask my opinion thereon as follows:

> "Among those who came to Camp McKinley were several who voluntarily and without being rejected upon any examination, returned home and declined to be mustered into the United States service. Some of these had what seemed to be a sufficient and reasonable excuse. Changes in business relations arose in one or two instances, sickness in family in one or more instances, dissatisfaction with the result of company or regimental elections caused one or more to return home. All members of the Iowa National Guard who were mustered into the United States service were paid from the date of their mobilization at Des Moines. All members of the Iowa National Guard who were rejected by the examining board and for that reason were not mustered, have been paid. The governor desires to know whether under the law there is any authority and whether he would be justified in directing the pay-payment of those who, on their own motion, regardless of the reasons actuating them, declined to be mustered. Should you find the authority to pay these persons, the governor desires you to state whether you would recommend that they should be paid the compensation provided by the statute of Iowa for members of the Iowa National Guard of like grade when at annual encampment or under state service, or whether they should be paid such compensation as the statute provides in the event of a requisition from the president; i. e., the United States army compensation."

Section 32 of chapter 131, laws of the Twenty-seventh General Assembly, appropriates the "sum of $500,000, or so much therof as may be necessary, to be at the disposal of the governor, and to be used in the defense of the state and in aid of the national government in case of war. The proper officers are hereby authorized and directed to draw warrants therefor upon the requisition of the governor. * * * * This appropriation shall not be used for any other purpose than as herein provided."

In an opinion given to you September 15, the following language was used: "The manner of expending this fund is left to the sound discretion

of the governor. It is a special appropriation to aid the state in supplying promptly all the troops which the state may be called upon to furnish the general government in case of war," and my conclusion was that the governor was authorized to pay all such claims as may be shown by the facts to be meritorious, and such as equity and good conscience require the state to liquidate.

The sound discretion of the governor referred to, is, of course, limited by the direct provision of the law. The governor has no authority to use any part of the same so appropriated for any other purpose than in defense of the state and in aid of the national government in case of war. Said section 2609 provides that when a requisition shall be made by the president of the United States for troops, "the governor shall order into service the National Guard of the state, * * * and while so in service, the National Guard and militia shall be subject to the same regulations, and receive from the state the same compensation and subsistence as the army of the United States receives." This, then, is a limitation on the power of the governor in regard to the amount which shall be paid as compensation.

The end and object of calling the National Guard to Camp McKinley was to furnish troops for the United States service. The instructions sent to the captains of the companies, and to the colonels of the regiments to bring only those who desired to go to the front, and who could probably pass the examination, shows conclusively that no one was desired who would not enlist in the service of the United States after arriving at Camp McKinley. Those who did not intend to enlist, and knew they could not possibly pass the examination, ought, under no circumstances, to have come to Camp McKinley, and if such came, they have no legal or moral claim for compensation, and in this class should be put, I think, all persons who, after they arrived at Camp McKinley, without sufficient reason and excuse, re used to enlist. Dissatisfaction with the result of company or regimental elections, would not, in my judgment, be a sufficient excuse.

I would not like to say that none should be paid who, on their own motion, declined to be mustered in, regardless of the reasons actuating them. For instance, a young man coming to Camp McKinley fully intending to enlist, remaining in camp, drilling, because of the death of his father after leaving home making it absolutely necessary for him to return home to look after the business or the family, has strong equities in favor of his claim for compensation. A case of that kind might arise after being sworn in the United States service which would justify and secure his discharge from the United States service.

I think it might be stated as a rule that the governor is not justified in directing the payment of those who, on their own motion, declined to be mustered into the service, but this rule may have its exceptions, and any reason which would justify the discharge of a soldier after he was mustered in, it appears to me would be sufficient to justify the governor in paying compensation for time spent in Camp McKinley, although he was not actually mustered in. If the reasons for not enlisting were sufficient, and arose after the soldier came to Camp McKinley, without his

procurement, and without his power to prevent, it occurs to me that he should be paid; otherwise, not. Yours respectfully,

MILTON REMLEY,
Attorney General.

Penitentiaries—Prisoner in solitary confinement is not entitled to have that time credited because he violates the rules and requirements of the prison. He gets no credit on his sentence for the days spent in solitary confinement.

Des Moines, Iowa, January 19, 1899.

Hon. N. N. Jones, Warden Penitentiary, Ft. Madison, Iowa:

Dear Sir—In response to your inquiry of the 18th inst., I beg to say that under section 5682 a prisoner is not entitled to be credited with the time which he serves in solitary confinement because he violates the rules and regulations of the prison. In order to determine the day of his discharge, the warden counts from the day that he is received at the penitentiary, and discharges him at the end of the period for which he was sentenced, but if he has been in solitary confinement for, say ten days during the time, he cannot be discharged for ten days after the period for which he was sentenced. In other words, he gets no credit on his sentence for the days which he spends in solitary confinement.

Yours truly,
MILTON REMLEY,

Collection of State Revenues. Right to Deduct Commission—There is no authority for counties retaining any part of the amount of state taxes collected, to pay the salary of the county treasurer.

Des Moines, Iowa, January 26, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—Your favor of the 25th inst. at hand, asking my opinion as to whether, under sub-division 2 of section 490 of the code, counties collecting the state revenue have a right to deduct from such collections any percentage to pay the salary of the county treasurer, or to reimburse the county for such salary paid.

The section in question provides: "Each county treasurer shall receive for his service the following compensation: 1. Three-fourths of one per cent of all money collected by him as taxes due any city or town, to be paid out of the same; 2. Three per cent of all taxes collected by him for all other tax funds, to be paid out of the county treasury." The last sub-division of said section fixes a limit upon the compensation, varying in different counties. Sub-division 4 provides a fee for the payment of money into the state treasury in such sum as the board of supervisors shall allow, not exceeding one-fourth of one per cent on the amount so paid, which allowance shall be paid by the county.

This section fixes the basis for determining the amount of compensation of the county treasurer within the limits provided therein. The law requires him to make a report of all fees. (Section 492.) Directly or indirectly, the county receives the benefit of all fees which are collected by the treasurer. He is a county officer, and except as a part of his compensation is received from fees under the first and third sub-division of said section, his compensation, as stated in said section, must be paid out of the county treasury.

Section 1453 of the code is as follows: "Each county is responsible to the state for the full amount of tax levy for state purposes, except such amounts as are certified to be unavailable, double or erroneous assessment." Section 1377 of the code requires the county auditor to make out and transmit to the auditor of state an abstract of the assessment of the real and personal property within his county.

The state levy, based upon the aggregate assessment of the county, indicates the amount that the county, under section 1453, is responsible for to the state, subject to deductions on account of unavailable taxes, or double or erroneous assessment. It will be noted that no deduction is to be made from the amount for which the county is responsible on account of a commission to be paid to the county treasurer. The language of section 490 is sufficient of itself to negative the idea that the county may retain any part of such taxes to pay the salary of the county treasurer. The language of section 1453 is additional proof of the fact that the state revenue cannot be diminished by three per cent of the cost of collecting

If any further argument were needed upon the point, the case of Merthe same.

rill vs. Marshall county, 74 Iowa, 24, is directly in point, holding that the three per cent referred to in sub-division 2 of said section cannot be deducted from the amount of tax voted in aid of railroads, but must be paid out of the county treasury. This decision is, in my judgment, conclusive upon the question. I see no authority whatever for counties retaining any part of the amount of state taxes collected to pay the salary of the county treasurer. Yours respectfully,

MILTON REMLEY,
Attorney General.

Exemptions to soldiers and their widows. Construction of paragraph 7 of Section 1304, of Code—The exemption is the same whether the title of the homestead be in his or his wife's name.

Des Moines, Iowa, January 31, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—Yours at hand, requesting my opinion upon the question whether the exemption authorized by paragraph 7 of section 1304 of the code, in behalf of soldiers coming within the class therein named, applies to a soldier, the title of whose homestead is in the name of his wife; in other words, if a soldier otherwise entitled to the exemption occupies a homestead the title of which is in the name of his wife, is it exempt?"

I have had a number of inquiries in regard to the same question as that raised by Mr. Heffelfinger, whose letter you enclose. While it is true that exemption from taxation, being the exception, should be strictly construed, yet another principle of construction applies, viz., that such construction must be adopted as will carry out the intent and purpose of the legislature.

The evident intent of the legislature is that a Union soldier or sailor who is unable to perform manual labor, and is dependent thereon for the support of himself and family, shall be released from paying taxes on the property in which he has homestead rights and occupies as such, which does not exceed $800 in value. The homestead right is something more than what is called the dower right. A homestead may consist partly of the land of the wife and partly of the land of the husband, lying contiguous. (Lowell vs. Shannon, 60 Iowa, 713.) The right of the wife in the homestead is a present, fixed and substantial right, and not merely possibly remote and contingent. (Adam vs. Beale, 19 Iowa, 61.) The wife's interest in the homestead is an existing right which she is entitled to protect. She may redeem the premises from execution sale, and may enforce a contract under which another makes such redemption in trust for her. (Byers vs. Johnson, 89 Iowa, 278.) She may maintain an action to recover the possession thereof, if such possession is surrendered by the husband under a contract of sale in which she has not joined. (Bowling vs. Clark, 83 Iowa, 481.) She may redeem from tax sale. In short, no act of the husband alone can deprive her of her homestead rights. In case of the death of the husband, she is entitled to occupy the homestead during her life. She has an insurable interest in the homestead. It is in fact her homestead actually, and not simply by a figure of speech. Her rights therein can be maintained and defended by law.

All the rights that she has in the homestead, the title of which is in her husband, the husband has when the title is in the name of the wife. In the latter case, if the wife is unable to pay the taxes on the homestead occupied by the husband, he must pay the same, if it is subject to taxation. The proper support of his family, if the homestead is liable to taxation, would demand that he pay such taxes, else lose by tax sale his homestead. In short, the homestead that he occupies with his wife is his homestead, whether the title is in the name of his wife, or his own name, and to preserve that homestead, he must pay the taxes if the homestead is subject to taxation.

But section 1304 provides that "the homestead not exceeding $800 in actual value of a Union soldier or sailor unable to perform manual labor and dependent thereon for the support of himself and family, shall be exempt from taxation." This, in my judgment, includes the homestead of the soldier, whether the title thereof be in the name of his wife or in his own name. To otherwise hold, would defeat the evident intention of the legislature in many cases. Yours truly,

MILTON REMLEY,
Attorney General.

Taxes collected. How. Compensation for—There is no law making the state fund liable for part of the expenses of making assessments, correcting assessments, expenses of the board of review, collection of the taxes for any litigation in regard to the assessment and collection of taxes due the state.

Des Moines, Iowa, February 9, 1899.

George Clammer, Esq., County Attorney, Indianola, Iowa:

Dear Sir—Your favor of the 20th ult. came duly to hand, but at the time I was engaged in pressing duties in the supreme court and could not investigate the question until now. You say:

> "The board of supervisors of Warren county have employed a person to look up and report to the county treasurer under section 1374, code of 1897, for the assessment of all property subject to taxation which has been withheld, overlooked, or from other causes is not listed and assessed. Through his service, there have been taxes paid to the county treasurer for the years '94, '95, '96, '97 and '98. The supervisors, under section 1453, have certified that these taxes were unavailable without this expense, and the treasurer has apportioned the expense to all the funds, including the state." You ask my opinion whether or not the state would be liable for its proportionate share of this expense.

I know of no provision of law which makes the state fund liable for any part of the expense of making the assessment, correcting the assessment, expenses of the board of review, collection of the taxes, or for any litigation in regard to the assessment and collection of the taxes due the state. I state the proposition generally. The machinery for the collection of the state taxes is in the hands of officers elected by the townships and counties. The counties are made responsible for the tax that can be collected under section 1453. The pay of these officers is provided for out of the funds which are raised by levies upon the counties. The counties, and the officers elected by the counties and paid by the counties, are made the agents for the collection of the state tax, as well as other taxes which they are authorized to collect. The state has no agents or officers charged with the assessment and collection of taxes due the state, except as it is made the duty of the county officers to collect the same. It is a part of the duty of the county officers to collect such taxes imposed upon them by law. The pay for their services is provided for by law. I know of no provision of the law authorizing money to be paid from the state fund for services which the law requires to be rendered by officers paid from the county fund.

The duty imposed by section 1374 upon the county treasurer, the county attorney, or the board of supervisors, is no less a duty because the expense thereof may be out of proportion to the direct benefits resulting to the county from the performance of that duty. The same might be said of hundreds of criminal prosecutions. The section in question does not authorize the deduction of any part of the fund going to the state to pay for such expenses, nor do I know any other section of the statute that so authorizes.

You say that taxes for past years have been collected, and that the supervisors have certified that such taxes were unavailable without this expense, and the treasurer has apportioned the expense to all the funds, under section 1453. Under section 1453 the counties are made absolutely liable for the amount which the state levy upon the assessed property of the county would amount to, except such taxes as are unavailable. The basis for determining the amount that the county is liable to the state for is the total assessment made. It is evident property which was not assessed was not included in that basis for making the charge against the county, and said section has no application to taxes collected under section 1374. The board of supervisors, with as much propriety, might certify that none of the state tax would be available without the expense of maintaining the county treasurer and his office, as well as the expense of the assessors, and of boards of review, and might, with equal propriety, charge up to the state, a pro rata share of such expense. Some counties of the state have attempted to charge the state fund with three per cent of the amount thereof under section 490. I think they are as fully authorized to do so as your treasurer would be to charge a part of the expenses of collecting the tax under section 1374 to the state fund.

Whether or not the law is the wisest that could be made, I cannot say, but I am very clear the law authorizes no such charges; nor has any officer of the state any authority to use the public money for such purposes Yours truly,

MILTON REMLEY,
Attorney General.

Revenue Stamps—Certificates issued from the Auditor's office to insurance companies and their agents are not required to have revenue stamps.

Des Moines, Iowa, February 14, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—I have the honor to acknowledge the receipt of yours, asking my opinion upon the following questions:

First—"Should a 10-cent revenue stamp be affixed to the enclosed and similar certificates issuing from this office to insurance companies and agents of such companies?

Second—"In case you are of the opinion an internal revenue stamp is necessary, who should pay for and affix the stamp?"

The certificate you enclose is that referred to in sections 1724 and 1725 of the code, and is, under the law, issued as evidence that the insurance company is authorized to do business within the state of Iowa, which evidence of authirity is required to be furnished to the agents of such company. Under section 1752 of the code, certain fees are required to be paid to the auditor, without the payment of which neither the company nor its agents can do business in the state of Iowa. A company otherwise qualified is entitled to this evidence of its authority to do business in the state, upon the payment of the fee prescribed by law. If such

company would tender the amount provided by statute, I have no doubt it would be the duty of the auditor to issue such certificate.

The law regulating insurance companies, and requiring the payment of certain fees, is for a two-fold purpose, viz., first, to protect the citizens of the state from imposition and fraud by worthless companies; and second, to secure a revenue, both of which objects are strictly within the powers and functions of the government of the state. The act of congress approved June 13, 1898, known as the war revenue law of 1898, does not in any particular thereof attempt to levy a tax upon either the revenue of the state, or any of the agencies for carrying on the functions of the state. It is true that under the schedule of stamp duties we find the following: "Certificates of any description required by law not otherwise specified in this act, 10c." If we assume that the license or evidence of authority to do business in the state referred to in your communication comes within the definition of a certificate, it does not necessarily follow that it is embraced within the class of certificates referred to in the clause above quoted. The class of certificates are those "required by law." What law? Not the law of a state, because of the well recognized constitutional prohibition of the federal government to tax governmental agencies of the state.

It must be presumed that instruments and agencies which are outside of the sphere of the federal taxing power were not intended to be included by this section as among the instruments which congress intended to tax. We have no right to assume, then, that congress intended to include any instrument or document, whether it be called a receipt or a certificate, which is necessary to be issued by the state or any of its officers to effectuate the end and purposes for which the law was enacted.

But if this were not true, the exception made in section 17 of the act is conclusive upon the question. It is therein "provided that it is the intent hereby to exempt from the stamp tax imposed by this act such state, county, town, or other municipal corporation in the exercise of all the functions strictly belonging thereto, only in their ordinary governmental taxing or municipal capacity." The exception in the first part of said section is broad and sweeping, and the proviso is a further explanation. I see nothing in the act which indicates an intention on the part of congress to tax any of the agencies of the state. The fact that it has long been recognized that the constitution of the United States does not authorize congress to levy a tax upon the state, upon its revenues and governmental agencies and instrumentalities, would preclude the idea that congress did, by the passage of the war revenue tax law, attempt so to do.

In McCulloch vs. Maryland, 4 Wheat., 315-429, the court said: "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission. * * * If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its

reach all those powers which are conferred by the people of the United States on the government of the union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the union, for the execution of its powers. The right never existed, and the question whether it has been surrendered can never arise."

The court further says: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."

The court holds that the state of Maryland cannot tax the agencies of the federal government, acting within the scope of its jurisdiction. This doctrine has been affirmed by many cases since, and none have held to the contrary.

The converse of this proposition must be equally true, viz., that the federal government cannot tax the agencies employed by the authority which is recognized as sovereign in regard to the subjects which were never surrendered by the federal constitution to the United States.

Hence, it has been held in Collector vs. Day, 11 Wal., 113, that the income derived from the salary paid a state officer could not be taxed by the United States government. The court says, page 125: "The constitution guarantees to the state a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the states in our complex system, as recognized by the constitution, and the existence of which is so indespensible, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax."

On page 127 the court says: "And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the states, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

The same doctrine was announced in United States vs. Railroad Co., 17 Wal., 322.

In Railroad vs. Penniston, 18 Wal. 5-29, the court said: "That the taxing power of a state is one of its attributes of sovereignty; that it exists independently of the constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the federal government, either expressly or by necessary implication, are propositions that have often been asserted by this court. And in thus acknowledging the extent of the power to tax belonging to the states, we have declared that it is indispensible to their continued existence."

On page 36 it is said: "It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon their mode of constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power."

In United States vs. Railroad, 17 Wal., 322, the court held that bonds of a railroad owned by the city of Baltimore were not subject to federal taxation. On page 327 the court says: "There is no dispute about the general rules of law applicable to this subject. The power of taxation by the federal government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if an interference is permitted. Hence,

the beginning of such taxation is not allowed on the one side, is not claimed on the other."

The court cites with approval Sales vs. Davis, 22 Wis., 225, which held that congress cannot, without the consent of a state, impose a stamp duty upon tax deeds executed under the laws of the state, and cannot tax the revenues of the state.

In Field vs. Close, 15 Mich., 505, it was held that so much of the internal revenue law as requires process in state courts to be stamped as a condition of the validity of legal proceedings, is unconstitutional and void. Justice Cooley concurred in the decision.

Nor has congress authority to require a stamp upon the official bonds of state officers; (State vs. Garton, 32 Ind., 1,) nor to prohibit a state officer from recording an unstamped instrument which the laws of the state require to be recorded, but the act "must be limited in interpretation and effect to records required or authorized by act of congress, for the same reason upon which the prohibition in the same clause against giving unstamped instruments in evidence in any court has been decided to be applicable to federal courts only, and not to extend to the state courts," the opinion in that case having been rendered by Hon. Horace Gray, at present associate justice of the supreme court of the United States.

United States Attorney General O. H. Browning, in 12 opinions of Attorney General, 405, said: "The same principle which denies to a state power to raise a revenue by taxation on federal property, or sources of revenue, of means of carrying on its duties, would equally forbid taxation of state revenue for federal purposes. The continued existence of the state governments in all the powers necessary for their support is just as essential to our federal system as the continuance and support of the federal government. Nothing but the clearest expression could satisfy me that congress, in the internal revenue acts, has had any purpose to interfere with the appropriate means through which a state draws its revenue for its own support."

Hence, he held that a national bank was not liable, under the internal revenue laws, to a tax of five per centum upon the dividends due a state on stock owned by the state.

There are numerous other decisions of federal, as well as state courts, annunciating the principle. It is too well settled to be a disputed question that a state, its property, as well as the property of the municipal corporations created by the power of the state and the agencies or means adopted in the exercise of its constitutional powers, cannot be taxed, impeded or controlled by the government of the United States.

What is the effect of a tax upon the certificates issued by the auditor, if, as stated in Railroad vs. Peniston, the exemption of the agencies of the government is dependent upon the effect of the tax? If the federal government can tax such certificates 10c, that power being unlimited they may be taxed $10 or $100. In such a case, the revenue of the state from the issuing of such certificates would be cut off entirely. If the taxing power of the federal government extends to taxing the revenues of the state, the salaries of the officers, the official bonds, or other agencies or

means employed to exercise the constitutional powers, then such tax may be extended so as to destroy the state government altogether, or prevent its exercising its proper functions.

I may therefore say generally that the exercise of the constitutional powers of the state government, or any of the agencies employed, is not within the sphere of the taxing power of the federal government, and in the absence of a direct provision in the war revenue measure, it cannot be presumed that congress attempted to exercise a power which it did not possess. The exceptions in section 17 of the acts show such power was not assumed. So in the enactment of the income tax law. Salaries received by public officers were excepted from the income to be taxed, and in no instance has congress attempted to exercise the power to tax the state, or the means, agencies, or instrumentalities necessary in the exercise of the constitutional powers of the state.

My conclusion is that the certificates in question are not required to be taxed. Yours respectfully,

MILTON REMLEY,
Attorney General.

Companies Place Stamps on Certificates—There is no objection on the part of the state to the insurance companies themselves placing stamps on the certificates. The Auditor is not authorized to use public funds to place such stamps thereon.

Des Moines, Iowa, February 23,1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—On the 14th inst. I sent a copy of my opinion which I herewith enclose to you in regard to placing revenue stamps upon certificates issued to insurance agents, to Hon. N. B. Scott, commissioner of internal revenue, and requested him, if there was any authority for a different conclusion, to inform me thereof. I have not heard from him, and assume that there are no cases of any court holding contrary to the opinion which I have given. I am certain there are none.

In a conversation, you suggested that insurance companies might hesitate to accept the certificates without stamps. If they desire to put stamps on, certainly the state of Iowa has no objection, but the auditor has no authority to use public funds to place stamps thereon, nor has he, in my judgment, authority to require the companies to pay for such stamps.

Sections 10 and 11 of the war revenue law of 1898 are the only sections that provide a penalty for a person receiving or accepting any unstamped instrument or note which is required by the act to be stamped. Those sections relate to notes, drafts, bills of exchange, foreign and inland, orders for the payment of money. The act nowhere provides a penalty for a person accepting an unstamped certificate; nor does it require the one receiving such certificate to place a stamp thereon.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Residence—Under the common law, as well as the statute, a settlement once acquired continues until lost by acquiring a new one. A legitimate minor child has the settlement of the father. Under the facts in regard to settlement of an insane person, no claim can be made upon the State of Minnesota. Under the facts, Scott County is liable for the support of said patient.

Des Moines, Iowa, February 23, 1899.

Hon. William Larabee, Chairman Board of Control:

Dear Sir—With reference to the case of Louis Ruwe, insane, which you submitted to me, I beg to state that the principles of law governing the case are comparatively simple. Under the common law, as well as our statutes, a settlement once acquired continues until lost by acquiring a new one. (Code, section 2224.) A legitimate minor child follows and has the settlement of the father.

The undisputed evidence, as shown by the affidavits and statements, is that Louis Ruwe, Jr., became of age and had a settlement in Scott county, Iowa. Unless that settlement has been lost by acquiring a new one, under said section it still continues in Scott county. The testimony submitted to the commissioners of insanity of Scott county, as shown by Mr. Cheek's letter of February 17, shows that Louis Ruwe went to Jackson county, Minnesota, on March 17, 1898, and returned to Scott county December 28, 1898. A settlement is not acquired in this state, and the same is true in Minnesota, unless a person resides here for one year. In this state, a warning to depart within the year will prevent a settlement ever being acquired. The affidavits furnished by the Minnesota authorities also show the same facts that appeared before the commissioners of insanity. There is, then, no just ground for saying that a settlement was acquired by Louis Ruwe in Jackson county, Minnesota. The time that he resided there was insufficient for that purpose.

The expenses of the support of a patient in the hospital for the insane must be borne by the county in which the patient has a legal settlement. (Code, section 2281.)

The patient having once had a legal settlement in Scott county, and that settlement being presumed to continue until a new one is acquired, to escape this liability the burden of proof is upon Scott county to show that such settlement has been lost.

The evidence presented by both parties shows that a legal settlement was not acquired in Minnesota.

The affidavit of Henry Ruwe, Jr., states: "Louis Ruwe had worked for me about a year in O'Brien county." This is indefinite. If it were over a year, it is possible he acquired a settlement in O'Brien county, but the evidence is not sufficient to enable one to determine certainly.

His father testified before the commissioners of insanity that he left home about three years ago to work for himself. Part of the time it appears he worked in Cedar County, Iowa, part of the time in O'Brien county, and for a little more than nine months in Jackson

county, Minnesota. If he did not remain in any one place for a year or more, he did not acquire a settlement in any other place, and under the statute, his settlement continues to be in Scott county.

Whether or not he voted in Minnesota has no bearing on the question of settlement, as a person may have a settlement in one place and a residence in another.

My conclusions are: First, that no just claaim can be made upon the state of Minnesota; second, that Scott county would be liable for the support of the patient unless it can produce evidence showing that a settlement was acquired by the patient in O'Brien county, or some other county in which he resided for a year. Yours respectfully,

MILTON REMLEY,
Attorney General.

Building and Loan Associations—The law does not authorize the organization of any building and loan association which gives to one member rights, opportunities or immunities which cannot be shared by every other member. Such associations can only loan their funds to their members. One becoming a member must share the burdens and losses incident to the business. Loaning money to stockholders under a provision that the money loaned shall be repaid at a fixed rate, is a palpable evasion of the statute forbidding loaning money to other than members.

Des Moines, Iowa, Feb. 28, 1899.

Hon. Leslie M. Shaw, Governor of Iowa:

Dear Sir—In your favor of the 20th instant you state:

"Some amendments to articles of incorporation are submitted to us which provide that the shareholder may withdraw after a certain length of time and a definate number of payments, and the withdrawal value of his stock shall be the amount so paid plus a definite rate of interest. Other amendments to articles of incorporation have been proposed where a definite time is fixed for the maturity of the stock.

"The executive council desires to know whether the feature of mutuality among the stockholders is extended to the building and loan or savings and loan association corporation."

"In other words, can a stockholder, while having the right to share in the profits of the corporation, and therefore charged with his proportionate share of losses, be permitted to waive the feature of mutuality and withdraw, accepting a specified amount, regardless of losses, to be determined according to the articles of incorporation and by-laws?

"Would the permission to surrender stock and withdraw the amount theron with a definate rate of interest fixed by the articles of incorporation and by-laws destroy the mutuality contemplated

by the statute, if you shall hold that the statute contemplates mutuality?

"Does the stipulation in the articles of incorporation and by-laws, fixing a definate time at which the stock shall mature, regardless of profits or losses, destroy the feature of mutuality contemplated by the statute, if you shall hold that such mutuality is contemplated;"

The statutes of this state relating to building and loan associations or savings and loan associations, were enacted with reference to, and based upon the plane, purposes, and objects of building and loan associations as shown by their previous history in this state and elsewhere. The history of building and loan associations and their objects, shows that mutuality is essential to the plans and purposes of such associations. Our statutes relating thereto assume that such associations maintain the mutuality which is recognized as one of the features of building and loan associations. There is nothing in the statute to authorize the organization of any building and loan association which gives to one member rights, liberties or immunities which cannot be shared by every other member.

The whole theory of building and loan associations is that the stock holders shall pay in at stated periods given sums, which shall be invested for the benefit of all the members, and at stated times dividends shall be declared pro rata and credited to the stock of each, and if losses occur, such losses shall be borne likewise pro rata. If this principle were eliminated from building and loan associations, they would cease to be such, and under the laws of this state, would have no right to enjoy the privileges conferred by law upon building and loan associations.

The borrowing stockholder is the one who is least likely to withdraw his stock before the maturity thereof. It is this class of persons who are to be benefitted by the association, and in whose interest special privileges are accorded to building and loan associations. Any article of incorporation or by-law which permits a withdrawal for a specified amount, regadless of losses, necessarily makes such loss fall upon those who do not withdraw, and practically, in such a case, they fall upon the very class of persons whom the law seeks to benefit by giving special privilages to building and loan associations.

In this connection, permit me to call your attention to the fourth division of an opinion given to Hon. W. M. McFarland, Secretary of State, August 6th, 1896, on page 144 of the First Biennial Report of the Attorney General.

I will only add that any provision of the article of incorporation or by-laws which names a fied sum as the withdrawal value of a retiring member, regardless of loss, or which authorizes the payment of a definite rate of interest fixed by the articles of incorporation or by-laws, regardless of whether the profits justify the payment of such interest, or which fix a definite time in which the stock shall mature, regardless of loss or the amount of profits earned, in my judgment, destroys the mutuality of the association, and such articles or amendments should not be approved.

You further say: "Other amendments are proposed providing that a certain class of stock shall mature at a specified time without option of payment before maturity, the borrower agreeing to pay a certain number of payments of a definite amount, the company agreeing definitely to cancel and release his mortgages when such payments have been made.

"The Executive Council desires to know whether this is in conformity to the statute relative to building and loan and savings and loan associations, and whether the contemplated amendments destroy the feature of mutuality contemplated by the statute, should you hold that mutuality is essential."

Under the law, building and loan, or savings and loan associations, can only loan their funds to their members. One becoming a member must share the burdens and bear the losses incident to the business in which the association is engaged. To issue stock to one about to borrow, and loaning money to such stockholders, providing that the payment on the stock shall be in such sums that the money loaned shall be repaid at a fixed rate, is, in my judgment, a plain, palpable evasion of the statute against loaning money to other than members. Such a stockholder does not share in the profits of the association, nor would he be liable for the losses. If he were authorized to vote such stock, it would in effect be giving the borrower from the association a voice in controlling the business of the association in which he had no pecuniary interest other than that of being a debtor in such association. Such stockholder has nothing in common with the other stockholders.

On the other hand, being simply a debtor, with the right to pay his loan at stated periods, his interest would be antagonistic to the interests of the other stockholders.

I do not think that the law authorizes the issuing of such stock. Nor do I think there would be any mutual relations or responsibilities between such stockholders and other stockholders who share in the profits and losses of the association.

Yours truly,
MILTON REMLEY,
Attorney General.

Entomologist—He is entitled to appoint assistants and fix the compensation—Duties thereof—The money which is paid as fees or fines must be accounted for by him and paid into the state treasury, and should be credited to Entomologist fund.

Des Moines, Iowa, March 1, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—Your favor of the 23rd ult. came duly to hand, requesting my construction of chapter 53, laws of the Twenty-seventh General Assembly, relating to the compensation and appropriation for the support of the state entomologist.

The first section of said chapter creates the office of state entomolo-

gist. He is authorized to appoint assistants and fix the compensation. It is made his duty to examine all nurseries, fruit farms, or other places where trees or plants are grown for sale, at the request of the owner or agent, or where he has reasonable grounds to believe the scale exists. For the services thus rendered he shall collect a fee of not less than $5, nor more than $15.

Section 2 provides for the payment of the cost of destroying infected trees or plants in case the owner refuses to destroy the same, such cost being certified to the county auditor, who shall spread the same upon the tax books to be collected as other taxes, and when collected, such taxes are to be turned over to the entomologist to become a part of the fund for carrying this act into effect.

Section 4 provides certain fines in case of conviction, and that all amounts so recovered shall be paid over to the state entomologist and added to the fund herein provided for carrying out the provisions of this act.

Section 5 provides that all funds coming into his hands shall be turned over to the state treasurer, with an itemized statement of the sources whence received, the last clause of section 5 being: "He shall certify the amount of his expenses and per diem to the auditor of state, who shall thereupon draw his warrant upon the treasurer of state for the amount, which shall be paid out of the funds provided for carrying this act into effect."

Section 6 makes an appropriation of $1,000, or so much thereof as may be necessary for carrying out the provisions of this act.

Section 1 authorizes the work of the state entomologist and the necessary assistants, to be done between the 1st day of June and the 15th day of September in each year.

It is evident from the duties imposed upon the state entomologist and his assistants that the appropriation of $500 per year would not be sufficient to accomplish such work. The question might arise whether the last clause of section 4, applying the fines imposed and collected to the fund, could be maintained on constitutional grounds. Nothing is realized from the fund required to be paid under section 2 of the act. The costs which the state entomologist pays out for destroying infected trees or plants are simply returned to the state treasurer when collected. Nothing would be left, then, for compensation for him or his assistants. The money which is paid as fees or fines must be accounted for by the state entomologist and paid into the state treasury.

The language in sections 2 and 4, viz., "become a part of the fund for carrying this act into effect, and added to the fund herein provided for carrying out the provisions of this act," and the payment of the sums thus referred to to the state entomologist, and by him turned over to the state treasurer, satisfies me that the thought in the mind of the legislature was that the fees of the state entomologist and his assistants should be applied toward the payment of his per diem and expenses; that the act providing for the state entomologist would provide the means for paying the expenses thereof, or nearly so, but for fear the fees received by the state entomologist would not be sufficient to pay his per

diem and expenses, a small appropriation of $1,000 for the biennial period was made, or so much thereof as should be necessary.

I think all funds paid to the state treasurer, carrying out what I believe to be the legislative intent, should be credited to the state entomologist fund, and so much of the appropriation of $1,000 during the biennial period as may be necessary. Yours truly,

MILTON REMLEY,
Attorney General.

Building and Loan Associations. Amendments to Articles—Existing share holders are bound by subsequent amendments to the articles. An association may lawfully amend its articles, although prior share holders may be affected thereby. The fundamental, organic law of the association must be applicable to all alike.

March 9, 1899.

Hon. Leslie M. Shaw, Governor of Iowa:

Dear Sir—Your favor of the 7th instant at hand in which you say:

First—"There are pending before the Executive Council amendments to articles of incorporation of certain building and loan associations and savings and loan associations, where it is sought to give members the right to withdraw after certain specified time, and to entitle them to a certain specific per cent. of the amount paid in upon their several shares, with a certain specified per cent. of the earnings of said payments, providing the amount so received shall not exceed the aggregate amount paid in, and interest thereon for the average time at a certain specified rate.

The Executive Council desires your opinion whether this limitation upon the amount to be received by withdrawing members destroys the mutuglity provided by statute."

Any plan of withdrawal which is open to all members on equal terms and where the terms upon which such withdrawals may be made are such that the value of the stock of those who do not withdraw will not be impaired by reason of the withdrawing members receiving more than his equitable share of the assets of the company, would not in my judgment destroy the mutuality. The limitation on the amount which may be withdrawn on the case stated by you is two-fold:

First—A specific amount of the amount paid bq the stock-holders on his stock, together with the earnings of such payment.

Second—Within that limitation is still another,—that the amount received by withdrawing members shall not exceed the amount paid in, together with a specified rato of interest thereon from the time of such payment.

If the specified payment of the amount paid in and the earnings thereof allowed to the withdrawing member, should exceed the amount paid in with the specified rate of interest thereon, then the second limitation would control.

These limitations being the general rule applicable to all members alike, and each member having an option to withdraw on the terms named, or to continue until the stock has matured, I cannot say that such provisions destroy the maturity required by law.

There is one suggestion that I would make. A case might arise wherein the losses of the association would use up all the earnings and maybe one-half or more of the capital. In such a case it would appear that any specified sum named in the articles of incorporation which should be paid to the withdrawing member, might be in excess of the equitable proportion of the assets. In regard to this I will say, however, that the courts hold that whenever an association is unable to pay its stock in full, it is insolvent; in which event each stockholder would be entitled to receive only his pro rata share of the assets after the payment of the liabilities, if any, according to the rules of equity and independent of the regulations contained in the articles of incorporation. The general principles of equity prevent an insolvent corporation paying to stockholders any sum to the deteriment of the estate of the insolvent corporation.

The statement then that the plan proposed in your inquiry does not destroy the mutuality provided by statute must be understood as applying to solvent building and loan associations.

Second—You further say "there are pending before the Txecutive Council amendments to articles of incorporation of certain building and loan associations, expressly providing that the amended articles shall not apply to existing shareholders to the extent of the stock already held, but that the proposed amendments shall be applicable only to shares subsequently made."

"The Executive Council desires your opinion upon the following propositions: 'Are existing contracts for the purchase and payment of shares of stock and for the payment of loans to members subject to subsequent modification by amendments to the articles of incorporation, or are existing shareholders and borrowers entitled to mature their stock and discharge their loans in accordance with the terms provided in articles of incorporation existing at the time said stock was purchased and loans negotiated.' "

A borrowing member occupies a dual relation to a building and loan association. First, he is a member, and participates in the management of the association and also in the making of its constitution and by-laws. As a borrower, he has entered into contract relations with the association and is a debtor in the sum as shown by the contract. The rights of such a member are different in these different relations.

Let us consider first his rights as a member. Most articles of incorporation provide for the amendment thereof. But whether they do or not, section 1615 of the Code authorizes corporations formed under the law, to change any provision of the articles of incorporation at the annual meeting or special meeting of the stockholders called for that purpose. There is a line of decisions which hold that the articles of incorporation form a contract between the members, and the stockholders bzecome creditors of the association to the extent of their stock and

profits accruing to them under the articles of incorporation; that they have vested rights which cannot be affected by any change in the articles of incorporation to which they do not assent. Whatever rule may be adopted by other states, such a rule is not applicable to this state, where the law under which associations are incorporated expressley authorizes a cahange in any provisions of the articles of incorporation. I recognize the decision of all courts protecting vested rights, but what can be considered a vested right of the stockholder in a corporation, the constituent law of which expressly authorizes a change.

If A purchases real estate obtaining a title in fee simple, he secures a vested right therein ofw hich he cannot be deprived without compensation or by arbitrary legislation. But if A receives a deed with a clause therein by which his title may be defeated upon the happening of some contingency, and that contingency happens and he loses the land, he cannot be said to be deprived of vested rights. His rights was just what he obtained by his deed. Every person taking stock in a corporation organized under the laws of the state of Iowa, places his money under the control of the corporation to be managed and used in the manner in which the articles of incorporation then provide, and also in such manner as any future amendment to the articles lawfully made may provide. If amendments are made it is just such a contingency as the stockholders knew might happen, and in effect he has agreed that the original contract might be changed after he invested in the stock, and if a change has been made which seems to make his stock less valuable, it is no more than he contracted might be done. Consequently, no vested rights are impaired.

As to a member's rights as a borrower, a different rule governs in regard to the member's relations to the association as a borrower.

He has received money from the association which he has contracted to repay, together with certain interest thereon. This contract is expressed in the notes and mortgage which he has given. This contract in my judgment cannot be changed so as to require him to pay either a greater sum of a greater rate of interest or a greater amount of fines for failure to pay promptly, nor can his liability as a debtor of the association be increased or enlarged by any subsequent change of the articles of incorporation. The legislature by a direct act would not have the power to imair the obligation of this contract.

It may be asked, "but if the terms of the withdrawal of his stock, or the rate of interest he is entitled to receive on his stock, in case of withdrawal, is changed, does not this in effect increase the amount that he would have to pay when he pays his loan?" The two transactions are seperate and cannot be confounded. He has pledged himself to pay to the association a fixed sum. If he wished to withdraw as a member, he as a member is entitled to the same terms as any other member. Before he withdraws he must pay up his loan. The amount that he sha pay to the association is determined by his note and mortgage. The value of the shares which he holds as a member is determined by the articles of incorporation and the financial condition of the association.

The amount thus found, as the withdrawal value, he can receive in cash, or apply as a credit on his indebtedness to the association as a borrower. A change in the articles of incorporation which may permit a less amount to be paid to the withdrawing member does not effect his contract as a debtor to the association, but it effects alone the amount which he may receive as a withdrawing member.

As a member he stands on the same footing with other members who have not borrowed. It will be conclusively presumed in view of the law of this state, that on becoming a member of the association, his investment in the stock was made, and the rights which he acquired thereby were agreed to be eubject to such changes as might be lawfully made in the articles of incorporation, and he is bound thereby whether he actually assented thereto or not.

I have assumed the clause in your inquiry "exciting contracts for the purchase and payment of shares of stock" refers alone to the contract expressed in the articles of incorporation and the certificate of stock issued thereunder; and further that the certificate of stock issued was in accord with the articles of incorporation.

In my judgment existing shareholders are bound by subsequent amendments to the articles of incorporation and an association may lawfully amend its articles of incorporation, although prior shareholders may be affected thereby. If this were not true, then persons purchasing stock after such amendments, might not be on the same footing with members who purchased stock prior to the amendments. This would destroy the mutuality. "The fundamental idea of a building and loan association is mutual profit sharing." Leahey vs. B. & L. Ass'n. 76 N. W. Rep., Page 638.

The same case says: "When the corporation aggregate agrees with all of its members to pay a definate amount at a given time, regardless of whether the anticipated profits has been earned or not, unless the requisite profit has been earned, it is quite evident that someone must suffer. The principle of equity and mutuality would thereby be destroyed."

In Wilcoxen vs. Smith, 78 N. W. Rep. Page 219, our Supreme Court has said: "But the association is composed of members whose rights are mutual, and among whom there should be equality based upon their payment to the capital stock of the association."

It would be repugnant to the fundamental idea of building and loan associations to permit one class of shareholders to receive dividends or earnings of the association in any greater amount or upon any different basis than that allowed to any other class of members.

I am clearly of the opinion that an amendment that makes an unequal division of profits possible, or has articles of incorporation applicable to one class of members and other articles of incorporations applicable to another class of members, cannot be sustained by the law. The fundamental organic law of the association must be applicable to all alike.

Yours truly,

MILTON REMLEY,
Attorney General.

Taxes—Deducted from monies and credits in making assessment. Debt defined. Tax comes within the term "debt." There is no reason why one is not entitled to deduct from his monies and credits the amount of taxes which he owes. Taxes remaining on the books uncollected for more than four years are released from penalty.

March 17, 1899.

J. W. Morris, Esq., County Attorney, Panora, Iowa:

Dear Sir—Your favor came duly to hand at a time when I could not possibly take it up; and at the earliest possible moment I have made an examination of the law, and will state to you my conclusions.

You ask if the 1898 taxes are a proper debt which can be deducted from the monies and credits in making the assessment for the year 1899.

The question turns upon what is meant by a debt. A deba is defined to be "that which is due from one person to another;" "that which one person is bound to pay to another;" "thing owed;" "obligation;" "liability."

The tax payer is liable for the amount of his taxes to the state, county or city. It is due from him to the corporation or soverign entitled to the tax. He is bound to pay the tax to another, and in every sense the tax seems to come within the definition of the term "debt."

In Findley vs. Taylor, 66 N. W. Rep. 754, the court held that taxes are a debt of the person taxed at least from the time they become due. See also City of Dubuque vs. Illinois Central, 39 Iowa, 56; Burlington vs. B. & M. R. R. Company, 41 Iowa, 134; Sioux City vs. Independent School District, 55 Iowa, 150.

It would seem a special hardship for a man who had say $200 of tax to pay on the first of January, and had accumulated and saved up $200 to pay that tax, to be obliged to have that money assessed for taxation when he was owing the amount to the corporation or power that levied taxes upon it. I can see no principle or reason why one is not entitled to deduct from his monies and credits, the amount of taxes which he owes.

You also refer to Section 1301 and ask whether the treasurer can collect penalty on any tax remaining unpaid four years or more. The section provides that no penalty or interest shall be collected upon taxes remaining unpaid four years or more from the 31st of December of the year in which the tax books containing the same were first placed in the treasurers hands. This releases the penalty and interest on all taxes which remain on the books uncollected for more than four years. The original tax remains a lien, but if the treasurer fails to collect the taxes within the four years from the 31st of December after he receives the first tax he cannot under this provision collect anything more than the original tax named in the list. The treasurer might be liable on his bond in case the failure was due to neglegance.

Yours truly,

MILTON REMLEY,

Attorney General.

Independent School Districts—Boundaries of municipal corporations. The extending of the boundaries of a municipal corporation may, in the manner required by law, extend the boundaries of the independent school district thereof, without any action on the part of the school districts, their officers, and regardless of the effect of such change upon the districts from which territory is taken.

Des Moines, Iowa, March 23, 1899.

Hon. R. C. Barrett, Superintendent of Public Instruction:

Dear Sir—Yours at hand, in which you ask my opinion upon the following question:

> "Does the law as found in Chapter 89, Acts of the Twenty-seventh General Assembly, contemplate that 'when the corporate limits of any city or town are extended outside the existing independent district or districts, the boundaries of said independent district or districts shall be also correspondingly extended,' without regard to township or county lines, manner of the organization of the district or districts from which the territory is taken, or the condition in which such district or districts will be left after the territory had been taken?"

In regard to this I will say that Chapter 89, Laws of the Twenty-seventh General Assembly, contains this provision: "When the corporate limits of any city or town are extended outside of the existing independent district or districts, the boundaries of such independent district or districts shall be also correspondingly extended."

This language is general, and without exception or limitation. It is evidently the intent of the Legislature that whenever the limits of a city or town are extended beyond the independent district or districts within said city or town, then the boundaries of the independent district or districts shall be correspondingly extended. The extension of the corporate limits of the town ipso facto extends to the boundaries of the independent district or districts of the city or town.

The first part of said chapter provides how the boundaries between a school township and an independent city or town district may be changed in certain cases by the action of the respective boards of directors. There are also certain sections of the Code which provides how the coundary lines of independent districts in certain cases may be changed. For instance, Seceion 2793 is in relation to the change of the boundary lines of contiguous independent districts within the same civil township. A limitation is found therein, viz: "the independent district from which territory is detached shall, after the change, contain not less than four government sections of land," etc. This limitation applies alone to the case described by the section.

The restrictions contained in said section do not apply to some other case, as for instance, that above specified in the language quoted in said chapter 89. We are not authorized to engraft conditions or limitations expressed in a section relating to one class of cases upon the statute re-

lating to another class of cases. I do not recall any law which is in conflict with the provisions above quoted, but that being the last expression of the legislative will, it would be considered as repealing any in conflict therewith, if any such there be; though I think there are no statutes in conflict with it.

Hence, my conclusion is that the extension of the boundaries of a municipal corporation made in the manner required by law, extends the boundaries of the independent district of said municipal corporation, without any action on the part of the school districts or their officers' and regardless of the effect of such change upon the districts from which territory is taken. Yours respectfully,

MILTON REMLEY,
Attorney General.

Local Board of Health—Duty of, to examine into the condition of any cellar, room, tenement, building or place occupied as a dwelling or otherwise. No man has a right to use his home so as to injure others, or be a menace in the community.

Des Moines, Iowa, March 30, 1899.

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

Dear Sir—Your favor of the 27th instant at hand, enclosing a letter from Mr. George Mueller, in which you ask my opinion as to what rights the local board of health has under the facts stated in the letter. The facts stated are briefly these:

A man is living alone in a shanty, surrounded by filth and in the midst of filth, and has been so living many years until he is infected with the scurvy, and he himself and the dwelling have become the source of disease and a menace to the community. He owns a farm of 160 acres, several houses in town, and has money and other property, but is a miser by instinct and practice. The question is whether he can be cleaned up, new clothing purchased for him, his house cleansed or he be taken to another house which he owns and cared for during his sickness, and whether the expense of thus caring for him can be collected from his estate.

The local board of health has full power, under section 2568 of the Code, "when satisfied upon an examination that any cellar, room, tenament, building or place occupied as a dwelling or otherwise, has become, or is, by reason of the number of occupants, unclenliness or other cause unfit for such purpose or a cause of nuisance or sickness to the occupants or the public, to issue out a notice in writing to such occupants or any of them, requiring the premises to be put in proper condition as to cleanliness, or require the occupants to remove or quit such premises within a reasonable time to be fixed, and if the persons so notified, or any of them, neglect or refuse to comply therewith, they may, by order, cause the premises to be properly cleaned at the expense of the owner or owners, or may forcibly remove the occupants and close the premises, and peace and police officers shall execute such orders,

which premises so closed shall not be again occupied as a dwelling place without the written permission of the board."

Section 2569 provides the manner in which the general purposes stated above may be carried out, and also provides that the removal and cleansing may be done at the expense of the owner or occupant.

Section 2573 provides a penalty for failing to comply with the orders and regulations of the board of health. The costs of the abatment of the nuisance under the provisions of Section 2569 may be taxed up as costs in the proceedings before the justice, and be collected like any other judgment by execution. The forfeiture provided in Section 2573 can be recovered in an action in the name of the clerk of the board.

The provisions of law are ample to meet such a case, and if the facts are stated correctly in the letter which you enclosed, the local board of health should not hesitate to enforce the law with firmness, remove, or cause the old man to be removed from the filth and squallor in which he dwells, clean up the house, or fasten it up so that it shall not be occupied again as a dwelling, and if its present condition is a menace to public health in case it were nailed up, destroy it, and take such steps as may be necessary to remove the evil and source of disease from the community.

No man has a right to use his home so as to injure others, or to be a menace in the community, and no false ideas or sentimentalities about the personal right of a man to do as he pleases with his own should prevent the board of health from taking heroic action, if necessary, to protect the public and to protect the man against himself.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Taxes. Collection of. Remedy where tax payer has failed to properly list his property for assessment. Recovery may be had for taxes due within five years previous, together with 6 per cent interest thereon. Section 1374 of the Code can be invoked to recover taxes which would have been due from taxpayer had he not withheld his property from assessment prior to the taking effect of the new Code.

Des Moines, Iowa, March 30, 1899.

S. P. Miles, Esq., Nora Springs, Iowa:

Dear Sir—Your favor of the 23rd instant duly at hand. The question upon which you desire my opinion is certainly a very interesting one, it being based upon the following facts:

Mr. A. of your county died last fall, leaving an estate in moneys and credits amounting to $45,000. His son had, for years, attended to all business, and listed the moneys and credits of his father at $15,000, and on that basis he was taxed.

Section 1374 of the Code authorizes the county treasurer to bring

an action in such a case against the tax peyer, or his estate, to recover the amount that would have been paid as taxes had the property of the tax payer been properly listed and assessed. Recovery under said section may be had for the taxes due within five years previous, together with six per cent. interest thereon. The quesetion is whether recovery may be had under said section for any property which was withheld from assessment prior to the taking effect of the new Code.

It is true that prior statutes did not give the county treasurer the right to maintain such an action. It is true, however, that every tax payer was required, not only by statute law, but by the general principles of government, to contribute his full share toward the public burdon in such sum as may be determined upon the basis fixed by law. Section 823 of the Code of 1873 made it the duty of the tax payer to assist in making out a list of his property. It was required to be made under oath. If he failed to do so, he was subject to a penalty of $100. Section 824 authorized the assessor, in case the tax payer refused to give a full list, to add to the assessment any property omitted, and to enter the same at double the ordinary assessable value. Under section 857, as amended, it was made the duty of every person subject to taxation, to attend at the office of the treasurer and pay the tax.

In Dubuque vs. Illinois Central Railway, 39 Iowa, 56, it was held that the tax lawfully levied became a debt; also in Burlington vs. B. & M. Railway, 41 Iowa, 134; and that each might be collected by a suit.

In Finley vs. Taylor, Executor, 97 Iowa, 420, it was held that taxes were a debt which must be paid by the admisistrator or executor.

The courts of some other states hold otherwise, but it may be considered settled in this state that there is an obligation to pay a tax in proportion to the taxable property owned by the tax payer. While there has been no case determined by our Supreme Court, that I am aware of, which has heretofore authorized suit to be brought for taxes to be recovered against a party who has failed to properly list his property for assessment, yet it has always been a moral obligation, as well as a lagal obligation, for every person to list his property honestly and fairly for taxation, and the amout which he owes to the state or county is a debt. Section 1374 creates no new obligation. It only provides a new remedy to recover a debt which has existed prior to the adoption of the new Code.

Retroactive legislation cannot be passed which impares vested rights. No one, however, can say that he has a vested right to reap the benefit of his fraud,—possibly perjury. The state, county and school districts all had a vested right to receive from the tax payer his proportionate share of the taxes levied in pursuit of law.

"Retrospective laws are not necessarily unconstitutional, and those which tend to cure defects in acts done, and authorize the exercise of powers which operate retrospectively, are sustained by the courts, if the legislature possessed authority to confer the power and the act would have been valid under a prior enactment, and vested rights of property are not disturbed. * * * * Remedies are within the control of the legislature, subject to the restriction that the obligation of contracts will not be impaired. * * * * The legislature may provide new

and additional remedies for a right already existing which would be lost if no remedy were provided. And retrospective laws which affect binding statutes, giving new remedies, modifying an existing one, or removing an impairment in the way of legal proceedings, are not unconstitutional."

Tilden vs. Swift & Co., 40 Iowa, 78.

In York vs. Goodwin, 67 Me., 260, it was held that a statute which gave to the tax collector the right to bring an action, applied to taxes levied before the statute was passed. The court says: "But the act only gives an additional remedy for the collection of taxes. It interferes with no vested right which only furnishes another mode of compelling the defendant to do what, without compulsion, it was his duty to do."

In Ryan vs. Gallatin & Co., 14 Illinois, 78, it was held that assumpsit would lie where the statutory remedy was deemed inadequate. See also Cooley on Taxation, p. 435.

In my opinion, section 1374 only gives an additional remedy to compel the tax payer to do that which it is his duty to do. It creates no new obligation on the part of the tax peyer. It only provides an additional means for enforcing an obligation which has heretofore existed. It provides no additional burdens or penalties. Only "the amount of property that should have been taxed each year, the same was withheld and overlooked and not listed and assessed, together with six per cent. interest thereon from the time the tax would have become due and payable had such property been listed and assessed," can be collected, and no more.

There is no penalty embraced within the amount which can be recovered which did not exist before the Code took effect. Hence, my conclusion is that the provisions of section 1374 can be invoked to recover taxes which would have been due from the tax payer had he not withheld his property from assessment prior to the taking effect of the new Code.

Yours truly,

MILTON REMLEY,
Attorney General.

Penitentiary. Convict's sentence. Solitary confinement—The number of days for which a convict has been confined as a punishment for misbehavior should be added to the term of his sentence.

Des Moines, Iowa, May 1, 1899.

Hon. Wm. A Hunter, Warden Penitentary, Anamosa, Iowa:

Dear Sir—Your favor of the 29th ult. at hand, in which you say: "Convict Milsap was sentenced to the penitentiary for one year; expiration of full term May 6th, 1899, with diminution, April 6th, 1899. He has at various times been confined in solitary punishment six days, therefore has lost sixty-two days. When shall I discharge him?"

Section 5682 of the Code provides that "no convict shall be dis-

charged from the penitentiary until he has remained the full term for which he was sentenced, to be computed from and including the day on which he is received into the same, exclusive of the time he may have been in solitary confinement for any violaton of the rules and regulations of the prison." Your leter states that he has been in solitary confinement six days. Excluding these six days, the time for his discharge would be May 12th, 1899.

Were it not for his violation of the rules he would have been entitled under the statement of your letter, to diminution of one month for good time. Under section 5704 of the Code, however, he forfeits for the first offense two days of his good time; for the second offense, four days; for the third, eight days; for the fourth, sixteen days, and in addition to this, as many days as he has been confined as a punishment for his violation of the rules of the institution.

Your letter does not state the number of offenses. He may, so far as it appears from your letter, have been confined in solitary confinement for one or more days for one offense, or six days for one offense. Hence, I cannot state how much of his good time is forfeited under the provisions of the section last named. I assume, however, that there were six offenses, because it is stated that he has lost sixty-two days. I imagine this lost time was computed as above stated, and for each offense above the fourth , sixteen days each. If this supposition is true then for the first four offenses he would have lost thirty-five days, being thirty-two on the schedule above stated and three days more than one that he was in punishment.

You will notice, however, section 5704 provides that for more than four offenses, the Warden shall have power, with the approval of the Governor, to deprive him of any portion or all of the good time that the convict may have earned, but not less than as provided for the fourth offense. This last clause has no bearing in this case because he had lost more good time for the first four offenses than he had earned. Section 5704 does not increase the length of time of his confinement; it only works a forfeiture of the good time that he had earned. He can forfeit no more good time than he has earned. The effect of said section 5704 is to charge off the number of days according to the schedule there stated of the good time earned, but it cannot be considered to add anything to the length of his sentence.

My conclusion is that the six days for which he was confined as a punishment should be added to his year of sentence, and that he will be entitled to his discharge on the 12th day of May, under the facts which you have stated.

Yours respectfully,

MILTON REMLEY,
Attorney General.

Convict—Release from Penitentiary—There is nothing in the statute which would justify furnishing clothing, money or transportation to a convict who is still kept in confinement awaiting a new trial.

Des Moines, Iowa, March 1, 1899.

Hon. William A. Hunter, Warden Penitentiary, Anamosa, Iowa:

Dear Sir—Your favor came duly to hand, in which you state the following facts:

A person was convicted and sentenced to the penitentiary, and was duly received by you as warden. The case was appealed to the supreme court, the judgment reversed and the case remanded to the district court for a new trial. Under order of the court or judge thereof, you delivered the prisoner to the sheriff to be taken to the proper county for a new trial. He was convicted of petty larceny and sentenced to serve a term in the county jail. He now asks for a regular discharge from the institution, with a new suit of clothes, and the allowance authorized by section 5684.

Section 5684 makes provision for a man when he is released from the penitentiary at the expiration of his sentence, or upon a pardon or parole by the governor. The discharge referred to, to my mind, relates alone to his being set at liberty. Section 5682 provides that no convict shall be discharged until he has remained the full term, etc. One of the definitions of discharge is: "To release legally from confinement."

The person referred to was not released from confinement. He was not discharged in the sense in which the term is used in said section. He did not serve his full term. The court having set aside the judgment sentencing him to the penitentiary, he was still retained in confinement for a new trial, but at a different place.

The purpose of section 5684 is to give clothing other than prison garb to those who are set free, to give them transportation to their homes, and a few dollars in money to enable them to hunt for work without being driven to begging or larceny for a subsistence. There is nothing in the language of the statute, nor the purpose of the statute, which would justify furnishing clothing, money or transportation to a person who is still kept in confinement awaiting a new trial. Yours truly,

MILTON REMLEY,
Attorney General.

National Banks—United States Bonds owned by such banks—Method of assessing the stock—The assessor should assertain what is the actual value of all of said stock. He should, from all the information obtainable, determine the actual value of the shares of stock, whether it be below par or above par, deducting from the aggregate value the amount of capital that the bank actually invested in real property; dividing the remainder

by the number of shares of stock, twenty-five per cent. of which is the amount for which the stock should be assessed.

Des Moines, Iowa, March 6, 1899.

Hon. Frank F. Merriam, Auditor of State, Des Moines, Iowa:

Dear Sir—Your favor duly at hand, asking my opinion as to the proper method of assessing the stock of national banks, and whether if such banks own United States bonds, such bonds are to be deducted from the value of the stock in the manner provided in section 1322 of the code in reference to real estate.

You say that many assessors are applying to you for instructions as to the proper method of assessing the stock of national banks, or rather the method of ascertaining how much the assessment should be.

It is true that United States bonds and stocks as such are exempt from taxation by the states. (Section 3701 United States revised statute.) Said section originally included treasury notes, and other obligations of the United States; but by chapter 281, second supplement of the United States revised statutes, approved August 13, 1894, it was expressly provided "that national bank notes, United States legal tender notes, and other notes and certificates of the United States payable on demand and circulating, or intended to circulate as currency, and gold, silver or other coin, shall be subject to taxation as money on hand or on deposit under the laws of any state or territory." The statute of the state of Iowa does not attempt to tax United States bonds as such. It has always been permissible since national banks were authorized, to assess the owners or holders of shares of stock in national banks, with the value of such shares of such stock, as personal property. (United States revised statute, section 5219.) By such section the legislature of each state is authorized to determine and direct the manner and place of taxing all the shares of national bank associations located within the state subject to the restriction that the rate of taxation should not be greater than the taxation of other moneyed capital in the hands of individual citizens, and the shares of any national bank association owned by a non-resident of any state shall be taxed in the state or town where such bank is located, and not elsewhere.

Section 1322 makes no provision for assessing any property of a bank, except its real estate. The assessment of the stock in the hands of the owners of the share, is in lieu of the assessment of the property of the bank. The persons to whom the stock is assessed do not own bonds. They own simply stock in the corporation which owns the bonds. They cannot claim that their stock in the bank should not be assessed at the actual value, because the banks own certain United States bonds. Stockholders in national banks are entitled to the exemption which said section gives, and no more.

The question for an assessor to determine is, what is the actual value of said stock. You ask if the value of the stock should be determined by finding the total of the capital stock, surplus, and net undivided profits, and deducting therefrom the amount of capital invested in real estate, and dividing the result by the number of shares of stock? The law does

not so require. Other things should also be considered, among them the nature of the assets of the bank and its earning capacity. If the bank should have a large amount of poor paper on hand and doing but little business, the stock might be actually worth much less than such a process of ascertaining its value would indicate. On the other hand, with a large business which justified the payment of large dividends the stock of the bank might be worth in the market much more than shown by the capital stock, surplus, and undivided profits.

Section 1322 provides that the national banks shall furnish certain information to the assessor. It further provides that "from such statement and other information he can obtain, including any statement furnished to and any information obtained by the auditor of state, which shall be furnished him on request, he shall fix the value of said stock, taking into account the capital, surplus, and undivided earnings." This authorizes the assessor, in determining the value of the stock, to consider any fact, circumstance, including the amount of capital, surplus and undivided earnings, which would weigh with a person about to purchase such stock.

The assessor is not limited to the value ascertained by adding the capital, surplus and undivided earnings, and dividing by the number of shares of stock, but he should from all the information he can obtain, determine the actual value of the shares of stock whether it be below par or above par. From the aggregate value he should deduct the amount of capital of the bank actually invested in real property, and divide the remainder by the number of shares of stock, thus ascertaining the value of such share, twenty-five per cent of which is the amount for which the stock should be assessed.

Section 1322 in no way contrevenes the statutes of the United States. There are numerous decisions sustaining the views above stated, both state and federal, so that it is no longer an open question.

Yours truly,

MILTON REMLEY,
Attorney General.

Game Warden—Authority to make arrests—He or his deputy have no authority to make arrests which is not possessed by private citizens under Code 5197.

Des Moines, Iowa, March 8, 1899.

Hon. George F. Delavan, Estherville, Iowa:

Dear Sir—Yours of the 6th inst. at hand. You request my opinion as to whether a deputy game warden appointed under the provisions of section 2562 is authorized by said section or any of the provisions of the fish and game law, to make arrests.

I see nothing in any of the law relating to the duties of the fish and game warden or his deputies that gives to the warden or his deputies any authority to make arrests which is not possessed by private citizens, under section 5197 of the code. It is true that the duty of the fish and

game warden is to impartially enforce the provisions of this chapter (section 2539) and that the duty of the deputy warden is to aid him in the enforcement thereof. The enforcement of law, however, must be done in a lawful manner and by the use of means provided by law. No one would claim that the clause "enforce obedience of the provisions of the law" would authorize the warden or his deputy to summarily apprehend a violaor of the law, pass sentence upon him summarily himself, and execute the sentence. Chapter 64 of the acts of the Twenty-seventh General Assembly empowers the warden to seize fish, or birds, or animals which have been caught and killed in violation of law, which may be done without a warrant, but this does not extend to the arrest of the person.

Section 5197 authorizes a private person to make an arrest for a public offense committed or attempted in his presence. This gives sufficient authority for an arrest by the game warden or his deputies or any person caught in the act, and undoubtedly the legislature thought this was sufficient power, else it would have provided for the arrest by the game warden and his deputies under other circumstances. Yours truly,

MILTON REMLEY,
Attorney General.

Building and Loan Associations—1. Such associations are mutual companies in which memebrs share equitably and mutually in profits, and expenses and losses. Such associations are not authorized by law to issue stock in different series. The profits, losses and expenses of each series being kept seperate, the same being shared in, only by the members of that series and not by the members of another series.

2. No new share holder can be placed on any other or different relation in any respect from old share holders.

Des Moines, Iowa, March 15, 1899.

Hon. Leslie M. Shaw, Governor of Iowa:

Dear Sir—Your favor of the 11th inst. duly received, in which the executive council request my opinion upon the following questions:

> First—"Can a building and loan association, or savings and loan association operate two or more series of stock at the same time, keeping the expenses and profits of each separate and distinct and preserve the mutuality between the stockholders?
>
> Second—"If so, must the separate series provide for the same dues, the same legal rates of interest on loans, the same fines upon default of payment, and the same withdrawal privileges?"

In regard to the first question, I will say that all authorities hold that building and loan associations or savings and loan associations are mutual companies in which the members share equitably and mutually in the profits and expenses and losses of the association. There is noth-

ing in the nature of a building and loan association or the law that will prevent an association from issuing stock at different times or different years, nor that will prevent them calling the stock issued in the different years, different series. But it is absolutely necessary that all the stockholders in all of the series should bear the same proportion of expense, receive the same proportion of the earnings, and contribute in the same proportion to the expenses. That is, every dollar paid to the capital stock by a new share holder must receive the same dividends as a like sum standing to the credit of one of the older share holders, and no more. It should be charged with the same losses and expenses as a like sum standing to the credit of the older stockholder, and no more.

It is evident that if the expenses and the profits of each series are kept separate and distinct that the equality between the share holders of one series and the share holders of another will be disturbed and destroyed. The apportionment o the expenses of the association between the different series of stockholders must of necessity be arbitrary. While it might be made approximately equitable, yet there is no manner of ascertaining the actual expense of each series. If the capital paid in by the stockholders of one series is loaned only to the members of that series, and the profits of such loans are kept separate and distinct from the profits of the other series, and the expenses are likewise kept separate, this is in effect a new company, the management of which may be chosen by the share holders of other series, which likewise practically constitute another company.

I am well satisfied that the law no where authorizes such an organization or the issue of any series of stock the profits or losses of which are determined by facts or investments peculiar to that series, separate and distinct from the aggregate earnings or losses of the entire association. It would be absurd to say, and unwarranted by law, that $100 invested by one stockholder in a mutual association could receive 5 per cent dividends, while another stockholder on a like sum received 10 per cent or 15 per cent. If the profits of each series could be kept separate, then the losses of each series must likewise be kept separate. One series may then have a profi. year after year and another series may lose, in fact, all the capital of that series. One series may become insolvent and the other series gain year after year in property and capital. The balance sheet of the association may show that the association as a whole is unable to meet its liabilities, but one series has been carefully managed and shows a surplus of assets over and above the liabilities.

These suggestions show the utter impossibility of organizing a building and loan association on any such basis. In case of the insolvency of the company, a court of equity would charge to each share holder his proportionate share of the entire losses of the company, whether the losses arose from the investment of the fund of this series or that series.

I do not wish to be understood at saying that stock cannot be issued at different dates, and that different sums may be paid at each installment; but whatever sum is paid goes into the treasury of the association. It is invested as the funds of the association. The earnings of the association from all of its funds are ascertained at a stated period and the

profits are divided among the stockholders, whether old or new, in proportion to the amount that each contributed to the capital from which the earnings were derived. The expense must be paid in the same proportion.

The terms upon which money may be borrowed by a member must be the same to every stockholder. The same fines in case of default in payment, and the same withdrawal privileges must be open to every member of the association, regardless of when his stock may be issued. The dues or contributions to the expenses of the association must be in proportion to the contributions of each to the capital of the association. Stock issued to one man cannot be charged with a greater percentage of the expenses than stock issued to another.

To illustrate, it would not be proper to charge a monthly payment of 60c with 7c as expense, and to charge a monthly payment of another issue of stock of $1.00 with no more than 7 per cent. This would create an unequal contribution to the expenses of the association, which a mutual company cannot demand.

My conclusion is that building and loan or savings and loan associations are unauthorized by the law to issue stock in different series, the profits, losses and expenses of each series being kept separate, the same being shared in only by the members of that series and not by the members of another series.

Second, that such companies may legally issue stock at different dates, payable in such sums at each installment as the articles of incorporation authorizes, providing that every dollar paid in by the new share holders shall receive its pro rata share of the profits of the entire association, and be chargeable with its pro rata expense of the entire association, and consequently with the losses of the entire association. But no new share holder can be placed on any other or different relations in any respect from the old share holders. Yours respectfully,

MILTON REMLEY,
Attorney General.

Tax on express companies—There seems to be no authority or principle to justify the conclusion that express companies should pay less than 2 per cent. on the aggregate amount of business done during the year preceeding March 1, 1899.

Des Moines, Iowa, May 2, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—Yours of the 21st ult. at hand, in which you state:

> "It is maintained by some that as the amendment to section 1346, increasing the tax upon express companies did not take effect until July 4, 1898, the companies should be taxed at 1 per cent from March 1, 1898, to July 1, 1898, and at 2 per cent from July 1, 1898, to March 1, 1899." You ask my opinion in regard thereto.

Said section 1346 of the code of 1897 fixes the basis for determining the amount of the tax that shall be paid by express companies. The

basis is the gross receipts of such companies for the year preceding March 1. It also provides that 1 per cent of such gross receipts shall be paid to the state treasurer before the first Monday of May of each year. The amendment referred to, being chapter 31 of the Twenty-seventh General Assembly, increased the rate from 1 per cent to 2 per cent, or every dollar on the hundred to two dollars on the hundred, but it does not change the basis of taxation, only increases the rate.

It is competent for the legislature to divide taxpayers into classes and determine the basis for the taxation of each class. One class of taxpayers may be required to contribute to the public burdens in proportion to the amount of property each owns; another class in proportion to the amount of business each does. Still another may be taxed per capita, etc., etc.

The basis for the taxation of express companies is the amount of business done during the year next preceding the 1st of March. The amount of that business is not increased or diminished by the fact that the rate of tax required to be paid was less than that under the present law. The legislature having fixed the basis, and also the rate of taxation on that basis, the companies are liable for the amount found to be due under the law as it exists at the time the taxes accrue.

A very kindred question arose in regard to the amount required to be paid by insurance companies, and the same principles are involved which are stated in the opinion to your predecessor given January 21, 1898. I know of no authority or principle which would justify the conclusion that the express companies should pay less than 2 per cent on the aggregate amount of business done during the year preceding March 1, 1899. Yours truly,

MILTON REMLEY,
Attorney General.

Rooms in Capitol—Use of for examination of applicants for admission to the bar. Construction of joint resolution number 6 of special session Twenty-sixth General Assembly.

Des Moines, Iowa, May 8, 1899.

Col. J. D. McGarragh, Custodian:

Dear Sir—In response to the request of the governor, I submit to you my opinion as to the meaning of a clause in section 152 of the code, in view of joint resolution No. 6 of the special session of the Twenty-sixth General Assembly.

Section 152 of the code contains the following: "The senate chamber, the hall of the house of representative, and the committee rooms shall be used only for legislative purposes." At the same session, after the passage of that act, the same legislature passed joint resolutions Nos. 4, 6 and 7, allowing the use of rooms for the board of educational examiners, the use of the supreme court for the examination of applicants for admission to the bar, and for the code supervising committee. Since then I understand, although I have not seen it, that a resolution passed

by the last General Assembly authorized the use of some of the rooms named in said section by the board of control.

It is not necessary for me to enter into a discussion of the question whether a statute can be repealed by a joint resolution. I am free to say, in my judgment, it cannot. Nor is it necessary to enter into a discussion of the force and effect of joint resolutions. In construing a statute the true object is to ascertain the legislative intent. It is recognized that it is right to consider the evil intended to be remedied by the passage of the law. There never has been any complaint or criticism of the use of any of the rooms in the capitol for any of the legitimate purposes of the state, and whatever evils were intended to be remedied, the use of the legislative halls and committee rooms for such a purpose as the examination of the applicants for admission to the bar was not one of the evils.

Another rule of construction is that courts can consider the contemporaneous construction placed upon the law by the legislature itself, and should give it weight. We see that the same legislature, by three resolutions, showed that it did not intend to construe said section 152 as preventing the use of the legislative halls and committee rooms, when not needed for legislative purposes, for the proper purposes therein specified.

Another consideration: The law provides that candidates for admission to the bar shall be examined. To accomplish this, there must be a suitable place provided. The capitol was built for the use of the state in the business which the state has to perform. If no room were provided in the building, it would be the duty of the clerk or the bailiff to provide a room elsewhere at the expense of the state, and it cannot be presumed, without a positive enactment to that effect, that the legislature intended, by the adoption of section 152, to do such an unreasonable thing as to require suitable quarters for the examination of applicants for the admission to the bar to be provided elsewhere when ample quarters were standing idle in the capitol building.

The hall of the house of representatives is placed in the same category as the committee rooms. A strict construction of resolution No. 6 would only authorize the custodian to provide "a suitable room;" that is, "one suitable room" in the capitol. I see nothing in said joint resolution that would prevent the custodian from permitting the use of the house of representatives, if that were the one room suitable. The number of applicants for examination at the present term is too great to be taken in any other room, and I am of the opinion that the legislature did not intend, by section 152, to prohibit the use of any unoccupied room in the capitol building for the purpose of the examination of the applicants for admission to the bar. The right to permit the use of the hall of representatives under the circumstances seems to me as full and complete as the use of any committee room.

The legislatures of the state by long custom have, by resolutions, directed codes, stationery, etc., to be furnished to their members, and to the committees of the houses, and the clerks of the committees; have assumed the right to give away the chairs of the presiding officers of

the two houses, and to dispose of other personal property of the state, as well as to direct the use of the buildings of the state. It may be considered a question whether the temporary use of the buildings belonging to the state is not a subject that may be controlled by resolution, but without determining that question, I am very clear that resolution No. 6 does show the legislative intent with reference to section 152 of the code, in accordance with the views above expressed.

Yours respectfully,

MILTON REMLEY,

Attorney General.

Publications—Weekly crop reports.

1. The law does not require such publications to be made by the State printer. Weather and crop bulletins should be paid in the same manner as other expenses of the weather and crop service.
2. Any bills for printing and binding the publications which the law authorizes to be made should be allowed by the executive council in the manner provided for allowance of such bills.

Des Moines, Iowa, May 11, 1899.

Hon. A. H. Davison, Secretary Executive Council:

Dear Sir—I have the honor to acknowledge the receipt of yours, enclosing the request of the executive council for my opinion upon the following questions:

First—"Does the law of Iowa authorize and empower the council or its members or employes to give the state printer credit under the provisions of section 169 of the code, or in the accounting required of the state printer under that section, for paper used by him in printing such publications as the following: (1) The weekly crop reports issued by the weather bureau; (2) The Arbor Day, Bird Day or Memorial Day leaflets or pamphlets issued by the superintendent of public instruction; (3) The course of study and lists of examination questions issued by the same department; (4) Practical suggestions in dairy and creamery management and dairy laws of the state of Iowa, by the dairy commissioner; and other like publications where there is no express authority in the statute?

Second—"Does the law of Iowa permit the council or the secretary of state to pay (or audit the accounts) for the printing of the before mentioned and similar publications, out of state funds?

Third—"Does that provision in section 168 of the code, providing that the council 'shall also furnish the public printer with all paper required for the various kinds of public printing, in such quantities as may be needed, etc.,' authorize the use of paper belonging to the state in the manufacture of publications issued in the discretion of state officers, or only for publications explicitly

provided for by statute, other than office stationery, blank forms, etc? If so, please define the degree of discretion in these matters the law leaves to officers."

The publications named all appear to be of the same class and governed by the same principles except the first one, the weekly crop reports, and in regard to this I will say that I presume you mean what is called in section 1677 weekly weather and crop bulletins, and my answer will relate to the weekly weather and crop bulletins.

Sections 1677 to 1681 of the code relate to what is called weather and crop service. The annual appropriation of $2,700, made by section 1681 is "for such service." The expense, then, of performing every duty required by said sections must be included and brought within the appropriation thereby made, unless there is some other provision authorizing a part of the expense to be paid in another manner.

Section 1677 requires the director to issue weekly weather and crop bulletins during the season from April 1 to October 1, and to edit and cause to be published at the office of the state printer, the Monthly Weather and Crop Review. It further provides: "The state printer shall print 3,000 copies thereof, which shall be distributed from the office of said society." Section 1680 provides for the printing of the annual report, "the expenses to be paid as in case of other reports."

I consider the direction to have the Monthly Weather and Crop Review to be published by the state printer to be inferentially directing payment therefor in the manner in which the state printer is paid, and taking the Monthly Weather and Crop Review out of the expenses which must be paid out of the appropriation. The same is true in regard to the annual report of the director. But there is no provision which inferentially would imply that the weekly weather and crop bulletin should be paid by the state in any other manner than out of the appropriation made for the weather and crop service. There is nothing requiring such publication to be made by the state printer, and in my opinion, the weekly weather and crop bulletins should be paid in the same manner as other expenses of the weather and crop service are paid, out of the appropriation made therefor.

Second—There is no question but that the law contemplates that all state officers who are entitled to draw supplies, and whose offices are furnished by the state, shall receive at the expense of the state "all such articles required for public use and necessary to enable them to perform the duties imposed upon them by law." (Section 168.) This appears to be a limitation on the articles that shall be supplied at the expense of the state. They must be for public use. Not only that; they must be necessary to enable them to perform the duties imposed upon them by law. It will not do to say that a publication for gratuitous distribution to the public is for the public use, and hence, can be paid for at the expense of the state unless it is necessary to enable them to perform the duties imposed upon them by law.

Public use, in that connection, I would construe to mean for the proper use of a public officer performing the duties imposed upon him by law. Any publication which does not come within the limitation

above stated cannot, in my judgment, be paid at the expense of the state, without there is some act of the legislature authorizing the publication thereof.

It goes without saying that the bills for printing and binding the publications which the law authorizes to be made should be allowed by the executive council in the manner provided for the allowance of such bills, and the same is true with reference to crediting the printer for the paper used in such work of the state. The converse of this is equally true; that bills for work done without authority of law could not be allowed, or credit be given for paper used in work not authorized by law to the state printer.

In my judgment, the question should be determined with a spirit of liberality and fairness. Where any printing is done, either in the form of blanks or stationery or circular letters, or anything whatsoever that will facilitate the work of an officer in performing his proper duties, the judgment of the officer ordering the work might well be considered by the executive council as practically conclusive, and the bills for printing and paper should properly be allowed. But where the printing done has no relation to the office, and in no reasonable view of the case is necessary to enable the officer to perform the duties imposed upon him by law, then the state could not be required to pay the bills therefor.

To illustrate: If it were necessary for me as attorney general to write a number of letters of the same kind, and I thought it would be economy and better to prepare a circular letter, I would feel justified in so doing, and think such a bill should be allowed by the executive council. If, on the other hand, I prepared a treatice upon the law applicable to the county attorneys, defining their duties from my standpoint, giving instructions with regard to how their duties should be performed, such publication not being necessary for the performance of the duties of my office, however meritorious it might be, and however much it might be intended for the public good, I think the council, because it does not come within the limitations fixed by the statute, should re use to allow bills for the printing, or credit for the paper used.

I use this illustration simply to indicate my idea of the line of distinction. The first would be clearly within my province and discretion; the second would be beyond the discretion which the law imposes upon me.

Whether the particular publications submitted to me and referred to in your communication are for the public use, and necessary for the officers to perform the duties imposed upon them by law, is not a question of law. The determination of that question is a question of fact, which determination is by law wisely left to persons other than myself.

Yours respectfully,

MILTON REMLEY,

Attorney General.

Building and Loan Associations. 1. The holder of illegally issued stock can claim nothing on account of his stock. The liability

of the association is upon an implied promise to pay back the consideration received. This should be paid on demand. If not paid on demand, the association would be liable to 6 per cent. interest thereon from the time of the demand.

2. If the articles authorize the waiver of payment on stock, and nothing is said in regard to charging it up when one withdraws; the same cannot be demanded after such a waiver.

Des Moines, Iowa, May 27, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—Yours at hand, in which you ask my opinion upon the following questions:

> First—"In case a building and loan, or savings and loan association, sells stock which under the laws of Iowa is illegal and contrary to the provisions of said laws, on what basis should this department request such an association to cancel or take up such illegal stock held by investors, and on what basis should the association settle with investing members who seek to withdraw from the association? Also, state the basis on which settlements should be made with borrowing members, under above or like circumstances and conditions."

In regard to this I will say that the terms of withdrawal provided in the articles have no application to stock which was issued illegally and contrary to the provisions of law, and form no basis for determining the amount that should be paid to the holders of the stock. The stock being illegally issued, without authority, and contrary to law, it has no validity whatsoever.

The rule which I think would govern in such a case is this: The association should pay to the holder of such illegal stock the amount of money received thereon, together with 6 per cent interest from the date at which the same is demanded. The holder of the stock can claim nothing on account of the stock. The liability of the association, however, is upon an implied promise to pay back the consideration received. This should be paid on demand, and if not paid on demand, the association would be liable for 6 per cent interest thereon from the time of the demand.

The rights of the holder of such illegal stock, who has borrowed money thereon, present more difficulty. I think, however, they should be governed by the same principle, the association having no right to loan to any other than a member. The borrower should repay the amount of money he actually received, less the amount which he has already paid to the association on stock, premiums, and interest.

I would not like to say that the mortgage is entirely void. The borrower could not claim the mortgage was void and retain the money that he had received, but the association, being unable to fulfill the contract expressed in the articles of incorporation, stock certificate, and mortgage, could not insist upon the borrower being bound by terms which do not bind the association.

In making a settlement under such circumstances, the effort should be to place both parties in as near the same position as they were before the stock was taken or the money loaned, as possible. Since the association cannot comply with its contract to the borrower, it is entitled to receive the money which it advanced to the borrower, after allowing credits for all payments made. The borrower should be charged with the amount of money that he actually received from the association, and all the money that was actually paid by the borrower to the association, whether as instalments on stock, interest, or premiums, should be credited to the borrower, and he should pay the balance found due. If this balance is not paid by the borrower on demand, he would be liable for 6 per cent interest thereafter.

There is no statute law covering the case, and it must be governed by the principles announced by the courts. It is a rule of law that money paid to a corporation for stock which has been illegally issued, may be recovered from the corporation. It is also a rule that money paid on a contract which is illegal in the sense that it cannot be enforced against both parties, can be recovered. Applying these rules to your inquiry, I think the association is liable to the so-called stockholder for all the money it has received from him. The taking of stock and borrowing from the association, in the absence of the rights of other parties, is to be treated as one and the same transaction or contract, which the association cannot carry out. Since the association cannot comply with its contract, it is in no position to demand interest, or anything more than that it be put in the position it was before it attempted to make an illegal contract. If it receives back the money actually paid by it to the borrowing member, after crediting him with what he has already paid, it is placed in such position, and has received all it can properly demand.

Second—"In case the articles of incorporation or by-laws, or both, of a building and loan or savings and loan association, provide for the collection of a membership fee, and said association fails to collect such fee when its stockholders are admitted to the association and apply for stock, can the association deduct such fee from the value of a withdrawing member's stock at the time of withdrawal—in other words, can a company collect its membership fee when a member leaves the association rather than when he enters?"

Without seeing the articles of incorporation, I would not like to say whether a membership fee can be charged to a withdrawing member if it were not paid when the member first took his stock. It is doubtful whether the officers would have a right to waive the payment of a membership fee if the articles of incorporation did not so provide, but if it were waived, and could properly be waived, then it cannot afterward be charged to the withdrawing member unless the articles so provide. If the articles authorize the waiver of the payment, and nothing is said in regard to charging it up when one withdraws, it is clear to my mind that it cannot be demanded after it is waived. Yours respectfully,

MILTON REMLEY,
Attorney General.

Claim for arrest of criminal—Requisition must be issued befor Governor would be justified in acting in regard to allowing a bill for arrest. Section 5181 of Code construed.

Des Moines, Iowa, June 15, 1899.

C. A. Meredith, Esq., Atlantic, Iowa:

Dear Sir—Your favor of May 11th came duly to hand when I was engaged in supreme court work, which could not be ignored. I have had occasion to examine the subject to which you refer on several occasions, and do not know of any authority of law for the governor to make any payments for the arrest of criminals except that requisition be issued. In other words, before the governor had jurisdiction to act in regard to allowing any bill for the arrest of criminals, there must have been a requisition issued for such arrest.

Section 5181 cannot be taken out of its proper relations with other sections and be construed independent of the matter treated of in the chapter. The power of the governor to do anything does not exist, unless he is appealed to to issue a requisition for a fugitive from justice, who has gone to some other state. It may be said it is just as reasonable for the state to pay the expenses in such case as that to which you refer in your favor as if a requisition had been issued. This is probably true, but yet the governor must have the sanction of law for everything he does. He could not allow a claim and have it paid because, in his judgment, it is as reasonable that the state should pay that particular bill as some other bill of the same general character, for the payment of which the statute does provide.

In an opinion on page 370 of my report of 1898, I went as far as I think the statute would justify. If there is any other construction that occurs to you that might lead to a different result, I would be very glad to have you call my attention to it. There are several such claims that I know of that seem to be a hardship for the state not to pay, but we must be bound. Yours truly,

MILTON REMLEY,
Attorney General.

Life association—There is not place in assessment life insurance companies, or stipulated premium companies, for the payment of anything in the nature of an endowment, or for issuing anything in the nature of paid up policies. Such a plan is contrary to the whole plan and meaning of stipulated premium or assessment life insurance associations.

Des Moines, Iowa, June 16, 1899.

O. P. Worsley, Secretary Mutual Life Association of Iowa, Red Oak, Iowa:

Dear Sir—I have again re-examined the amendments to your articles of incorporation, which have been submitted to me, with a great deal of care, because of the fact that similar articles have been presented to me

by other companies, and I am told that still other insurance companies in the state are issuing policies of the kind that your amendments provide for. I recognize that the law should be administered impartially and the same rules applied to all corporations and persons. Hence, I have tried to get the consent of my judgment to approve the articles in question, so that your company would be permitted to do the kinds of business which I am told many companies are doing, but I am unable to satisfy myself that the law permits it to be done. The fact that other companies are doing what to my mind is not authorized by the law, if such is the case, should not lead me to do an official act which I do not believe is authorized by the statute. Hence, I cannot approve your amendments. I do this reluctantly, because the amendments seem to be drafted so as to throw the greatest number of safeguards possible around the insured under policies of that class. But it is the kind of insurance that the statute does not contemplate companies doing business under chapter 7, title 9, of the code, may engage in. In other words, the policies your amendments propose to issue seem to be excellent of the kind, but they are not the kind that are authorized by the statute.

The general plan proposed in your amendments is to receive double the amount of the stipulated payments paid by those making annual payments for a term of years, and at the end of that term of years, to give the policy holder an option to receive in cash, upon the surrender of his policy, the amount which he has paid over and above the actual assessments, against the members with the earnings of interest thereon, and his pro rata share of the profit from lapses of other policies, or he may continue his policy and the assessments made thereon, after he ceases paying, shall be paid from the fund arising from the over-payments which he has made, and he have in effect a paid up policy. Of course, if this fund credited to him should be exhausted by reason of the excessive mortality, it would not be a paid up policy, and he would be liable to further payments or else lose his insurance. This is the essential feature of the proposed insurance.

I find nothing whatsoever in the law permitting companies doing business under the provisions of chapter 7, title 9, to engage in that kind of [illegible] policy holder elects, at the end of the period for which [illegible]e made by him, he may receive a sum of money in the nature of an endowment or an accumulation, or he may continue his policy as a so-called paid up policy, although it is not, strictly speaking, one; neither of which class of business is authorized to be done under the provisions of law by insurance companies of your kind. There is no place in assessment life insurance companies or stipulated premium companies, if I understand what is meant by stipulated premium companies, for the payment of anything in the nature of an endowment or for issuing anything in the nature of paid up policies. Such business is contrary to the whole plan and meaning of stipulated premium or assessment life insurance associations.

Chapter 7, title 9, of the code, is a revision of chapter 65, laws of the Twenty-first General Assembly. You will notice that section 1 of said chapter 65 permitted mutual associations and co-operative associations

to provide for the payment of endowments. This is wholly omitted from the code, and there is not a syllable that I can find in the code which contemplates that any sum, whatsoever, shall be paid to the beneficiary, himself, save and except his pro rata share of the surplus, as provided in section 1797. The omission of the authority to provide for endowments to be paid the member in the enactment of the new code is itself very suggestive. No less so is the omission of the following provision which occurs in section 20 of said chapter 65: "But this act shall not prevent any assessment life association or organization authorized by this act from providing for an equitable surrender value paid up policy or endowment upon the cancellation of any policy or certificate, providing the terms and conditions thereof are set forth in said policy or certificate of membership, and provided that such endowment or surrender value shall, in the main, be accumulated during the term of such policy or certificate." The comparison of this with section 1797 shows that a fixed purpose was intended by legislature to change the law as it was written in said chapter 65.

I confess some of the terms used by the legislature in regard to plans of insurance are difficult of explanation. Confusion of ideas often arises because of inaccurate use of language, or of confounding of terms. For instance, in chapter 65, section 1, we find the terms, "the mutual assessment co-operative or natural premium plan," yet, in the codifying of this section, we find the "stipulated premium or assessment plan." Turning to section 1678, we find what is usually called the old line insurance companies are referred to as conducting business "upon the level premium or natural premium plan." Evidently, the association referred to in chapter 65, doing business upon the natural premium plan, does not refer to the same kind of insurance companies as those referred to in section 1768. I have searched the authorities in vain to find a legal definition of the terms natural premium or stipulated premium or level premium. The stipulated premium plan does not mean the same as natural premium plan, else stipulated premium plan would be required to do business of the kind referred to in chapter 6, instead of chapter 7, title 9. A mutual assessment company is one that from time to time makes an assessment upon all of its members to pay the losses and expenses of the company as they occur, upon such a basis as is fixed by the articles of incorporation, usually depending upon the age of the members. A stipulated premium company, if I have a correct idea of the meaning of the term, is an assessment company that estimates the number of assessments that may be required during the year and obligates a member to pay to the company in advance enough to meet the estimate assessments during the period for which the payment is made. This sum deposited by the member is credited to him. When a death loss occurs, or assessment for expenses is made, the same is charged to him, and if, because of an unexpected mortality, more is needed, extra assessments can be made. If the fund deposited and credited to the member is not exhausted, it stands to his credit. This, in brief, is the essential difference between an assessment company and the stipulated premium. They are both governed by the same general principles and rules of law, and neither, to

my mind, is authorized to issue policies of the nature of endowment policies or paid up policies. From the nature of the case, they cannot issue paid up policies. It is contrary to their organization and being, and for the state authorities to permit such companies to issue policies, which the policy holders may be made to believe are paid up policies, when, in fact, they are not, would open the door to a fraud upon the policy holders and a wrong which can never be corrected after man has passed the insurable age.

I am unwilling to strain the statute beyond its evident purpose and intent, when so serious consequences may be visited upon the very people hat the laws regulating insurance companies were intended to protect.

My attention has been called to section 1797 as a recognition by the legislature of the right of a company to create a fund, which shall be paid to the members, either in the form of a cash surrender value, or paid up policy insurance, or extended insurance. I cannot agree with that conclusion. What is it that this section authorizes to be distributed to the members? It is only any surplus or advance insurance fund accumulated in the course of its business. What is a surplus? It is that which is left from a fund, which has been appropriated for a particular purpose; the remainder of anything; the overplus; the residue. The surplus of a bank is the amount remaining after deducting from its assets all of its liabilities to its stockholders and creditors. The amount due to a creditor can never be considered a part of the surplus. So if an insurance company or association receives from a policy holder a sum of money, which it agrees to repay him, that sum of money never becomes a part of the surplus, but it becomes a part of the liability of the company. An insurance company or association cannot receive from the policy holders money which it contracts to repay and make that money thus received a surplus by simply calling it so. In the practical working of an insurance association, if the stipulated premium is made large enough to cover all possible assessments during the year at the highest rate of mortality, there will be something left over after paying the losses, which do actually occur. This is properly a surplus, and the statute simply provides that that sum may be paid back to the member in one of the ways provided in said section, but not that a fund may be accumulated for the simple purpose of paying it back. If such a company can issue paid up insurance, then the member's share pro rate of the surplus, which has been accumulated during the term for which he has been contributing thereto, can be used in payment for such paid up insurance. But I think it is evident that such companies cannot issue paid up insurance without going contrary to the law of their existence, and any insurance they issue as paid up insurance, I am firmly convinced, must be so in fact and not in name. It is evident, and it is preeminently fair, all these companies being mutual companies, that when a member surrenders his policy of membership, he should receive his proportion of the surplus that he has contributed to, and I have no objection to the company's calling such payment to the member an equitable surrender value of the policy, but I see nothing in this language

which justifies the conclusion that a company is authorized to receive payment from the members year after year so as to give a cash surrender value to the policy beyond that what the legitimate surplus would entitle it to.

My attention has also been called to section 1790, and this is referred to as a recognition by the legislature of the right to accumulate moneys to be held in trust for the purpose of fulfilling its policies or surplus. I do not question that provision may be made in the articles of incorporation by which payment may be received from the members in excess of the immediate need for the demands for losses and expenses, which may be held in trust for the purpose of securing the payment of future assessments in case the mortality increases, thereby enabling the association to pay its losses in full, should the rate of mortality be beyond the expectation of the company at the time their rates are established. But this does not authorize a payment to the insured of any sum whatsoever. Insurance of this kind is only for the benefit of the heirs, widow, orphans, or legatees of such members.

Associations doing the business referred to in said chapter 7, title 9, are not required to have the reserve required of old line companies, nor are they required to deposit with the auditor the amount of the ascertained valuation of the policies in force, as is required by section 1774 of the code. Old line companies are required to have on hand cash enough to meet the contracts that they make with the insured. Companies doing business referred to in said chapter 7 are exempt from the burdens placed upon old line companies, but the nature of their business is correspondingly limited. I know of no construction which will justify me in straining the law relating to associations, the nature of whose business is limited by statute, so as to enable them to do all classes of business, which companies complying with chapters 7 of said title 9 are authorized to do.

I suppose that all will agree with me that the legislature intended there should be a distinction from the business done by those insurance companies referred to in chapter 6 and those referred to in chapter 7, and I cannot get the consent of my judgment by any forced construction to obliterate this distinction. Hence, I return you your amendment without my approval. Yours truly,

Attorney General.
MILTON REMLEY,

Board of Regents of State University—Compensation and mileage of members—In order that a member may be entitled to reimbursement for his expenses, he must submit the matter to the Board of Regents themselves and have the claim allowed and paid out of the fund of the University instead of being paid out of the Setate Treasury, under sections 2617 and 2618 of the Code.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—Your favor at hand, in which you desire my construction of

Des Moines, Iowa, June 19, 1899.

sections 2617 and 1618, relating to the allowance of claims for compensation and mileage of members of the board of regents of the state university for services upon a committee "to look up a candidate for president." You enclose a requisition of one of such committee, which discloses the fact that mileage is claimed from the residence of the regent to Chicago, and from there to a number of places in other states, and from a place outside of the state to Iowa City; also from Iowa City to the place of residence of the regent. You ask whether or not you are authorized by law to draw a warrant for the amount claimed in the requisition.

The general subject of your inquiry was discussed in an opinion to Hon. Thos. D. Healy, chairman of the investigating committee, which is found on page 328 of the report of the attorney general for 1898.

There has been a slight change in the law, and your inquiry embraces more than was involved in the inquiry of Senator Healy. Still, most of the reasoning of such opinion is applicable to the present case. I will add that the following clause in section 2617, viz.: "The limitation of thirty days shall not apply to building committees, which shall not consist of more than three members, but such committees shall not charge for or receive compensation for more than sixty days in any one year," is a legislative recognition of a custom which has long prevailed with all boards of trustees and regents of this state, and possibly in all states, of appointing committees to discharge certain duties which can be more appropriately done by a committee than by the full board.

For instance, a finance committee to examine the reports of the secretary and treasurer, consisting of two or three members, would be more efficient than a full board of thirteen members. So an executive committee to audit accounts and direct the issuing of warrants for the salaries fixed by the board, or on contracts entered into by the board, after seeing whether the work has been done and attending to incidental repairs, might properly, and as a matter of fact does, meet every month. Such meetings are necessary, and the members of the committee being clothed with authority from the full board to perform certain duties in behalf of the board, I am clear that such duties are official duties, for which they are entitled to receive the per diem under sections 2617 and 2618, and the mileage therein provided for from their places of residence to the usual place of meeting of the board, which, in this case, is at Iowa City.

Section 2618, however, evidently cntemplates that the boards shall have, or do have, a fixed place of meeting, which is presumably where the institution is situated. It is made the dutp of the auditor to compute the mileage due each claimant by the nearest traveled route from his home to the place of meeting. This section limits the payment of mileage. It would require great imagination and a strain of the language of the law to say that the place of meeting was wherever the committee might go. I think it fair to say that in contemplation of the law the place of meeting is the place where the institution is situated; certainly

not outside of the state. I do not think that the board, or a committee, can fix a place of meeting, say in Chicago, then in Columbus, or Ann Arbor, or elsewhere, and receive mileage under this section from the state treasury. If the duties assigned to a committee are such as are referred to in the opinion to Senator Healy, that they might properly be performed by someone other than a member of the board as an agent of the board, then it is doubtful whether such committee would be entitled to per diem even, and the statute requiring the nature of the services to appear in the claim filed, seems to be for the purpose of enabling the auditor to determine whether such services are properly within the official duties of the regent or trustee.

It is possible that the work done by a committee visiting candidates for the presidency of the university, or the places where they reside, to obtain information as to their qualifications or fitness for the place, might be done by someone not a member of the board of regents. The information thus obtained might be just as accurate and useful as if it had been gathered by one of the members of the board. But the full board would have more confidence in the accuracy of the report of one of its members who has the same responsibility of final action thereon as themselves, than in the report of one who had no such responsibility. Hence, the custom of having the members of the board perform such duties, which custom has been recognized by the legislature, is not without reason or sanction of law. I think such committee service may properly be considered "official duties" for which the regent is entitled to the per diem under section 2617 of the code.

I would say generally the legislature intended to leave a large discretion to regents and trustees in the control of the institutions which, from the necessity of the case, they must have, and their decisions upon such matters, unless there is clearly an abuse of the discretion, should not be disturbed. So far as the per diem is concerned in the bill submitted to me, I see nothing to suggest to my mind an abuse of the discretion which the law imposes in the regents; but so far as the mileage is concerned, assuming that there was a meeting of the proper committee of the board of regents for the transaction of official business at Iowa City, the mileage should be computed by the auditor from the home of the regent to Iowa City and return, by the shortest traveled route, and an allowance be made accordingly, and the mileage for traveling to points outside of the state disallowed.

I do not mean to say that such regent is not entitled to reimbursement for his expenses, but that matter must be presented to the board of regents themselves, and allowed by the board, and paid out of the funds of the university instead of being paid out of the state treasury under the section under consideration. Yours respectfully,

MILTON REMLEY,
Attorney General.

Collateral Inheritance Tax—Section 1469 and 1475 of the Code construed.

Des Moines, Iowa, June 23, 1899.

Hon. John Herriott, Treasurer of State:

Dear Sir—In reply to your request for my opinion in regard to apparent conflict between section 1469 and section 1475 of the code, with reference to the time of payment of the collateral inheritance tax, I will say that there is really no conflict.

Section 1469 provides that such tax shall be paid within fifteen months from the approval of the court of the appraisal of all real estate of the decedent subject to tax.

Section 1475 provides that all taxes imposed by this chapter, payable by executors, administrators or trustees, shall be paid within fifteen months from the death of the testator or intestate, or within fifteen months from assuming the trust by such trustees, unless a longer period is fixed by he court.

In many cases the administrator or executor has no charge or control of the real estate of the decedent. The title passes immediately upon death directly to the devisee or heir. Lands conveyed by deed to collateral heirs in anticipation of death are subject to the taxes. The owners of the real estate, which passes from the decedent to them, in many cases are required to pay the taxes. The administrator or the executor pays the tax upon such personal property as comes into his hands; also upon such real estate as comes under his control.

Section 1475 fixes the time when payment shall be made by the executors, administrators or trustees, while section 1469 fixes the time within which payments shall be made by persons who have received land from the decedent, which lands do not come under the control of the administrators.

Second—The last clause of section 1475 is as follows: "All taxes not paid within the time prescribed in this act shall draw interest at the rate of 8 per cent per annum."

You ask from what time is the interest to be reckoned upon delinquent inheritance taxes, from the end of fifteen months, or from the date of the death of the decedent? I think the taxes should bear interest from and after the time they become due, according to the time fixed by the statute, viz., fifteen months. It would be unusual to say that interest should be paid before the tax becomes due. To so construe the law would impose a penalty for not paying the tax promptly on the date fixed by the statute. Penalties should not arise by implication, or if the legislature intends to impose such penalty, it should have expressly so provided.

You will notice that under section 1475 the court has power to extend the time within which the tax shall be paid, but the time from which the tax shall draw interest is that fixed by statute by this act and not from the extended time fixed by the court. It would appear that the legislature intended that the collateral inheritance tax should be paid within fifteen months of the death of the testator or the intestate, and if not paid at that time it should draw interest at the rate of 8 per cent there-

after, notwithstanding the court may, under the authority given, extend the time of payment beyond fifteen months. Yours truly,

MILTON REMLEY,
Attorney General.

Insurance Companies—Such companies are only authorized to do the business which the state empowers them to do. They can only do the character of business which the state, either expressly or by implication, authorizes to be done. There is some doubt as to whether any life insurance company organized to insure the lives of individuals, has a right to couple accident insurance with such life insurance. The statute nowhere authorizes any company to insure against sickness, or provide indemnity for loss of time caused by sickness.

Des Moines, Iowa, June 19, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—Yours of the 26th ult. came duty to hand, in which you ask my opinion upon the following questions:

> "Would I, as auditor of state, be warranted under the statutes of this state in authorizing an insurance company organized for the purpose of making insurance upon the lives of individuals and of every insurance pertaining thereto, and which company could comply with the insurance laws of this state governing life insurance, to transact sickness or health insurance?
>
> "Would I, as auditor of state, be warranted in authorizing an insurance company organized for the purpose of accident insurance, indemnifying persons against loss of time, to transact sickness or health insurance by allowing indemnity for disability caused by any one or all of a number of specified diseases?
>
> "In the event that under the statutes I would not be warranted in issuing certificates of authority for the transaction of this sick or health insurance, can an insurance company whose plan of business provides for the transaction of such insurance, transact, without authority from this department, that class of insurance business in this state, there being no specific provision in the statutes authorizing the transaction of this sick or health insurance? It is contended by the life insurance companies that having authority to make insurance on the lives of individuals and all insurance pertaining thereto, that they should be authorized to transact this sickness and health insurance. The accident companies contend that they, in effect, are simply indemnifying the insured for loss of time from any disease specified in the contract."

An incorporation is only authorized to do the business which the statute empowers it to do. An insurance company can only do the character of business which the statute either expressly or by implication au-

thorizes to be done. Your inquiry is a little obscure because of the fact that you say the companies are organized for the purpose of making insurance on the lives of individuals, and of every insurance pertaining thereto. What is meant by every insurance pertaining thereto? If it is intended to mean the issuing of policies of all kinds which are usually issued by life insurance companies, it would still be very general and indefinite.

Our statute treats even accident insurance companies different and other from life insurance, (see section 1709 of the code), except that stipulated premium or assessment companies may be incorporated for the purpose of furnishing accident indemnity. (Section 1784.)

It is doubtful whether any life insurance company, organized to insure the lives of individuals, has a right to couple accident insurance with such life insurance; but certain it is that the statute nowhere authorizes any company to insure against sickness or provide indemnity for loss of time caused by sickness or ill-health. It is in no sense an insurance pertaining to the insurance of lives.

The legislature has not seen fit to recognize health as a proper subject of insurance. It is evident that such business would encourage frauds and sham sickness, and would be such a business as might wreck an insurance company which holds large funds in trust to be paid to the widows and orphans of policy holders. The law does not recognize such insurance as legitimate insurance.

I can find nothing which would warrant you in issuing certificates of authority for the transaction of sick or health insurance; nor can an insurance company whose plan of business provides for the transaction of such so-called insurance, conduct such business legally in this state, and if any established life insurance company which insures the lives of its members or policy holders is conducting such insurance business, I am satisfied the auditor would be justified in revoking its certificate and prohibiting it doing any business in the state. Yours respectfully,

MILTON REMLEY.
Attorney General.

Penitentiaries—Under the Code, the term of imprisonment should date from the date the defendant is received into the penitentiary.

Des Moines, Iowa, June 20, 1899.

Hon. Wm. A. Hunter, Anamosa, Iowa:

Dear Sir—Your inquiry of the 16th inst. at hand. Section 5682 of the code provides that "a convict shall not be discharged from the penitentiary until he has remained the full term for which he was sentenced."

We think this section clearly covers your question in the case of Thomas Folan. The fact that the order of the court provides that the defendant shall be confined in the penitentiary from the date of sentence, could not obviate the express declaration of the statute as to the length of time the defendant shall remain therein.

We think that under this section of the statute, the two years of imprisonment should date from the date the defendant is received into the penitentiary. Yours truly,

MILTON REMLEY.
Attorney General.

Building and Loan Associations—Voluntary Liquidation of—

1. If the articles provide a method of voluntary liquidation, that method must be strictly pursued. The statute provides no way for voluntary liquodation.
2. The statute makes the notes and mortgages of such associations non-negotiable.

Des Moines, Iowa, June 21, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—I have before me your favor of some time ago, requesting my opinion "as to the proper manner of procedure for a building and loan association doing business under the building and loan association laws of Iowa, which desires to go into voluntary liquidation."

You ask also: "Could the assets, particularly the notes and mortgages held by such a building and loan association, be transferred to private parties?"

In regard to the first question, I will say that if the articles of incorporation provide a method for voluntary liquidation, that method must be strictly pursued.

The statutes of the state provide no way for voluntary liquidation. In the absence of any provision in the articles of incorporation, the first step to be taken would be to call a meeting of the stockholders to determine whether the association would go into voluntary liquidation. Such meeting should determine the general plan of procedure, or authorize the board of directors to take such steps as are necessary.

The difficulty in the way would be the refusal of some members to consent to the plans proposed. This difficulty, however, is more imaginary than real. Those who desire to go into voluntary liquidation, if any member refuses to consent thereto, could, under the articles of incorporation, withdraw their stock. The expense, then, of maintaining the association would fall upon comparatively few stockholders, and any losses which occurred after that time must be borne by them. If a large majority desired to go into liquidation, self interest would compel the majority to accept the result, but I know of no legal method of compelling those unwilling to have a dissolution of the articles of incorporation to consent thereto before the time fixed in the articles themselves.

In regard to your second question, the statute makes the notes and mortgages held by such building and loan associations non-negotiable. This does not of itself make the assignment of the notes and mortgages illegal, (code, section 3046), but the maker may avail himself of any defense or counterclaim against the assignee which he had against the as-

signor thereof. The practical difficulties in the way of transferring such notes and mortgages to private parties are greater than the legal difficulties. I doubt whether the association would be authorized to transfer the stock which the borrower pledges to the association as guaranty for the loan, or whether any private party would be willing to take a note and mortgage executed by a borrowing member of a building and loan association; nor can I see why any borrower from a building and loan association would desire to continue his note and mortgage after the association has, to all intents and purposes, gone out of business.

The better way, and in fact, the only way, to avoid complications and litigation, is for the stockholders to meet together and formulate a plan comprehensive enough to take care of all the outstanding loans, and pay off the amount due on the stock borrowed. Borrowers from the association can obtain money, if their security is good, on equally favorable terms, and I think much more favorable than they can from an association that has practically gone out of business. In most cases, and if handled with tact, I dare say in all cases, the borrowing member would execute a new note and mortgage to some investment stockholder, who would take such new note and mortgage in payment of his stock.

I only make the above as a suggestion, for certainly the law is entirely silent upon the method of procedure in case the association desires to go into voluntary liquidation. Yours respectfully,

MILTON REMLEY.
Attorney General.

Assessments—Real estate—Duty of State Board of Review—The Board is authorized, under the law, to call upon the auditors of the various counties for any reasonable data, facts, or information which may be necessary or proper for them to have in determining whether the assessment of the county has been properly made. It is the duty of such county auditors to comply with the request of the State Board of Review in this respect.

Des Moines, Iowa, June 21, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—Yours at hand, in which you say that the state board of review, under authority given in section 1377 of the code, has made request of the county auditors to answer, in addition to the tables of figures shown by the assessment for the year 1899, the following questions:

> "Highest price per acre for farm land during the twelve months previous to this assessment."
>
> "Lowest price per acre paid for farm land during the twelve months previous to this assessment, excepting sheriff and tax sales and lands conveyed for nominal consideration."

"Total number acres sold, excepting sheriff and tax sales and lands conveyed for nominal considerations."

"Total consideration received, including encumbrances."

"Average value per acre."

You also state: "Some of the county auditors question the right of the state board of review to ask for this information, or rather question whether it is their duty to supply this information, as it will necessitate them obtaining a part of it from the records of the county recorder's office."

You ask my official opinion as to what powers the state board of review has under said section, and the duties of the county auditors with reference thereto.

Section 1377 of the code provides that certain specific information and data shall be furnished by the county auditors to the state board of review. The last clause of said section is as follows: "And such other facts as may be required by the state board of review."

The purpose of said section is to furnish the state board of review with the propert data for the purpose of enabling it intelligently to adjust the valuation of the property of the several counties, and equalize the same as the said board is required to do under section 1379 of the code. I see nothing in the language of section 1377 limiting the power of the state board of review to call for such facts as appear from the returns of the township assessors to the auditors of the counties. "Such other facts," may be any information which the auditor can procure for the purpose of enabling the board to discharge its duties intelligently. The fact that it may be necessary for the auditor to go to the recorder's office is of no weight against this construction.

It is no novel idea for the law to require a duty of a county officer which compels him to go to the office of some other county officer. For instance, in section 4896, the clerk is required to go to the recorder's office to cancel mortgages which have been foreclosed, and in different places in the statute, similar duties are imposed upon county officers. It is clear, to my mind, that the last clause of section 1377 gives to the state board of review the authority to call for any reasonable data, facts or information which may be necessary or proper for it to have in determining whether the assessment of the county has been properly made.

I do not mean to say that under this clause, the Board of Review would be sustained in requiring the auditors to make investigation and report facts which would throw no light upon the juestion of the proper assessment of the county, but any reasonable requirements must be complied with by the auditors. Said section says: "Each auditor shall make out and transmit to the Auditor of State * * such other facts as may be required by the Board of Review." This imposes a duty upon the county auditors.

Not only is it, in my judgment, a duty of the county auditors to comply with the requirements of the State Board of Review in this respect, but the interests of the counties might demand that it furnish such information. It might be better for the counties to have accurate informa-

tion or data furnished the State Board of Review, rather than to leave it to the uncertain information which the board might be required to gather from other sources. Yours respectfully,

MILTON REMLEY.
Attorney General.

Appropriations—State Industrial School for Girls—

1. Support of school construed. Expenses for extension of water works and buildings for water closets are not considered as proper charges against support fund. The appropriation for that purpose is a limitation on the amount which the board authorized to expend for such purpose.
2. The term "water works" embraces the entire plant which is necessary to procure and convey water to the place where it is needed. The well is a part of the water works.

Des Moines, Iowa, June 23, 1899.

To the Honorable Board of Control of State Instruction:

Gentlemen—In your favor of the 27th ult. you refer to chapter 149 of the Acts of the Twenty-seventh General Assembly, which makes an appropriation for the State Industrial School, Girls Department, for extension of water works and for building for water closets. $1,500, and desire my opinion upon the following questions:

> First—"Can this Board in any event lawfully authorize the use of sufficient money from the support fund of the institution to sink deeper the existing well or to sink an independent well, as may be deemed best, to such a depth that an abundent supply of good wholesome water is obtained?
>
> Second—"Can such expenditures from the support fund be made for the purpose indicated in No. 1 above prior to the time the $1,500 appropriation has all been expended?
>
> Third—"Would this Board be legally warranted in expending, if necessary, the whole $1,500 appropriated for the purpose of securing a good water supply, leaving nothing with which to erect the building for water closets?
>
> Fourth—"Can this Board legally use from the support fund, sufficient money to obtain a good supply of water, and then use so much of the $1,500 appropriated as may be necessary to erect a building for water closets and make all needful connections with the water mains and sewers?"

You also state that there is but one well on the place furnishing water fit for use, inadequate at times, for the ordinary use of the institution, to say nothing about not furnishing a supply of water for fire protection. There is another well 300 feet deep which is furnished with a windmill and pump, but the well has never furnished water.

Section 1713 of the Code as amended by chapter 81, Twenty-seventh General Assembly, makes an appropriation for the support of the In-

dustrial School of the sum of $10 for each girl actually supported in said school, or so much thereof as may be necessary. This language means more than simply the support of each girl in said school. It is the support of the school. Many things are comprehended within the term, "support of the school," other than food and clothing for the girls in said school, but I do not think the fund appropriated for the use of the school could be used for any purpose for which the legislature has made an express appropriation.

The appropriation made by the legislature for the extension of the water works, and for building for water closets, clearly indicates that such expenses were not considered as a proper charge against the support fund. Without this legislative expression, it is extremely doubtful whether the support fund could properly be charged with such expense under the statutes with reference to the Industrial School. I am very clear that the appropriation made for the extension of the water works, and for building for closets, is a limitation on the amount which your Board is authorized to expend for such purposes, and precludes the idea of using any of the support fund for such purposes.

In regard to the third inquiry above stated, I will say that this appropriation is made for the extension of the water works and for building for water closets. The term, "water works," is applied to a system by which water is furnished for use. It embraces within its meaning the entire plant, or whatever is necessary to procure and convey water to the place where it is needed. It may consist of dam, reservoir, stand pipes, pumps, mains, and whatever is necessary for that purpose. In Taylor vs. McFadden, 84 Iowa, 262, under a statute authorizing cities and towns to erect, or authorize the erection of water works, and under an ordinance of the council ordering that a system of water works be established, an artesian well was sunk, and the Supreme Court says: "The system is an artesian well,—a system that has proved satisfactory in many localities."

The well is a part of the water works. An extension of the water works, then, is literally complied with by sinking the well deeper. Sinking a well is extending the water works downward. and this is as much an extension as to extend the mains laterally.

A supply of water for such an institution being indispensible, and the appropriation act not limiting the amount that shall be expended for the extension of the water works, I do not think there can be any question but that you are authorized to expend whatever is needed for the extension of the water works in order to furnish the institution with an abundance of pure water, even if it requires the expenditure of the entire appropriation. Nor, if it is more economical and better to sink an independent well if necessary to procure water, do I think this would be a violation of the law. The legislature could not foresee what would be required to furnish water or to sink a well, and without doubt it is more important to have water than to erect a building for water closets. The construction of such acts should be liberal enough to carry out what the legislature evidently intended, and if the appropriation is not sufficient to acomplish all that was contemplated by the legislature I think

the Board should accomplish as much as the appropriation will permit and do the work that is most important.

Yours respectfully,
MILTON REMLEY.
Attorney General.

"

Commission of Pharmacy—Entitled to postage stamps at expense of state—After exhausting the allowance provided for in section 2594 of the Code, they are entitled to postage stamps at the expense of the state, same being intended to be included in "stationery."

Des Moines, Iowa, July 1, 1899.

Hon. Leslie M. Shaw, Governor of Iowa:

Dear Sir—In compliance with the verbal request of the Executive Council through you as to whether the Commission of Pharmacy would be entitled to postage stamps at the expense of the state, having exhausted the $2,000 annually devoted to defraying their expenses as provided for in section 2594 of the Code, I beg to say it would seem that the following clause of section 2584 of the Code: "The Commission shall have power to make all needed regulations for its government, and for the proper discharge of its duties under this chapter, the same to be done without expense to the state, save the necessary blanks and stationery which shall, upon requisition, be furnished by the Secretary of State," does properly include postage stamps within the word, "stationery."

Section 168 of the Code, entitled "Supplies and Postage," provides that the Executive Council shall supply certain state officers, naming them, and "other officers entitled thereto by law. with all such articles required for the public use and necessary to enable them to perform the duties imposed upon them by law. Supplies, including postage and stationery, shall be furnished to the officers as persons entitled thereto by law."

At the time of the passage of this section of the law, no Commission of Pharmacy had been created, which seems to be a sufficient reason why it was not mentioned along with the Dairy Commissioner, Labor Commissioner, Mine Inspector, etc. "Other officers" mentioned in this section clearly includes the Commissioners of Pharmacy, as it is a part of the administrative machinery of the state government. "Supplies, including postage and stationery, shall be furnished to the officers as persons entitled thereto by law." It is just as essential to the performance of the duties imposed upon them by law that the Commissioners of Pharmacy have supplies, including postage and stationery, as any other of the officers of state.

I do not think the legislature intended to use the word, "stationery," in a narrow or restricted sense, but in a broad and liberal sense;—in the sense which would clearly include postage stamps, together with envelopes, paper, pencils, etc.

I therefore conclude, and it is my opinion, that since they have ex-

hausted the allowance provided in section 2594 of the Code for defraying expenses of the Commission, they can have postage stamps at the expense of the state, the same being intended to be included in "stationery" as used in section 2594 of the Code.

Yours respectfully,

CHAS. A. VAN VLECK,
Assistant Attorney General.

National Banks—Taxation of—It is lawful for legislation of a state to classify property and provide for taxation in such manner as shall be most effective in securing a just contribution to the expenses of the government. Property of national banks is not assessed. Stock is. It is no less an assessment of the shares of stock because the corporations are required to pay the assessment. It does not violate a federal statute.

Des Moines, Iowa. July 6, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—In reply to your verbal request for my opinion as to whether the views stated with reference to the taxation of national banks, expressed in my opinion to you dated March 6th, 1899, apply to the assessment of state or savings banks, I will say that I think there can be no manner of doubt that the same principles apply. It is held by all courts that it is competent for the legislature of a state to classify property and provide for taxation in such manner as sahll be most effective in securing a just contribution to the expenses of the government; that the manner of taxation is left to the wise discretion of the legislature.

The property of national banks, as well as of state and savings banks, and loan and trust companies, is not assessed. The stock is assessed. In case of national banks, it is assessed to the stockholders. In case of state or savings banks, or loan and trust companies, it is assessed to such banks or companies. In either case, it is only an assessment of the shares of stock. It is no less an assessment of the shares of stock because the corporations are required to pay the assessment. Under the general provisions in regard to corporations in section 1325 corporations are made liable for the payment of taxes assessed against the shares of stock, even in the hands of the individual stock holders.

In National Bank vs. Commonwealth, 2 Wal., 353-359, the Supreme Court of the United States announces the rule that share holders of national banks may be taxed by the state on stock or shares so held by them, although all the capital of the bank be invested in United States securities, and in the same case it holds that a tax on the shares of stock did not cease to be such because the bank was required to pay the tax for the share holders.

So, under section 1322, the shares of stock of a state or savings bank alone are assessed, and although such banks are required to pay the tax thereon, it does not thereby become a tax upon the property of the bank.

In Primghar State Bank vs. Rerick, 36 Iowa, 238-244, the Supreme Court says: "But as the capital of a state bank is really owned by the stock holders, and as it is reduced by the amount paid for taxes, its value is reduced by a sum equal to that paid, and the share holders do in effect pay the taxes, and equality of taxation to that extent exists under the two systems."

The legislature can provide that a tax levied upon the shares of stock shall be in lieu of all taxes on the property. Under the repeated decisions of the Supreme Court of the United States, where the shares of stock of a bank are taxed, and not the property of the corporation, no federal statute is violated by refusing to deduct the amount of the capital stock of the bank which is invested in United States bonds, from the aggregate value of the shares of stock.

I think unquestionably the rule announced in my former opinion applies to state and savings banks. Yours respectfully,

MILTON REMLEY.
Attorney General.

Penitentiaries—Convict placed in solitary confinement—Time which is spent in solitary confinement as a punishment is added to the length of time for which he was sentenced. He gets no credit for the time served in solitary confinement.

Des Moines, Iowa, July 7, 1899.

Hon. N. N. Jones, Warden Penitentiary, Ft. Madison, Iowa:

Dear Sir—Yours of the 6th inst. at hand, asking my construction of section 5682 of the Code regarding the time for the discharge of convicts who have been placed in solitary confinement for violating the rules and regulations of the prison.

It is evident to my mind that any time which the convicts may have spent in solitary confinement for any violation of the rules, is not included within the time for which he is sentenced. In other words, the time which is spent in solitary confinement as a punishment is added to the length of time for which he was sentenced.

I enclose you a copy of an opinion given to Capt. Hunter, Warden of the Penitentiary at Anamosa, which includes the same question you ask. The evident intention of the legislature was that any person who violated the rules and was placed in solitary confinement because thereof, should stay in prison just as many days longer than the term for which he was sentenced as he spent in solitary confinement.

Yours truly,

MILTON REMLEY.
Attorney General.

Railroad Commissioners—Expense incurred in investigations of accidents—They are entitled to subpoena witnesses for the purpose of assisting in arriving at a conclusion as to the cause of

the accident, and to pay such witness fees out of their expense fund.

Des Moines, Iowa, July 13, 1899.

To the Board of Railway Commissioners, Des Moines, Iowa:

Gentlemen—Your request of July 13th, for an opinion upon the following proposition, is at hand:

> "By joint resolution of the last legislature, the Board of Railroad Commissioners was required to investigate a railway accident which occurred at Hubbard, Iowa, alleged to have been caused by the operation of double headers upon freight trains. The resolution made no provision for the payment of witnesses examined or to be examined by the Commission. In pursuance of this resolution, the Commission at Hubbard, Iowa, held an investigation and required by subpoena the attendance of several witnesses who were not officers, agents, or employes of a railway company.
>
> "The Commission is desirous of the opinion of the Attorney General with reference to the payment of these witnesses, and other witnesses who may be examined during this investigation. Can the Commission legally pay the cost of subpoenaing and the attendance of such witnesses out of its expense fund, which in a provision made by the last General Assembly may be found in section 3, chapter 131? If not, how can such witnesses be legally paid?"

In compliance with the foregoing request, we have to say that since the legislature made no provision in its resolution for the payment of expenses incurred in such investigation, they no doubt contemplated that such payment would be made out of an expense fund provided by appropriation for the use of the Railroad Commissioners. In its investigation of the above accident, the Railroad Commission had authority, and it was its duty, to subpoena witnesses for the purpose of assisting it in arriving at a conclusion as to the cause of the accident. The Commission having such authority, and exercising it, the expense of such investigation would be a just and legal expense, to be paid out of such fund as they have at their disposal for such purposes.

Chapter 131 of the Acts of the Twenty-seventh General Assembly, appropriated to the use of the Railroad Commissioners for clerical help and expenses, the sum of $8,000.00. The Commissioners having authority to subpoena witnesses to testify before them in an investigation such as the above, and exercising that authority, must make some provision for the payment of the expenses of such witnesses. This, then, would be a legitimate expense. Since they have been provided with a fund for expenses, and the above is a proper and legitimate expense within their duty, we are clearly of the opinion that it could be paid out of such appropriation.

Yours respectfully,

CHAS. A. VAN VLECK,

Assistant Attorney General.

Penitentiaries—Prisoner in solitary confinement for violation of rules of the prison is not entitled to credit on his term of imprisonment for the time served in such solitary confinement. There is nothing in the statute which would justify charging up against a prisoner a diminution of good time not yet earned.

Des Moines, Iowa, July 17, 1899.

Hon. N. N. Jones, Warden Penitentary, Ft. Madison, Iowa:

Dear Sir—Yours of the 14th instant at hand. There are two sections of the Code which must not be confounded. Section 5682 authorizes adding to the term of the sentence every day which the prisoner has been kept in solitary confinement for any violation of the rules of the prison. This is the effect of such section. In computing the time which he is required to be imprisoned by the sentence, the days in which he is in solitary confinement are excluded. If a man sentenced for one year should be kept in solitary confinement for thirty days, he could not be released until thirteen months after he was received at the prison.

Section 5703 authorizes the allowance of what is called good time, or diminution of the sentence because of good conduct. If one does not conduct himself properly, he is not entitled to any diminution of the sentence, or good time. Section 5704 relates alone to a forfeiture of good time by subsequent violation of the rules. One cannot forfeit that which he does not possess. He does not forfeit his right to good time, but the good time.

I notice the change in the section from section 2, chapter 57 of the Twenty-third General Assembly, but do not think it has changed the meaning thereby. These two sections are intended to encourage good conduct and reformation on the part of the prisoners. If the prisoner is unruly and does not conduct himself properly, he fails to make good time, and if he is in solitary confinement, then his term of sentence is lengthened under the first section cited. There is nothing in the entire statute which, to my mind, would seem to justify charging up against a prisoner a diminution of good time not yet earned. I doubt very much whether such policy would be in accord with the spirit of the statute.

For instance, if a prisoner under a twenty-five year sentence, should for the first five years be unruly, violating the rules every day, enough diminution of good time to be earned might be charged up against him to equal all the good time which he could possibly earn during the last twenty years, and he would have no incentive to change his course. I do not think the language would justify that construction.

Yours truly,

MILTON REMLEY.
Attorney General.

Insurance companies—Right to insure health in this state—The entire subject of insurance is covered by legislation in this state. There is no law of comity which would justify a corporation

organized under the laws of another state, doing business in this state of a kind or in a manner contrary to the policy of the state with reference to such business.

Des Moines. Iowa, July 18, 1899.

Hon. Frank M. Merriam, Auditor of State:

Dear Sir— I have re-examined the question of the right of insurance companies to insure health in this state, and have examined with care the opinion of Hon. Fred A. Maynard, Attorney General of Michigan, with reference to the laws of his state, and the argument of Mr. Chas. C. Nadal, which you have submitted to me.

Whatever may be the law in Michigan, I am clearly of the opinion that the law of this state does not authorize such insurance. It is contended that the law of comity among states requires that a foreign corporation be permitted to do in this state all the business which its charter and the laws under which it was incorporated, authorize it to do in the state which gave it origin, unless there is a direct provision of law prohibiting it. I cannot concur in any reasoning which would authorize a foreign insurance company doing a class of business in the State of Iowa which is denied to our domestic companies doing the same general class of business, or which is against the policy of the state as ascertained from all of its legislation.

But it is false assumption on the part of Mr. Nadal, who furnished the brief, that the statutes of this state do not prohibit it. Section 1709 contains this provision: "Any company organized under this chapter, or authorized to do business in this state, may insure houses," etc. It will not be disputed that this is a limitation on the kind of business that local companies may engage in. The next section prohibits "any company organized under the laws of this state, or doing business therein, from issuing policies of insurance for more han one of the six purposes mentioned in the preceeding section." Section 1747 imposes a penalty upon every company organized under the laws of this state, or doing business in this state, for failing to conform to all the provisions of the law of this state.

Now, if section 1719 of the law of this state is a limitation upon the kind of insurance that may be done in this state by companies organized under the laws thereof, it is, in express language of the statute, no less a limitation upon the powers of foreign companies to do business in this state.

The entire subject of insurance is covered by the legislation of this state. The policy of the state with reference to insurance is ascertained from its legislation. There is no law of comity which would justify a corporation organized under the laws of another state doing business in this state of a kind, or in a manner, contrary to the policy of the state with reference to such business. To so hold would be a misapplication of the principles of comity as recognized by the courts.

After reviewing the subject carefully, I am compelled to adhere to my former views.

Yours truly,

MILTON REMLEY,
Attorney General.

1. Intoxicating liquors—Written consent of resident freeholders within 50 foot limit—The statute cannot fairly be construed to mean personal property. It means the owner of real estate.
2. County fairs—This prohibition extends from the time the agricultural fair begins until it closes, and is not limited to the closing of the fair in the evening and the opening of its gates in the morning. The prohibition forbidding the sale within the one-half mile limit applies to the whole term of the fair.

Des Moines, Iowa, July 19, 1899.

M. W. Herrick, Esq., Monticello, Iowa:

Dear Sir—Yours of the 14th instant at hand, in which you ask my views upon the question, suppose a resident freeholder owns no real estate within the fifty foot, but does own a stock of merchandise and operates a mercantile business in a building within fifty feet; does the statute require his written consent, having reference to paragraph 2 of section 2448 of the Code?

Said paragraph requires a written statement of consent from the resident freeholder owning property within fifty feet of the building where said business is carried on. In State vs. Greenway, 92 Iowa, 472, the Supreme Court held that a resident freeholder means one residing in the city, and not one residing in the state or county outside of the city.

The term "freeholder" means one having an estate equal to a life estate in real property. The property referred to in the clause quoted evidently means the kind of property that a freeholder must have in order to be a freeholder; i. e., real estate. I think it should be construed the same as if instead of the word "freeholder" "the owner of real estate for life" had been used. Then it would seem that there would be no doubt about said clause referring to the owners of real estate. This is the view taken by the Supreme Court in State vs. Mattier, 94 Iowa, 42-44, where it is said: "That evident intent of the statute was that no saloon should be operated within fifty feet of the real property of any resident freeholder without such owner's consent."

Personal property is easily removed. Its situs may be changed from day to day. To say that the owners of personal property which was placed within fifty feet of the building to be used as a saloon was intended by the legislature, might prevent any building being used. A freeholder residing in a city could tie a horse to a post in front of a saloon, or put a desk in a room adjoining, and in many ways property placed within fifty feet of a saloon could require the saloon to be closed because of such act. I do not think the statute could fairly be construed to mean personal property.

Second—Having reference to the last clause of said paragraph 2, you ask: "Does this prohibition extend from the time the agricultural fair commences until it closes, or may one, without violating the statute, sell intoxicating liquors within one-half mile of the fair between the time the fair closes each day and the time it opens the next morning.

his place of business at which he has the right to sell being within half a mile."

I do not think he has such right. The language of the statute is: "But in no case shall such business be conducted * * * within one-half mile of a place where the agricultural fair is being held." The fact that people do not usually attend fairs in the night time, does not negative the idea that the fair is being held from the time it opens on the first day until it closes on the last day. There is no adjournment from day to day. No one can point to an hour at which the fair adjourns in the evening, or at which it opens in the morning. The exhibits continue upon the grounds. Of the parties attending the fair, some remain on the grounds, others in the vicinity. Many remain on the grounds all night. The evils which the statute intended to prevent would not be prevented by opening a saloon in the evening. Large crowds are drawn by the fair, remaining about the place where the fair is held from day to day. On such occasions, drinking is more freely indulged in than when men are going about their usual pursuits. Keeping the saloon closed a few hours during the days on which the fair is being held, would not accomplish the purpose which the statute intended. I think the fair is being held from the time it opens on the first day until it closes on the last. Such is the ordinary acceptation of the terms.

Hence, I do not think a saloon keeper within one-half mile of the place where the fair is being held can open his saloon during the evenings of the days on which the fair is being held. Yours very truly,

MILTON REMLEY.
Attorney General.

Penitentiaries—Insane department—Inmate—The expenses for conveying and returning him is to be paid in the first instance by the county from which he is sent. It is the duty of the warden to give notice, and hold such person until the sheriff of such county shall receive and hold such person.

Des Moines, Iowa, July 22, 1899.

Wm. A. Hunter, Esq., Warden Penitentary, Anamosa, Iowa:

Dear Sir—Your inquiry of the 21st instant at hand, and in reply will say that section 5543 of the Code requires that the person who is in charge of the insane department of the Penitentiary shall give notice to the sheriff and county attorney of the proper county of the fact that the inmate has become mentally restored. and that the sheriff of such county shall, without delay, receive and hold such person in custody until he is brought to trial, or is legally discharged. The expense for conveying and returning him is to be paid, in the first instance, by the county from which he is sent.

Thus you will see that it is plainly your duty to give the above notice, and to hold such person until the sheriff of such county shall receive and hold such person.

The allowance usually made to discharged convicts does not apply in cases of this kind.

Yours truly,

MILTON REMLEY,
Attorney General.

Collateral Inheritance Tax—A non-resident decedent holding real estate, bank stock and notes and mortgages upon Iowa real estate

1. The greater weight of authority holds that the state has ample power to tax persons or property which are within its jurisdiction, and for the purpose of taxation may fix the status of property. All such notes and mortgages should be considered in arriving at the amount of collateral inheritance tax to be paid by the Sheldon estate.
2. The debt itself, and not the evidence thereof, being the property I do not think the fact that the contract to pay the debt at some point outside of the state would alter the status of the debt with reference to the ability for the collateral inheritance tax in this state.
3. The imposing of an inheritance tax by another state upon an estate does not prevent the State of Iowa from assessing the collateral inheritance tax upon that part of the estate consisting of evidences of indebtedness of citizens of Iowa.
4. The inheritance tax paid in another state, or to be paid there, if any, is not considered a debt proveable against the estate in Iowa.
5. It is the duty of the county attorney to prosecute the appointment of an administrator and enforce the rights of this state to the succession tax.

Des Moines, Iowa, July 24, 1899.

Hon. John Herriott, Treasurer of State:

Dear Sir—I have the honor to acknowledge the receipt of your request for my opinion upon the several questions hereinafter stated, growing out of the estate of Hon. Benjamin R. Sheldon, late of Rockford, Ill. The facts stated by you are substantially these: Judge Sheldon's estate consisted of large properties in Illinois, Iowa, and other states. In his life time he owned real estate in several counties in Iowa; also owned stock in at least one bank in Iowa, and was also the owner of sundry notes given by residents of Iowa and secured by mortgages upon Iowa real estate. You ask, first:

"Do notes given by citizens of this state, and mortgages on Iowa land or property securing them and other intangible property of similar character, owned by the Sheldon estate and held in Illinois at the time of the decendent's death, constitute property within the jurisdiction of this state, as contemplated by section 1467 of the Code of Iowa?"

The notes referred to, and the mortgages securing the same, are only evidence of a debt. If destroyed, the debt,—the right to demand payment of the money loaned,—with interest, remains. (Courtland vs. Hotchkiss, 100 U. S., 498.) The debt is unquestionably intangible property, and by a fiction of law is generally considered under a comity as having a situs at the place of residence of the owner. This, however, may change by statute.

There are a number of decisions which appear to hold that a debt owned by a non-resident of the state cannot be taxed by the state in which the debtor resides. An examination of these cases, however, shows that the question turns upon the statutes of the state under consideration. For instance, in Davenport vs. M. &. M. Ry. Co., 12 Iowa, 539, the power of a state to impose a tax upon debts or obligations due from a citizen of this state to a resident of another state, was not involved. The court held that the debtor could not be taxed because of such debt; as it was not property, he did not own it, and the law did not authorize a tax to be levied against a non-resident to whom such debt was due.

The case of State Tax on Foreign-held Bonds, 15 Wal., 300, is most relied upon to sustain the doctrine that a state cannot tax a debt owing to a resident of another state. This decision was by a divided court, four of the nine judges dissenting. The Pennsylvania law under consideration required the debtor to pay the tax, and to deduct the same from the interest which was due the non-resident creditor. The majority of the court held this impaired the obligation of the contract. and the tax was void.

Unquestionably the greater weight of authority holds that the state has ample power to tax persons or property which are within its jurisdiction, and may, for the purpose of taxation, fix the situs of property, and when it has jurisdiction of the person or of the property in such a way as to enforce the tax, its right to levy such tax will be upheld.

The collateral inheritance tax law, or inheritance tax laws of any kind, are not taxes upon property, but upon the right of successions to property. I think it is competent for the legislature of a state, unless restricted by constitutional prohibitions, to enact whatever law it may desire with reference to the succession of property, and impose such terms and conditions upon the devolution of all property which is owned by residents of the state, or which is within the jurisdiction of the state, actually or constructively, or upon which the laws of the state are to be invoked for the purpose of reducing to possession.

The question that is, does Chapter 4, Title 7 of the Code subject the owners of property referred to in your inquiry to the succession tax? It, in express terms, subjects the property within the jurisdiction of the state, whether belonging to inhabitants of the state or not, or whether tangible or intangible, which shall pass by will or by the statute of

inheritance of this or any other state, or by deed, will, etc. The fact that one is a non-resident of the state does not release his estate from the payment of this tax. If the property is within the jurisdiction of the state, that is sufficient.

There are a number of cases which hold that where the notes and evidences of the debts are within the state at the time of the decease, the inheritance tax must be paid because the property is within the jurisdiction of the state. I do not think the case is different, however, in any essential feature, where the evidence of the debt may be at the place of residence of the decedent, or actually outside of the state. The debt itself is the property; the note merely the evidence of the debt. The statute subjects intangible property. In order to reduce choses in action to possession in this state, the courts of the state must be resorted to. A local administrator must be appointed, and such administrator is, under the law, required to pay the cost of administration and all charges which the state imposes upon him. Among such charges is the collateral inheritance tax. The state may not have jurisdiction of the piece of paper which is used as the evidence of the debt, but the debt itself is in the state, and the means of enforcing payment must be exercised in the state. The administrator, who alone is authorized to collect debts within this state, must be an officer appointed by the courts of this state, and in a very real sense, the debt, which is intangible property, is within the jurisdiction of the state, and clearly, to my mind, the legislature intended to require such property to be subject to the succession tax. It is certainly included within the class known as intangible property.

There is no provision exempting ancillary administrators or trustees from paying the tax which is imposed in general terms upon all executors or administrators. Hence, I think all such notes and mortgages should be considered in arriving at the amount of collateral inheritance tax to be paid by the Sheldon estate.

> Second—You further ask; "Does the fact that some of the mortgages or notes before mentioned are made payable in Iowa and others at points outside of the state in any way alter the status of such intangible property with respect to their liability for the inheritance tax imposed by the Iowa statute?"

The debt itself, and not the evidence thereof, being the property, I do not think the fact that the contract to pay the debt at some point outside of the state would alter the status of the debt with reference to the liability for the collateral inheritance tax in this state.

The debt itself is the property. Since the statute takes cognizance of the intangible property, and has indicated the policy which sets aside the fiction that choses in action are within the jurisdiction of the domicile of the owner, I see no difference in principle between notes and mortgages payable to the state and those payable outside of the state. If it is competent, for the purpose of taxation, for the state to fix the situs of intangible property within the state for the purpose of subjecting it to the succession tax, the debt being considered the property, it being due from a citizen of the state, it becomes property within the state in contemplation of law.

The Orcutt appeal, 97 Pa., 179, held that bonds of the United States belonging to a resident of New Jersey, deposited simply for safe keeping with a trust company in Philadelphia, were not subject to the inheritance tax of Pennsylvania because they were simply evidence of indebtedness, not by any person or corporation within the commonwealth, but by the general government. Pennsylvania had no jurisdiction of the personal representatives of the decedent and had no jurisdiction of the debt itself; hence, by no fair construction of law could the debt evidenced by the bonds be considered within the jurisdiction of Pennsylvania.

A debt payable outside of the state could be collected by an administrator appointed within the state, and such administrator would be required undoubtedly to account for the collateral inheritance tax provided by law.

> Third—"Does the imposition of an inheritance tax by the state of Illinois upon the Sheldon estate estop the state of Iowa from assessing a tax of five per cent. upon that part of the Sheldon estate consisting of evidence of indebtedness of citizens of Iowa."

By no manner of means. The State of Iowa having jurisdiction of the property within its borders, tangible and intangible, and having authority to levy a tax thereon, or impose conditions upon its devolution, it coming within the recognized powers, cannot be hindered from so doing because a sister state, after the property passes from the jurisdiction of Iowa, may also levy a tax thereon. It may be said that the property is liable for double taxation, or to pay two succession taxes. Double taxation cannot always be avoided. It is at most a mere matter of policy. Courts will not construe the laws of the state so as to cause double taxation unless it is plainly the intent of the legislature. There are many instances where double taxation is effected. In our own state, for instance, the property of railroads is taxed, and the stock of railroad companies held by citizens of our state is also taxed. At any rate, the power of taxation being vested in the State of Iowa with regard to property within the state, it cannot be limited in the exercise of this power because another state may also levy a tax based upon property in Iowa.

"No state can legislate except with reference to its own jurisdiction. One state cannot exempt property from taxation in another. Each state is independent of all others in this respect." (Bonapart vs. Tax Court, 104 U. S., 594; Dos Passos Inheritance Tax, p 50, p 187.)

> Fourth—You ask: "If the beneficiaries of the Sheldon estate conclude to file an inventory of all the intangible property referred to above, are they entitled to the deduction of the inheritance tax paid in Illinois along with the other deductions of indebtedness allowed by this state in the assessment of the collateral inheritance tax?"

I do not consider the inheritance tax paid in Illinois, or to be paid there, if any, a debt provable against the estate in Iowa. The property within the jurisdiction of Illinois is subject to the laws of Illinois with reference to the inheritance tax. Iowa could not prove up against the estate in Illinois a claim for inheritance tax, and I see no reason for considering a claim for inheritance tax by the State of Illinois as a debt against the estate in Iowa.

Fifth—You ask: "Is the Treasurer of State acting with authority of law in authorizing the county attorney of Lyon county to proceed as hereinbefore stated? In other words, can the state maintain a lien against the real property in Iowa belonging to the Sheldon estate for the taxes that may be charged against the intangible property which it is sought to discover by such proceedings?"

You say you have instructed the county attorney of Lyon county to make application to the District Court for the appointment of an administrator of the estate in Iowa.

I think you are authorized by law to instruct the county attorney to procure the appointment of an administrator and enforce the rights of the state to the succession tax. Whether the state may maintain a lien upon the real property in Iowa for the tax that may be charged against the personal property, is a matter that I cannot determine from the facts before me. If the real estate was devised as a specific bequest to one person, and the notes and mortgages to another collateral heir, then I do not think the real estate of one collateral heir could be made liable for the tax due from the property bequeathed to another collateral heir. In other words, the executor or administrator must pay the tax due on account of the personal property, and I think as a general rule he could not subject lands devised to another person to the payment of such tax upon personal property. What would be the administrator's rights in regard to the real estate, I cannot say, not having a copy of the will before me. Yours respectfully,

MILTON REMLEY,
Attorney General

Publication and distribution of reports and bulletins of the geological survey—Expense—How paid—Such expense should be paid out of their moneys in the state treasury not otherwise appropriated, and not to be paid out of the $5,000 only appropriated.

Des Moines, Iowa, August 12, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—Your favor to the attorney general of August 8. asking my opinion

> "as to the construction of section 2502 of the code, relative to the expense incurred in the publication and distribution of reports and bulletins of the Geological Survey. It is desired to know whether the auditor of state is authorized and empowered by this section to draw warrants in payment of the expense above referred to, out of the $5,000 appropriation mentioned in said section; or, on moneys in the state treasury not otherwise appropriated,"

is at hand.

This section provides that "postage, stationery and office expenses of the state geologist shall be paid by the state, as are the expenses of the

other state officers." It further provides "and the entire expenses provided for under this chapter, aside from the above exception relating to office supplies and expenses, and that of the publication and distribution of reports and bulletins, shall not exceed the sum of Five Thousand Dollars ($5,000.00) per annum, which amount is hereby appropriated annually, to be paid out on warrants of the state auditor on the presentation of bills duly audited and allowed as provided in this section." It would clearly seem that the legislature contemplated that the geological board should be entitled to the whole amount of the $5,000 annually appropriated to be at their disposal "aside from the expenses of office supplies and office expenses and publication and distribution of reports and bulletins." If this be true, then it was not the intent of the legislature that the expenses so excepted should be paid out of said sum so appropriated. We are clearly of the opinion that such was the intention of the legislature. We therefore submit and it is our opinion that the expense incurred in the publication and distribution of reports and bulletins of the geological survey should be paid out of other moneys in the state treasury not otherwise appropriated, and not to be paid out of said five thousand dollars annually appropriated. Yours truly,

CHAS. A. VAN VLECK,
Assistant Attorney General.

Savings Bank—Such corporation has no authority except such as given by statute. Its rights are limited. Such bank has no authority to invest its funds in any other manner than that specified in the statute. It cannot invest its deposits in stocks or shares of national banks.

Des Moines, Iowa, September 1, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—Your favor at hand, refering to section 1850 of the code, and asking my opinion upon the following questions:

First—"Is a savings bank authorized by law to invest its funds, capital or deposits in stock or shares of stock in a national bank?"

Second—"Is it authorized to invest its funds, capital or deposits in shares of stock of a corporation organized for pecuniary profit, and known as a bank building company?"

In regard to this I will say that a corporation has no authority except that which is given it by the statute. The law authorizing a corporation to do savings bank business, limits its right to invest its funds or capital or deposits in the manner specified in section 1850. Such bank has no authority whatsoever to invest its funds in any other manner than that specified in said section. The section provides: "Each savings bank shall invest its funds or capital or moneys deposited therein, and all its gains and profits, only as follows."

You will notice that the purchase of stock by a savings bank, either of another bank or another corporation, is not one of the investments which the statute authorizes. Hence, such investments are prohibited

by law. This prohibition is a wise one. A savings bank by investing its funds in the stock of a national bank or any other bank in case of the insolvency of such bank may be made liable on the stock owned by the savings bank, and in case of the failure of such national bank or other corporation, the savings bank might be carried down with it.

I do not think there is any question in regard to savings banks being prohibited from thus investing their funds, nor can there be reasonable doubt as to the wisdom of the law. Yours truly,

MILTON REMLEY.
Attorney General.

Fish Commissioner—There is no authority to justify the fish commissioner in making a sale of property which has been forfeited to the state, without an order of court directing such sale to be made.

Des Moines, Iowa, September 4, 1899.

Hon. Geo. E. Delavan, Estherville, Iowa:

Dear Sir—Yours of the 29th ult. at hand, asking my opinion as to whether there is authority to sell nets, seines, traps, contrivances, material, etc., used for the purpose of catching, taking, killing, trapping any fish, birds or animals contrary to the provisions of law, which have been seized as authorized by chapter 66 of the acts of the Twenty-seventh General Assembly.

Section 5 of said chapter requires the officer making the seizure to file an information before any justice of the peace of the county alleging the facts warranting the forfeiture or destruction of said property. A notice is required to be served upon the person. A trial is had before the justice in case any party appears to defend. The court shall determine whether such property will be adjudged forfeited to the state or destroyed. Such property used for an unlawful purpose, under section 1 of the chapter, is declared to be a nuisance.

Section 1 also provides: "Any fish, birds or animals so found shall be sold for the purpose of paying the costs, and the amount, if any, in excess of the costs, shall be turned into the school fund of the county in which the seizure is made."

This does not include the contraband property, and no provision is made specifying what shall be done with the property that is adjudged forfeited to the state. I think, however, it is clearly contemplated that any property seized which can be used for no other purpose than an illegal use, such for instance as the seines or traps for the taking of fish, etc., shall be destroyed, and the court should so adjudge. Any property, however, that can be legally used should be forfeited to the state. It is evident, however, that it is not contemplated that the state should keep a warehouse for the purpose of saving and storing away property forfeited to the state, and the general policy of the law is that such property should be sold and the proceeds placed in the school fund. If any guns are seized, I think it would be proper for the court to adjudge the

forfeiture thereof to the state, and provide in the judgment that the same should be sold under order of the court and the proceeds of such sale turned into the school fund of the county in which the seizure is made.

I know of no other way by which the intent of the law can be carried out. If guns, for instance, were seized and adjudged to be forfeited to the state, the right of the owner of the gun would be cut off. He would not be injured by the order requiring the property to be sold. No one but the state would have a right to complain of such an order to sell, and if such sale were made under order of the court, it would be an adjudication which would bind the state unless appealed from.

I know of no provision which would justify the fish commissioner in making a sale of such property which had been forfeited to the state without an order of the court directing such sale to be made.

Yours very truly,

MILTON REMLEY.

Attorney General.

Fish Commissioner—Illegal seining Lake Manawa—Prosecutions for—The State of Iowa has exercised jurisdiction over this lake.

Des Moines, Iowa. September 4, 1899.

Hon. Geo. E. Delavan, Estherville, Iowa:

Dear Sir—Your favor at hand, enclosing a letter of W. H. Killpack, the county attorney of Pottawattamie county, with reference to the case of the State of Iowa vs. Price Gibson and F. M. Phillips, convicted in a justice court for the illegal seining of fish in Lake Manawa. The district court on an agreed state of facts discharged Phillips on the ground that Lake Manawa was a part of the Missouri river and the law did not apply to boundary waters of the state. The question submitted to me is the advisability of appealing from said decision. It appears that the case was submitted to Judge Smith, of the district court, upon an agreed state of facts. Without such agreed state of facts before me, I am unable to give an opinion as to the propriety of appealing the case.

It appears that what is now Lake Manawa was at the time of the survey of Pottawattamie county a part of the Missouri river. By what means the lake was formed I do not know. Presume, however, that at some time the water washed a channel across the narrow neck of land occasioned by the bend of the river. Whether it was done suddenly or under circumstances that would make the middle line of Lake Manawa the boundary line of the state, I cannot say.

It is evident, however, that at the present time Lake Manawa is not a part of the Missouri river. The exception to the general law prohibiting seining applies alone to the Mississippi, Missouri and Big Sioux rivers, and to so much of the Des Moines river as forms the boundary line between this state and Missouri. Lake Manawa not now being a part of the Missouri river, the defendant did not bring himself within the exception which made it lawful for him to seine in the Missouri river.

Chapter 14 of the acts of the Twenty-seventh General Assembly gives to the courts of the counties bordering on the Missouri river jurisdiction in civil and criminal actions or proceedings to the center of the main channel of the Missouri river where the same is or may hereafter be. So, independent of the question whether the middle channel of Lake Manawa is the boundary line between the state of Iowa and Missouri, I am inclined to think that the court had jurisdiction of the offense, and that it erred in holding that Lake Manawa was a part of the Missouri river.

Some years ago there was an act of congress passed granting Lake Manawa to the City of Council Bluffs. I have not the reference to the act before me, and speak from recollection. While it may be doubted whether congress had any power to grant a lake wholly within the state to the City of Council Bluffs, or any one else, yet it is a recognition of the fact by congress that it is in the state of Iowa. Nebraska has not asserted any claim to any part of Lake Manawa. The state of Iowa has exercised jurisdiction over the lake, and possibly whatever may have been the original right of the state of Nebraska to a part of Lake Manawa and the land lying between the lake and the Missouri river, it is doubtful whether Nebraska could now assert any title because of laches.

But that question I do not pass upon. I feel well satisfied that the defendant Phillips, admitting that he seined in Lake Manawa, did not bring himself within the exception which permits seining in the Missouri river. The people of Council Bluffs and the county of Pottawattamie are more interested in this matter than the people of other parts of the state.

Unless there is something in the agreed state of facts which precludes the adoption of the views above suggested, if the county attorney or the people of the city are sufficiently interested in the matter to take an appeal to the supreme court, I will cheerfully render any assistance that I can; but without more perfect knowledge of the facts I would not be able to intelligently advise an appeal. Yours respectfully.

MILTON REMLEY.
Attorney General.

Fish Commissioner—There is no doubt but that our state law is constitutional which prevents the shipping of game without the state.

Des Moines, Iowa, September 6, 1899.

Hon. Geo. E. Delavan, Fish and Game Warden, Estherville, Iowa:

Dear Sir—Your favor of the 5th inst. at hand, in which you say:

> "In the City of Estherville is located a freezer where game is kept for traffic. The parties owning this freezer employ men to hunt. They also buy game when they can get it. These parties ship to eastern markets, and claim that the inter-state law regulating traffic protects them. Our people are getting most awfully tired of this business." You request my opinion as to whether the law can be enforced against inter-state traffic.

The exact point was decided by the supreme court of the United States in Gear vs. Connecticut, 161 U. S., 519. The Connecticut law was

very much like our own, and it was held by the supreme court that the law was within the constitutional power of the legislature of the state to enact. The court sustained the Connecticut law fully.

I have no doubt but that our state law is constitutional, and that the parties to whom you refer are violating the law, upon the facts which you state, and should be dealt with. Yours respectfully,

MILTON REMLEY.
Attorney General.

College Farm at Ames—Right of railway company to double track across—The Board of Trustees has no power to grant to the railway company, for such construction as they may deem reasonable, the additional right of way asked.

Des Moines, Iowa, October 3, 1899.

Hon. W. O. McElroy, Chairman Board of Trustees, College Agricultural and Mechanical Arts, Newton, Iowa:

Dear Sir—Your favor of the 29th ult. at hand, in which you say:

> "The Chicago & Northwestern Railway crosses the college farm at Ames. The Railway Company is making its road a double track, and for that purpose desires the grant of an additional right-of-way across the college farm."
>
> You ask: "Has the board of trustees power to grant to the Railway Company for such consideration as the board may deem reasonable, the additional right-of-way asked?"

If the power to grant such additional right-of-way exists in the board of trustees, it is because of paragraph 2 of section 2647, which is as follows: "The board of trustees shall have power to manage and control the property of the college and farm, whether real or personal." If this is not broad enough to give to the board such power, then they have no such power.

The trustees are simply agents of the state, and must act within the powers given them by the law. When they are directed to accomplish a certain purpose, and the manner of its accomplishment is not specified, a discretion is given to them. There is no authority given to them to sell the college farm, or the real property of the college which is of a permanent nature. To manage and control the property of the college and farm does not, in my judgment, imply the power to sell it.

It may be said the right-of-way of a railroad is simply an easement. This is true in theory, but not in practice. An easement which appropriates to the exclusive use of the owner of the easement a definite part of the realty when the easement continues, and is likely to continue forever, is to all intents and purposes a final disposition of the real property. But whether it be considered as an easement or a sale of the fee, it is real property, and the granting of such right-of-way, in every aspect of the case, is a conveyance of a part of the realty of the college. The fact that when the railroad company is discontinued, or ceases to be used as

such, the land would again revert to the college, does not change the principle.

I see nothing whatever in the statute which in express language, or by implication, gives to the board of trustees any power whatsoever to Chicago & Northwestern Railway Company, then may they not grant a right-of-way to another company, and another, and another, until the college farm would be covered with railways? I do not intimate that the board of trustees would do such a thing, but if they have the power to grant one right-of-way, they certainly have the power to grant another right-of-way to another company. If they have power to grant ten acres to a railway company for a right-of-way, why have they not the power to grant all?

I am very clearly of the opinion that the power to manage and control real property does not imply a power to sell. Yours truly,

MILTON REMLEY,
Attorney General.

Propriety medicines—Sale of—Such medicines are usually called patent medicines, which are manufactured under an exclusive right. Domestic remedies are such as are usually made at home.

Des Moines, Iowa, October 16, 1899.

N. T. Hendrix, Esq., Board of Pharmacy Commissioners, Columbus Junction, Iowa:

Dear Sir—Yours of the 7th inst. at hand, asking my construction of that part of section 2588 which excepts from the prohibition of said section "the keeping and selling of proprietary medicines, and such other domestic remedies as do not contain intoxicating liquor or poison." Your inquiry relates alone to what is meant by domestic remedies.

Proprietary medicines are such as are usually called patent medicines, or those manufactured under a certain trade mark, and which the manufacturer has a private or exclusive right to manufacture. There are numerous other remedies in regard to which no one has the exclusive right or any peculiar right to manufacture more than another person.

Domestic remedies are such as are usually made at home, or are usually kept in the house to be administered as simple and harmless remedies for common complaints. For instance, hot drops, camphor, squills, etc. It may be made to include all simple remedies of the use of which people generally have a knowledge, and such as are usually kept in the house for children's ailments. It would be impossible for me to name all such things as are embraced within this term. "Domestic" in this sense refers to the home, or pertaining to the home. Yours truly,

MILTON REMLEY,
Attorney General.

Gambling and gambling devices—What constitutes—Slot machines are gambling devices. A game of chance resulting upon a drawing is a species of gambling or lottery.

Des Moines, Iowa, October 18, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—In regard to your request for my opinion upon the question what constitutes gambling or gambling devices in the sense in which the term is used in chapter 43 of the acts of the Twenty-seventh General Assembly, relating to appropriations to county or district agricultural societies, I will say that the term used is in its ordinary and accepted use, as given by the lexicons and the decisions of courts.

Any device, machine, or contrivance used in gaming or gambling, is a gambling device. To gamble is defined thus: "To play a game for money or other stakes."

It may be said generally that any game in which a person parts with his money in the hope or with the expectation of receiving either a sum of money or property in return therefor, the amount of which depends upon some chance or result of the game, is gambling. It has been held by our supreme court that playing at billiards or pin pool with an agreement that the losing party shall pay for the use of the table, is gambling. A game of chance resulting upon a drawing is a species of gambling or lottery. Slot machines by which one, for a given sum, will obtain one cigar, or by a lucky turn more than one, are unquestionably gambling devises.

It is impossible to name all games specifically, but any game or device which comes within the general definition above stated, is, in my judgment, gambling, or a gambling device. Yours respectfully,

MILTON REMLEY,
Attorney General.

Industriaal School for Girls—The authority of the industrial school to retain control of the inmates is derived from the order of commitment announced by the warrant and that statement which the court or judge furnishes to the superintendent. It may be said that the age or minority of the person committed to the school has been adjudged. Such errors, if any, committed by the judge, must be corrected by an appeal. The finding of the court upon a question of minority or marriage is conclusive until reversed on appeal.

Des Moines, Iowa, October 18, 1899.

Board of Control of State Institutions:

Gentlemen—Yours of the 9th inst. at hand, in which you say:

'We have several cases at Mitchellville. girls who have been

committed to the institution, who, when committed, were in fact within the age prescribed by law, but we find, after commitment, that they have been married before being committed to the school, and one of them has been divorced.

"The question arises whether, under such circumstances, these girls should be kept in the school. The statute fixing the years within which they may be sent, and they becoming of age when married, should we still retain them, or may we properly discharge them. As a rule, these are girls who are very difficult to get along with in the institution, and whose presence is detrimental to other inmates."

In regard to the above I will say that your inquiry does not intimate when the girls referred to were sent to the industrial school; whether before the enactment of chapter 80 of the laws of the Twenty-seventh General Assembly or since. I would not like to say that girls committed to the school prior to such act would have their term of commitment extended by said chapter three years longer than the time named in the warrant of commitment.

The question that you ask would not arise with reference to cases committed since said chapter 80 took effect. While I think the industrial school is an educational institution and a reformatory rather than a penal institution, yet it is unquestionably true that persons cannot be sent to said institution except under the authority and in the manner specified in section 2708 of the code. It is very plain to me that a court or judge would have no authority to commit a person who had attained his or her majority to the institution. The fact, then, that the warrant which is required to be executed by delivering the boy or girl to the industrial school has been issued, presupposes that the court or judge found the facts necessary to warrant the commitment. The authority of the industrial schools to retain control is derived from the order of commitment announced by the warrant and the statement which the court or judge furnishes to the superintendent.

It may be said, then, that the question of the age or the minority of the person committed to the industrial school has been adjudicated. If there were errors committed by the court or judge, they must be corrected by an appeal, and cannot, in the absence of an appeal, in my judgment, be re-investigated by either the superintendent or the board of control. For the purpose of retention in the industrial school by the superintendent or the board of control, the judgment of the court or judge as to the age or minority of a girl or boy committed to such school becomes a verity. If one committed to the school claims to have been married, it will not avail. The court must have found otherwise, and the finding of the court upon that question is conclusive until reversed on appeal, or in some proper method.

I think unquestionably you should still retain the girls, as you would have no authority to overrule the judgment or order of the court committing them to the school. Yours respectfully,

MILTON REMLEY.
Attorney General.

Appeals before county sperintendents—What legally included as costs.

1. Witness fees and service of subpoena by officers are proper costs to be taxed. The statute authorizes no further costs.
2. The statute makes no provision for the expense of a stenographer.

Des Moines, Iowa, October 19, 1899.

Hon. R. C. Barrett, Superintendent of Public Instruction:

Dear Sir—In regard to your request for my official opinion upon the following questions:

First—"What may be legally included as costs in the hearing of appeals before a county superintendent?

Second—"May the expenses of a stenographer be charged as part of the costs? If not, by whom should expenses of this character be paid?"

I will say that section 2821 of the code authorizes the issuance of subpoenas for witnesses, and provides for the service of the same, and for such services the witnesses and officers shall be allowed the same compensation as is paid for like attendance or services in the district court. These items constitute the costs. The statute in express terms authorizes no further costs to be paid which shall be taxed or recovered. While the term, "tax all costs to the party responsible therefor," appears, it evidently refers to the costs for which the statute provides. Section 2820 prohibits the allowance of any other compensation to the superintendent than that now allowed by law. The necessary postage must be paid by the party aggrieved. The county provides proper stationery, and I can think of no other costs that are proper to be taxed by the county superintendent.

Second, in regard to the expenses of a stenographer, I will say that there can be no expenses unless a stenographer is employed, for which the statute makes no provision. The design of the law in allowing appeals to the county superintendent, and from him to the state superintendent, is to afford a speedy and inexpensive tribunal for the correction of abuses or errors by school directors. The law with reference to the charging of fees, and the manner of procedure in the district court, has no application to trials before county superintendents. There is no authority of law to employ a stenographer and tax the expenses of such stenographer as costs in the appeal case. There is no requirement of law that the evidence there shall be preserved of record. If a party wishes to appeal to the state superintendent from the judgment of the county superintendent, he must make such provision for preserving the testimony as he may desire. There is nothing to prevent the parties agreeing to employ a stenographer, or to prohibit the superintendent from permitting such a record to be kept, and if kept correctly, from certifying the same; but any arrangement in regard to the employment of a stenographer must be by consent of the parties litigant, and at their

expense, without having the same taxed as part of the costs for which a judgment can be rendered. Yours respectfully,

MILTON REMLEY,
Attorney General.

Receivers—An association of the state means an association organized under the laws of the state.

Des Moines, Iowa, October 28,1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—You request an opinion upon the proper construction of the following clause, viz.: "The receiver may also, with the approval of the court or judge, transfer the members of such association who consent thereto to some like solvent association of the state," of section 1795, the exact point being whether the words, "some like solvent association of the state," mean a like association organized under the laws of the state, or doing business in the state.

The change of language from that occuring in section 16, of chapter 65, of the acts of the Twenty-first General Assembly, does not, in my judgment, make any change in the meaning thereof. An association of the state means an association organized under the laws of the state. We do not speak of a corporation organized under the laws of any other state as a corporation of this state. According to the general use of language, a corporation of a state is understood to mean a corporation organized under the laws of such state.

I think without question that the transfer of the members must be to a like solvent association organized under the laws of the state of Iowa.

Yours truly,
MILTON REMLEY,
Attorney General.

Industrial School for Girls—One can be committed to such school only after a trial before a court or judge. Chapter 80, of Lawe of the Twenty-seventh General Assembly, can be given a retroactive operation, and girls committed before said act took effect should be discharged from the school in accordance with the law in effect at the time the warrant of committment was issued.

Des Moines, Iowa, November 9, 1899.

Hon. Wm. Larabee, Chairman Board of Control:

Dear Sir—Yours of recent date at hand, in which you call my attention to chapter 80 of the laws of the Twenty-seventh General Assembly, amending section 2708 of the code by changing the time in which girls are to be committed to the Industrial School at Mitchellville from majority to the age of twenty-one years. You say there are some girls who were committed under the former law, and who had not arrived at the

age of eighteen when the amendment to the law was passed fixing the limit at twenty-one years. You ask:

"Can these girls who were thus committed under the former law be legally held by the board or superintendent in the school until they arrive at the age of twenty one years?"

While it is unquestionably true that the industrial schools are reformatory rather than penal in their intent and operation, it is also true that the proceedings under which one is committed to an industrial school are either criminal or quasi criminal. In some cases the persons sent have been convicted of crimes. The general law for the punishment of the crime has been suspended, and in lieu thereof commitment to the industrial school is ordered by the court or judge. The detention of a girl in the industrial school is enforced by law. The penalty for assisting one to escape from the industrial school is more severe than for assisting one to escape from jail who has been charged with a criminal offense other than a felony. One can be committed to the industrial school only after a trial before a court or a judge, and a girl is committed to the school by warrant, which warrant shall state "the place at which the party resided at the time of the arrest, her age as near as can be ascertained, * * * and the statement as to residence and age shall be conclusive for the purposes of this chapter."

If the detention in the industrial school be considered as a punishment for a crime, then if said chapter 80 attempted to increase the punishment for conviction, it would in that case be an ex post facto law, and hence, unconstitutional.

If we consider the detention of a girl in the industrial school as for educational and reformatory purposes only and not penal, there would be no ground for calling said chapter 80 an ex post facto law in case it were applied to commitments before the amendment was enacted, but we do not obviate the difficulty upon this theory. It is unquestionably true that the right to detain a girl in the industrial school is derived from and depends upon a judgment of a court of record of a judge thereof. Prior to April 8, 1898, when said chapter 80 took effect, the law required the court or judge, in case he was satisfied that the boy or girl was a fit subject for the industrial school, "to commit him or her to the industrial school until he or she arrived at majority."

Whether a definite number of years or months were stated in the warrant would be immaterial, inasmuch as the age was required to be found, and the law distinctly fixed the term for which a girl should be committed, viz., until she arrived at the age of eighteen years, the age of her majority. It would be proper for the court, in issuing the warrant of commitment, to state the number of years and months the girl should be detained, but in the absence of such statement, the age having been found and stated in the warrant, the term of her detention would only be a matter of computation and the warrant would be sufficient.

People vs. Dednen, 6 Abb. Pr. Rep., 87.

In effect, then, the judgment or order of the court is that the girl shall be committed to the industrial school either to be detained for a period fixed by the court and stated in the warrant, or to be detained

for a term to be determined from facts found by the court and stated in the warrant. The sole question, then, is whether, after a judgment of the court has been thus entered, an amendment to the law can change or enlarge the judgment of the court.

To so hold would be giving a retrospective effect to the statute. It is well recognized that statutes not remedial will not be construed to operate retrospectively, even when they are not obnoxious to any constitutional objection, unless the intent that they so do is plainly expressed or made to appear.

Sutherland Stat. Con., Sec. 462;
Percell vs. Smith, 21 Iowa, 540;
Rosier vs. Hill, 10 Iowa, 470.

There is nothing in said chapter 80 of the laws of the Twenty-seventh General Assembly, indicating that the legislature intended it should have a retrospective effect. In determining to send a girl to the industrial school, a judge might be influenced by the length of time that she would be detained there, and we cannot say that a person would have been sent had the judge known the period of detention there would be three years more than the law contemplated it should be at the time he made the order.

In my judgment, said chapter 80 cannot be given a retrospective or retroactive operation, and the girls committed before said act took effect should be discharged from the school in accordance with the law in effect at the time the warrant of commitment was issued.

Yours respectfully,
MILTON REMLEY,
Attorney General.

Mulct Tax—Assessor's failure to return assessment for—The law fixes the amount of the tax and provides how it shall be ascertained, and who shall pay the tax, without any action on the part of the board of supervisors.

Des Moines, Iowa, November 9, 1899.

Oliver Gordon, Esq., Forest City, Iowa:

Dear Sir—Yours of the 31st ult. came duly to hand. It was impossible for me to reply sooner.

You state the assessor did not return an assessment for the mulct tax as provided by section 2433, but that the same was returned on October 21st by three citizens, as permitted under section 2435. You ask whether this listing is done in time for the board to take action at its next regular session, saying the assessor should have done so by the 15th of September. Section 2433 requires the assessor to return a list of persons liable to the mulct tax before the 30th day of oach of said months.

The adoption of the code has made some change in the mulct law. If you will notice, section 9, of chapter 62, of the acts of the Twenty-fifth General Assembly, is entirely omitted from the code. We have, then, this condition of affairs: Section 2422 fixes the amount of the tax and defines the class of persons who shall be liable therefor. Sections 2433 and 2435

specify by whom and how it shall be ascertained who belong to the taxable class. When the assessment is made in either manner provided by soid sectoins, ohe auditor, under section 2737, is required to certify to the county treasurer a complete list of the persons returned to him by the assessors, or entered on the sworn statement made to him by citizens aforesaid, together with a description of the real property. Section 2436 requires the treasurer to enter upon a book known as the mulct tax book a quarterly statement of the mulct tax as due and payable by the persons carrying on such business or keeping such places. Other sections provide for the collection of the tax, and when it shall be delinquent.

You will see from this that there is no action needed or required by the board of supervisors in regard to levying the tax. The law fixes the amount of the tax and provides how it shall be ascertained, and who shall pay the tax, without any action on the part of the board of supervisors.

If a person thinks he is improperly assessed, then he can make an application for the remission of the tax, as provided by section 2441 of the code. He must do so at the next session of the board after the listing, and must file his application therefor eight days before the time of hearing. If an application is made, the board can properly fix a date on which it shall be heard eight days after the application is filed.

Formerly it was supposed that in order to make the taxes valid, the board of supervisors should levy the same, and I have assumed that this was the idea that was entertained by your board; but I think this is erroneous. If an application is made by the person assessed, he will be entitled to a hearing at the next regular session of the board, provided his application is filed eight days before the hearing; but if he makes no application for a remission of the tax, there is nothing for the board to do. Yours truly,

MILTON REMLEY.
Attorney General.

Mutual Lfie Associations—Receivers for—After a receiver is appointed the court making such appointment has full equity powers to order a distribution of the funds in the way it shall be equitable and just to all parties interested therein. Such order should be made only after notice to the policy holders.

Des Moines, Iowa, November 10, 1899.

Hon. Frank F. Merriam, Auditor of State:

Dear Sir—Your favor of the 4th inst. at hand, in which you quote from a letter of the receiver of the Equitable Mutual Life Association, of Waterloo, in which he asks: "Is there any reason why the deposit made with you by the Equitable Mutual Life Association should not be turned over to me as receiver?"

You say you presume the deposit with your department was made under sections 1785 and 1806 of the code, and ask my opinion "as to the necessary procedure for the receiver to take in order that I may properly be relieved of the care of these securities."

The Equitable Mutual Life Association, of Waterloo, was incorporated under chapter 7, of title 9, of the code. Section 1791 provides: "Any association accumulating any money to be held in trust for the purpose of the fulfillment of its policies, or certificates, contract or otherwise, shall invest such accumulations in the securities provided in section 1806 of this title, and deposit the same with the auditor of state as therein provided." Substantially the same provisions exist with reference to the funds or accumulations of any such company held in trust for the purpose of fulfilling any contract in its policies or certificates.

It is a notorious fact that the Equitable Mutual Life Association issued kinds and classes of policies which, in my judgment, were not authorized to be issued by companies organized under said chapter 7. What was the nature of the trust attaching to the different funds deposited with the auditor of state I have no means of ascertaining. It is possible that a part or parts of such funds may have been held in trust for different classes of policy holders respectively, and possibly such funds could not pass into the hands of the receiver to be used in paying the general liabilities of the company without great injustice to the beneficiaries of the trust fund which has been deposited in your office. The law is silent upon what the duties and the liabilities of the auditor may be with reference to such funds.

It is unquestionably true, however, that after a receiver is appointed the court making such appointment has full equity powers to order a distribution of the funds in the way that shall be equitable and just to all parties interested therein. Each policy holder that has, or claims to have, any interest in the funds deposited in your office can present his claim to the district court of Blackhawk county and ask for proper orders upon the receiver; but in view of the fact that the fund in your custody is charged with a trust of the nature of which probably you have no special knowledge, and are not charged by law with the performance of any duty connected therewith except to hold the fund, I think it would be the better practice for the receiver, upon a showing to the court of the nature of the trust attaching to these funds, to obtain an order from the court upon you to turn over the funds to him. Such order should be made only after notice to the policy holders having an interest in the fund. All you need require is such an order as will protect you from the claims of any one having a beneficial interest in the fund deposited.

Yours respectfully,

MILTON REMLEY.

Attorney General.

Fish Commissioners—The use of phantom or silk minnows with three gangs of hooks, is illegal.

Des Moines, Iowa, November 10, 1899.

Hon. Geo. E. Delavan, Estherville, Iowa:

Dear Sir—In regard to your inquiry as to whether the use of phantom or silk minnies used for trolling with three gangs of hooks, as they are made and sold in the stores, is contrary to law, I would say that section

2542 provides: "No person shall use more than two lines with one hook on each line in still fishing or otherwise, except that a trot line as above provided, or in trolling a spoon hook composed of three hooks fastened together may be used."

Unless the phantom or silk minnies with three gangs of hooks come within the class of hooks described by the words "a spoon hook composed of three hooks fastened together," it is evident to my mind that its use is illegal.

I am not acquainted with the contrivance described in the inquiry. In trolling with a spoon hook, no phantom or silk minnies are used, and three hooks fastened together do not constitute three gangs of hooks. I do not think, however, we are justified in calling three gangs of hooks three hooks fastened together, nor are silk minnies the same as a spoon. Judging from the description given in the inquiry, the phantom or silk minnies with three gangs of hooks is something very different from a spoon hook with three gangs fastened together.

It is more a question of fact than a question of law, but I know of no reason why the exception in the statute allowing the use of spoon hooks composed of three hooks fastened together should be extended by construction so as to include therein something of a different nature altogether, and having more hooks. Yours respectfully,

MILTON REMLEY,
Attorney General.

Amana Society—Liability of members for collateral inheritance tax.

Des Moines, Iowa, November 10, 1899.

Hon. John Herriott, Treasurer of State:

Dear Sir—Your request of the 4th inst. at hand. The facts stated in your letter with reference to the membership and property of the members of the Amana Society may be summarized as follows:

The society is incorporated under the laws of the state for religious and benevolent purposes, the members of which live together as a community. The property of the society is held in common and managed by the trustees for the benefit of the members. A person, upon becoming a member of the society, transfers to the society all his real and personal property, for which he receives credit on the books of the society, and retains a right to the amount of such credit, which in case of his withdrawal, is paid to him without interest or participation in the common earnings. In case of his death, leaving heirs who are members of the society, the amount standing to the credit of the deceased member is credited to the heirs in the proper proportions, or in case will has been made by a deceased member to another member of the society, a like credit is made. Whoever as a member has a credit upon the books of the company for money deposited, either by himself or his ancestor or grantor, upon withdrawal from the society is entitled to receive the amount thus credited. Under such circumstances, you ask:

"In case of the transfer of property from one member of the society to another, who is the collateral heir of the deceased, is such property liable to the payment of the collateral inheritance tax?"

You suggest that it is claimed, because the Amana Society is a religious and benevolent society, that such tax should not be paid.

The tax imposed by the Iowa statute is a tax upon succession and not a tax upon the property itself. The credit or indebtedness of the Amana Society to one of its members is a chosen action, and not the property of the society. The society stands in the relation of debtor to the member. The right of the member to receive the property upon his withdrawal from the society is itself property. It is the property of the member, and not the property of the society. Upon the death of a member the society receives no part of the estate of the deceased member, under the facts stated. It still continues to be the debtor, not of the deceased member, but of the collateral heir. It does not participate or share in the estate of the deceased member. Hence, the exemption from the payment of the collateral inheritance tax upon an estate passing to religious or benevolent societies has no application to the facts of the case under consideration. The society holds this fund in trust, to be paid under certain conditions to whomsoever it may be due. The ownership of the fund or chosen action having passed by the death of one member of the society to another who is a collateral heir, entails no new burdens or responsibilities or benefits upon the Amana Society itself.

The law, however, imposes a condition or a burden upon the right of such collateral heirs to inherit. They must pay to the state the tax provided by statute as a condition of their receiving the property. The fact that they may not wish to reduce the chosen action to possession does not change the operation of the law. It is to be presumed that they receive a present benefit from remaining members of the society and leaving their property to be controlled and managed by the society; but whether they do or not, they have a right to demand the payment by the society of the sums credited to them respectively. This credit is property which they receive by succession, and for that right of succession granted by statute, the tax should be paid.

As you say, the case is an exceptional one. The legislature, however, made no exception so as to excuse members of the society from paying the collateral inheritance tax as other persons. It undoubtedly never occurred to the legislature, but I know of no way of grafting exceptions upon a statute which the legislature did not make.

Yours respectfully,
MILTON REMLEY,
Attorney General.

Loan and Deposit Company—Certain classes of stock not authorized by the law—The money paid by share holders on such stock should be repaid, together with 6 per cent. interest thereon from the time the money was received by the company.

Des Moines, Iowa, November 11, 1899.

E. W. Brooks, Esq., Secretary Iowa Loan & Deposit Company:

Dear Sir—In regard to the matter submitted to me by the auditor with reference to Class F stock, which was issued prior to the law of 1896, I will say that I do not think such stock could properly be issued, even under the law as it existed prior to the act of 1896. Certain it is that such stock could not be continued after the amendment of your articles of incorporation which were approved by the executive council.

The money paid by the share holder on such stock should be repaid to such share holder, together with 6 per cent interest thereon, from the time the money was received by the company, the holder of such shares of stock returning the same to the company for cancellation. This, I think, is sustained by the rules of law which are well recognized, and is as equitable a disposition of the matter as can be well devised. The stock should be cancelled at once, and the holders thereof should be paid as above stated. Yours respectfully,

MILTON REMLEY,
Attorney General.

Location of school house sites—In rural districts the limitation of the law is for the sole benefit of the land owner and the provision prohibiting the selection of a site within 20 rods of a residence was for his protection alone, and referred to the residence of the man whose land was about to be taken. It was not the intent of the legislature to permit one whose land was not taken by eminent domain, to prevent a school house being erected within 40 rods of his residence.

Des Moines, Iowa, November 23, 1899.

Hon. R. C. Barrett, Superintendent of Public Instruction:

Dear Sir—I have the honor to acknowledge the receipt of your request for my construction of section 2814 of the code, especially that clause thereof which says that a schoolhouse site "shall, except in cities and incorporated towns or villages, be at least forty rods from the residence of any owner who objects to its being placed nearer," the exact point, if I understand the matter, being whether, in a condemnation proceedings to obtain a site, any person other than the owner of the land about to be condemned can object to the condemnation of such land because it may be within forty rods of his residence.

The question is one of no little difficulty because of the very general terms used in said section. At first blush it would seem that the clause, "forty rods from the residence of an owner," is general and broad enough to give to any person whomsoever the right to object to a school house being placed within forty rods of his residence. In order to arrive at the true meaning of this section, it is necessary to compare it with other provisions of the law, and to look at the history of the legislation.

Prior to 1870, there was no provision of law for the condemnation of a site for a school house. School districts had a right, prior to that time,

to acquire by purchase or lease, sites upon which to erect school houses, and no person whomsoever had a legal right to object to a school house being erected upon any site which the school district could thus acquire. Chapter 124 of the Thirteenth General Assembly, provided a way whereby a school district, by its board of directors, might legally take and hold, under condemnation proceedings, a suitable site for the erection of school houses, the first section of said act giving such power, but providing certain limitations upon its exercise for the protection of the land owner who was unwilling to have his land thus taken. One such limitation was that the land taken for school house purposes should not exceed one acre; another, that orchards, gardens or public parks should not be taken; and a further limitation, that all sites selected should be on the public road, and not within twenty rods of any residence without the consent of the owner.

It is very clear to me that such limitations were for the sole benefit of the land owner, and the provision prohibiting the selection of a site within twenty rods of a residence was for the protection alone, and referred to the residence of the man whose land was about to be taken.

On the adoption of the code of 1873, said chapter 124 was incorporated in chapter 10, of title 12, of the code of 1873. In section 1826 of the code of 1873, this language is found: "The site so taken must be on some public highway, at least forty rods from any residence the owner whereof objects to its being placed nearer"; i. e., the site taken under the provisions of said chapter as it appears from the preceding section.

It will not do to take a paragraph or a sentence out of the connection of the law in which it appears and give it a universal application, disasociating it from what precedes or follows, or the subject matter treated of. Chapter 10, of title 12, of the code of 1873, relates alone to the condemnation of property for a school house site. Said chapter 10 now appears as sections 2814, 2815 and 2816, of the code of 1897. The phrase, then, "at least forty rods from the residence of any owner who objects to its being placed nearer," must be construed in connection with the subject matter treated of, and the purpose the legislature had in view in inserting such language in the act. From the beginning of our school system, school boards were authorized to purchase or rent school sites, to be situated where, in their judgment, was best, and the owner of no residence near by could prevent such site being selected within twenty or forty rods of his residence.

There must be something wrong with any construction which would authorize a school board to place a school house at the dooryard of a resident, if it could purchase the land therefor from his neighbor, and would preclude it from so doing in case they had to resort to condemnation proceedings. At least, it is such an inconsistency that we must not presume the legislature so intended, unless the language of the statute forces us to that conclusion. Does the language of the statute so provide? What is meant by "any owner" or "the residence of any owner?" What owner is referred to? Evidently the owner of the land about to be taken. If the owner of the land about to be condemned does not object to the school house being within forty rods, it can be condemned.

"Any" is derived from the words "a one." The Century Dictionary defines it in the singular to be, "one; a or an; some." "Any owner," then, means an owner of the land about to be taken who objects to its being placed nearer to his residence. This construction of the meaning of "any," or the limitation of it to a class of individuals, is not without authority. The case of Shute vs. Boston, 99 Mass., 236, sustains these views, as does also the case of Wells vs. Greenhill, 5 B. & Ald., 869.

The power of a school district, acting through its school board, to purchase grounds for schoolhouse purposes, is given by sections 2749 to 2773. The acquisition of real estate for school house purposes under these sections may be made without consulting the wishes of the owners of adjacent lands, and I am clearly of the opinion that sections 2814 to 2816 inclusive, providing a way for the condemnation of school house sites, were never intended by the legislature to permit one whose land was not taken to prevent a school house being erected within forty rods of his residence. This is in accord with Fisher vs. Dist. Twp. of Tipton, S. L. Dec., 1892, 686. This clause, "forty rods from the residence of the owner," is for the benefit alone of the man who is unwilling to have a school house upon his land and refuses to sell, whose land, in the exercise of eminent domain, is taken from him by condemnation proceedings. This clause is a concession made to such unwilling owner alone, and to no other person. Yours respectfully,

MILTON REMLEY.
Attorney General.

Building and Loan Associations—Articles thereof.

1. Certain classes of stock are not only unauthorized by the statute but are against public policy.
2. The latitude given to the board of directors in said articles opens the door to favoritism and fraud.
3. Payments of 25 cents and 40 cents per share per month and limiting the payments to 212 and 141 months respectively, indicates a class of business which would be unsafe and ought not to be permitted.
4. The method of withdrawing stock without making provision for the payment of costs and expenses in winding up the affairs, would work an injustice.
5. The articles of incorporation do not limit the amount of indebtedness. This is not in accordance with the policy of the law.
6. It ought not to be left to the board of directors to determine by-laws the condition governing stock.

Des Moines, Iowa, December 5, 1899.

Hon. Leslie M. Shaw, Governor of Iowa:

Dear Sir—I have examined the amended and substituted articles of incorporation of the Iowa Business Men's Building and Loan Association, which you have submitted to me, and in regard to which you ask my opinion. I find many serious objections to the approval of the same, some of which I shall state only in general terms without attempting to note all of the clauses which are obnoxious to the principles to which I shall call your attention.

First—The issuing of non-maturing stock, known as Class D, or "fully paid coupon stock," authorized by section 2, article 5, is in contravention, in my judgment, to the principles which control building and loan associations, and is not authorized by the statutes of this state. The same may be said with reference to the issuing of prepaid stock, which is authorized by section 5, of said article 5. Our own supreme court has held that there must be mutuality between share holders of building and loan associations. This is in accord with the almost unbroken voice of authority from other states. I recall but one state which holds otherwise.

These two classes of stock are preferred stock, to a certain extent, at least. Class D, or fully paid coupon stock, is not stock in fact; it is practically a bond of the association upon which interest is paid semi-annually. This interest is paid, whether the earnings of the association are such as to authorize any dividend whatsoever, and in no true sense of the word can it be considered stock. It is possible that in case a receiver were appointed for the association in the distribution of the assets that such stock would be compelled to share in the losses and be placed on a par or pro rata with other share holders, but the fact that such stock is to receive a fixed interest makes it preferred stock.

The same is true with reference to the prepaid stock, referred to in section 5. The profits are apportioned according to its own book value. The book value is determined by the amount that has been paid in. Under the first paragraph of section 5, a discount is allowed upon the payment of such stock. Such stock receives its dividends upon the book value not to exceed 4 per cent per annum. Said section 5 provides that "out of the net profits so apportioned to prepaid shares there shall be paid cash dividends * * * not to exceed 4 per cent per annum." This implies that if there are no profits, there shall be no dividends, but if we turn to article 8, we see that provision is made for the payment of cash dividends on prepaid stock, before the profits to be distributed among the share holders are ascertained or apportioned. This clearly makes this class preferred to the extent that it receives a cash dividend year by year and shares in the profit which is left after the payment of this cash dividend. This prepaid stock having received dividends year by year, the amount thus paid is withdrawn from the possibility of diminution because of losses which may occur from time to time.

Beside this, the share holder who pays and obtains his discount receives a benefit by reason of such discount which we must presume would equal the fair interest for all the money advanced, and at the same time he is to receive a dividend upon the amount which he has actually paid in, thus placing him at an advantage over the installment stock. It

was held in Sumrall vs. Commercial Building & Trust Co., 50 S. E. R., 69, that preferred stock upon which dividends were to be paid, whether there were profits or not, is void as against public policy.

In my opinion these two classes of stock are not only unauthorized by the statute, but are against public policy and the whole theory upon which building and loan associations are permitted to do business.

Second—Section 6, article 5, read in connection with section 2, of article 6, provides for methods unknown to the law of building associations. The statute provides that the plan and terms of withdrawal of members shall be stated in the articles. This refers to the withdrawal of money paid upon the stock by the member. These two sections, if valid, authorize the withdrawal of money not actually paid by the member, but which is pledged to be paid in the future. The law contemplates that the stock shall be matured by the payment of single payments stated or monthly installments to which profits are added, and when the payments and profits equal the par value of the stock, then the same is deemed matured and payment thereof must be made to the share holder.

These two sections, however, authorize the arbitrary maturing of the stock, based not upon the money paid, but upon what is pledged to be paid, together with anticipated profits. The last clause of section 2, article 6, provides for the commutation and discounting of payments which are secured to be made upon the stock which is matured in advance. The effect of this is that a share holder may, by subscribing for certain shares of stock, receive the par value of the stock by giving security for the payment of the dues, and in a year thereafter the board of directors may release the security and cancel his stock upon his prepaying the estimated future dues, giving him a discount for the cash payment. The effect is that such share holder receives back the money that he has paid, together with the anticipated profits which would have arisen had the money remained with the association, without sharing in the risks of losses or waiting for his profits until they are earned. The latitude given to the board of directors in such a case is so great that it opens the door to favoritism and fraud to such an extent that I cannot believe it otherwise than detrimental to the good faith members of such association.

Third—Section 3, article 5, provides for the issuing of installment stock, Classes L and M, by the payment of 25c and 40c per share per month, and limiting the payments to 212 and 141 months respectively. It may be a question whether such small payments continuing for so long a time will not surely lead to the disappointment of the share holder, and whether the expense of continuing such payments for so many months,—Class L being for seventeen years and eight months,—will not necessarily be so great that there will be no profit either to the association, or to the share holder. If so, then it is an unsafe class of business, which ought not to be permitted. But whether this is true or not is a question of fact for the council to determine, and not a question of law.

Fourth—Section 2, article 10, provides for the rate of interest which shall be paid on withdrawals according to the time in which payments

have been made. The last clause, however, provides: "If such profits are not sufficient when so computed, then the stock so withdrawn shall be entitled to a rate per cent found to be earned as net profits during said period."

There may a case arise where the withdrawing member would receive the full amount of the money paid in, together with estimated profits, as it appears upon the books of the association. He could receive no more than this in case the association were wound up and all of its assets converted into cash for distribution. Experience with associations shows that there is a loss in winding up the affairs of an association, and to permit a member to withdraw the full value of the stock, together with estimated profits, leaving the cost and expenses of winding up the affairs of the association, and probable shrinkage of property to be borne by the other members, is an injustice which I think ought to be provided against.

Fifth—Article 17, enumerating the powers of the association, includes therein the power to make notes, warrants, bonds, checks, orders, or other evidence of indebtedness. Our statute does not contemplate that an indebtedness shall be incurred for which notes or bonds may be given. The articles of incorporation do not limit the amount of indebtedness. I do not think it in accord with the policy of the law to authorize building and loan associations to become indebted by issuing notes and bonds and conducting a business involving hazards which may sweep out the earnings of the very men for whose benefit the laws were enacted. The powers of such associations are limited, and incorporators wishing to have the benefit which the law gives, ought to be compelled to confine themselves within the powers granted.

Sixth—Under our law, (section 1609 of the code,) corporations shall have power to establish by-laws and make all rules and regulations necessary for the management of their affairs. This embraces the scope and purpose for which by-laws may be adopted. It may be proper to confer upon the directors power to make by-laws, but the by-laws must confine themselves to rules and regulations necessary for the management of its affairs. The power to make by-laws which shall fix and determine the liability of the members, and determine their rights between themselves and the corporation, is not, in my judgment, given by law. It would be extraordinary for a board of directors to have the power to adopt by-laws and change them at will, which would have the force and effect of changing the contract which the articles of incorporation make between the members and the association. In several places in the articles submitted to me this principle seems to be overlooked. I do not think it ought to be left, as it appears to be in article 19, to the board of directors to determine by by-laws the conditions governing stock.

Unless the articles in question were amended in accordance with the above views, I could not recommend their approval. Yours respectfully,

MILTON REMLEY,
Attorney General.

Game—The law forbids the killing of certain game for traffic even during the "open season." But during such "open period" the law does not prohibit persons from buying quail or selling them. Buying and selling quail during the "closed period" is made unlawful. Buying and selling quail between Nov. 1st and Jan. 1st is not forbidden.

Des Moines, Iowa, December 27, 1899.

Hon. George E. Delavan, Estherville, Iowa:

Dear Sir—Replying to your favor of the 26th inst., in which you desire to be informed whether it is lawful to offer quail for sale now, I will say section 2551 of the code was amended by chapter 66, of the acts of the Twenty-seventh General Assembly. As amended, "all persons are prohibited from shooting or killing any ruffled grouse or pheasant, wild turkey or quail between the 1st day of January and the 1st day of November." It is, therefore, lawful to kill quail during the month of December subject to the other provisions of law, among which are: "No person shall kill any of the birds named, quail included, for traffic, nor shall they kill more than twenty-five on any one day, nor shall they take with any trap, snare or net any of the birds named in section 2552." Section 2554 makes it unlawful for any person, company or corporation to buy or sell any of the birds or animals in this chapter during the period when the killing of such birds or animals is prohibited, except during the first five days of such prohibited period. These sections make it unlawful for any person to kill for traffic, even during the open period, but during such open period the law does not prohibit any person from buying quail or selling them. I do not think that a merchant who buys quail and sells the same during the month of December is violating a statute, but the person who kills the quail for traffic is violating a statute. But buying or selling quail and other birds during what is called the "closed period" or the period when the killing of such birds is prohibited, is made unlawful. However guilty the one who kills the birds for traffic may be, there seems to be no law prohibiting the buying and selling of the same between November 1 and January 1.

Yours respectfully,

MILTON REMLEY,
Attorney General.

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