VOLUME V.

Report of Board of Control.
No. 22. Report of Pharmacy Commissioners.
No. 23. Report of Veterinary Surgeon.
No. 24. Rules of the Twenty-ninth General Assembly.
No. 25. Report of Board of Dental Examiners.
No. 26. Report of Oil Inspections.
No. 27. Report of Dairy Commissioner for 1900.
No. 28. Report of Dairy Commissioner for 1901.

VOLUME VI.

Insurance Report for 1901. Volume I. Fire.
Insurance Report for 1901. Volume II. Life.

VOLUME VII.

Insurance Report for 1902. Volume I. Fire.
Insurance Report for 1902. Volume II. Life.

SECOND BIENNIAL REPORT

OF THE

ATTORNEY-GENERAL

OF THE

STATE OF IOWA.

CHARLES W. MULLAN,
ATTORNEY-GENERAL.

Transmitted to the Governor, January, 1902.

PRINTED BY ORDER OF THE GENERAL ASSEMBLY.

DES MOINES:
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1902.

REPORT.

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

To the Honorable Albert B. Cummins, 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 1900 and 1901.

Schedule "A" is a complete list of all criminal appeals submitted to the supreme court of which disposition has been made.

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

Schedule "C" is a statement of all criminal and civil cases pending on the first day of January, 1902.

Schedule "D" is the official written opinions delivered by this office during the years 1900 and 1901.

CRIMINAL APPEALS.

The policy of this office, that all appeals in criminal cases shall be submitted to the supreme court at as early a day as can be reasonably done, has been followed as strictly as is practicable, and the results have been satisfactory. It is now generally understood by the members of the bar throughout the state that unnecessary delays in the determination of appeals in criminal cases cannot be obtained, and the cases are as a rule promptly prepared and submitted for determination by the supreme court.

Comparatively few of the judgments of the district courts in criminal cases are reversed by the supreme court, and this fact is evidence of the ability and care with which this class of cases is tried in the district courts of the state. The criminal laws of the state are as a rule wisely and faithfully administered, and generally well enforced throughout the state.

During the past year there has been an unusual number of murder cases tried in the district and supreme courts. I am unable to suggest any reason why this condition exists. Not-

withstanding this fact, the criminal statistics of the state compare favorably with those of other states, and our people are, as a rule, law abiding citizens.

CIVIL CASES.

Schedules "B" and "C" furnish information as to the status of the civil cases in which the state is a party, and it is not deemed necessary to refer to all of such cases here in detail.

The most important of this class of cases now pending in the courts are what is known as

THE LAKE BED CASES.

When the original government survey of the lands within the state of Iowa was made, many lakes were meandered and excluded from the public lands claimed by the government, which have since become dry, either by natural or artificial means. The drying up of these lakes has left large tracts of land which were not included in the government survey, and the question as to the ownership of such lands is now involved in several suits pending in the district courts.

It is the claim of the state that it holds the absolute title to all lakes and lake beds within the state under its right of sovereignty, while it is urged on the other hand, by those opposed to the claim made by the state, that such lake beds were, and are, a part of the swamp lands of the state, which passed from the government to the state, and from the state to the county in which the same are situated, and from the counties to individual purchasers.

The case of Rood v. Wallace is now pending in the supreme court of the United States upon a writ of error to the supreme court of the state, the state of Iowa, as intervenor therein, being the plaintiff in error. The case has been argued fully in print, and will be submitted for determination at the October term of the supreme court of the United States.

Another case of like character is pending in the district court of Greene county, and it is hoped that a decision of these cases will determine the rights of the state in the lake bed lands.

COLLATERAL INHERITANCE TAX.

The law imposing a tax upon collateral inheritance has been before the supreme court in several cases for construction, and many questions involved have been determined by that court. Questions are, however, continually arising as to the interpretation and intent of this law which have not been settled by the courts, and which are frequently difficult of determination. The solution of these questions has imposed a large amount of labor upon this office.

The law has in some respects been criticised as imposing a hardship upon persons who succeed to property subject to the collateral inheritance tax. One case where such criticism was made came to this office for determination.

The decedent was a resident of Pennsylvania and owned real estate in Iowa. By the terms of his will he directed that all of his real estate be sold and converted into personalty, and then divided among certain collateral heirs.

Under the laws of Pennsylvania, a will which provides that real estate shall be converted into personalty, draws to the jurisdiction of that state such real estate as personal property of the deceased, although it may be situated in another state; and under the decisions of the courts of that state such real estate becomes liable to pay the collateral inheritance tax imposed by the laws of Pennsylvania.

Under our statute there is no doubt that real estate situated within this state is liable for the collateral inheritance tax imposed by the laws of this state, and the diverse holding of the separate jurisdictions thus makes such property subject to double taxation. This is undoubtedly a hardship upon the persons who succeed to the inheritance of such real estate, but I see no way out of the difficulty, except for the supreme court of Pennsylvania to reverse its decision as to the liability of real estate located elsewhere than within its jurisdiction to pay a collateral inheritance tax within that state. The holding of that court has, by the courts of several states, been criticised as being clearly illogical, and not in harmony with the taxing powers of the several states.

On the whole, however, I believe the collateral inheritance tax law is salutary in its effect, beneficial to the state, and produces a revenue with as little hardship as any system of taxation which has been devised.

CORPORATIONS.

The law requires the attorney-general to examine and approve the articles of incorporation of certain classes of insurance companies, and the amendments thereto, before the same can be approved by the auditor of state and a certificate issued to such

company giving it the right to transact business within the state.

This provision of the statute necessarily also brings to the attorney-general for examination the policies and contracts proposed to be issued by such insurance companies, as well as their by-laws which fix the method of transacting their business. Such examination imposes upon the attorney-general a large amount of labor and responsibility, and there should, in my judgment, be a provision of law requiring insurance companies to pay a reasonable compensation for such labor.

In my opinion all articles of incorporation required by law to be filed with either of the state departments, should be submitted to the attorney-general and to the executive council for approval, and that no grant of corporate rights or of corporate franchise should be made by the state except upon such approval.

Corporations seeking corporate franchises and powers from the state should submit to the attorney-general and to the executive council not only their articles of incorporation, stating in general terms the character of the business of the corporation, but a complete plan of the business sought to be transacted by such corporation, stated in detail, that such officers may determine before a corporate franchise is granted by the state and a certificate issued to such corporation authorizing it to transact business within the state, whether the business which it proposes to transact is a legitimate business, and not opposed to the public policy of the state.

A large portion of the entire business transacted within the state is done by incorporated companies, and many corporations are asking that their articles of incorporation be filed by the secretary of state and a certificate issued permitting them to transact business, which, to say the least, is of doubtful legitimacy. Bond and investment companies, co-operative and home building associations and other companies and associations of like character, have multiplied rapidly throughout the state, and are claiming the right to transact business within the state, practically without the supervision of any of its officers.

While the power to determine whether the business proposed to be transacted by a corporation is legitimate, must necessarily, in some degree at least, be lodged with the secretary of state or other officer to whom the articles of incorporation are presented for filing, the right to reject and refuse to file articles of incorporation of companies seeking to transact a business which is against public policy, should be clearly defined by law and, in my

judgment, lodged with the attorney-general and the executive council.

No corporation desiring to transact a legitimate business within the state can object to its articles of incorporation being examined and passed upon by the attorney-general and the executive council, and such a law would have the effect of preventing the organization of companies for the purpose of transacting a business of doubtful legitimacy.

INSURANCE LAWS.

The insurance laws of the state are inadequate for the government and control of insurance companies doing business therein. They are incongruous, inharmonious and conflicting, and I believe it would be wise for the legislature to repeal every line of the present insurance laws and enact a complete, harmonious and adequate insurance law by which the various kinds of insurance would be classified and the rights and duties of insurance companies clearly defined.

Iowa has been a fruitful field for the organization of insurance companies. Many companies have been organized within the state apparently for the sole benefit of the managers thereof, and without regard to the interests of the members or policy holders. Under the present law it is practically impossible to prevent the organization of such companies.

An insurance department should, in my judgment, be created by the legislature, which should have the supervision and general control of all classes of insurance, including fraternal benefit societies.

BOARD OF LAW EXAMINERS.

The creation of a state board of law examiners by the twenty-eighth general assembly has imposed upon the attorney-general a considerable amount of additional labor. The preliminary work required for the examination of the applicants by the board, necessarily falls upon him as chairman thereof. The operation of the law to the present time has been very satisfactory, and I have no doubt that the ultimate result will be very beneficial to the bar of the state.

In this connection I desire to bear witness to the fidelity and ability of the other members of the board in the work of carrying out the provisions of the law relating to the examination of applicants to the bar. The members were happily selected by

the supreme court, and the work of the board has been most harmonious.

MONEY RECEIVED.

The only money received by me to the present time is the sum of $37.90, which was unexpended balance of the amount required to be deposited with the clerk of the United States supreme court for costs in Campbell v. Waite, which was taken to that court upon a writ of error by the state. The amount was received by me April 17, 1901, and on the same day paid to the state treasurer, whose receipt I hold therefor.

NEEDS OF THE OFFICE.

There is now allowed by law an assistant attorney-general who receives an annual salary of $1,200. In my judgment this sum is insufficient compensation for the labor of a lawyer who is fitted by education and training to do the work of an assistant in this office.

I call attention to what was said by my predecessor in his last biennial report upon the subject, and the comparisons which he makes between the compensation paid the assistant in the attorney-general's office of this state and other states having substantially the same population. The office of assistant attorney-general must be filled by one who has received a liberal education and thorough training in law, and has had experience in the practice, and yet the salary which is fixed by the legislature as compensation for the time and services of a person so equipped, is $1200—less than is paid the clerks in other departments of the state.

A bill was introduced in the senate at the last session of the general assembly raising the salary of the assistant attorney-general to $2,000. The committee on compensation of public officers reported it back for passage amended so as to make the compensation $1,500. In this form it passed the senate, but did not pass the house. The same session of the legislature raised a number of the salaries of the clerks and bookkeepers in the different departments, and many of them are now receiving a salary in excess of that paid the assistant attorney-general.

I find no fault with the legislature for raising the salaries of clerks and bookkeepers in the state departments, as I believe the state should pay its employes liberally; but I think the legislature has fallen into a serious error when it expects to obtain a trained lawyer, competent to perform the work required of an

assistant in the office of the attorney-general, for $1,200 a year, I hope the next legislature will see the necessity of fixing an adequate compensation for this office.

A set of the reports of the supreme court of the United States is greatly needed in this office. Aside from the reports of our own court, the reports of no other court are so frequently consulted, and it is a great drawback and hindrance to the prosecution of the work of the office to be compelled to go or send to the library whenever it is necessary to examine a decision contained in one of these reports.

The idea appears to have grown up in the minds of the people, and particularly of the legislators of the state, that the work of the office of the attorney-general can be successfully performed without a well equipped office. Nearly a hundred briefs and arguments in cases are written in a year, nearly as many opinions prepared upon important questions during the same length of time; a large number of briefs in the courts of the state in civil cases must be prepared and the general routine work of the office transacted. All this is expected of the office with a meager equipment and an insufficient and underpaid office force.

It is a great draft upon the time of the attorney-general and his assistants to be compelled to go to the state library every time it is necessary to examine a case contained in a report of the supreme court of the United States. The cost of a set of these reports is small, and they should be made a part of the equipment of the office.

In conclusion, permit me to express my appreciation of the courtesy extended to me by you and the other officers of the state with whom my official duties have brought me in contact, and to say that our relations have been most pleasant during my term of office. I also acknowledge the faithful and valuable services of my assistant, Mr. Chas. A. Van Vleck, and the other members of my office force. If the work of the department is deserving of any commendation, it is largely due to the efficient manner in which they have discharged their duties.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

SCHEDULE "A."

The following is a list of criminal cases submitted to the supreme court, and also rehearings asked during the years 1900 and 1901, and the final disposition of the cases:

TITLE OF CASE.	COUNTY.	DECISION.	OFFENSE.
State v. Wm. M. Bair, appellee	Audubon	Reversed December 20, 1900	Practicing medicine as an itinerant physician.
State v. Wm. J. Baughman, appellant	Cass	Affirmed April 13, 1900	Incest.
State v. Jane Stinson Beebe, appellant	Linn	Affirmed December 18, 1901	Keeping house of ill-fame.
State v. Theodore Burdock, appellant	Clinton	Reversed October 16, 1900	Murder.
State v. Jesse Bige, appellant	Hamilton	Reversed December 19, 1900	Seduction.
State v. Chas. Bishop, appellant	Mitchell	Affirmed October 20, 1900	Burglary.
State v. Wm. Boone, appellant	Johnson	Affirmed May 23, 1900	Assault with intent to commit murder.
State v. John W. Booth, appellant	Howard	Affirmed December 20, 1901	Perjury.
State v. L. R. Bone, appellant	Cerro Gordo	Reversed October 9, 1901	Murder.
State v. Joseph Burns, appellant	Dubuque	Reversed on rehearing April 10, 1900	Seduction.
State v. Max Bysong, appellant	Fayette	Reversed December 19, 1900	Assault with intent to inflict great bodily injury.
State v. Chas. Carnagy, appellant	Linn	Affirmed May 24, 1900	Rape.
State v. S. E. Carter, appellant	Warren	Reversed October 4, 1900	Obtaining property by false pretense.
State v. James Chapman, appellant	Jones	Affirmed February 6, 1900	Burglary.
State v. Irvin Chauvet, appellant	Sac	Affirmed October 2, 1900	Keeping house of ill-fame.
State v. Simon Clipper and Fred Klocke, appellants	Allamakee	Dismissed January 27, 1900	Arson.
State v. S. D. Clough, appellant	Warren	Affirmed October 3, 1900	Perjury.
State v. John Coontz, appellant	Wayne	Affirmed October 24, 1901	Assault with intent to commit murder.
State v. Joe Cordroy, appellant	Polk	Affirmed October 24, 1900	Robbery.
State v. James Cunningham, appellant	Audubon	Affirmed May 8, 1900	Murder.
State v. Thomas Daily, Jr., appellant	Iowa	Reversed April 10, 1901	Seduction.

State v. A. I. Dexter, appellant	Hancock	Affirmed October 3, 1901	Obtaining property under false pretense.
State v. R. C. Dinnell, Jr., appellant	Polk	Affirmed October 24, 1900	Burglary.
State v. D. W. Doss, appellant	Clark	Petition for rehearing overruled May 17, 1900	Keeping a gambling house.
State v. James H. Easton, appellant	Fayette	Affirmed April 12, 1901	Fraudulent banking.
State v. S. G. Edmonds, appellant	Calhoun	Dismissed October, 1900	Injury and destruction to grain growing on land.
State v. J. H. Engle, appellant	Clay	Reversed May 8, 1900	Embezzlement.
State v. Ted Evans, appellee	Mahaska	Dismissed April 13, 1900	Maintaining a liquor nuisance.
State v. Jacob Geier, appellant	Keokuk	Affirmed October 2, 1900	Murder.
State v. Wm. Glover and Frank Ward, appellants	Des Moines	Affirmed February 5, 1900	Robbery.
State v. John Gray, appellant	Marshall	Reversed October 4, 1901	Murder.
State v. F. W Gregory, appellant	Harding	Reversed April 10, 1900	Maintaining a liquor nuisance.
State v. Gus Grimmell, appellant	Greene	Reversed December 19, 1901	Abortion.
State v. Gustave Hamann, appellant	Lyon	Affirmed April 10, 1901	Seduction.
State v. Chas. Hart and Sol Davis, appellants	Appanoose	Affirmed April 10, 1900	Burglary.
State v. John Hopper, appellant	Polk	Affirmed October 24, 1900	Breaking and entering a building.
State v. B. H. Hough, appellant	Fayette	Dismissed October 11, 1900	Gambling for money.
State v. John Hudson, appellant	Clinton	Petition for rehearing overruled May 11, 1900	Murder.
State v. Jesse Hunt, appellant	Decatur	Affirmed December 21, 1901	Burglary.
State v. Iowa Cent. R'y Co., appel ant	Franklin	Affirmed May term, 1901	Maintaining a nuisance.
State v. Mrs. H. M. Jameson, appellant	Cass	Affirmed October 20, 1900	Larceny. (Two cases of like nature.)
State v. G. C. Jamison and W. C. Crone, appellants	Franklin	Reversed January 25, 1900	Using false weights.
State v. John Johnson, appellee	Polk	Reversed October, 1901	Assault with intent to commit rape.
State v. Chas. Jones, appellant	Audubon	Affirmed December 18, 1901	Larceny from a person.
State v. Earl Kauffman, appellant	Keokuk	Reversed October 4, 1900	Seduction.
State v. C. S. Keenan, appellant	Page	Affirmed May 9, 1900	Libel.
State v. Thomas King, appellant	Jones	Reversed October 1, 1901	Breaking from penitentiary.
State v. William Kissock, appellant	Jasper	Reversed October 2, 1900	Seduction.
State v. Albert Kuba, Appellant	Linn	Affirmed October 11, 1901	Depositing dynamite bomb on doorstep of dwelling house.
State v. Geo. Lee, appellant	Ringgold	Reversed April 10, 1901	Abortion.

SCHEDULE "A"—CONTINUED.

TITLE OF CASE.	COUNTY.	DECISION.	OFFENSE.
State v. Mrs. Harry Lugar, appellant	Wright	Reversed December 21, 1901	Prostitution.
State v. Chester McCullough, appellant	Mitchell	Reversed October 9, 1901	Larceny.
State v. John McGarry, appellant	Dubuque	Reversed October 3, 1900	Murder.
State v. Norman McPherson, appellant	Louisa	Affirmed October 7, 1901	Murder.
State v. C. H. Macy and E. D. Turner, appellants	Lee	Affirmed October 2, 1901	Breaking and entering a building.
State v. L. R. Maxwell, appellee	Polk	Reversed April 10, 1901	Embezzlement.
State v. Antoine Miller, appellant	Linn	Reversed October 1, 1901	Maintaining a liquor nuisance.
State v. Clarence Mills, appellant	Davis	Affirmed February 1, 1900	Murder.
State v. D. Moran, appellant	Decatur	Reversed December 21, 1900	Maintaining a liquor nuisance.
State v. Chas. More, appellant	Taylor	Affirmed December 20, 1901	Adultery.
State v. Tho.s Mulholland, appellant	Clinton	Affirmed December 20, 1901	Seduction.
State v. Chas. H. Newhouse, appellant	Monroe	Affirmed December 20, 1901	Larceny.
State v. W. O'Day, appellant	Howard	Affirmed May 23, 1900	Violating pharmacy law.
State v. Harve Owens, appellant	Davis	Petition for rehearing overruled January 25, 1900	Larceny.
State v. Will Owens and J. L. Perry, appellants	Hardin	Affirmed December 19, 1900	Keeping a gambling house.
State v. Will Owens and M. Evans, appellants	Hardin	Affirmed December 21, 1900	Keeping a gambling house.
State v. John Penny	Emmet	Affirmed December 19, 1900	Murder.
State v. J. L. Perry, appellant	Hardin	Affirmed May 21, 1900	Maintaining a liquor nuisance.
State v. Frank Peterson, appellant	Clinton	Affirmed April 11, 1900	Rape.
State v. E. A. Pinckney, appellant	Winnebago	Affirmed April 12, 1900	Maintaining a liquor nuisance.
State v. Henry J. Prins, appellant	Sioux	Reversed January 22, 1901	Forgery.
State v. John Ryan and Jos. Griffith, appellants	Benton	Affirmed April 12, 1901	Burglary.
State v. C. F. Santee, appellee	Polk	Reversed April 12, 1900	Using gasoline for illuminating b'ld'g.
State v. G. T. Schlenker, appellee	Polk	Reversed December 22, 1900	Selling adulterated milk.

State v. Robert Schwab, appellant	Sac	Affirmed January 15, 1900	Assault with intent to commit murder.
State v. Fred Sears, appellant	Sac	Affirmed October 22, 1901	Catching fish with a seine.
State v. Bruce Shefler, David Rinard and C. C. Hayes, appellants	Linn	Affirmed December 22, 1900	Assault with intent to inflict great bodily injury.
State v. Jack Shields, appellee	Pottawattamie	Reversed October 5, 1900	Forgery.
State v. Frank Sigler, appellant	Fremont	Affirmed October 1, 1901	Murder.
State v. A. F. Smith, appellant	Chickasaw	Affirmed May 29, 1901	Larceny.
State v. M. Snyder, appellant	Poweshiek	Affirmed May 23, 1900	Maintaining a liquor nuisance.
State v. J. M. Spayde, appellant	Webster	Petition for rehearing overruled May 18, 1900	Forgery.
State v. Chas. Spiegel, appellant	Polk	Affirmed October 2, 1900	Arson.
State v. Frederick Stahley, appellant	Louisa	Affirmed February 6, 1900	Incest
State v. Alexander D. Storms, appellant	Louisa	Affirmed April 11, 1901	Murder.
State v. Geo. Sutton, appellant	Shelby	Affirmed December 22, 1900	Perjury.
State v. R. R. Swallum, appellant	Hardin	Reversed April 12, 1900	Maintaining a liquor nuisance
State v. August Swanson, appellant	Winnebago	Dismissed January 22, 1900	Maintaining a liquor nuisance.
State v. Clark Todd, appellant	Benton	Affirmed April 11, 1900	Committing a felony.
State v. R. Tripp, appellant	Dallas	Affirmed December 19, 1900	Obtaining a signature to a written instrument by false pretense.
State v. Frank Utterson, appellant	Polk	Affirmed October 24, 1900	Burglary.
State v. Marvin Walters, appellant	Clayton	Affirmed May 21, 1900	Seduction.
State v. E. A. Westbrook, appellant	Mahaska	Affirmed December 18, 1901	Larceny.
State v. Hiram Westbrook, appellant	Mitchell	Affirmed May 23, 1900	Rape.
State v. Alice Williams, appellant	Scott	Affirmed October 23, 1900	Larceny from the person.
State v. G. A. Willimas, appellant	Union	Affirmed December 18, 1901	Murder.
State v. Orris Wolf, Leavitt Wood and Chas. Allum, appellants	Poweshiek	Reversed December 22, 1900	Rape.
State v. A. L. Wood, appellant	Madison	Affirmed December 20, 1900	Perjury.
State v. Archibald, appellant	Harrison	Affirmed December 19, 1900	Murder.
State v. Owen Worthen, appellant	Benton	Affirmed May 8, 1900	Burglary.
State v. David R. Wright, appellant	Appanoose	Reversed May 23, 1900	Murdar.
State v. David R. Wright, appellant	Appanoose	Reversed December 20, 1900	Murder.
State v. Leonard Wycoff, appellant	Shelby	Affirmed October 4, 1900	Seduction.
State v. Joe Zimmerman and Amos House, appellants	Linn	Reversed October 3, 1900	Keeping a gambling resort.

SCHEDULE "B."

The following is a list of criminal cases pending in the supreme court of Iowa on January 1, 1902:

TITLE OF CASE.	APPEALED FROM.	OFFENSE.
State v. American Express Co	Tama	Keeping intoxicating liquors with intent to sell.
State v. Bedison, C. H., et al.	Page	Having intoxicating liquors in possession with intent to sell.
State v. Berger Ellsworth and Wm. Phillips	Mahaska	Robbery.
State v. Booker, Elza	Monroe	Rape.
State v. Boyd, A. J., Jr.	Jefferson	Liquor nuisance.
State v. Comer, Frank	Cass	Rape.
State v. Dunn, Pat.	Marshall	Murder.
State v. Foster, Lucy	Kossuth	Assault with intent to murder.
State v. Garety, John	Audubon	Larceny.
State v. Gathman, Albert	Pottawattamie	Seduction.
State v. Gray, John	Marshall	Murder.
State v. Gregory, J. A.	Pottawattamie	Larceny.
State v. Hammer, M. R.	Jasper	Assault with intent to commit murder.
State v. Hanaphy, Pat.	Jefferson	Selling intoxicating liquors.
State v. Height, Fred	Linn	Rape.
State v. Hogan, John	Winneshiek	Burglary.
State v. Hoot, Jerome W	Black Hawk	Assault with intent to commit murder.
State v. Hossack, Margaret	Warren	Murder.
State v. Irvin, H. C	Madison	Purpose of prostitution and lewdness.
State v. Jay, Martin	Boone	Larceny.
State v. Jamison, G. C., and W. C. Crone	Franklin	Using false weights.
State v. Kuhn, Sarah	Keokuk	Murder by poisoning.
State v. Locke, John	Madison	Burglary.
State v. Maxwell, James	Keokuk	Seduction.
State v. Mungoven, Henry	Wapello	Assault with intent to murder.
State v. Osborne, C. E.	Polk	Robbery.
State v. Phillips, Jack.	Wapello	Murder.
State v. Poulsen, Maggie	Audubon	Keeping a house of ill-fame.
State v. Shendler, William	Johnson	Adultery.
State v. Shumka, Joseph, Jr	Benton	Assault with intent to commit murder.
State v. Snyder, Geo. W	Jefferson	Assault with intent to commit rape.
State v. Soper, Hubbell O.	Washington	Conspiracy.
State v. Steffens, Geo	Scott	Rape.
State v. Wheeler, Isaac	Boone	Rape.
State v. Wright, J. L.	Jasper	Soliciting orders for intoxicating liquors.
State v. Wright, George	Muscatine	Murder.
State v. Zenas, John W.	Muscatine	Perjury.

SCHEDULE "C."

The following is a list of civil cases in which the state was interested, for the years 1900 and 1901, pending in the supreme court of the United States:

Manchester Fire Insurance Company, 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 enforcement 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, from which decision plaintiffs have taken a writ of error to the supreme court of the United States, where the case is still pending.

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 court 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.

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.

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 Healey appeared for the sheriff. The court dlscharged the petitioner. Because of the important question involved and appeal has been taken by the state to the United States circuit court of appeals, where the judgment was affirmed. The state sued out a writ of error to the supreme court of the United States; the cause was dismissed by that court for want of jurisdiction because no federal question was involved.

The following is a list of civil cases in which the state was interested, for the years 1900 and 1901, pending in the supreme court of the state of Iowa:

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

On September 7, 1896, John Lawson, a resident of this state, died, leaving an estate consisting of several tracts of land and considerable personalty, all in this state. On November 11, 1896, there being no heirs at law present and able to take charge of said real estate, L. F. Potter was duly appointed and qualified as administrator of said estate. All of said lands were listed in the office of the clerk of the district court of said county, as subject to the collateral inheritance tax, said real estate being appraised at $11,900, and the personal property at $768.95. On June 4, 1900, appellant herein filed in the office of the clerk of said district court a petition praying an order directing said Potter to pay into the office of the treasurer of the state of Iowa the amount of tax due on said estate as provided by law. On June 29, 1900, said Potter filed an answer to said petition, averring, among other things, that said property was not subject to said collateral inheritance tax. On June 29, 1900, the cause was fully tried and submitted to the court, who found and determined that said Lawson departed this life after the enactment of the original collateral inheritance law of this state and before the enactment of the first amendment thereto, and that said appraisement by the collateral inheritance tax appraisers was made since the enactment of the first amendment to the collateral inheritance tax law, and thereupon dismissed appellant's petition and denied his application for an order upon said administrator to pay the tax into the office of the treasurer of state. From said order and judgment of the court, appellant appealed to the supreme court of this state, where the case is now pending.

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 $362.25 as costs on 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 on the Relation of Milton Remley, Attorney-General, v. Byron F. Meek, et al.

An action in equity to abate a nuisance caused 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. The judgment of the lower court was affirmed October 24, 1900. A petition on rehearing was filed January 16, 1901, and overruled.

State of Iowa v. S. F. Prouty, Judge.

This is a *certiorari* proceeding, brought in the supreme court of Iowa to test the validity of an order made by defendant discharging one Mark Chiesa from the charge of contempt in violating an injunction restraining him from selling intoxicating liquors. The proceedings in the lower court were annulled, December 20, 1900, and the trial court was directed to take such further action in the contempt proceedings as were in harmony with the opinion of the supreme court.

The following is a list of civil cases in which the state was interested, for the years 1900 and 1901, pending in the district courts of the state of Iowa:

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.

John Y. Ferry 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 re-enactment 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 a decree was entered for plaintiff as prayed. Defendants appealed to the supreme court, where the judgment of the lower court was reversed January 22, 1900. Under the holding of the supreme court, the case was sent back for the purpose of hearing evidence as to whether the personal property had been distributed. The supreme court left the question open as to whether

the real estate could be subjected to a tax after the adoption of chapter 27 of the acts of the Twenty-seventh General Assembly. On November 29, 1900, the district judge filed his opinion, wherein he held,

First—That the personal property inventoried and appraised was by the executor sold and the proceeds derived from such sales were by him applied on the payment of claims and expenses of administration, and the same is, therefore, not subject to collateral inheritance tax.

Second—That the devisees took possession of their respective parcels of real estate more than one year prior to the taking effect of chapter 37 of the acts of the Twenty-seventh General Assembly, and that the title to the said real estate vested in said devisees at the time of the taking possession of the same, and that the said real estate is not subject to payment of said collateral inheritance tax.

Third—It is held that the money legacies provided for in the will are subject to and liable for the payment of said collateral inheritance tax.

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

Decedent, John M. Day, died in Iowa intestate in September, 1896, seised of certain personal and real property located in Polk county, Iowa. A certain part of his property was bequeathed to collateral heirs. Settlement has been made with the treasurer of state for collateral inheritance tax, in so far as it effects personal property. The appraisors fixed the amount of real property subject to taxation at $22,942.30. On the 24th day of April, 1900, the treasurer of state filed a motion praying the court to fix a tax upon appraisement, to be paid by said estate as collateral inheritance tax. This defendant became owner of said real estate between the 6th day of March, 1899, and the 13th day of June, 1899, and on the 26th day of April, 1900, filed a resistance to said motion. The district court held that the amendatory act of the Twenty-seventh General Assembly provided a means for the enforcement of the tax, that it became a lien upon this real estate. The defendant became the owner of this land after the amendatory act had been passed, and she was, therefore, charged with notice to the effect that this statute created a lien upon this property, and was further charged with the fact that the legislature had provided a remedy for its enforcement.

William L. Ogden v. Leslie M. Shaw, Governor of the 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 overflow land to the commissioner of the general land office at Washington, 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 has been fully submitted and is in the hands of the court for its decision.

Walter Shallenberger v. The Iowa State Board of Medical Examiners, et al.

An application to the district court of the state of Iowa, in and for Polk county for a writ of *certiorari*, requiring defendants to certify to said court the records of their proceedings, wherein plaintiff had made an application

for examination to practice medicine in the state of Iowa, and had been refused such examination. Said writ was allowed on the 1st day of May, 1901. The secretary of said board made a return to said writ, that said board had no record of any kind or character in its office, relative to the application for examination by plaintiff, other than the copies of certain exhibits attached to plaintiff's petition. The application was thereafter dismissed by plaintiff at his costs.

State of Iowa v. Equitable Loan Company of Ottumwa, Iowa.

A petition in equity was filed in the district court in Wapello county against defendant company, praying the appointment of a receiver, and that he proceed to recover the assets of said company and dispose of the same under the order of the court, and finally liquidate and wind up the affairs and business of said company in the interest of the members and the stockholders thereof. The case was subsequently dismissed under an arrangement for voluntary liquidation.

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 affair 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 the association, and that a restraining order be granted, prohibiting any of said parties herein named, or anyone having the assets of the 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 and 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.

State of Iowa v. Christopher T. Jones, et al.

This is an action brought in the district court of Polk county, to recover moneys alleged to have been collected as fees by defendant as clerk of the supreme court, and not accounted for or paid to the treasurer of state, as required by law. An answer has been filed by defendant, and the case is still pending in the district court.

State of Iowa on the Relation of Milton Remley, Attorney-General, v. The Muscatine North and South Railroad Company.

On July 11, 1900, the board of railroad commissioners of this state made an order requiring the company to put in an undergrade crossing within ninety days from date of its order. The company did not comply with this order, and upon a request from the board this action was brought, as provided by law, to compel obedience to its order. A petition was filed in the Muscatine district court in October, 1899, to compel the company to comply with this order. After the issues were made up and the case submitted to the court, and after full deliberation thereon, the judge ordered that the company should construct an undergrade crossing, as ordered by the board of railroad commissioners of this state, and in the manner and at the point as ordered by the board, on or before the first day of July, 1901.

State of Iowa 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 insane, 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.

State of Iowa on Relation of Milton Remley, Attorney-General, v. W. A. Smith.

A petition in equity was filed in the district court for the state of Iowa, in and for Pottawattamie county, praying an injunction to restrain defendant from draining Noble lake in said county. Noble lake is a permanent body of water and belongs to the state, and constitutes one of the principal waters of the state. An injunction was granted as prayed, and the case is still pending in the district court.

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 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.

The following is a list of the criminal cases in which the state is interested, for the years 1900 and 1901, pending in the supreme court of the United States:

State of Iowa v. James H. Easton.

Defendant was indicted by the grand jury of Winneshiek county, under section 1885 of the code, for fraudulent banking.

He was tried upon the indictment, and a verdict of guilty was returned by the jury. Upon this verdict the judge imposed a sentence of imprisonment for five years in the penitentiary. The defendant appealed from the judgment of the district court to the supreme court of Iowa, and the judgment of the court below was affirmed on the 12th day of April, 1901.

On the 16th day of April, 1901, the defendant sued out a writ of error from the supreme court of the United States to the supreme court of Iowa, on the ground that a federal question was involved in the case, viz:

That the defendant, at the time of the receiving of the deposit charged in the indictment, was president of a national bank authorized to do business at Decorah, Iowa, under the laws of the United States; that the provisions of sections 1884 and 1885 of the code of Iowa are not applicable to national banks, and that an officer of such bank cannot be convicted thereunder for receiving a deposit in an insolvent bank; that the state court has no jurisdiction to inquire into, hear, try or determine the question of the authority of the defendant to receive a deposit of money in such bank.

The case is now pending in the supreme court of the United States.

The following is a list of the civil cases in which the state is interested, for the years 1900 and 1901, pending in the district court of the United States in and for the Southern district of the state of Iowa:

Charles Spiegel, alias Charles Cohn, v. N. N. Jones, Warden of the State Penitentiary at Fort Madison, Iowa.

This was a petition for a writ of habeas corpus, on the ground that the information upon which the petitioner was extradited from Canada, charged the common law crime of arson, while the indictment, under which the petitioner was convicted and sentenced to serve a term in the penitentiary, charged the burning of a store building, which is made an indictable offense by the statutes of this state, but which is not included in the crime of arson as known to the common law. The court holds that the offense charged in the information is the same as charged in the indictment, and thereupon refuse to grant the writ.

SCHEDULE "D."

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

OLEOMARGARINE—The law prohibits anyone having in his possession a substitute for butter colored yellow, although it may be intended for the use of himself and his family.

DES MOINES, IOWA, January 9, 1900.

Hon. B. P. Norton, Dairy Commissioner, Des Moines:

DEAR SIR—Yours of the 6th inst. at hand, asking my opinion upon whether "the dairy laws forbidding anyone to have in possession oleomargarine contrary to the provisions of chapter 13, title 12 of the Code, will be violated by a private individual having in his possession for the use of his own family oleomargarine of a yellow color."

In reply to this I will say that the last clause of section 2516 is as follows: "No one shall manufacture, have in his possession, offer to sell or sell, solicit or take orders for delivery, ship, * * * any imitation butter or cheese, except in the manner and subject to the regulations in this chapter provided."

The next section permits the manufacture, having in possession, selling and offering for sale, etc., a substitute for butter and cheese not having a yellow color, or colored in imitation of butter or cheese, if each tub, firkin, etc., shall have branded, stamped or marked on the side or top thereof in the English language in a durable manner the words, "substitute for butter." It also permits such substitute for butter to be kept, used or served as food, or for cooking in hotels, restaurants, etc., provided the proprietor or person in charge of such place shall post a card opposite each table where the guests are served, on which shall be printed: "Substitute for butter used here."

Section 2518 prohibits the coloring of any substitute for butter so as to cause it to resemble true dairy products. Section 2519 prohibits anyone having in his possession any substitute for butter unless the same is duly marked or branded as required in this chapter, "except for the actual consumption of himself and family. The prohibition contained in section 2516 above quoted is general. No one "shall have in his possession, except in the manner and subject to the regulations in this chapter provided."

I have called attention to the remaining clauses of the law to show that there is no exception in favor of having in possession any yellow substitute for butter. Any substitute for butter which may be manufactured may be kept by one for actual consumption for himself and family without being branded or marked as required, but this exception does not apply to yellow oleomargarine or substitute for butter.

It is evident that the entire provision with reference to the sale of oleomargarine or a substitute for butter is intended to prevent fraud and deceit being practiced upon the public, or any part thereof. It may be said that one knowingly having in his possession for the use of himself and family a yellow substitute for butter, is not deceived thereby, and that a construction of law which would prohibit anyone having in his possession for his own use a yellow substitute for butter, unnecessarily interferes with private rights. Such an argument, however, should be addressed to the general assembly. It is competent for the general assembly to prohibit anyone from having in his possession any yellow substitute for butter, even for his own use, if, in the judgment of the legislature, such a prohibition is necessary, or a proper provision to prevent the evasion of a law, or its violation, which law is wisely made to prevent fraud and deceit being practiced upon the public.

I am of the opinion that the law prohibits anyone having in his possession a substitute for butter colored yellow, although it may be intended for the use of himself and his family. Yours truly,

MILTON REMLEY,
Attorney-General.

WITHHOLDING PROPERTY FROM ASSESSMENT—Penalty—In construing section 1374 of the code, it is held to mean that if the delinquent taxpayer pays the amount of tax which would have been assessed against him had he listed his property, together with 6 per cent. interest thereon, he is discharged from further liability. The treasurer is not authorized to conclude in his own mind, with or without evidence, that there had been a fraudulent withholding of property from assessment, and demand a penalty.

DES MOINES, IOWA, January 9, 1900.

D. W. Hamilton, Esq., Sigourney, Iowa:

DEAR SIR—Yours of the 5th inst. came to hand yesterday. In reply I will say that a careful examination of section 1874 requires "that the treasurer should demand the amount the property should have been taxed in each year the same was withheld, etc., together with 6 per cent. interest thereon from the time the tax would have become due and payable had such property been listed and assessed."

In other words, when property is discovered which has not been listed, it is the duty of the treasurer to demand the amount which would have been paid as taxes had the property been listed, together with 6 per cent. interest thereon. There is nothing up to this point in the section which implies that there is any penalty beyond the interest, and suppose the delinquent taxpayer pays the amount that is demanded within thirty days, could an action be maintained against him? I think not. There is nothing which suggests to my mind that the treasurer may have a hearing to determine whether the tax has been fraudulently withheld or not; nor would it be in accord with the spirit of our law to permit him to determine it in any star chamber proceed-

ings of which the other party had no notice or an opportunity to be heard.

I think the statute fairly means that if the delinquent taxpayer pays the amount of tax which would have been assessed against him had he listed his property, together with 6 per cent. interest thereon, he is discharged from further liability.

Referring to the latter part of said section, a failure to pay within thirty days, with all accrued interest (no penalty stated), gives a right of action to the treasurer. Until such failure has been made, no right of action exists.

We come now to the last clause: "And when such property has been fraudulently withheld from assessment, there shall be added to the sum sound to be due a penalty of 50 per cent. upon the amount, which shall be included in the judgment." This evidently refers to the trial of the cause and the entry of the judgment. If the evidence on the trial shows the court that the property has been fraudulently withheld, then it is authorized to add a penalty of 50 per cent. which shall be included in the judgment. I do not think a fair construction of this section would authorize the treasurer to conclude in his own mind, with evidence or without evidence, that there had been a fraudulent withholding of property from assessment, and demand a penalty.

There are cases where a penalty is imposed on account of failing to pay a fixed sum, or an ascertained sum, at a given time. For instance, delinquent taxes bear a usurious rate of interest as a penalty. But I know of no case where any officer of the state or county may assess up a penalty for a fraudulent or an illegal act. It is one of the fundamental doctrines of our system of government that there must be a notice before a hearing, and nothing can be determined except upon a hearing after due notice. I am very clear that the legislature never intended to give to the treasurer such extraordinary powers without providing for a notice and a hearing to the person against whom the penalty is assessed.

Yours truly,

MILTON REMLEY,
Attorney General.

GAME WARDEN—His duties as such do not require him to prosecute for the killing of deer, when owned by a private person. The wrong is a private one and not a public one.

DES MOINES, IOWA, January 26, 1900.

Hon. Geo. E. Delavan, Estherville, Iowa:

DEAR SIR—Your favor of the 24th inst., enclosing a letter from J. O. Walton, duly at hand. You ask whether you have jurisdiction of the matter. The matter referred to is concerning two deer which escaped from their owner and strayed away and were shot and killed by a man in violation of chapter 65, acts of the Twenty-seventh general assembly.

There was unquestionably, under the facts stated, a violation of the law. It is not made your especial duty to prosecute where private rights have been trespassed and injury done to private persons, although the act constitutes a violation of the criminal law. You as a citizen of the state have the right to file an information, and to begin prosecution for the violation of any law of the state. The owner of the deer in question is the one especially

interested. He can file an information, and the county attorney of the proper county can take charge of the prosecution of such a case, but I do not think you would be justified as fish and game warden to spend your time and incur expenses in instituting a criminal prosecution when the sole party injured does not take enough interest in it to begin the prosecution himself.

The public at large had no interest in the deer killed. Game which the state is interested in preserving was not diminished by the killing of these deer. The owner is the only one who suffers loss directly, and while the peace officers and officials of the county could properly take cognizance of the violation of the criminal law, yet I would not advise you that it is your duty to do so in a case of this kind.

I return you Mr. Walton's letter.

Yours truly,

MILTON REMLEY,
Attorney-General.

REFORMATORY FOR WOMEN AND GIRLS—The legislature may properly provide for the transfer of girls at Mitchellville to the reformatory proposed to be established at Anamosa, but they cannot be legally imprisoned in the penal division of such reformatory.

DES MOINES, IOWA, January 29, 1900.

Hon. Chas. W. Stewart, House of Representatives:

DEAR SIR—Yours of the 28th inst., submitting to me a draft of a bill for the establishment of a reformatory for women and girls, duly received. You request my opinion concerning the bill, and especially with reference to the powers therein given to the board of control to transfer the inmates of the Industrial School for Girls, at Mitchellville, to such reformatory.

With reference to the bill itself, I will say that it seems to be drawn with care, and contains no provisions of doubtful meaning. I have noted in pencil a few suggestions. It occurs to me that section 6 might well have another provision added thereto, in about this form: "But if any woman or girl over sixteen years of age shall be committed to the reformatory department of said institution under a sentence of a court after being duly convicted of crime, and shall thereafter prove intractable or detrimental to the best interest of said reformatory department, then the board of control may order her removal and confinement in the penal department of said reformatory."

The Industrial School for Girls, as now constituted; is educational and reformatory in its nature, and is not a penal institution. The reformatory division of the reformatory proposed to be established at Anamosa by this bill is of the same general character. On the other hand, the penal division of said reformatory is imprisonment in the sense in which the term is used in section 11, article 1 of the constitution. The provisions of the existing law for the commitment of girls to the industrial school at Mitchellville, is the method adopted by law to designate those girls who shall be subject to the educational and reformatory training adopted in the industrial school at

Mitchellville. Comparatively few, I apprehend, have ever been indicted or found guilty of any crime. That being true, I do not think it is competent for the legislature to order the imprisonment in the penal division of such reformatory of anyone who has not been indicted and convicted, and if such imprisonment is desirable, it would be necessary to comply with the provisions of section 2710 of the code.

In regard to the transfer from the industrial school at Mitchellville of such girls as are confined therein to the reformatory division of the reformatory proposed to be established, I think there are no constitutional obstacles in the way. It was said *in re Hartwell*, 1 Lowell, 536: "Another of the incidental powers conferred on the keeper of jail, and implied in the sentence, is that if the jail be lawfully removed he shall remove the prisoners with it. The sentence need not recite that the keeper is to hold the prisoner in the jail at Lenox unless and until there shall be some lawful occasion or necessity to remove him therefrom. All this is implied. The court expressly holds the state has a right to regulate the custody of prisoners within the state, including their removal from one jail to another when necessary, and of this necessity, the state, acting by its legislature, is the sole judge."

This is with reference to prisoners sentenced to a penal institution within the state. If the legislature has such power in regard to prisoners convicted and sentenced for their crimes, by so much more has the legislature the power to direct in what educational or reformatory institutions these children or youths shall be placed, whom, for their own no less than the protection of society, it is necessary to provide enforced attendance upon instruction for their education and reformation. It is within the power of the state, unless prohibited by the constitution, to take full and absolute control of the care and education of all the children of the state. This includes the power to take custody, care and control of children of a class whose environments and tendencies are such that they would become criminals and a charge upon society.

I have no question that it is in the power of the legislature to say where the education or reformation of such children shall be conducted, and in what place they shall be kept, or to remove them from one institution to another, according as the legislature may determine to be for the best interest of such children, and of the state at large. I think the legislature may properly provide for the transfer of the girls at Mitchellville to the reformatory proposed to be established at Anamosa, but they cannot be legally imprisoned in the penal division of such reformatory.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

LIFE INSURANCE ASSOCIATIONS—Such associations, having deposited funds with the auditor of state, under section 1791 of the code, have no authority to withdraw such securities for the purpose of placing them as collateral security to indemnify a surety company which becomes liable upon an appeal bond of such associations.

DES MOINES, IOWA, February 5, 1900.

Hon. F. F. Merriam, Auditor of State:

DEAR SIR—In reply to your request of January 9th, for my opinion, I will say that a life insurance association doing business under chapters 7 and 8 of title 9 of the code, which has deposited funds with the auditor of state under section 1791 of the code, would, in my judgment, have no authority to withdraw such securities for the purpose of placing them as collateral security to indemnify a surety company which becomes liable upon an appeal bond of such life association. Section 1791 provides: "An association accumulating any money to be held in trust for the purpose of the fulfillment of its policy or certificate, contract or otherwise, shall invest such accumulations in securities provided in section 1806, and deposit the same with the auditor of state, as therein provided."

It will be conclusively presumed that securities deposited with the auditor, under the provisions of said section, have some trust attached thereto, and such securities can only be withdrawn for the purpose of being used in accordance with the articles of incorporation or the contract made between the company and its policy holders. The use of such securities as collateral security to indemnify those signing an appeal bond, is not such a use as is authorized by the articles of incorporation or the law. Hence, I do not think such securities can be withdrawn for the purpose stated.

Your favor also enclosed a requisition, which seems to be in due form, and shows that the funds to be withdrawn are to be used for the purpose for which they were originally deposited. The withdrawal of funds deposited with the auditor is authorized by section 1792, upon satisfactory proof in writing that they are to be used for the purpose for which they were originally deposited, and if the affidavits of the officers of the company are uncontradicted and unimpeached, this requisition not being for the purpose of securing collateral security, but being regular in form, I see no reason why it should not be honored. Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSURANCE COMPANIES — PHYSICIANS GUARANTEE COMPANY, FT. WAYNE, IND.—It has no elements of an insurance company. It should not be admitted to do business in this state as an insurance company.

February 6, 1900.

Hon. Frank F. Merriam, Des Moines, Iowa:

DEAR SIR—Your favor of the 2nd inst. at hand enclosing copies of the contract, application, etc., of the Physician's Guarantee company of Fort Wayne, Indiana, duly at hand, upon which you ask my opinion as to whether

or not said company is an insurance company and should be compelled to comply with the laws of the state. There can be no manner of doubt about it. It has not the first element of an insurance company. The character of the business is not one of insurance. The statute of Iowa provides for no insurance of that kind, or anything like it. I have no hesitation in saying that the company should not be admitted to do business in this state as an insurance company.

If it is admitted to do business in this state as a corporation, it can only do so by complying with the law relating to foreign incorporations.

I do not wish, however, to be understood as saying that a company engaged in the business that that company is engaged in, as shown by its advertisements and literature, can properly do business in the state of Iowa by filing its articles of incorporation with the secretary of state, and paying the fee required by statute of foreign incorporations. I have grave doubts in regard to the business proposed to be done by said corporation, being a legitimate business. It strikes me at first blush that the contracts and business proposed to be done by the corporation is against public policy. The law wisely holds physicians and professional men to an accountability for the manner in which they discharge their duties. Statutes are made so as to provide that none but men skilled in the profession, may practice medicine in the state. The fact that for malpractice, liability in a civil action is enforced, fastens upon the practitioner a responsibility which is both wise and salutary. I suggest that any organization which seeks to relieve the physicians from the consequences of his insufficiency or carelessness, and secures to him immunity from damages, is contrary to public policy as expressed by the statutes of Iowa and by recognized public policy independent of statute.

I do not give this as a definite opinion, but would prefer leaving the question until it is presented, if it shall be at the proper time, upon the secretary of state. Yours truly,

MILTON REMLEY,
Attorney-General.

GAME—A person having live quail in his possession, shipped into this state from another state for the purpose of propagation, is not liable criminally because of such possession.

February 7, 1900.

Hon. Geo. E. Delevan, Estherville, Iowa:

DEAR SIR—Your favor of the 6th inst. at hand, asking my opinion in regard to whether it is unlawful for a man to have live quail which he has shipped into the state from Kansas for the purpose of propagation, in his possession, while waiting for proper weather to turn them loose, "during the period when the killing of such birds is prohibited." The letter which you enclose intimates that parties who have been prosecuted for violating the game law are likely to take advantage of the circumstances to cause the arrest of the person who has shipped in live quail from Kansas.

In my opinion, section 2554, which prohibits any person "having in possession any of the birds or animals named in this chapter, during the period when the killing of such birds or animals is prohibited, except during the first five days of prohibited period," was never intended, and cannot be fairly construed to cover such a case as that to which you refer. The game law was intended to protect the game of the state, and by no fair construction of the statute can it be used or tortured into rendering an act for the increase and propagation of game in the state criminal.

If the construction of said section would permit the prosecution of the person in question, then the owner of every park in which the birds and animals named in the statute were kept, or every person who kept on his premises for the purpose of propagation, any of the animals or birds named in said section, would likewise be guilty of violating the game law. Such a construction is an absurdity upon the face of it. I think you are justified in saying to your correspondent to go ahead with his laudable enterprise and trust to the good sense of any court or jury to thwart the malicious designs of all persons whomsoever. Yours truly,

MILTON REMLEY,
Attorney-General.

REPORT OF STATE GEOLOGIST—It was not the intention of the legislature that such report should be included and bound in the Iowa Documents.

DES MOINES, IOWA, February 12, 1900.

Hon. A. H. Davison, Secretary Executive Council:

DEAR SIR—Yours of the 10th inst. at hand, in which you say:

"The executive council request your opinion in writing as to whether the annual report of the state geologist, including the survey reports, is, under the statutes of Iowa, one of the reports to be bound in the set of documents provided for in paragraph 2, of section 126 of the code."

In regard to this I will say that section 126 provides: "The secretary of state shall make distribution of the various public documents turned over to him, as follows. Paragraph 2 providing: 'One thousand copies shall be stitched and bound in half-sheep, containing a copy of each report, to be arranged under the direction of the secretary of state.'" These reports thus bound are commonly called the Iowa Documents.

It is evident that the secretary of state is not required to have bound in the Iowa Documents any reports except those which have been, or under the law are required to be, turned over to him. If we turn to section 2501, providing for the publication of the annual reports of the geological survey (section 2501 and other sections), we find no provision requiring any of such reports to be turned over to the secretary of state, but section 2501 has something of the idea that the board of geological survey shall have control of the copies not required for distribution. But take another view: the general impression derived from reading the statutes with reference to the reports is, that the reports referred to in paragraph 2 of section 126 are only those specially named in the preceding sections. The reports of the state geologist relate to matters other and distinct entirely from those

referred to in the reports of state officers and state institutions. Prior to the adoption of the code it was not usual or customary to incorporate the report of the state geologist in the Iowa Documents. Chapter 82 of the Twenty-second General Assembly specifically named the reports that should be embraced therein, and the report of the state geologist was not included among the number. The report of the geological survey is more of a scientific and educational report along a specific line, and so far as I know, is never classed with the reports showing the management of the state affairs and of the state institutions.

I do not think the legislature intended such reports to be included in the Iowa Documents; nor is there anything in the language of section 126 which expressly requires it. Yours truly,

MILTON REMLEY,
Attorney-General.

BUILDING AND LOAN ASSOCIATIONS AND INSURANCE COMPANIES. 1.—When articles of incorporation of a building and loan association are once approved by the executive council, the law makes no provision for the recall of such approval. Remedies are suggested by way of amendments to the law.

2.—Articles of incorporation of insurance companies should be submitted to the attorney-general for his approval, before a certificate to do business is issued by the auditor of state. They should be required to submit the form of their policies to the auditor for approval. Remedies by way of amendments to the law suggested.

3.—Additional powers should be given to the attorney-general respecting building and loan associations and insurance companies doing business illegally.

DES MOINES, Iowa, Feb. 17, 1900.

To the Senate of the State of Iowa:

GENTLEMEN—The resolution adopted by the Senate on the 7th inst. requested my opinion upon four questions, as follows:

1. "Is the present law sufficiently comprehensive that the executive council or the officers charged with the approval of articles of incorporation can prevent the incorporation of, or the transaction of business by building and loan associations or insurance companies in contravention of law or public policy."
2. "Are there building and loan associations or insurance companies now doing business in Iowa in contravention of law or public policy? If this is answered in the affirmative, in what manner do such companies violate the law?"

3. "Has the attorney-general exercised the powers given such officer respecting illegal corporations; is it necessary to give further and additional powers to the attorney-general, and if so, what powers, to enable such officer to prevent the conduct of an illegal business by the said associations?"
4. "What amendments, if any, are necessary in our laws to insure a conservative and prudent control of such corporations?"

Two classes of incorporations are involved. To avoid repetition and undue prolixity I will present my views, *first*, in regard to building and loan associations, and, *second*, in regard to insurance companies, endeavoring to present the same under the three heads involved in the first, second, and fourth questions:

First.—As to the present law.
Second.—The evils, if any, existing.
Third.—The remedy therefor.
This will be done without repetition of the questions propounded.

The questions concerning both kinds of corporations involve the inquiry, what is public policy? It is difficult to give a comprehensive and exact definition of public policy which can be applied to all cases. I shall not attempt it. However much courts and lawyers may differ as to what is public policy, I think all will agree to the following propositions:

First.—Whatever is contrary to the spirit of the law, and defeats the end and purpose for which the law was enacted, is contrary to public policy.

Second.—Whatever is morally wrong in its tendency, deceptive and fraudulent in its practices, and produces results injurious to the welfare of any considerable number of the general public, is contrary to public policy.

Third.—That it is the policy of the state of Iowa, as shown by its laws and the history of legislation for more than half a century, to encourage the citizen to acquire a home, to care for the family while living, and make provisions as far as possible for his dependent ones after he is dead.

Fourth.—That the purpose of the law with reference to building and loan and insurance companies (both artificial, intangible beings born of the legislative will), was in furtherance of the general policy above stated, and to afford reasonable safeguards against fraud and deception, imposition upon, and the despoiling of, the very classes of persons whom it is the policy of the law to encourage and protect.

Such, I understand, to be the policy of this state, and the sense in which the term "public policy" was used in the inquiries of your honorable body.

I.

IN REGARD TO BUILDING AND LOAN ASSOCIATIONS.

The present law, section 1894 of the code, requires the executive council to examine the articles of incorporation and by-laws of building and loan associations, and to determine whether they are in conformity to the law, and are based upon a plan equitable in all respects to their members. If so, such articles shall be approved by the executive council. The clause of said section authorizing the executive council to pass upon the plan of building and loan associations, and to determine whether they are equitable in

all respects to their members, is quite broad and comprehensive, and ordinarily would be sufficient to prevent the approval of any articles which would do an injustice to any of their members. The general power is, however, limited by other provisions of law recognizing the right of building and loan associations to issue certain kinds of stock, or to assess fines, charge usurious interest, etc. It is not in the power of the executive council to say that a class of business which the legislature seems to recognize as legitimate and equitable, is inequitable.

To illustrate: Section 1898 seems to recognize guarantee stock. In my judgment there is no place for guarantee stock in a building and loan corporation. In this the executive council have concurred, but have felt themselves, because of the statutory recognition, powerless to prevent the issue of such stock.

The law makes no provision, when the articles of incorporation of a building and loan association are once approved by the council, for the recall of such approval in case it be found to be transacting a business which may be strictly in accord with the articles of incorporation, yet may be a practical fraud upon the public, or all who invest money in such corporation. It is true section 1917 authorizes the revocation of the certificates by the auditor in case the association shall violate any of the provisions of law, but if the executive council approves the articles of incorporation, and acts are done which are not inconsistent with such articles, and no provision of law can be found expressly prohibiting such acts, it is questionable whether the auditor's authority reaches the evil.

The present law was enacted at a time when the building and loan fever was at the highest, when comparatively few men in the state had opportunity to know of the practical workings of building and loan associations. It was an excellent law under the circumstances; probably the best that could have been enacted. But experience has taught the people as if "with thorns of the wilderness and briers." At the present time I do not think the law is sufficiently comprehensive to prevent transactions which are contrary to the spirit of the law and public policy; specific defects will be referred to hereafter.

AS TO THE EVILS.

The evils are many and grievous. The many complaints received at this office from all parts of the state of the wrongs, the disappointments, the sorrows occasioned by delusory confidence in the promises of building and loan associations, is a strong argument at least that there is something radically wrong with the system. The complaints come from borrowers largely, and from non-borrowing members who wish to withdraw their stock. It is no uncommon thing to find a party paying a given sum monthly for four or five years on his stock who wishes to withdraw from the association in order to use his accumulated earnings, but is unable to realize from the association as much money as he has paid thereto, and this, too, in spite of the assurance that the association has been declaring dividends of 10 per cent, 12 per cent, or 14 per cent. In numerous cases, borrowers make monthly payments of interest and premium at the rate of 12 per cent or 14 per cent, and payments also upon the stock, which may be continued for four or five years, at the end of which time, if they wish to

pay up their loan, they are informed that the sum required to pay off the mortgage is actually more than the money borrowed. With some associations a system of fines and forfeitures has been adopted which bears heavily upon the unfortunates who are unable to continue the payments upon their stock. I have yet to find a case where the promises and representations made at the time the stock was taken have ever been fulfilled; nor have I found a borrower who felt that he obtained money to build a home at a cheap rate of interest, and that his connection with a building and loan association had been otherwise than disastrous. I do not say that there are no such cases. I am well satisfied that many domestic local associations, where the expenses have been kept down to the minimum, have produced good results, and many such associations have been beneficial to the community in which they do business. I have heard very few complaints of the domestic local associations.

The theory upon which building and loan associations are justified is, first, it encourages the man of small means to make a saving from a limited income; second, by furnishing money at reasonable rates to those who wish to build homes, they are enabled to pay for their homes in small monthly payments from year to year. The primitive idea of building and loan associations was that each member who made monthly deposits would in time become a borrower. If all became borrowers, and ultimately paid substantially the same rate of interest, it mattered little what that rate of interest might be, for all shared substantially equally in the benefits and in the burdens of such a system. It was a means of accumulating capital from small savings to build homes for the members as fast as the accumulations would permit. A very different condition arises, however, when stock is purchased in large amounts by capitalists—paid up stock—which, many times, receives dividends more than double the legal rate of interest. I am satisfied that not over 40 per cent of the stock of building and loan associations of the state is borrowed upon. Suppose it were 50 per cent. Taking up a report of an association at random, one of the strongest associations in Iowa, which has been in operation ten years, in reply to the question: "What has been the average annual dividend declared by your association since its date of organization, including the term covered by this report?" I find this answer: "Thirteen and one-fifth per cent."

The only source of income of a building and loan association is the premiums and interest paid by the borrowers, and the lapses, fines or forfeitures from the unfortunate members who fall by the way. Assuming that one-half of the stock belonged to the borrowers and the other half to the investors, many of whom had fully paid up stock, in order to make a dividend of thirteen and one-fifth per cent on the entire stock, the half of the stockholders who borrowed must have paid enough as interest and premiums to have amounted to twenty-six and two-fifths per cent on the money which they had borrowed, less, however, what was gained by the association by forfeitures and fines. It requires no words from me to show that such a ruinous rate of interest is crushing the very men the law was intended to benefit and protect.

It will be said that the dividends on the stock will offset the high rate of interest paid. From the nature of the case this cannot be true. "A" subscribes for $1,000 of stock in a building and loan association, and bor

rows $1,000 thereon. "B" subscribes for $1,000 of stock and pays therefor $1,000 in cash. "A" pays say 6 per cent premiums and 8 per cent interest, payable monthly. Such interest amounts to more than 14 per cent payable annually. At the end of the year "A" has paid into the association $140 as interest and premiums. To offset this he gets a dividend on his monthly payments which go to the loan fund for the average time. On the usual plan of payment he has paid in during the first year $72. $60 of which goes to the loan fund. He obtains then dividends on $60 for one-half of the year which, at the rate of thirteen and one-fifth per cent, amounts to $3.96, which is in no sense an offset for the amount of interest that he has paid. "B", on the other hand, receives in cash his dividend of $132. That $132 passes forever beyond the control of "A", and there is never any redistribution of it. The same disparity, it is true, would not exist between the payments of interest and premiums and the dividends on stock in each succeeding year, but at the end of the time when "A's" stock is matured and his mortgage is canceled, which is seldom less than nine years, he has paid the enormous sum of $1,260 interest, which is in no ways offset by the dividends on the small payments made yearly on his stock; but "B", the investor, has received his $132 regularly every year.

This illustration leaves out one element. As the business is now conducted, there is a profit to the association from the fines and forfeitures of those parties who are unable to continue their payments, but such fines and forfeitures are taken from the class of people who can poorly afford to lose the money they have paid to the association. It is a patent fact, and cannot be disputed, that under the plans of building and loan associations as now operated under the law, capitalists have taken advantage of the law to secure exorbitant interest on their investments, and that, too, at the expense of the very persons the law is intended to benefit and protect.

The systems of fines and forfeitures are oppressive upon persons whose only crime is their inability to pay as much each month as they hoped to. Some associations have issued stock providing for the forfeiture of the entire amount that has been paid in case of failure for a given time to continue the payments. Others have a plan of imposing fines and selling the stock for the purpose of paying arrearages, which method would be tolerated in no enlightened community in regard to any other subject for a moment.

Some associations have stock which is, to all intents and purposes, preferred stock, receiving an unequal distribution of the profits at the expense of the common installment stock. The supreme court of Kentucky, in a recent case, held that preferred stock in a mutual building and loan association, was against public policy. While there are associations which are undoubtedly carrying on their business within the legitimate lines of building and loan association laws, and have produced results highly satisfactory to the investor, and not very objectionable to the borrower who persists until the maturity of his stock, yet I will venture the assertion that 90 per cent of the borrowers from building and loan associations in the state, and an equal percentage of the installment stock holders who withdraw their stock before maturity, feel that they have been deceived by false promises, and unjustly dealt with.

There are some domestic building and loan associations whose expense account is far in excess of that permitted by law. The auditor's raport of the building and loan associations furnishes an interesting study. It shows some domestic local associations conducting their business at almost a nominal expense—some as low as one-half of one per cent of the receipts. Many of the domestic building and loan associations, however, show the expenses to be far in excess of the amount received for the expense fund, which is, in my judgment, violation of the law. Other associations have made investments of funds in a manner not authorized by law, which jeopardizes not only the earning capacity of the home builder's fund, but also the principal which he has paid in from his savings. Other associations fail to show the amount of salaries of their officers, but report thousands of dollars of traveling expenses, office help, etc., which aggregate the full amount of the expense dues. One association masks together under the title of "Sundries," over $40,000 of unclassified disbursements. One association, with total assets of less than $2,000, shows expenses for salaries of nearly $900, and general expense of $400. Some associations pay large salaries far in excess of the service rendered, it seeming to be the problem how best to "pluck the goose without making it squawk." Other associations show a praisworthy moderation in this respect. The Auditor's report furnishes food for reflection. It cannot, however, disclose the tears of the widow who has paid for years what was recognized as an exorbitant interest on a loan, and made payments on stock which she understood were payments on the principal, to find after years of privation that she owes as much as she did in the first place. It cannot tell of the blasted hopes and bitter disappointments of the young man, and maiden, the hired girl, and the laborer, who have, through years of privation, paid of their hard earnings into an association which promises so much and fulfills so little.

What are the remedies?

This is a difficult problem. I can only make tentative suggestions.

First.—The law should forbid any part of the principal paid in by the stockholder to be used for expenses. Most associations deduct from 11 to 13 per cent of the amount paid in on installment stock, and apply the same to the expense fund. The expenses should, in my judgment, be paid out of the profits. A proposition made by one business man to another: "Let me take your money and invest it for you; I will secure you remunerative returns, but I will take, to pay for managing the affair, 13 per cent of the money you place in my hands," would be met with derision. Yet that is what nearly every building and loan association in the state does.

Second—There should, in my judgment, be a limit upon the expenses of the associations. Most of the domestic local associations are now very moderate in their expenses; but not so with many of the others.

Third.—All guarantee stock or preferred stock under any and all names which receives a fixed dividend, whether profits have been earned or not, should be entirely eliminated. If the associations are mutual in name and liability, there should be a mutuality of the profits. It is desirable that associations have the power, when there is a temporary demand for loans, to secure the money with which to supply the demand. This can be done by issuing paid up stock, with a limit placed upon the dividend it shall

receive, which amount shall in no case exceed the dividend earned by the other stock. Such stock should be called in when the funds of the association will permit, and it should not have a vote on amending the articles of incorporation.

Fourth.—The power to impose fines and forfeitures upon persons who fail to pay the installments on their stock ought to be removed. There can be no good reason why a person making savings deposits from year to year should lose what he has already deposited in case misfortune should prevent him from depositing further; or that the amount deposited should be charged with fines and penalties because of his inability to deposit more.

Fifth.—How it will benefit the poor man or wage earner to permit him to enter into a contract to pay an interest which under the general law would be usurious, is something that surpasses comprehension. The exemption of building and loan associations from the law of usury, works a hardship which I am convinced was not foreseen by the former general assemblies.

Sixth.—The executive council ought, in my judgment, to be given more plenary powers, including the power to revoke the certificate authorizing the association to do business.

Seventh.—Provision should be made by which money paid on stock by the party who has borrowed thereon, in case of foreclosure, should be treated as an absolute payment on the money borrowed, together with the profits, if any, credited on such stock.

Eighth.—Some provision should be made to enable associations to go into voluntary liquidation, with suitable provision for the protection of the borrowing member. In this connection it might be well also to authorize the assignment of the loans made by the liquidating association to some association of similar character, subject to the rights of the borrowing member to have the amount paid on his stock credited on such loan. It might be well to permit two or more associations to consolidate by a three-fourths vote of the stock of the respective associations, on terms which the executive council or some officer of the state should approve as equitable to all concerned.

Ninth.—The effect of chapter 48, laws of the Twenty-seventh General Assembly, was to make new and different contracts for those affected thereby, which has worked a hardship in very many instances. In my opinion justice demands the repeal of said chapter, leaving all parties in their original contractual relations.

The amendment of the law along the lines above suggested would relieve the system of many of its inequitable features. It will be urged against some of the suggestions that no new association could be started depending upon the profits to pay the expenses, and that there would be no inducement for capitalists to put money into the stock of an association in case some or all of these suggestions should be incorporated in the law. If it is remembered that the building and loan association law was not made for the benefit of capitalists, but for another class of persons altogether, the suggestion loses much of its force. It is true, unquestionably, that such a law as above outlined would deprive associations of a source of profit; but at the same time it would strip them of the speculative features which have in

the past enabled the men of means to secure exorbitant returns for the use of their money at the expense of the very men and women whom it is the policy of the law to encourage and help. The plea in favor of liberal laws, so called, for such associations was made on the ground of their beneficial results to the wage earner and man of moderate means. They are claimed to be *quasi* benevolent associations. If they have ceased to be such, and become instruments of oppression, they have failed to demonstrate their right to live. If such associations cannot live under restrictions that will prevent the abuse which I apprehend is recognized as a crying evil, then they ought not to live; but I do not apprehend that the suggestions above made, if engrafted in the law, would seriously interfere with domestic local and worthy domestic associations. All unworthy ones should not be fostered by the state at the expense of the welfare of its citizens.

II.

AS TO INSURANCE COMPANIES.

The present law appears to give sufficient authority to the auditor with reference to companies organized to do the kind of insurance referred to in chapter 4, title 9 of the code, inasmuch as the articles of incorporation must be approved by the auditor after the same shall have been submitted to the attorney-general, and the forms of all policies issued are required to be submitted to the auditor for his approval. In regard, however, to companies referred to in chapter 5, title 9 of the code, formerly known as farmers' mutuals, there are few restraints upon their manner of doing business. The articles of incorporation and the form of policy are subject to the approval of the auditor, and if an examination of the auditor shows that the association is in an unsound condition, or doing an unsafe business, he may revoke the certificate of authority to do business. If such associations were limited to the county of their principal place of business, or counties contiguous thereto, the absence of legal restraint upon their acts would not be so objectionable. Such associations, when their business is confined to a neighborhood, are usually subject to the scrutiny of their members, and I think experience shows that the business is conducted honorably, cheaply, and to the entire satisfaction of the members.

But state associations are very different. There is no reason why what are called state associations under said chapter 5 should not be required to comply with chapter 4 of said title. There is just as much necessity for a state association organized under chapter 5, to have $25,000 of available assets, and be subject to the same inspection and restrictions as other mutual companies doing business under the provisions of chapter 4. The business which they actually do is the same. It is actually done in the same manner by premium notes, etc. The liability of the public to be defrauded is just as great. There are more complaints coming to this office in regard to the wrong doing and fraud perpetrated by the state associations than in regard to the mutual associations doing business under the provisions of chapter 4.

AS TO LIFE INSURANCE.

The laws of Iowa with reference to life insurance are in an anomalous condition. We have level premium companies, natural premium companies, stipulated premium associations, assessment associations, benevolent associations, fraternal associations; in fact, insurance companies of all descriptions, and some nondescripts Life insurance of all shades and complexions can be written under the laws of this state as they now stand. There is not, in my judgment, sufficient authority given to those who approve the articles of incorporation of the different insurance companies to prevent them doing a business not contemplated by the laws, or contrary to public policy. Only stipulated premium and assessment associations are required to submit their articles to either the auditor or attorney-general for approval, and the authority given such officers by the law appears to be very limited. The insufficiency of the law will appear when we consider the evils which are done under the law as it now stands.

AS TO THE EVILS.

The state control over some classes of associations is sufficient to induce the public to believe they are under state control, but that control touches so lightly that the associations do practically as they please. In such cases the state control is a delusion and a snare. An inquiry was received at this office from a man in Texas enclosing an advertisement by some agent of an Iowa company, in which it was stated that the state of Iowa guaranteed the payment of the policies.

Companies and associations are organized, and policies are issued, which should be accompanied by the company's private glossary or key to enable the members to understand the meaning of the terms employed. A policy was issued by an association, now happily deceased, which "accepted the policy holder as a general partner and member in said association to the extent of —— shares in its combination ten-year indemnity and accumulative cash surrender value securities limited to the aggregate benefit value of $100 per share," which may mean one thing to the company, another to the policy holders, and to the average citizen is gibberish.

Companies doing business on what is called by the statute, "level premium," or "natural premium plan," more commonly called old line companies, are not required to submit their articles of incorporation to any person whomsoever for approval; nor are such companies required to submit their policies to the auditor or any officer of the state for approval. Practically the only control over such companies organized in this state is that of the auditor, who is made the depositary of the capital stock of $25,000 and the net cash value of the policies in force, otherwise the reserve, but his authority is very limited.

The auditor can examine whether such companies are insolvent, and "if found to be insolvent, or the condition such as to render their further continuance in business hazardous to the public, or to the holders of its policies," to turn the matter over to the tender mercies of the attorney-general.

There is no provision of law authorizing the auditor, or any other officer, to call a halt upon the kind of business that such companies may

do, or to require the contracts which they may make with the public to be submitted to any officer of state for inspection and approval.

So-called old line insurance companies have been incorporated, and more are endeavoring to be incorporated, which have few or none of the characteristics of life insurance, and which are not conducted on life insurance principles, but whose principal business smacks loudly of the features of bond companies, which have been condemned everywhere as against public policy. They are insurance companies in name, and not in fact. A man of sixty is *insured* at the same rate as a child of five. No medical examination is required. The amount agreed to be paid in case of death is entirely incommensurate with the so-called premium paid. The so-called policy or bond is to mature in ten years, and 10 per cent of the face thereof is required to be paid by the holder every year. At the end of ten years, the promise is to repay the holder the amount that has been paid in by him to the company, and a share of the speculative accumulations arising from the lapses and forfeitures enforced against those who are unable to pay longer.

To state the proposition concretely: The company enters into a contract with the so-called policy holder to pay $1,000 at the end of ten years, in consideration of the policy holder paying for each of the ten years to the company the sum of $100. If the so-called policy holder fails to pay any year, even if he has already paid $700, or $800 or $900, he loses and forfeits all that he has paid to said company. The company promises, in case the so-called policy is not forfeited or lapsed, that the holder shall receive a benefit from these lapses. I have seen statements made by the agents of such companies that the investor or policy holder will receive, at the end of ten years, double the money he has paid, and if he dies before the expiration of the ten years, he receives a small sum as life insurance. Statements are published showing a large percentage of lapses, and enormous profits are predicted because of the many lapses which will inure to the benefit of those who are the persistent members. Such companies take for their own use all of the first payment of $100. They set aside about 91 per cent of all the subsequent payments, which is invested, and from such sum they expect to realize enough to pay the amount which is absolutely promised.

Thus it will be seen that more than 18 per cent of all the payments made by the policy holders inures directly to the benefit of the corporation. One such company, during the year 1898, shows a total premium income of $148,000, and a death loss of $1,200. It shows commissions, bonuses to agents of over $66,000; salaries to officers and home office employes, over $4,000; total expenses over $83,000. The receipts from the new business were nearly $107,000. If we deduct the total disbursements of the company for expenses and death losses from the amount of the first year's premium, over $22,000 remains, which is a very handsome profit on a paid up capital of only $25,000. Whether such companies will be able, after deducting over 18 per cent of the total amount paid by the members, to fulfill their absolute promises of repayment of the total amount paid in, is very doubtful; but in no possible contingency will the company be able to pay the amount which the agents and officers represent to the policy holders they will receive. The average amount of insurance for the whole ten years does not exceed three-fourths of the amount which will be paid by the policy holder

during the ten years. The cost of term insurance would not exceed $12 per thousand. To divide the contract and the premium paid on a $1,000 contract, the member pays $90 for insurance. He pays $910 for the bond, or endowment, if please so to call it. The endowment, then, costs $91 a year.

To illustrate: Suppose a contract were made by a bank; in consideration of a man depositing with a bank $91 a year, the bank would, at the end of ten years, pay $1,000, but if the depositor failed to deposit in any year, he would forfeit to the bank all that he had paid. I think everyone would say it was not legitimate business and should not be tolerated in any community; and certainly corporations which are created by the state, and empowered to contract by law, should not be permitted to thus prey upon the inexperienced and gullible. The contract between such so-called insurance companies and so-called policy holders is at least 90 per cent of the same kind named in the illustration. In my judgment, such a business is against public policy, if not against the law of the state as now existing.

Not a few stipulated premium and assessment associations doing business under chapter 7, title 9, of the code, I am informed, are issuing term policies, *quasi* endowment policies, paid up policies, and in fact, nearly every kind of policies which level premium companies are issuing. Many of such policies are a palpable fraud upon every one who accepts them. A paid up policy with the right of the association to require further payments, is a contradiction of terms, and a fraud on the face of it. It is no less a fraud because hidden away in some dark corner of the policy, in fine print couched in language which few but the officers of the association can understand, the right to require further payments is reserved.

It is the refinement of cruelty for an association to take a man's money, year after year, he paying it under the belief that at a given time he will have a paid up policy, or an endowment, for his good wife after he is gone, or for himself in his old age, and after he has been tolled along until he is past the insurable age, and his ability to earn a livelihood is no more, to be told that his policy was not a paid up policy, and the supposed endowment was a myth; that his equitable share in the grand combination, accumulative, emergency, savings, cash surrender value securities, has been dissipated to pay for excessive mortality losses, or has disappeared through a system of division and silence. It is no solace for such a man to learn that under the law the perpetrators of such a fraud cannot be sent to the penitentiary.

One old lady wrote me that she had worked, stinted and saved to make payments to an association of malodorous memory, on a ten-year endowment policy for $1,000; that she had made nine payments and the $1,000 she expected was her only reliance for future support; the association had failed. "Will I get my $1,000? What shall I do?" she asked. I didn't have the heart to tell her to go to the poor-house.

The stories of wrong perpetrated upon honest, simple-minded, confiding people which continually come to this office, at times make me wish I had been born without sympathies, or had not been honored by being chosen attorney-general.

Even while I write this, a victim now past the insurable age ends his story by saying: "Had I not believed the state controlled insurance companies and prevented worthless companies from doing business, I would not have been deceived. The state has no right to pretend to control such companies and not control them."

I endorse this sentiment with all the emphasis possible. Common honesty demands that the state should control life insurance companies doing business in this state *in fact*, or cease to pretend to do so.

There is no statute requiring any life insurance company or association to submit the form of its policies for the approval of the auditor. In the years past every attempt of the auditor, so far as my knowledge goes, to prevent the issuance of certain kinds of policies, was met with a challenge of his authority. In fact, to prevent any class of insurance policies being issued, however obnoxious to his sense of justice, he has been compelled to arrogate to himself authority not expressly given by statute. Any success in this respect in the past has been through fear that he may arbitrarily withhold his certificate authorizing the companies to do business in this state. Policies can be, and have been, issued which the statutes do not authorize, of which the auditor can have no knowledge and has no power to prevent, which policies contain promises which the associations have neither the present ability, nor any reasonable hope of ever being able to fulfill.

The authority given to the auditor to turn over to the attorney-general insolvent companies, and those not carrying out their contracts, does not relieve the situation a great deal. It is practically no more than the holding of an inquest on a company found dead, and burying the remains. The injury was done to the public before the company's insolvency became known.

There are many Iowa companies and associations doing a safe and honorable business. Such need not, and do not, fear strict legislative control. The evils to which I have referred, which are causing Iowa companies to fall into disrepute, are chargeable mostly to those associations which are organized by *promoters* for the money there is in it to them, and are conducted on unsound principles for a few years, when they go to the wall, leaving to their confiding victims resentment and loss instead of provision for their dependent ones.

These truths must be self evident.

Any scheme which enables one to obtain the money or property of another without returning a fair equivalent, is bad in ethics.

Any business which depends for its success upon enforcing unconscionable contracts, into the signing of which inexperienced and unwary men and women are beguiled by false hopes and illusory prospects, presented by smooth and plausible, over-paid and under-scrupulous agents, is not a legitimate business, and is contrary to public policy.

No state has a right by law to authorize a body of men to shelter their private consciences and private fortunes underneath a corporate name and entity, while they carry on a business which thrives alone upon the misfortunes, improvidence, or poverty of those, many of them God's poor, who are drawn into their meshes.

In this respect Iowa has not measured up to her responsibilities.

REMEDIES.

I can only suggest the lines along which, in my opinion, additional legislation may well be directed.

First.—All articles of incorporation of companies and associations incorporated under the laws of this state, as well as companies incorporated under the laws of other states, should be submitted to the auditor and attorney-general for their approval, and those officers should be authorized to disapprove all articles, the plans or the nature of the proposed business of which do not provide proper safeguards for the protection of the policy holders.

Second.—All companies and associations which make assessments on the members, or by a so-called safety clause reserve the right to make assessments, should, by statute, be prohibited from issuing so-called paid up policies, limited payment policies, and from accumulating a fund to be paid back to the members as dividends, distribution of surplus, or endowments in any form.

Third.—All forms of policies should be submitted to the auditor for his approval, and he should be required to disapprove of any form which does not state on the face of the policy, in plain and ordinary language, within the comprehension of persons of ordinary understanding, all the terms, conditions, or warranties by the breach of which the policy is avoided, and to revoke his certificate authorizing the company to do business in the state of any company or association which issues policies in a form not approved by the auditor.

Fourth.—All policies which require the payment of a fixed premium should be made non-forfeitable after two annual payments.

Fifth.—Any company or association which publishes in its literature false and misleading statements as to the nature of the business it transacts, or in regard to the ability of the corporation to fulfill its contracts, shall forfeit its right to do business in this state, and its certificate therefor shall be revoked by the auditor.

Sixth.—Section 1839 of the code, requiring a medical examination of all members of associations, should be extended so as to include level premium companies also.

Seventh.—No mutual company or association should be permitted, by an amendment of the articles of incorporation, to increase the premium or rate of assessments upon existing policy holders.

Eighth.—No stipulated premium or assessment association incorporated under the laws of another state, should be permitted to do business in this state if it uses a greater per cent of the premiums or assessments for expenses or soliciting new business than is allowed to similar associations organized under the laws of this state. The per cent to be used for expenses might properly be limited by statute.

Ninth.—All associations which have attempted to absorb any other association, either by reinsuring or consolidation in any way, (which I contend cannot be legally done under our laws) and have made assessments on the members thus received, should be required to treat such members as their own original members, and pay the same amount, in case of death, as their own original members receive.

It will be urged that if these suggestions are carried into the statutes, they will cripple some of the companies and associations now doing business in the state, and will make it difficult to organize new companies and associations in the future. My answer to this is: Such laws will not injure good, safe companies, honestly managed; all others, by the grace of state, have no right to live; and by the grace of God, should be buried out of sight; that organizing insurance companies is not the chief end of man; that it is better far to have a few good, trustworthy companies, than to turn loose a thousand worthless ones to prey upon a long suffering public.

III.

In regard to your third inquiry, I will say that the statutes do not plainly give to the attorney-general any powers respecting illegal building and loan associations and insurance corporations until the matter is placed in his hands by the auditor.

Actions to test official and corporate rights may be brought by the county attorneys. (Code, section 4315.) The general power given the attorney-general by section 1640 of the code, to institute an action in equity to dissolve a corporation for good cause, seems to be limited by other sections requiring the auditor to take the initiative with reference to building and loan and insurance corporations. In view of the equivocal language of section 208, it is by some considered doubtful whether he can bring any action in the name of the state except when "requested to do so by the governor, executive council, or general assembly," unless specially authorized by some other statute.

I have not felt warranted in bringing any action to close up any building and loan, insurance, or banking corporation, until my attention was called thereto by the auditor in the manner directed by statute. I have, however, used to the extreme verge, the limited powers given to the attorney-general to prevent the conduct of illegal business by such corporations.

I am satisfied that I have made some mistakes by inadvisedly approving a few articles of incorporation of insurance associations, the press of other duties preventing the careful scrutiny that ought to have been given them. But since I discovered those mistakes, no articles of incorporation have passed this office without the closest examination. I think there are a few certificates of approval of articles of incorporation signed by me which should be recalled or canceled, and I shall assume the responsibility of so doing unless the present general assembly makes changes in the law which render such recall unnecessary.

I think the attorney-general should be given a larger discretion in regard to the approval of articles of incorporation which are submitted to him for approval. It is claimed under the present law that his only authority is to see that the articles are in legal form. In this view I have not concurred, but have insisted that the articles must provide alone for that class of business which the law authorizes that kind of a corporation to do. But I have not felt warranted in refusing to approve such articles solely because I was convinced the plan of business was such that the association must, in the nature of things, be short lived, and disappoint every policy holder who might not die early.

I do not think it would be wise or practical to give to the attorney-general anything like a general supervisory power of the corporations referred to. It would be impossible for him, with the insufficient force in his office, to give such matters the attention they demand.

It might be well, however, to enlarge his powers so as to require him to bring actions to wind up the affairs of all corporations, including those named in your inquiries, when they are doing a business not authorized by law, or not authorized by their articles of incorporation; or are conducting the business in a manner by which the public are deceived or defrauded.

I am not, however, asking for myself additional powers and responsibilities, and would not be so ungenerous as to ask them for my successor; but I will endeavor, to the best of my ability, to perform every duty which the legislature in its wisdom imposes upon this office, to the end that the fair fame of this noble commonwealth shall not be tarnished by the acts and practices of corporations which it has created.

I have the honor to be, your obedient servant,

MILTON REMLEY,
Attorney-General.

BOARD OF SUPERVISORS—It has no power, given it by law, to interfere with the discretion of the clerk of the courts in having bar dockets printed where and when and by whom his good judgment may dictate.

DES MOINES, IOWA, February 21, 1900.

W. O. Clemans, Esq., County Attorney, Cedar Rapids, Iowa:

DEAR SIR—Yours of the 20th inst. at hand, in which you ask my opinion as to whether "the board of supervisors, by resolution, can direct when and by whom the bar dockets shall be printed, or whether the same shall, under section 3661 of the code, be printed by direction of the clerk of the court, and the printing given to whom he may see fit."

In reply thereto I would say that section 3661 requires the clerk to furnish the court and bar a sufficient number of printed copies of the calendar. The rule of law is of universal acceptation that where a duty is enjoined upon a public officer, and no direction is given by statute as to the manner in which he shall perform that duty, a discretion is left with him to perform the duty in such manner as he may determine best.

Apply the rule to the question you ask. The clerk is directed to furnish printed calendars. Unless some statute directs how these calendars are to be procured by the clerk, or who is to print the same, he has an absolute discretion in the matter which cannot be controlled by anyone. I find nothing in the statute which authorizes the board of supervisors, by any resolution, or by any vote, or in any manner whatsoever, to interfere with the exercise of this undoubted discretion given to the clerk. It is true the board of supervisors must order the payment for them, and it has the right to insist that the cost of the printing shall be reasonable, but in my judgment, has no power given it by law to interfere with the discretion of the clerk in having such calendars printed, where, when, and by whom, his good judgment may dictate.

Yours truly,

MILTON REMLEY,
Attorney-General.

LIFE ASSOCIATIONS—Where securities are deposited in the office of the auditor of state, he is not authorized to make any disposition thereof without a statement of the funds to which they respectively belong, furnished to him by said association.

DES MOINES, IOWA, February 27, 1900.

Hon. Frank F. Merriam, Auditor of State:

DEAR SIR—Your favor of the 5th inst. duly at hand. You enclose the articles of incorporation of the Federal Life association, of Davenport, together with a statement of the securities now on deposit in your office; also a requisition made by the said association for the withdrawal of certain securities, and also a sample of certain policies which purport to be guaranteed by securities deposited in your office. You state that some of the securities in your office have nothing upon them to designate to what fund they belong. The requisition is made under section 1792, which provides: "The auditor shall permit a withdrawal of the same upon satisfactory proof in writing filed with him that they are to be used for the purposes for which they were originally deposited."

The articles of incorporation of the Federal Life association provide that certain funds shall be accumulated, and shall be devoted to certain specific purposes. Certain classes of policy holders are required to pay more than certain other policy holders for the purpose of accumulating a fund, and the policy, as well as the articles of incorporation, requires that the fund thus accumulated shall inure to the benefit of the policy holders belonging to that class. There is a trust, under the articles of incorporation, attaching to every fund deposited with the auditor of state by this association.

The law requires that satisfactory proofs shall be furnished the auditor that the funds to be withdrawn are to be used for the purposes for which they were originally deposited, *i. e.*, that the association so withdrawing the funds intends to use them in execution of the trust which attached to the funds thus deposited. Where an association has accumulated several funds of different names, and securities are deposited with the auditor of state, the nature of the trust attaching to each fund should be stated so that the auditor may know the purpose for which it is deposited, and hold the same as security for the beneficiaries who are entitled to said fund.

The requisition contains a preamble, as follows: "Whereas, the premiums received by this association under the life and savings fund plan, after deducting the amount required for the surety and expense funds, are and shall be liable for the payment of mortuary claims; that there is now due and payable from the savings fund to the mortuary fund for mortuary purposes, four thousand one hundred dollars."

This is a peculiar statement for a preamble. If it is intended as a resolution of the board of directors, which it purports to be, that the savings fund shall be liable for the payment of mortuary claims, then such resolution is wholly void as applied to this fund. Under article 14 of the articles of incorporation, all the premiums received by the association under the life and savings plan are subjected to the amount required for the surety and expense funds, and for the payment of death claims, and the balance

of the premiums thus received, after meeting the drafts upon it, constitutes the savings fund. This savings fund is required to be invested in substantially the manner required by section 1791 of the code. After it is invested it, together with the profits thereon, is apportioned to the policies from which it was created, and no other class of policies is entitled to participate therein. Certain options are given to the policy holders. Among them is a continuation of their insurance beyond the time for which it was written by the application of the accumulations of this fund to the payment of the premiums year by year. Such fund cannot again be drawn upon to pay mortuary losses.

The requisition in question calls for no funds other than the savings fund, and it shows affirmatively that the withdrawal of such fund is not for the purpose for which it was originally deposited, but shows that there is to be a violation of the trust attaching to the said fund by using it for mortuary purposes. Hence, you could not legally surrender the securities, upon that requisition.

You ask, if you cannot surrender such securities on that requisition, how you can legally surrender the same. I will say that you can only legally surrender them upon proper evidence being furnished you that they are needed to execute the trust attaching to the securities on deposit in your office.

It appears in the papers submitted to me that certain of the makers of the mortgages on deposit in your office have paid to the Federal Life association the amount of their mortgages, and they are needed to be turned over to the makers. You can legally permit the Federal Life association to substitute other mortgages for those which have been paid. but no maker of any mortgage on deposit with the auditor of state has any right to pay the same to the payee without the payee having in possession the mortgage. If the association may receive pay for mortgages, which are on deposit with the auditor of state charged with a special trust or security for the fulfillment of certain kinds of policy contracts, at pleasure, and if they may withdraw such securities and apply them to any purpose for which said association may see fit, then it is useless and worse than useless to have such securities deposited with the auditor of state at all. The law requiring the deposit of such securities means something, and if, while they are deposited with the auditor of state, they are subject to the control of the association the same as if they were in the vault of the association, the law becomes meaningless.

With reference to those securities on deposit in your office, without having the fund to which they belong properly designated, you are justified in requiring the association to furnish you with a statement of the funds to which they respectively belong, and until this is done, you would not be authorized to make any disposition thereof, but retain them until you can ascertain from some source the trust attached thereto.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

MUTUAL FIRE INSURANCE COMPANIES—Mutual companies can issue no stock. A certain company shows by its articles of incorporation that it partakes both of the nature of a stock and a mutual company. This it cannot do. It must be either one or the other, it cannot be both.

DES MOINES, IOWA, March 1, 1900.

Hon. Frank F. Merriam, Auditor of State:

DEAR SIR—In regard to your inquiry as to whether the guarantee fund (so-called) provided for in articles of incorporation and by-laws of mutual fire insurance companies, such as the Anchor Mutual Fire Insurance company, whose articles of incorporation and by-laws you submit to me, shall be considered as a liability, or whether, in making the statements to your department, such companies are authorized to list the so-called guarantee fund in a manner similar to that in which stock companies list their capital stock, I will say that the articles of incorporation of the Anchor Mutual Fire Insurance company are very peculiar indeed, and certain features therein have received the condemnation of the supreme court in the case of Berry v. the Anchor Mutual Fire Insurance company, 62 N. W. R., 681.

The supreme court holds in that case that there was no authority of law whatsoever for having the holders of the so-called guarantee funds directors of the company, and that such provision was illegal and void. That case was decided April 4, 1895, and yet that provision has been continued, although there have been some amendments attempted by the said corporation since the decision of the supreme court.

I am willing to accept as legal and proper certain members guaranteeing the contracts of a mutual fire insurance association, and it may be competent for the corporation to provide that such notes given to the company for the purpose of fulfilling its policy contracts may be assessed in a certain manner; but it is a misnomer to call the notes given by guarantors to the company a guarantee fund. Section 15 of the articles of incorporation provides that the moneys advanced by the guarantors and applied to the payment of losses shall be regarded as advances to be thereafter paid by an assessment made upon the pledges of members to the association for their own insurance. There is in fact, then, no liability of the association to the makers of the guarantee notes unless there has been money advanced thereon by the makers of such notes. If payments have been made on such notes to the full amount thereof, then such notes undoubtedly constitute a liability to the company. Every amendment to the articles of incorporation since the organization of said company in 1889 has been made, or purported to be made, by the contributors to the guarantee fund alone, except the amendment acknowledged October 1, 1895, which amendment purports to be adopted at a meeting of the policy holders and guarantors. A serious question arises whether any of such amendments have been legally adopted and are now a part of the articles of incorporation.

The plan of business seems to be to permit those persons who have given guarantee notes to the company, and have received a certificate showing

the amount which each has guaranteed, to have full and absolute control of the affairs of the association, and to treat the notes which they have given respectively as stock of the company. It requires too great a stretch of the imagination to call one who is conditionally liable as guarantor for contracts of a corporation, a stockholder. The claim that it is a mutual company under its present organization is only a pretense. Mutual companies can issue no stock. No provision is made for the policy holders sharing in any election of officers, or having any voice whatsoever in the affairs of the company. This fiction is carried along until we come to section 5, article 8 of the by-laws, wherein it is provided: "In case any stockholder transfers his stock," etc., referring by stockholders to the person who has given a guarantee note to the company.

There seems to be an attempt to impose upon the policy holders the liability of the members of a mutual company, and at the same time permit the management to reap the benefits of a stock company. I do not think this can be done, and you would be justified in requiring the company to amend its articles of incorporation so as to put it squarely upon a stock company basis, or else upon a purely mutual basis. Certain it is that the so-called guarantee fund is nothing, and is entitled to no consideration unless the makers of the guarantee notes have actually paid something to the company on such notes. Then the amount which they have paid is a liability against the company, and should be so reported as a liability. If nothing has been paid by the makers of the guarantee notes, then the amount of the notes is neither an asset nor a liability; but under no circumstances, according to the articles of incorporation, can the so-called guarantee notes be considered as an asset. If the company desires to report that responsible parties guarantee their policies to the extent of $25,000, I know of no reason why objection should be made thereto; but the fact that a man may have credit to the extent of $25,000, if he has no property whatsoever, does not make him worth $25,000, by any manner of means.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

MUTUAL ASSESSMENT ASSOCIATIONS—The directors, president, vice-president, and secretary of such associations must be members thereof.

DES MOINES, IOWA, March 3, 1900.

Hon. Frank F. Merriam, Auditor of State:

DEAR SIR—You have requested my official opinion as to "whether or not the directors and officers, such as president, vice-president, secretary and treasurer, of mutual assessment associations organized to do business under the provisions of chapter 5, title 9 of the code, should be selected from the members of such associations; and whether or not such officers can legally act as officers of such mutual assessment associations if they are not actually members of the associations."

In regard to this I will say that there is no direct provision of the statute which explicitly prohibits one not a member of such mutual association

from being an officer therein if so elected, as there is with reference to companies doing a business authorized by chapter 4 of said title 9 (see section 1695 of the code). But I am very clear that the legislature in no way contemplated that an association should be organized and practically owned and controlled by one or more persons who have no property to insure, and who do not belong to said association. The history of legislation, and the policy of the law as stated in section 1625, as well as by analogy in other matters, I think make it as reasonably certain that the law did not intend anyone should be an active officer in associations organized to do business specified in chapter 5, of said title 9, who was not a member. The original section 1160 of the code of 1873, which is the basis of all subsequent legislation in regard to farmers' mutuals, did not in fact contemplate a corporation. The association was bound together by mutual pledges. It was a voluntary association; no provision was made with reference to how it should be managed or by whom. The custom of farmers' mutuals at the time the law was passed, was to elect the officers from their own number, and recognizing that custom, and for the purpose of enabling persons who gave their mutual pledges to conduct their business inexpensively, the present statute was enacted; but I do not think it was their intent that the law should be so construed that persons in cities and towns, with no property to insure, without making any pledges themselves, should form a corporation, issue policies or certificate of membership which would make insured members, and carry on a general insurance business with practically no restraints which a local company would exercise over the officers chosen from their own members.

I am of the opinion, therefore, that the officers, meaning thereby the directors, president, secretary, and such officers as have executive control of the affairs of the company, should be members. I do not mean to say that a person may not be chosen treasurer to simply receive and pay out funds belonging to the association, but having no voice in its management otherwise; nor that all the agents must necessarily be members of the association; but the active, executive officers of the affairs of the association must be members of the association. Yours truly,

MILTON REMLEY,
Attorney-General.

GAME LAW—Where there has been a conviction on two counts of an information for violating the game law, the prosecuting attorney and the informant who files the information, each is entitled to have $10.00 taxed in his favor as a part of the costs of the case.

March 6, 1900.

Hon. Geo. E. Delavan, Fish and Game Warden, Estherville, Iowa:

DEAR SIR—Yours of the 5th inst. at hand asking my opinion as to "whether upon a prosecution and conviction of several counts of an information for violating the game law, the informant is entitled to a fee of $5.00 for each count, or whether he is entitled to no more than $5.00 for

each case upon which there has been a conviction although the defendant was convicted upon several counts?"

In regard to this I will say that the language of the statute is very explicit. It says: "There shall be taxed as a part of the costs in the case, a fee of $5.00 to the informant and a like fee of $5.00 to the attorney prosecuting the case, upon each count upon which there is a plea or verdict of guilty and judgment of conviction." It is not $5.00 for the case but the costs in the case shall include a fee of $5.00 for each count upon which there is a judgment or conviction. If there have been convictions on two counts, the prosecuting attorney and the informant who files the information are each entitled to have $10.00 taxed in his favor as a part of the costs of the case, five dollars on each count, and so on. I do not see how the statute is susceptible of any other meaning.

Yours very truly,

MILTON REMLEY,
Attorney-General.

MUTUAL FIRE INSURANCE COMPANY—When the assets of such company, organized under chapter 4 of the code, including therein the fair present worth, or value of all notes, together with the other assets of the company, fall below $20,000.00, in excess of the liabilities of the company, the auditor of state is justified in finding that its assets are insufficient to entitle it to continue in business.

DES MOINES, IOWA, March 9, 1900.

Hon. Frank F. Merriam, Auditor of State:

DEAR SIR—Yours of the 8th inst. at hand, in which you ask my opinion upon the following question:

> "Under what circumstances can a mutual fire insurance company, operating under the provisions of chapter 4, title 9 of the code, become impaired, and what is the construction of sections 1731, 1732 and 1733 of the code, in reference to the duties of the auditor of state when a mutual fire insurance company doing business under chapter 4, title 9 of the code, is found to be impaired?"

In order to rightly construe the sections referred to, it will be neccessary to look at other provisions of said chapter 4. Section 1691 requires a stock company to have paid up in cash an actual capital of not less than $25,000. In regard to a mutual company, section 1692 requires notes of the incorporators and insurers to the amount of not less than $25,000, to be given by solvent parties, founded upon an actual application for insurance made in good faith of which $5,000 shall be paid in cash. These notes are made the basis of security for the payment of losses and expenses in regard to the transaction of the business of the company. They stand in the place of the capital stock required of stock companies, and are upon a different plane, and the makers incur a different liability from the makers of premium notes given for insurance after the organization of the company.

It will thus be seen that the legislature intended, before a company, either stock or mutual, could be authorized to transact a fire insurance business, that there must be at least $25,000 of cash in hand or notes against solvent parties which should be liable for the payment of losses by fire and the expenses of the company. The premium notes taken from insurers after the organization stand upon a different basis. They can only be collected in accordance with the terms of the notes, and are given to pay the maker's *pro rata* share of the cost of insurance covering the period during which the policy is in force. Such notes cannot be considered assets of the company to the full amount of the face thereof. Every member has a statutory right to have his policy canceled by paying short rates, and hence it cannot be claimed that the company could in any event collect more than the short rates, less the amount theretofore paid by the insured. But it does not follow that the notes are worth no more than the remainder of the short rates collectible thereon, for procuring the business has cost the company something, and upon the theory that only the short rate can be collected on such notes, there is so far as the company is concerned a real value in the balance of said notes which should not be disregarded. I know of no rule which can be infallibly applied to all cases.

The question is what is the real value of such notes taking everything into consideration—including the probability of the members continuing their policies until the expirations thereof, and the fact, if such it is, that the entire commissions have been paid to the agents for procuring the insurance represented by said notes.

Section 1731 provides, in reference to a stock company, that when its capital stock, which shall not be less than $25,000, has become impaired more than 20 per cent below the paid up capital stock required, unless the deficiency is made good, the attorney-general shall proceed to wind up the affairs of the company. This indicates clearly the standard by which fire insurance companies shall be measured. Where the assets, then, of a mutual company fall below the standard, the auditor is justified in concluding that the assets of the company are insufficient to justify the company continuing in business, and section 1733 provides he shall proceed in reference to such company in the same manner as herein required in regard to stock companies.

I think, therefore, when the assets of a mutual fire insurance company, organized under the provisions of said chapter 4, including therein the fair present worth or value of all notes, together with the other assets of the company, fall below $20,000 in excess of the liabilities of the company, the auditor is justified in finding that its assets are insufficient to continue in business. Yours respectfully,

MILTON REMLEY,
Attorney-General.

DEPARTMENT OF AGRICULTURE—The act of the legislature, creating such department, and providing for the filling of the office otherwise than by an election by the people, or appointment by the governor or some other officer of the state, is held constitutional.

DES MOINES, IOWA, March 14, 1900.

Senator W. F. Harriman, Des Moines:

DEAR SIR—You ask my opinion in regard to the constitutionality of Senate file No. 165, being a bill for an act to create a department of agriculture, etc., especially upon two points:

First.—Whether it is competent for the general assembly to create an office and provide for the filling of that office otherwise than by an election by the people, or appointment by the governor or some other officer of the state; and,

Second.—Whether the bill is obnoxious to section 1, article 8 of the constitution, providing that no corporation shall be created by special laws.

In regard to this I will say that all legislative authority in this state is, by the constitution, vested in the general assembly. The general assembly has the power, then, to enact any law unless there be some constitutional inhibition. Certain officers of the state are required by the constitution to be elected by the people. The constitution, however, recognizes that other officers may be appointed, and there is no provision whatsoever which requires all officers of the state to be elected by the people.

The bill in question creates a department of agriculture. We may assume, for the sake of the argument, that those persons who shall administer the affairs of the department of agriculture are state officers. Such officers, however are not constitutional officers. There is a distinction to be made between election and appointment to an office. There is no constitional provision providing who shall make the appointment to the offices which the general assembly may create. Throughout the entire history of the legislation of the state, offices have been created by the general assembly, and provision is made for the filling of such offices sometimes by appointment of the governor; sometimes by appointment of other officers; either state or county; sometimes the offices are filled by designating the incumbents of certain other offices or positions to fill the offices created, and no question has ever been raised, to my knowledge, of the constitutionality of the appointment made in accordance with the provisions of law. The legislature may either confer upon some designated officer the power to make such appointment, or it may confer the power to make such appointment upon some other body or class of persons. Almost the identical question was determined in the case of Sturges v. Spofford, 45 N. Y., 446, in which it was held that the act creating a board of commissioners of pilots to have charge of the licensing and regulations of pilots for the port of New York, etc., three of whom were to be appointed by the Chamber of Commerce of the City of New York, and two by the presidents and vice-presidents of the marine insurance companies of the city represented in the board of underwriters, was not unconstitutional.

Senate file No. 165 proposes that certain officers in the department of agriculture shall be selected by a convention composed of representatives from the different agricultural societies of the state, thus conferring upon the representatives of persons supposed to be most interested in agriculture the power to make an appointment. In the New York case the power to make the appointment of the commissioners was delegated to the representatives of commercial and private associations or corporations. The agricultural societies whose representatives in convention assembled appoint the officers created by Senate file No. 165, are *quasi* public organizations, supported in part by the state, incorporated under the laws of the state, in furtherance of the policy of the state, to promote agriculture, the most important industry of the state.

The case of State *ex rel.* Childs v. Griffin, 72 N. W. R., 117, is referred to as holding to the contrary. I do not understand the case to so decide. The constitution of the state of Minnesota is different from that of the state of Iowa, and a different question was involved, but the court recognized the principle which I have stated above in the following language:

> "It will be understood that we do not intimate that the legislature cannot create an office, and itself appoint the officer thus provided for, or lodge the power of appointment elsewhere than with the chief executive."

Second.—In regard to the second objection referred to, I will say that I see nothing in the bill that creates a corporation. It is simply a designation of the department of agriculture as an arm of the state. The property received by the department of agriculture, as referred to in section 9, does not become the property of the officers of the department of agriculture. Whatever is received becomes the property of the state, to be managed and controlled by the department of agriculture so long as the state shall authorize the same to be done. There are to be no dividends or gains of any kind to those managing the department of agriculture, other than the salary fixed or provided for them in the manner specified in the bill. I see nothing in the act which can justly be construed into creating a corporation of any kind or nature. I am well satisfied that the bill in question is not obnoxious to the two constitutional objections referred to above, and from a careful reading of the same, I have discovered no constitutional objection thereto.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

ELECTION—BALLOT—The use of a voting machine preserving the secrecy and carrying out the intention of the constitution does no violation to the provisions of the constitution.

DES MOINES, IOWA, March 21, 1900.

Hon. Wm. W. Hawk, House of Representatives:

DEAR SIR—You have requested my opinion upon the question whether voting machines may be constitutionally used at elections in this state.

In regard thereto I will say that section 5, article 2, of the constitution, is in these words: "All elections by the people shall be by ballot." The true answer to your inquiry depends entirely upon what is meant by "ballot." Various definitions have been given of the word. The word "ballot" is derived from the word "ball." The second definition in Webster's International Dictionary is: "The act of voting by balls, or by written or printed ballots or tickets; the system of voting secretly by ballots or tickets." Among the definitions in the Imperial Dictionary, is: "The system of voting in such a way that the voter cannot be identified." In the Century Dictionary is this definition: "The method of secret voting by means of small balls or by printed or written ballots which are deposited in an urn or box called a ballot box." The Standard Dictionary, among other definitions, contains this: "The method of election by choice by voting with tickets or colored balls which are placed in a box or urn in such a manner that the voter can conceal his choice if he so desires."

In short, if we consider the original meaning of the word "ballot" as "a ball," and limit the manner of election to that used originally when the ball was in use, it will be seen that since the constitution was adopted there has never been a constitutional election, for never have balls been used in the state of Iowa. The Greeks use shells, ostrakon, for their method of conducting a secret ballot, hence the word "ostracial." In this growth of language, ballot has come to mean, and did so mean, in my judgment, at the time our constitution was adopted, a method of conducting a secret ballot.

The constitutional provision above quoted, therefore, means that all elections by the people shall be by that system which enables the voter to express his choice without it being known for whom or what he has voted. It is used in contradistinction to a *viva voce* vote, as had been formerly used in England. Any system, then, which preserves that secrecy of the ballot or vote of the elector, in my judgment fulfills the constitutional requirement.

We are not without authority to sustain this position. Under a constitution more restricted than ours, the Rhode Island court held that an election by the use of voting machines was constitutional. (19 R. I., 729.) The use of a paper ballot is an acknowledgment of a departure from the primitive use of the word. I think, without doubt, that at the time our constitution was adopted the word "ballot" was understood as meaning a system of secret voting in contradistinction to *viva voce* voting, and the use of a voting machine preserving the secrecy and carrying out the intention of the constitution is, in my judgment, not obnoxious to the constitution.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

CORPORATIONS—They have no power in this state to incur an indebtedness to exceed two-thirds of their capital stock. Any foreign corporation seeking to do business in this state must conform to the policy of this state, both in regard to the nature of the business transacted and the security which the law of this state is intended to give to those having dealings with such corporations.

DES MOINES, IOWA, March 30, 1900.

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

DEAR SIR—You have submitted to me copies of the articles of incorporation of the Marfield Elevator Company, and the Interstate Elevator Company, which corporations are incorporated under the laws of the state of Minnesota, and seek to obtain permits to do business in the state of Iowa by complying with section 1637 of the code, and you ask my opinion whether, under the circumstances, such permits should be granted.

The nature of the business of each company is stated in the following words: "The general nature of the corporate business shall be the erection, purchasing, leasing, owning and operating and sale of elevators and warehouses; and the doing of a general business for itself or on commission in buying, selling, cleaning and storing grain, seeds of all kinds, flour, feed, fuel, lumber and building materials." The capital stock of the Interstate Elevator Company was originally $100,000, "of which not less than $40,000 shall be subscribed for and paid in on or before April 1, 1896, and the balance of said stock may be subscribed for and issued or not, and at such times as the board of directors may at any time determine." Under article 4, the limit of the indebtedness was placed at $250,000. By amendments made June 2, 1899, stock was authorized to be issued to the extent of $200,000 "and all of said increase of stock to be subscribed and issued at such times and in such amounts as the board of directors may from time to time determine." The article in regard to indebtedness was amended so as "to increase the highest amount of indebtedness or liability to which such corporation shall at any time be liable to the sum of $500,000.

It will be noticed that these amendments required, so far as the public may know, only $40,000 of stock to be subscribed and paid in, and the corporation is authorized to become indebted in the sum of $500,000. The Marfield Elevator company can also become indebted far in excess of the capital stock paid in.

Under section 1611 of the code, such corporations, if organized under the laws of this state, shall fix the highest amount of their indebtedness or liability in a sum that shall not exceed two-thirds of the capital stock. The purpose of this evidently is to protect the public who have dealings with such corporations. This provision of our statute is of old standing, it appearing in the code of 1851.

It may be said, then, to be the settled policy of the state that no corporation organized in this state shall have the power to incur an indebtedness to exceed two-thirds of their capital stock. While section 1637, relating

to granting permits to foreign corporations to do business in this state, does not, in express terms, require a foreign corporation to comply in all respects with the laws of this state relating to the organization of incorporations, yet I think it must be understood without doubt that the legislature intended that only such foreign corporations as conform generally to the policy of this state as expressed in its laws for the organization of corporations under the laws of the state, should be permitted to do business within the state.

I cannot conceive that the legislature ever intended that corporations organized under the laws of this state should be placed at a disadvantage as compared with foreign corporations doing business in the state. There is no rule of comity which would require a state to give permission to a foreign corporation to do either a class of business prohibited to coporations organized under the laws of this state, or to give to foreign corporations the right to do business on terms and conditions more favorable than those given to our state corporations. All foreign corporations, in my judgment, must afford to the people of the state who deal with them security and protection at least equal to that required of corporations organized under the laws of the state. It would be an anomalous condition to prohibit a corporation organized under the laws of this state, with a capital of $40,000 to incur liability in any greater sum than two-thirds of its capital, and to permit a Minnesota corporation with the same amount of capital to incur a liability of half a million of dollars. In my judgment, any foreign corporation seeking to do business in this state must conform to the policy of this state, both in regard to the nature of the business transacted and the security which the law of this state is intended to give to those having dealings with such corporation. Hence, I do not think it your duty to give permits to said corporations authorizing them to do business in this state.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PENITENTIARIES—The powers vested in the governor by section 5710 of the code are abrogated as to him and vested in the board of control by chapter 118, acts of the Twenty-seventh General Assembly.

March 31, 1900.

Board of Control of State Institutions, Des Moines, Iowa:

DEAR SIRS—Yours at hand, requesting my opinion upon the following question:

> "A convict confined in one of the penitentiaries became insane, and was transferred to the insane department at Anamosa, where he is now confined. His term is about to expire, and the warden proposes to cause an examination to be made as provided in section 5710 of the code. Are the duties which that section devolved upon the governor now to be discharged by the board of control, or is the governor still required to act according to the provisions of that section?"

Section 8, chapter 118, of the laws of the Twenty-seventh General Assembly, gives to the board of control "full power to manage, control and govern, subject only to the limitations contained in this act, * * * the state hospital for the insane * * * and the state penitentiaries." Section 55 of said chapter repeals all acts and parts of acts in conflict with, or inconsistent with this act. Section 5710 of the code as well as 5709, conferred upon the governor certain powers and duties in relation to the management, control and government of the penitentiaries, with power to order a convict to be transferred from one penitentiary to the insane department of the other or from one penitentiary to one of the hospitals for the insane, or to order that convicts should be retained in the hospital department for the criminal insane. If such powers are still to be exercised by the governor, it is the duty of the board of control to respect and carry out the orders of the governor which may be made in the exercise of that power. It becomes evident, therefore, that the exercise of such power is an encroachment upon, and inconsistent with, the full power given to the board of control to manage, control and govern said institutions.

Many cases may arise where the exercise of such power by the governor would produce a conflict of authority. Suppose, for instance, the governor should direct a convict to be sent to a state hospital who had no settlement in the state, and the place of his settlement was unknown. He would have to be received as a state patient. The last sentence of section 38 of said chapter 118, provides "that no patient to be maintained at state expense shall be received at the state hospital without the formal order of the board of control." In the case supposed, then, the governor may, if such a power still exists, order a state patient to be sent to one of the hospitals, and the board of control refuse to make an order to receive him at the state hospital.

I think, without question, so much of section 5710 of the code as imposes any duty upon the governor with reference to the matters therein contained, is in conflict and inconsistent with said chapter 118 of the laws of the Twenty-seventh General Assembly and has been repealed, and the board of control, under the provisions of said chapter 118 has full power to discharge the duties devolved by said section upon the governor.

Yours truly,

MILTON REMLEY.
Attorney-General.

PENSION MONEY—The board of control, or the commandant of the Soldiers' Home, has power to require a deposit with the commandant of a part of pension money of an inmate which extends to two classes only; first, those who have been convicted twice of violating the criminal statutes of the state, or who shall have twice been found guilty by the commandant or court martial of intoxication or other misdemeanor; second, those pensioners who have a wife or minor children.

DES MOINES, IOWA, April 23, 1900.

Board of Control of State Institutions:

DEAR SIRS—Yours of the 23d inst. at hand, enclosing two letters from pensioners at the Iowa Soldiers' Home with reference to the disposition to be made of their pension money, and asking my opinion in regard to your authority to comply with the requests made in these letters.

The act of the Twenty-eighth General Assembly, approved March 29th, being an act defining the power of the board of control in relation to the pension money of members of the Iowa Soldiers' Home, prohibits the board of control adopting or enforcing any rule making any disposition of the money received from pensions by members of the Soldiers' Home, except as provided in the act. Section 2 of the act provides for the disposition of the money of pensioners in cases where the member of the home shall have been "convicted twice by any court of justice of violating the criminal statutes of the state, or who shall twice be found guilty by the commandant or a court martial, if the members so elect, of intoxication or other misdemeanor."

Said section 2 does not authorize any interference with the pension money received by any member of the home unless he shall have been convicted of violation of law or of a misdemeanor as above stated. Section 3 of the act is as follows: "All members of the home who are pensioners and having wife or minor children, shall be required to deposit with the commandant at once upon receipt of his pension check, one-half of his pension money, which shall be sent at once to said wife or minor children, unless said wife is proven to be a woman of immoral character."

It will be thus seen that the power of the board or the commandant of the home to require any deposit with the commandant of any part of the pension money extends to two classes of pensioners; first, those who have been convicted twice of violating the criminal statutes of the state, or who shall twice be found guilty by the commandant or court martial of intoxication or other misdemeanor. The second class is all pensioners who have a wife or minor children. The power of the board to adopt or enforce any rule with reference to any other class is entirely prohibited by section 1 of the act.

The letter of Mr. Chas. P. Swalm, his statement of facts being endorsed as correct by the commandant, and assuming that he has not been twice convicted of violation of any criminal law, or intoxication, or other misdemeanor, by the commandant or court martial, brings him within neither of the classes referred to above, and hence he is authorized, in my judgment, to do exactly as he sees fit with the money received from the pension, and if he desires to send one-fourth of it to his mother, it is his privilege. If his mother were dependent upon him, which does not appear from the statement of facts to be the case, the board could take no steps to enforce the sending of money to her unless he should be convicted in the manner referred to in section 2 of the act, of some violation of law, misdemeanor, or intoxication.

Hence, I think he is at liberty to use or dispose of his pension money as he wishes, without let or hindrance from the commandant or the board of control.

Second.—In regard to the case of Mr. Augustus Morrison: It appears from his letter that he receives a pension of $8.00 per month, and under the rule heretofore enforced, has been sending all above $6.00 per month to his two children who are twelve and fourteen years of age respectively, and are at the Soldiers' Orphans' Home at Davenport. He wishes to discontinue the sending of money to his children and to apply all in excess of $6.00 per month to the payment of certain debts.

His case comes clearly within the provisions of the third section which I have quoted above. Having minor children, under section 3, he is required to deposit with the commandant one-half his pension, or $4.00 per month, which amount section 3 requires to be sent at once to his children. The other half, or $4.00 per month, Mr. Morrison is at liberty to dispose of as he deems best. In his letter he states that the children are not in need of any of the necessities of life. By section 3, the need of the children is not an element to be taken into consideration. The statute says plainly that the members of the home who are pensioners, and have a wife or minor children, shall be required to deposit with the commandant at once upon receipt of their pension checks, one half of the pension money.

A series of inquiries might arise as to how this money shall be expended for the minor children; whether the home at Davenport could use the same for the support of the children there; whether it shall be used by the children themselves as pin money; whether a guardian might be required to receive it for them. But these inquiries relate more to the wisdom or unwisdom of the act with which your present inquiry has nothing to do. I think it plain that section 3 requires a greater deposit to be made by Mr. Morrison and those similarly situated with reference to having a wife or minor children than was required under the rule heretofore in force. The act in question, while it has limited the power of the board and of the commandant, has increased the burden upon the class of members in the home described in section 3 thereof.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

MUTUAL ASSESSMENT INSURANCE ASSOCIATION—There is nothing to prevent a corporation from insuring against loss or damage from all the causes named in section 1759 of the code. Under proper provision, an association organized under chapter 5, may divide its members into classes.

DES MOINES, IOWA, April 27, 1900.

Hon. Frank F. Merriam, Auditor of State:

DEAR SIR—Your request for my official opinion upon the following question has been duly considered, viz:

"An association is about to incorporate for the purpose of doing fire, lightning, and tornado business, under the provisions of chapter 5, title IX of the code. The incorporators desire to provide in the arti-

cles for a division into two classes,—one division to consist of fire and lightning business, and the other class to consist of tornado and wind-storm business. They desire, further, to provide that in case of loss from fire and lightning that only those holding fire and lightning policies are to be assessed to pay the loss; and that when losses occur by tornado and wind-storm that only those holding tornado and wind-storm policies are to be assessed; the query being, can an association containing these provisions in its articles of incorporation be legally authorized to do business under the provisions of the code already cited, provided *bona fide* applications for insurance to the amount of $100,000 is first obtained in each class."

Section 1759 of the code provides: "Any number of persons may, without regard to the provisions of the preceding chapter, enter into contracts to and with each other for their insurance from loss or damage from fire, tornado, lightning, hail-storms, cyclones, or wind-storms." The following sections of said chapter 5 imply at least that the persons entering into the contracts referred to in section 1759 may incorporate, and the contracts entered into and with each other are entered into by means of the corporation. The kind of insurance which may be done is specified in said section 1759. The corporation is a mutual association.

I do not think there is anything to prevent a corporation from insuring against loss or damage from all the causes named in said section 1759; nor would one be justified in saying that a company could only insure against one of the contingencies or causes specified in said section. In fact, it would be hard to distinguish between loss or damage from tornadoes, cyclones or wind-storms.

The only question about which there can be any reasonable doubt in my mind is whether such association may divide its members into two classes, depending upon the contingencies insured against. If a proper provision is made for the equitable apportionment of the expense of managing the company, each class contributing to the payment of the losses occurring in that particular class, and each class having insurance in the sum named in your inquiry and in the statute, I see no legal objection thereto. The mutuality required to be preserved by mutual companies does not necessarily mean that each one shall pay the exact amount which every other member pays. In fact, in all mutual insurance companies, the basis for contribution to losses is fixed by the premium paid, or the premium note given. Where one class, for instance, the class which is insured against tornadoes, hail-storms, cyclones, or wind-storms, agrees to pay the losses of the members of that class by an assessment upon the members of that class, the mutuality is preserved between the members of that class and the class insured against fire and lightning is not required to contribute to the losses of the other class. If each class contributes its equitable proportion to the expenses of operating the company, I cannot say that the mutuality is not maintained.

It is somewhat difficult to gather a clear idea of what the legislature intended by some of the provisions of said chapter 5. It is a little difficult to consider a contract made between a corporation and a member as "entering into contracts to and with each other." In one sense undoubtedly this is true, but in a very material sense it is not true. Still, construing the

different sections as best we may, I am inclined to think that you would be justified in authorizing a company organized under said chapter 5 to do business upon the plan above suggested, if due care is taken that each class shall contribute equitably its proportionate share to the expenses of maintaining the corporation and transacting the business.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

WARRANTS—AUTHORITY OF AUDITOR OF STATE TO DRAW—He has no authority to draw warrants against the fund appropriated under chapter 131, acts of the Twenty-seventh General Assembly, after the first day of April 1900.

DES MOINES, IOWA, April 27, 1900.

Hon. Frank F. Merriam, Auditor of State:

DEAR SIR—Yours of the 16th inst. came duly to hand, in which you ask my official opinion upon the following question:

"Can the Auditor of State draw warrants against the fund appropriated under chapter 131, acts of the Twenty-seventh General Assembly, after the first day of April, 1900?"

Section 2 of the said act is as follows: "There is further appropriated from the state treasury for the term of two years ending March 31, 1900, the following sums, or so much thereof as may be necessary, to wit: * * * provided that on the first day of April succeeding the meeting of the regular session of the General Assembly, all moneys appropriated under this act and remaining unexpended shall be and are hereby covered into the state treasury."

The correct answer to your inquiry depends upon the meaning of the word "unexpended." For a number of years substantially the same language has been used in the general appropriation act. The word "expended" is derived from the Latin "expendere," meaning "to weigh out; to pay out; to lay out;" used with reference to the paying out of money, because of the fact that before money was coined, the precious metal was weighed out in scales or balances. The English word "expend," when applied to money, means to pay out or disburse money. This is the definition given by most or all of the lexicographers, and common usage sanctions the use of the word in this sense.

The first clause of the section above quoted makes the appropriation for the term of two years, ending March 31st. The second clause expressly requires all moneys appropriated in this act, "and remaining not paid out on the first of April, to be covered into the state treasury." Money cannot, in any true sense, be said to be expended until it is paid out. The last clause of said section is equivalent to saying that all moneys remaining not paid out on the first of April shall be and are hereby covered into the state treasury.

The purpose of this provision is in harmony with the construction above given. In making appropriations and providing for the expense of the government of the state, and the state institutions, it is necessary that the legislature should know the amount of money subject to be drawn under previous appropriation bills. If it were proper to pay for bills or debts contracted, relying upon the appropriation after the first day of April, the general assembly would have no means of knowing the amount of such bills or debts outstanding, and hence could not know definitely the amount of money in the treasury subject to be drawn. The appropriations from one general assembly to another are not cumulative. The provision above quoted closes the account, so far as the money not drawn from the treasury is concerned, promptly on the thirty-first day of March succeeding the meeting of the regular session of the general assembly. If bills or debts contracted by any state officer on account of the appropriation contained in said act, cannot be settled and adjusted and paid prior to the first day of April, then the legislature can provide therefor by an additional appropriation in the omnibus appropriation act, and no one will be prejudiced by the construction thus placed upon it.

I am of the opinion that your inquiry must be answered in the negative.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INMATE OF HOSPITAL FOR INSANE—RESIDENCE OF—Such person cannot change his residence or place of settlement. He has not the mental capacity to form such an intention as is required by law.

May 4, 1900.

Board of Control of State Institutions, Des Moines, Iowa:

DEAR SIRS—Your favor of the 2d inst. at hand in which you ask my opinion upon the state of facts therein narrated, namely; that a patient at Clarinda hospital was paroled for sixty days, but was not discharged as cured He had been a state patient. During the time that he was out on parole he resided in Woodbury county. Under a new commitment he was returned to Clarinda April 21, 1900. The warrant and findings of the commissioners of Insanity of Woodbury county state his legal residence to be in Woodbury county. You ask whether, upon such facts, said patient could obtain a legal settlement so as to be chargeable to Woodbury county; or, stated otherwise, can an insane man, who is an adult, acquire a settlement in such a case.

I am very clear that if the patient's residence before he was sent to the hospital in the first place, was not in Woodbury county, he could not acquire a settlement in Woodbury county between the date of his parole, on January 15, 1900, and the date of his return, April 21, 1900. The length of time required to obtain a settlement in a given place is one year. Even had he been a sane man, he could not, in seventy days' time, acquire a settlement where he had not one.

I do not think an insane person can change his residence or the place of his settlement. Settlement follows from a continued residence in a given place for the period of twelve months. Settlement once acquired continues until it has been legally changed. To change the place of residence, two things must combine First, an intention to make such change; second, an actual change. An intention to change a residence cannot be imputed to an insane person. Hence, in my judgment, an insane adult cannot acquire a new settlement by simply wandering into another county or jurisdiction. If Woodbury county insane commissioners find that his settlement is in that county, it is possible that they have knowledge of facts which your honorable board may not know. While the patient in question had been committed as a state patient to the hospital, the former finding may have been incorrect and the latter one be correct. The board might well make a thorough investigation of the facts before doing anything to set aside the order of the commissioners of insanity of Woodbury county.

Respectfully yours,

MILTON REMLEY,
Attorney-General.

GAME LAWS—VIOLATION OF BY INDIANS ON RESERVATION—The above laws are general in their operation, and affect Indians the same as all other persons.

May 8, 1900.

Hon. Geo. E. Delavan, Estherville, Iowa:

DEAR SIR—Yours of the 9th inst. at hand asking my opinion upon the question whether the Indians of Tama county are amenable for the violation of the Iowa game law.

In reply to this I will say, that there is no exception made in favor of the Indians in the statute. The statute is general in its operation and effect. All persons, whether citizens or aliens, resident or non-resident are liable for any violation of the statute. The Indians can claim no exemption from the operation and effect of the criminal laws of the state.

Yours truly,

MILTON REMLEY,
Attorney-General.

But see *In re.* Blackbird, 109 Fed., 139.

FENCES—RIGHT TO ERECT ALONG MEANDERED LAKES—No adjacent land owner has a right to enclose the shores of a lake below high water mark, or any part of the lake with a fence so as to interfere with the rights of the public.

DES MOINES, IOWA, May 17, 1900.

F. M. Baughman, Esq., Deputy Fish and Game Warden, Breda, Iowa:

DEAR SIR—Yours of the 16th inst. at hand, in which you ask my opinion

as to whether parties owning land adjacent to Wall Lake, in Sac county, have the right to build a fence in the waters of the lake, thereby obstructing the passage of any wanting to fish in said lake from the shore, and whether they can prohibit anyone from climbing over or through such fence for the purpose of fishing.

In regard to this I will say that in all meandered lakes the state of Iowa owns all the land under the lake and on its shores up to high water mark. It holds the title for the use of the public. The public, and any part thereof, has the right to go to any part of the lake, or along its shores below high water mark, without let or hindrance. Persons owning land adjacent to the lake can prevent people trespassing on their land in going to the lake, but the right of the adjacent land owners does not extend below high water mark. Such land owners may erect wharves or docks, and use the shores for purposes connected with the legitimate use of the lake, but cannot prevent the public from going thereon, or passing along the shores of the lake freely. In using the lake, the adjacent land owners must use it so as not to interfere with the rights of the public.

It follows from this statement of the rules of law that no adjacent land owner has a right to enclose the shores of a lake below high water mark, or any part of the lake, with a fence, so as to interfere with the rights of the public.

Yours truly,

MILTON REMLEY,
Attorney-General.

TRUSTEES OF IOWA STATE COLLEGE—POWERS OF—1—They have no authority to use any part of the interest from the endowment fund to pay off expenses of the college experiment station.

2.—They cannot legally divert the funds appropriated by section 2674 of the code to the payment of the current expenses of said experiment station.

May 23, 1900.

Hon. J. B. Hungerford, Chairman Board Trustees Iowa State College, Carroll, Iowa:

DEAR SIR—Yours of the 16th inst. duly at hand in which you ask my opinion upon the following questions:

First—"Can the trustees of the college lawfully appropriate any part of the interest from the endowment fund, for the payment of the current expenses of the college experiment station?"

The act of July 2, 1862, donating lands to the several states provided, among other things, that the money derived from the sale of the lands aforesaid, shall be invested in a certain manner, and "the interest of which shall be inviolably appropriated by each state, which may take and claim the benefit of this act, to the endowment, support, and maintenance, of at least one college, where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such

branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislature of the states may respectively prescribe." The act further provides that the state shall erect the necessary buildings and keep the capital of the fund derived from the sale of lands forever undiminished. The state has accepted the grant upon the terms named in the act. The act of March 2, 1887, providing for an agricultural experiment station to be established under the direction of the college or colleges or agricultural department of colleges, made an appropriation for the expense of said experimental station. While the experiment station is under the control and direction of the college, yet it is something separate and distinct from the college so far as the expenses are concerned, and the sources from which the funds necessary to maintain the experiment station are derived. There is nothing in the statute of the state which authorizes or justifies the mingling of the funds provided for the support of the college proper and for the support of the agricultural experiment station. In view of the acts of congress, it is doubtful whether the legislature could authorize the diversion of the income fund of the college to the support of an experiment station, but whether the legislature has such power or not need not be discussed, for the legislature has not attempted so to do. The two are treated as separate institutions so far as the expense of supporting the same is concerned. Hence, I do not think the board of trustees of the college would be authorized in using any part of the interest from the endowment fund, for payment of the expenses of the college experiment station.

Second, you ask: "Can the trustees lawfully appropriate any part of the annual appropriation provided under section 2674 of the code, for payment of current expenses of the college experiment station?"

Section 2674 is as follows: "For the repairs, general improvements and current expenses of the state college of agriculture and mechanic arts, in its several departments and chairs, and in aid of the income fund, the sum of eighteen thousand five hundred dollars is annually appropriated out of any money in the state treasury not otherwise appropriated." This section specifies the purposes for which the appropriation is made. Bearing in mind that all appropriations of the national government, and all laws enacted by the legislature make a distinction between the college and the experiment station, it is evident that the appropriation made by section 2674 is intended for the support, repairs, general improvement and current expenses of the college and not for the current expenses of the experiment station. I do not think the trustees can legally divert the funds appropriated by said section to the payment of the current expenses of the experiment station.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

GAME LAWS—Fish in ponds or lakes owned by private individuals are private property. Under the facts stated, no opinion can be formed as to whether the parties are in fact the owners of the lakes in question.

June 8, 1900.

Hon. Geo. E. Delavan, Estherville, Iowa:

DEAR SIR—Your favor of the 28th ult. at hand, in which you enclose a letter of Mr. J. H. Scott, and request me to give you an opinion upon the rights of the parties from the facts stated in Mr. Scott's letter. Mr. Scott says: "We have in this town an association organized for the purpose of fishing and have leased, on the bottom lands of the Mississippi, a couple of ponds, or small lakes, that are surveyed, and taxes paid on the same, as if in a state of cultivation, and are cut off from the main channel or stream by the government levee. The association wish to know if they have the right, under the state law, to fish in these ponds with nets, or only with hook and line? In other words, they wish to know what their rights are now, as provided by the statute?"

The answer to this question depends altogether upon the ownership of the ponds or small lakes. If the ponds, or small lakes, are private property, then I am of the opinion that the owners, under section 2545, are the owners of the fish therein, and may take them as they see fit, or permit the same to be done. Under the facts stated, I can form no opinion as to whether the parties are in fact the owners of the lakes. Mr. Scott's letter says they are surveyed and the taxes paid the same as if in a state of cultivation. I infer also that the lakes were formerly connected with the stream by a natural outlet. The fact that some party has had a meandered lake surveyed, and voluntarily pays taxes, does not necessarily make him the owner of the lake, notwithstanding the outlet may be cut off by a levee built by the government.

The language of section 3545 is: "Persons who own premises on which there are waters having no natural inlet or outlet through which such waters may be stocked or replenished with fish, are the owners of the fish therein, etc." It may be contended that there was a natural inlet or outlet to these lakes which has now been closed by the government levee, and hence the lakes, although owned by private parties, do not come within the description of lakes referred to in said section. Such a construction would be very technical indeed, and I think contrary to the spirit and intention of the entire section. The government levee destroys the outlet or inlet and there is none there now, so that if the ponds or lakes belong to private parties, the public is not damaged by the taking of the fish therefrom by the owners of the lakes.

If private parties do not own the lakes, then I do not think they would be authorized to seine in them.

Yours truly,

MILTON REMLEY,
Attorney-General.

COMMISSIONER OF LABOR STATISTICS—Under the powers given him by law, to inspect factories, he may make a written request to enter said buildings for such purpose, and if refused permission, he may proceed to enter said buildings without the consent of the owner.

June 11, 1900.

Hon. C. F. Wennerstrum, Commissioner of Labor Statistics, Des Moines, Iowa:

DEAR SIR—Yours of the 8th inst. duly at hand in which you refer to section 2472 of the code, and ask:

> "Must the commissioner first obtain or secure the complaint of two or more persons before he can enter such factory, or does the law mean that he must make an examination of a factory on receiving such complaint, and does the law quoted, authorize him to make an examination on his own initiative after having first asked permission in writing to inspect such factory, as the law prescribes?"

The language of the statute is: "The commissioner of the bureau of labor statistics shall have the power upon the complaint of two or more persons, or upon his failure to otherwise obtain information in accordance with the provisions of this act, to enter any factory, mill, etc., when the same is open or in operation, upon a request being made in writing, for the purpose of gathering facts and statistics such as are contemplated by this act." Section 2474 of the code provides in general terms, the kind of information that may be required to be furnished by the owner or manager of such factory, mill, workshop, mine, etc. The information given may not prove satisfactory. Some matters about which information is to be asked, such as, what means are provided for the escape of the employes in case of fire; what measures are taken to prevent accidents to employes from machinery; how are the buildings ventilated, etc., could be obtained better by a personal inspection than by any description which could be given. The purpose of the law, among other things, is unquestionably to secure the best possible protection for the life and the health of the employes. A power given often implies a duty. Where complaint is made by employes or others, as to the insufficiency of the appliances to secure the life, health and comfort of the employes, I think it is the duty of the commissioner to make a personal inspection, exercising thereby, the power to enter the building when it is open or in operation, after making a request therefor in writing. But if, for any cause, he deems the information which he has obtained, not satisfactory, I do not think he is limited in his action until after complaint is filed. He may make a request in writing and if granted enter the building, and if refused permission he may proceed to enter the building without the consent of the owner.

Yours respectfully,

MILTON REMLEY.
Attorney-General.

BOARD OF CONTROL—The abstract of title of the east half of lot sixteen (16) in Sage's subdivision of the southwest quarter of section twelve (12), township seventy-nine (79), range twenty-two (22), west of the 5th P. M., shows the title in the present owner to be good.

June 11, 1900.

Board of Control of State Institutions, Des Moines, Iowa:

DEAR SIRS—I enclose you the abstract of title of the east half of lot sixteen (16) in Sage's subdivision of the southwest quarter of section twelve (12), township seventy-nine (79), range twenty-two (22), west of the 5th P. M. The objections thereto pointed out in my communication of May 4th have been removed except in regard to taxes up to and including the year 1876, as stated in item number 10 of the abstract.

In regard to this I will say, that while taxes are made a perpetual lien upon real estate, the long time that has elapsed since there was any effort to enforce the taxes, makes the defect in title more apparent than real The action of the board of supervisors in passing a resolution relinquishing taxes prior to and including 1876, although in my judgment without authority of law, has been acquiesced in for so long that there is not one chance in five hundred of the act ever being questioned hereafter. Everything considered, I am of the opinion you would be justified in purchasing the said land and considering the title thereof good, as I think it is for all practical purposes.

I enclose you herewith also the unrecorded deeds and tax receipts.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSURANCE COMPANIES—1.—The securities of such companies deposited with the auditor of state for the purpose of securing policy holders cannot be withdrawn under any circumstances, either by the company depositing the same or any assignee or reinsuring company, except upon the substitution therefor other securities in a sum of equal value to those withdrawn.

2.—Payment of interest could be endorsed on such security at the request of the company, in case it has been paid and there is no interest coupon to be severed from the mortgage or bond. No company has any authority of law whatsoever to receive payment in full for said securities.

3.—The maker of such securities, making payments thereon, to any one other than the auditor of state, while such securities are in his possession, does so at his peril.

June 12, 1900.

Hon. Frank F. Merriam, Auditor of State, Des Moines, Iowa:

DEAR SIR—Yours came duly to hand in which you ask my opinion upon the following subjects:

First—"In the transfer or consolidation of the assets and business of a legal reserve company organized in this state with a similar company organized in another state, on what basis, if at all, can the purchasing or surviving company if organized outside of this state, withdraw the securities deposited with this department?"

In regard to this I will say, that life insurance companies organized under chapter 6, title 9 of the code, if a stock company, under section 1769 of the code is required to deposit with the auditor of state, securities representing $25,000 of paid up capital. And under section 1774 they are required to deposit from year to year, enough in addition thereto, to make the total deposit equal the net cash value of all policies in force. A mutual company under section 1774 is required to deposit in section 1770 of the code, three-fifths of the whole annual premium of policies, averaging $1,000 each, issued on the life of two hundred and fifty persons, and from year to year, enough in addition thereto to make the total securities deposited with the auditor equal the net cash valuation of all policies in force by such company. The state becomes the trustee of the funds thus deposited, holding the securities, which as far as they go, are a guaranty of the fulfillment of the contract made between the company and the policy holder. The auditor is the custodian of the securities thus deposited, with the state as the trustee. No company organized in the state is permitted to do business without complying with the requirements of the provisions of the law above referred to. Section 1779 authorizes the companies having such deposits to change the securities, that is, they can substitute other securities in lieu of those theretofore deposited with the auditor. Section 1780 authorizes the companies having deposited with the auditor, bonds or other securities, to collect the dividends or interest thereon, forwarding to their authorized agents the coupons or other evidence of interest as the same become due. But there is no provision of law authorizing the withdrawal from the auditor's hands the bonds or mortgages or other securities once deposited there except upon the company first having placed in the auditor's hands, an equal amount of securities to be approved by the auditor. Section 1774 requires that the full net valuation of all policies in force shall be ascertained by the auditor, and securities in an amount equal thereto, shall be deposited with the auditor. The provision authorizing a substitution of securities and a collection of interests thereon, gives to the companies sufficient latitude in the loaning of their money and the collection of the interest thereon, but does not authorize them to withdraw securities deposited so as to reduce the amount deposited, below the net valuation of the policies of such company in force. Nor does the law authorize a stock company to withdraw securities so as to reduce the amount on deposit with

the auditor below the sum of $25,000 the amount of cash capital required of such stock companies.

The inquiry arises: For what purpose is this deposit with the state as trustee? Section 1778 clearly defines the trust imposed upon the state. If a company defaults or becomes insolvent or proceedings are instituted against a company, the securities on deposit shall vest in the state for the benefit of the policies on which such deposits were made, and the proceeds of the same, shall, upon order of the court upon final hearing, be divided among the holders thereof in proportion to the last valuation of the sum, or at any time be applied to the purchase of reinsurance for their benefit. It is thus seen, that the state is the trustee of securities which are pledged for the fulfillment of a contract of insurance made between the company depositing such securities, and its policy holders. No private arrangement between the company making such deposit, such as procuring reinsurance on some other company organized under the laws of this state, or any other state, or a consolidation of business by which the business is afterwards continued in the name of another company, will justify the trustee or the auditor of state acting for such trustee, in releasing the securities or permitting them to be withdrawn from the hands of the trustee. To illustrate: A enters into a contract with B and as an inducement for B to enter into the contract, deposits with C as trustee, certain securities as a pledge or guarantee that A will fulfill his contract with B. Afterward A makes another contract with D, to which B is not a party, by which D assumes all the obligations entered into by A and agrees to carry them out; what right in such a case would D have to the securities which were pledged and placed in A's hands for the fulfillment of the contract made with B. B has a right to insist that C, the trustee, shall hold the securities originally pledged for the fulfillment of the contract, and for C to deliver the securities without B's consent to any person whomsoever, would be a gross violation of his trust and contrary to every principle of law and equity.

The provisions of the statute to which I have called attention are wise and one of the most excellent features of the Iowa insurance law. They have been advertised and many policy holders have been induced to take policies in various companies because of the provision of law referred to, and the securities deposited with the auditor of state To permit a company which has received money as premiums from the policy holders on policies procured because of securities deposited with the auditor of state, to reinsure its risks in a company organized under the laws of another state, which latter company is not required to deposit the net valuation of all policies in force with the auditor of this state, and because of such reinsurance, for the auditor to surrender the securities pledged for the fulfillment of the contracts of insurance without the policy holder's consent, would be a gross violation of law and of his duty as an officer of the state. It would practically abrogate the wise provision which the law has made for the protection of policy holders. It would be a rank injustice to such policy holders, and, in addition thereto, I am inclined to the view it would render the auditor liable on his bond to every policyholder injured thereby. My conclusion is, that such securities cannot be withdrawn under any circumstances, either by the company depositing the same, or any assignee

or reinsuring company, except upon the substitution therefor of other securities in a sum of equal value with those withdrawn.

> *Second*—You ask further: "In case you find such securities should still be retained on deposit here, what arrangements, if any, should this department enter into to permit the temporary withdrawal of securities for the proper endorsement of payments made thereon; or in case said securities have been paid in full?"

In regard to this, from what I have said before, it will appear that the auditor has no authority to permit the withdrawal of any securities until an equal amount has been deposited with him. If securities equal to the net valuation of all policies in force have been deposited by the company, the auditor is authorized to surrender the coupons attached to bonds or notes, to the company as such coupons mature. But the bonds or mortgages should in no case be permitted to go out of the hands of the auditor until other securities are substituted in place thereof. The payment of interest could be endorsed thereon at the request of the company in case it has been paid and there is no interest coupon to be severed from the mortgage or bond.

> You ask: "What shall be done in case said securities have been paid in full?"

No company has any authority of law whatsoever to receive payment for securities which are deposited with the auditor of state. The maker of any mortgage or note, or any bond given to an insurance company, is presumed to know the law, and is not justified in making a payment to an insurance company unless such company has actual possession of the bond or mortgage. If he does so, he does it at his peril. It is my opinion that the auditor should permit no withdrawal of securities for the endorsement of payment made thereon, unless the company has placed an equal value in lieu thereof. Such companies being authorized to receive the payment of interest except as hereinafter stated, a company giving a receipt for the interest is entitled to have a receipt for the interest paid, attached to the note or mortgage, but if such note or mortgage has interest coupons attached, the auditor is justified in cutting off the same and forwarding it to the company. A company having no authority to collect the principal of any securities on deposit with the auditor, if it unlawfully does so, the auditor is justified in refusing to recognize such payment and still holding the bond or mortgage for the purpose of carrying out the trust imposed on the auditor when such security was deposited with him.

Third.—You ask further: "What action should this department take, if any, to prevent the companies accepting payment in part or in full amount of securities deposited here without the withdrawal of said securities?"

The latter part of section 1380 provides: "If any company fails to deposit additional security when and as called for by the auditor, or pending any proceedings to close up or enjoin it, the auditor shall collect such dividends or interest and add the same to such securities." In as much as under the law, companies not in default are authorized to collect the interest, I think the auditor should, in case a company fails to deposit additional securities when and as called for by the auditor, notify the

maker of every bond, note or mortgage on deposit with him, to pay no more interest to the company, but to pay the same to the auditor; this as a matter of precaution and as courtesy to the makers of the bonds and notes.

If it comes to your knowledge that any company illegally collects the amount of a note, mortgage or other security deposited with the auditor for the purpose of protecting the persons liable on such security from a fraud and double liability, I suggest that you notify the person liable on every security deposited by such company, in no case to pay any sum whatsoever to such company. It is a familiar principle of law, that the maker of a negotiable note or bond who pays the same to any person other than the actual holder thereof, does so at his peril. While I think the state could collect any security deposited with the auditor notwithstanding the payment to the insurance company which deposited with the auditor, yet as a matter of precaution and to protect such makers from being required to pay their obligation a second time, the notice above suggested might well be given, although not required by law. Courtesy to the makers of the bonds and notes, if not absolutely requiring it would justify it.

Let me say, generally, that every security required by law to be deposited with the auditor of state, either by a level premium insurance company organized under the laws of the state, or by any association, has attached to it some trust. The state is made the trustee for the fulfillment of the trust attaching to the securities deposited, and in no case is the auditor justified in surrendering the securities or permitting them to go out of his possession, except in the manner prescribed by law, or upon an order of the court, which executes in behalf of the state, the trust attaching to the securities deposited with the auditor.

Yours truly,

MILTON REMLEY,
Attorney-General.

CITY MILK DEALERS—WHO ARE SUCH—Wholesale dealers in milk and cream are included within the definition.

June 13, 1900.

Hon. B. P. Norton, Dairy Commissioner, Des Moines Iowa:

DEAR SIR—Yours at hand in which you desire my opinion upon the question:

> "Whether the statute definition of a city milk dealer will apply to those persons who sell their milk at wholesale, and deliver the same by wagon to retailers of milk in Des Moines and the other cities of the state in which the inspection of milk is carried on by this office."

The definition of city milk dealer in section 2525 of the code is as follows: "Any person or corporation who shall sell milk or cream from a wagon, depot or store, or sell or deliver milk or cream to a hotel or restaurant or boarding house, or any public place in any such city, shall be considered as city milk dealer." The language is very general and comprehensive and seems to include all persons who use a wagon or have a store or depot, from or at which milk is sold. I see nothing in the language to justify the idea that it referred only to retailers of milk. A wholesale dealer of milk who either keeps a store or depot or delivers the milk sold, from a wagon, is no less a dealer of milk than one who sells by retail alone. The milk of such a one is no less subject to inspection. The evil resulting from the sale of impure or unwholesome milk by a wholesale dealer is no less, but on the other hand, much greater than the sale of such milk by a retailer. I think without question, a wholesale dealer of milk or cream of the kind you name, in a city having 10,000 population or over, comes clearly within the definition of city milk dealer and should obtain a permit and pay the fee therefor, as in said section provided.

Yours respectfully,

MILTON REMLEY,
Attorney General.

STATE BOARD OF HEALTH—Construction of section 2573.

June 14, 1900.

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

DEAR SIR—Your favor at hand in which you enclose a letter from Mr. C. A. Meredith, county attorney of Cass county, and my opinion is asked as to the proper construction of section 2573.

In reply I will say, that in the first part of said section it is provided that certain acts and omissions or failures and neglect therein named, subjects the parties so offending to a civil action in the name of the clerk of the board, to a penalty of $20.00 per day for each day he so offends. The last clause is in the following words: "And in addition thereto, anyone so offending or knowingly exposing another to infection from contagious disease, or knowingly subjecting another to the danger of contracting such disease from a child or other irresponsible person, shall be liable for all damages resulting therefrom, and be guilty of a misdemeanor." This last clause which I have quoted, gives an additional remedy for violations or neglects enumerated in the first part of the section. One knowingly exposing another to infection from a contagious disease, or knowingly subjecting another to the danger of contracting disease from a child or other irresponsible person, under this last clause is made liable for all damages occasioned thereby, and also is guilty of a misdemeanor. The penalty of $20 00 per day does not apply to the two cases named in this last clause, but anyone guilty of any of the acts of commission or omission referred to in the first part of said section, is liable to three different actions. First, one in the name of the clerk of the board or the statutory penalty of $20.00 per day; second, he is liable to any person who has been injured by his act of omission; third, he is guilty of a misdemeanor.

I do not think the language susceptible of any other meaning. The phrase, "and in addition thereto," refers to the penalty affixed in the part of the section before said phrase. The use of language will not permit one to say that in addition to the acts before enumerated, or any of them, one must knowingly expose another to infection from a contagious disease in order to be held guilty of a misdemeanor. Such a construction would lose sight of the phrase "anyone so offending." If we bring the subject and predicate of the clause which I have quoted above, close together, it would

read this way, "and in addition thereto (that is, the penalties above described) anyone so offending * * * shall be liable for all damages resulting therefrom and be guilty of a misdemeanor." This makes the sense more perspicuous. Yours respectfully,

MILTON REMLEY,
Attorney-General.

EXPRESS COMPANIES—ASSESSMENT OF—The rights of the state will not be prejudiced by the acceptance of taxes tendered by said companies under the law existing prior to the enactment of chapter 45 of the laws of the Twenty-eighth General Assembly.

DES MOINES, IOWA, June 14, 1900.

Hon. Frank F. Merriam, Auditor of State:

DEAR SIR—Yours of the 4th inst. duly at hand, in which you say:

> "several express companies have tendered to this department their report as provided under the law in existence prior to the passage of the new law for the assessment of express companies by the Twenty eighth General Assembly, together with certified check for the amount of tax provided under the old law. This matter was brought to the attention of the executive council and they request an opinion from you as to whether it would be proper to accept the tax as tendered."

In regard to this I will say that from an examination of the prior law, it may fairly be considered that the tax thereby imposed was intended to be in the nature of a franchise tax. While the law of 1896 did not specify whether the first payment made under such law should be a tax for the year 1896, or the year 1897, the first payment was made under the law in May 1897, and was required to be so made. In view of the fact that the general policy of the law is to require the payment of the tax for a given year after the thirty-first of December of such year, it may be fairly inferred that the first payment of the tax required by chapter 33 of the Twenty-sixth General Assembly was intended to be a tax for the year 1896. Likewise the payment of the tax made during the year 1898 would be considered the tax for the year 1897. Also the tax paid in the year 1899 would be for the year 1898, and the tax tendered to you at the present time may fairly be considered the tax for the year 1899.

Chapter 45 of the laws of the Twenty-eighth General Assembly provides another method of taxing the express companies, and clearly implies that the assessment made thereunder for the year 1900, and certified to the county auditors of the several counties of the state, shall be subject to taxation in the local taxing districts, and shall be in full of all taxes from such companies during the year 1900. In other words, said chapter 45 provides a method for assessing the express companies, and it shall be in force fully for the year 1900, and taxes thereunder will not be required to be paid until after the first of January next.

I see no injustice in accepting the tax tendered by the express companies, nor any harm that can result to any interests in putting the new law into operation. Yours respectfully,

MILTON REMLEY,
Attorney-General.

REPORT AND ACCOUNTING FOR FEES BY PUBLIC OFFICER—1.—The monthly report of the clerk of the supreme court to the treasurer of state should include an accurate and particular account of all fees received or collected by him during the preceding month.

2.—He is personally responsible for uncollected fees which the law makes it his duty to collect before docketing cases.

3.—If he makes default in payment at the proper time, or appropriates any fees to his own use, he will be liable for the interest thereon.

4.—If such clerk fails to make his report to the treasurer at the proper time, and fails to account for fees collected, it would be the duty of the treasurer to call the attention of the governor or the executive council to such delinquency.

DES MOINES, IOWA, June 23, 1900.

Hon. John Herriott, Treasurer of State:

DEAR SIR—Your favor of the 31st ult. duly at hand, in which you call my attention to certain provisions of law with reference to the report and the accounting for fees by the clerk of the supreme court to the treasurer of state, and say:

> "In view of the fact that the clerk of the supreme court is by law required each month to account in detail to the treasurer of state for all fees that are due the state, and pay all fees collected into the state treasury, I respectfully request your opinion upon the following matters so that I may act as circumstances may make appropriate:
>
> "1. As a salaried officer is the clerk of the supreme court permitted, under section 1289 of the code, to appropriate for his own use any fees or moneys received by him for performing any duties or rendering any of the services required of him by law, or should his monthly reports to the treasurer of state include "an accurate and particular account" of all such fees received as sections 191 and 205 direct, the same to be accompanied by payment into the treasury of the entire amount therein reported as collected?"

Section 205 of the code fixes the salary of the clerk of the supreme court. It provides: "The clerk shall collect the following fees and account for them as provided in section 191 of the code, and shall also keep an account of and report in like manner all uncollected fees."

Section 191 provides with reference to the secretary of state and auditor that "they shall keep an accurate and particular account of all fees received by them which shall be verified by affidavit and rendered monthly to the treasurer of state, and they shall pay the amounts thus received to such treasurer at the end of each month.

Section 205 makes it the duty of the clerk to collect the fees therein specified upon the rendition of the services therein described.

Section 4638 of the code is as follows: "Every officer having the custody of a public record or writing shall furnish any person upon demand and payment of the legal fees therefor, a certified copy thereof."

It is a well established principle of law that a public officer, by accepting the office, agrees to accept the compensation, whether salary or fees, provided by law as full compensation for any service within the line of his official duty. It is stated in Throop on Public Officers, section 478, "that where a compensation is given by statute, whether by salary or by fees or by commissions or otherwise, it is in full of all his official services, and he is not entitled to demand or receive any additional compensation from the public, or from any individual for any service within the line of his official duty." There are hundreds of cases which sustain this doctrine.

Section 1289 is as follows: "The salaries of all officers authorized by this code shall be paid in equal monthly installments at the end of each month, and shall be in full compensation for all services except as otherwise expressly provided." The last clause is but a restatement of the law existing prior to the statute.

My conclusion is that the monthly report of the clerk to the treasurer of state should include an accurate and particular account of all fees received or collected by him during the month for any and all services rendered, for which the law requires a fee to be charged and collected, as well as an account of all uncollected fees, and that the money received for any service rendered for which the law authorizes a fee to be charged, should be paid into the treasury at the end of each month.

> "2. In case the clerk has not charged and collected the full amount of fees for performing his duties or rendering services to private parties, for which he is directed to charge and collect certain specified fees, is there due from him to the state treasury the difference between what he actually collected and what the law directs that he shall collect?"

Certain fees which the clerk shall charge are a specified sum for a specified service, which must be paid in advance. For instance, under sections 205 and 4121, no case shall be docketed in the supreme court until a docket fee of three dollars has been paid. If the clerk dockets a case without the payment of the fee in full, it must be considered that he personally extends a credit on his own account to the appellant or his attorney, and so far as the state is concerned, the fee should be considered as paid in full to the clerk, and it should be so reported and paid to the state treasurer at the end of the month during which the case was docketed. In this class of cases I think without question that the full amount of fees which the law directs him to collect is due the state treasury.

Certain other fees are definitely fixed by the statute, for a specified service, and are inelastic; that is, no computation is necessary to determine the amount, but the clerk has a discretion whether or not he will demand the payment thereof in advance. In regard to such fees a different rule would obtain. Not that the clerk is authorized to charge a cent less than the law directs,—he has no discretion in regard to that,—but where fees have not been paid in advance, cases may arise where collection cannot be enforced by execution, and the clerk might be justified in accepting a less sum in settlement of the costs than the law directs. In such cases, the clerk acting in good faith, I do not think the difference or the discount the clerk makes can be said to be due the state treasury; nor would he be liable therefor to the state in an action on his bond.

But if the clerk wilfully, or in bad faith, for personal gains, or for any other reason, does not charge the amount of fees which the law directs, or charges the legal fee and makes no effort to collect, a very different question is presented, and the law which is as stated below with reference to another class of fees, would, in such cases in my judgment, apply.

Another class of fees are those which the amount thereof is determined by ascertaining the quantity of work done and computing the fee therefrom at the rate fixed by statute,—such as copies of opinions of the court, transcripts of judgments or records, or papers on file in the clerk's office, for which he shall charge ten cents for every hundred words.

The words are never actually counted. They are generally estimated,—possibly an average page or two may be counted and the whole number of words approximated by multiplying the number of words found or estimated on one page by the number of pages. In case there be an error in computation, or in the estimate of the number of words, by reason of which the clerk charges and collects less than the lawful fee, I do not think the difference can be said to be due the state treasury. Nor would he, in the absence of *mala fides*, be liable therefore on his bond.

In case the clerk wilfully, or for considerations personal to himself, fails to charge and collect the fees required by law, but charges and receives a less amount, or having charged the correct amount, fails to collect the same when it is in his power to do so, whereby the state suffers loss, then he is unquestionably liable to the state for all loss sustained. He is doing the state's business, for which the state pays him a fixed salary. It is contemplated by law that litigants shall pay what is in effect a tax to help pay the expense of the court in which they have business. The clerk is made the agent of the state to collect this tax (fees). It authorizes him, except in a few instances—those named in section 1298, and possibly a few others—to collect the fee in advance. In some cases it is contemplated he shall collect the fee in advance of rendering the service. (Sections 4121, 1295, 4638.) He must faithfully discharge his duties fully in regard to collecting the full amount which the law directs. If he were negligent, or wilfully and wrongfully fails to discharge his duty in this respect, I think without question he would be liable to the state for the damages.

But unliquidated damages cannot be said to be due until they are liquidated, either by agreement of the parties, or by a proper tribunal. A person may be indebted to the state in an uncertain sum as damages, and yet

it cannot be predicated thereof that it is "due the state treasury" in the sense in which the terms are used in the inquiry.

The law requires the clerk to report the amount of fees he has collected I think this should include the amounts which are to be conclusively presumed to have been collected, as above stated. He is required to pay to the treasurer at the end of the month the amounts collected. If he does not do so, the balance is properly due the state treasury. He is not required to report any unliquidated damages which the state may claim of him for a violation of his official duty. This must be determined in the proper tribunal

> "3. Is interest due the state on the amount of any fees improperly retained by the clerk for the time the treasury has been deprived of the money?"

Fees collected by the clerk are required, as stated above, to be paid at the end of each month Section 3038 of the code says the rate of interest shall be six cents on the hundred by the year on money after the same becomes due.

Mechem on Public Officers, section 911, says: "A public officer who duly accounts for public funds at the proper time would not, unless by express statute or special agreement, be chargeable with interest thereon But if he makes default in payment at the proper time, or omits to include a portion of his account, or appropriates it to his own use, or retains it for an unreasonable time, he will be liable for interest upon the amount retained from the time it should have been paid " This, I think, is a fair statement of the law.

> "4. What is the duty of the treasurer of state with reference to the 'uncollected fees' reported by the clerk as due the state, now approximating the sum of $10,000?"

The sections of the code above referred to make it the duty of the clerk "to keep an accurate and particular account of all fees received by him, and to make report thereof, verified by affidavit. Also in like manner, to keep and report all uncollected fees."

The purpose of this requirement is that there shall be a check upon the accounts of the clerk. This provision is not altogether a formal one. Such reports would be of no service — altogether useless — if the treasurer of state should file the monthly reports away in a pigeonhole and they were never examined or inspected The fact that reports are required to be made to the treasurer for the purpose of keeping a check upon those who receive public funds implies a corresponding duty on the part of the treasurer. It goes without saying that it is the duty of the treasurer to require the payment of all moneys collected by the clerk as shown by the report, and if such report shows among the uncollected fees, items which, under the law, must have been paid in advance — for instance, the docket fees — it must be evident that the treasurer is authorized to demand the payment of the same by the clerk, and that his report be made so as to show the same were actually collected.

As stated above, as an agent of the state, it is the duty of the clerk to collect all fees required by statute to be collected. He must use all reasonable effort so to do. If, however, it appears that he abuses his discretion in not

demanding fees in advance when he is authorized so to do, and if he negligently fails or refuses to collect the uncollected fees when the same might be done with reasonable effort, then the treasurer of state would be authorized to call his attention to the matter, and if he persists in disregarding his official duty whereby the state suffered loss, it would be the duty of the treasurer to call the attention of the governor or the executive council to such disregard of duty, to the end that action might be brought in behalf of the state upon the official bond of the clerk to recover damages sustained by the state. Yours respectfully,

MILTON REMLEY,
Attorney-General.

BUILDING AND LOAN AND SAVINGS AND LOAN ASSOCIATIONS—Such associations under the laws of this state have no power whatsoever to incur an indebtedness by borrowing money for the purpose of making loans and pledge sufficient security of the association for such debt.

DES MOINES, IOWA, June 30, 1900.

Hon. A. H. Davidson, Secretary Executive Council:

DEAR SIR—Yours at hand, in which you say the executive council requests my opinion

> "As to the legality of permitting building and loan and savings and loan associations, in the amended articles which they are presenting to the council for approval, to provide for an indebtedness other than the stock authorized by law to be issued. Many of the associations provide an article, as they claim, in compliance with the requirements of section 1611 of the code, limiting the indebtedness to a per cent of the assets. These limits range from ten to seventy-five per cent of the assets. Others have, among the powers enumerated, the power to borrow money for the purpose of making loans, with authority to pledge sufficient security of the association therefor."

I will call your attention to an opinion published in the first report of the attorney-general, page 140, given August 7, 1896, to the Hon Wm. M. McFarland, secretary of state. I have no reason to change the views expressed on page 142 thereof.

I am aware that it is claimed by some writers on building and loan that there is an implied authority to borrow money in a limited amount to be used in the legitimate purposes of the corporation. This is adduced from decisions of courts relating to corporations generally, and not to building and loan associations, or in cases in which the rules with reference to estoppel and innocent purchasers seem to be the controlling principle which influenced the decisions. I am firmly convinced that the object and purpose of building and loan associations, from the first organization of such associations to the present time, is opposed to any such theory. Some cases that I have examined where it is claimed that the power to borrow

money or give a note exists, base the right so to do upon the fact that such associations were organized under the general incorporation laws of the state, and nothing in such law prohibited such associations from exercising all the powers given to corporations organized for commercial or manufacturing purposes.

The powers possessed by corporations of a particular kind must be largely—not wholly—determined from the statutes of the state under the laws of which they are incorporated. If a statute gives powers to a building and loan association by that name, it will be presumed that the legislature had a knowledge of the general plan and purposes of such association, and such plans and purposes, and the usual method of doing business of such association will be deemed to be engrafted, to some extent at least, by the use of the name which represents a given idea, into the statute itself.

Where the statute, however, specifically states the plan and purposes, and enumerates the powers which can be exercised by an incorporation of a particular kind, I take it to be universally accepted as true that such statute is a limitation upon the power of such corporation. The act of 1896, now codified as chapter 13, title IX of the code, deals with the entire subject of building and loan associations. Section 1891 provides that "any number of persons not less than five residents of the state of Iowa, may become incorporated as a building and loan association under the general incorporation laws of the state, except as otherwise herein provided, upon complying with the provisions of this chapter."

The phrase, "under the general incorporation laws of the state," relates to the manner of incorporation,—the formality attached to the execution of the articles of incorporation, recording, etc.,—but cannot be construed as giving to building and loan associations any powers at variance with the specific enactments made in said chapter with reference to building and loan associations.

It appears from sections 1611, 1612 and 1613 that certain things must be stated in the articles of incorporation of those corporations organized under chapter 1. Section 1893 relates to building and loan associations; specifies what must be contained in the articles of incorporation of the building and loan associations. It will not be contended for one moment that section 1893 of the code was intended to supplement the provisions of sections 1611 to section 1613, inclusive.

On the other hand, with reference to building and loan associations, section 1893 becomes, and must be considered, the only law with reference to the matter treated of in said section. The enumeration of powers given to such associations in section 1898 and the sections following must be considered as excluding other powers not enumerated therein; *i. e.*, so far as the nature of the business to be transacted is concerned. Chapter 13, and the laws amendatory thereto, are to be considered a limitation upon the power of building and loan associations, although in a certain sense they are said to be organized under the general incorporation laws of the state.

To illustrate this point: Authority is given to make loans to members on such terms and conditions and securities as the articles of incorporation and by-laws may provide. I do not think any one would contend for a moment that a building and loan association, in view of this provision,

would have authority to loan to one who was not a member. Yet a corporation with all the powers given in chapter 1, title IX of the code would be permitted to do so, and the provision above quoted does not, in express terms, prohibit loans to other than members.

Again, in section 1892, we find the following: "The capital stock named in the articles of incorporation shall be taken to mean the authorized stock, and the association may commence business when one hundred shares thereof have been subscribed," etc. The authorized stock is generally placed at millions of dollars. Under the law, stockholders may withdraw their stock from building and loan associations at any time, and have the right to withdraw it in accordance with the articles of incorporation. The stock, then, is a variable quantity from time to time. If it be said that such associations have the right, under section 1611, to become indebted to two-thirds of the amount of their capital stock, would it be said that the indebtedness may be two-thirds of the stock authorized, or the stock actually subscribed, although not paid, nor any part; or shall the limit of the indebtedness fluctuate from day to day, just as stock may be subscribed or withdrawn? The absurdity of the proposition appears to me so plain, in view of the fact that fixing the limit of indebtedness is for the purpose of the protection of creditors, and shows very plainly, to my mind at least, that the legislature never intended that a building and loan association should have power to borrow money, or become indebted in any sum whatsoever.

I do not mean by this that such associations may not purchase supplies or make contracts from which liability arises for the payment of salaries to their secretaries or officers. Such expenses are met by the current revenues, and are in no sense indebtedness, such as is contemplated in section 1611 of the code. The right to order supplies, or contract for the services of a secretary or employes, is one of the incidental powers, and is not dependent upon the power to incur indebtedness. It was never contemplated that building and loan associations, which were intended to provide a means of profitably investing monthly savings of home builders in the erection of homes for their members, should jeopardize the rights of the members by becoming indebted to creditors, who may sweep out of existence in times of panic or stringency of the money market, the savings of all its members.

In my judgment, building and loan associations, under the laws of this state, have no power whatsoever to incur an indebtedness as above explained, and no articles should be approved by the council which provide *for an indebtedness.*

Yours respectfully,

MILTON REMLEY,
Attorney-General.

IOWA COLLEGE OF AGRICULTURE AND MECHANIC ARTS—A certain contract relative to the purchase of land construed.

DES MOINES, IOWA, July 12, 1900.

E. W. Stanton, Esq., Secretary Board of Trustees, Iowa College of Agriculture and Mechanic Arts:

DEAR SIR—Yours of the 11th inst. at hand, in which you enclose a blank form of a contract executed for the leasing of the southeast quarter of sec-

tion 4, township 93, range 27, and say that the lessee now furnishes a certified copy of a survey, made by the county surveyor, showing the tract contains only 152 acres instead of 160 acres, and upon this fact bases a claim for a refund of the rental paid upon the shortage of eight acres, and asks that a patent be issued upon the payment of the original appraisement per acre of the 152 acres. You ask my opinion as to the legal obligation of the board in the matter.

It appears that the description of the land in the lease was as above stated, and after such description is the following clause: "being a part of the Agricultural college land grant and containing 160 acres." It appears also from the lease that the lessee agreed to pay a gross sum for the land as rental, but in case he exercises an option to purchase, he should have the right to purchase such land at the said sum of ..... dollars and ..... cents per acre

Upon this state of facts, my opinion is that the description of the land by government subdivision as aforesaid is not limited or changed by reason of the clause, "containing 160 acres" The description refers to a specific tract of land surveyed and marked by the government surveyors, known as the southeast quarter of section 4, township 93, range 27 The statement of the quantity of land therefore, under the ruling in Ufford v Wilkins, 33 Iowa, 110, must yield to the description. The rent agreed to be paid is a gross sum. A statement of the manner of arriving at the amount of rent to be paid does not change the fact that the payment is for a gross sum. We have, then, this proposition: A party rents a quarter section of land and agrees to pay a sum of money named in the contract therefor as rental. Does the fact that it has fallen short a few acres from what the parties thought was in the tract rented entitle the lessee to a reduction of the rent? I think not. If the quarter section had overrun eight acres, as is sometimes the case, would the lessee have been liable for the rent thereof? Evidently not, for the land which he rented was all within the description, or what is said to be "within the call of the lease." The same rule which he would apply to the college in case the land had overrun will apply equally to him if it had fallen short.

If there had been false representations, which the lessor knew to be false, a different rule might apply. (Hallam v. Todhunter, 24 Iowa, 166) There is no warranty in the contract that the land contains 160 acres There is no breach of the contract on the part of the college. There is no agreement in the contract to return a part of the rental paid in case the land, upon being surveyed, does not contain 160 acres. I do not think, under the facts stated, that the lessee is entitled to any repayment of the rent.

I do not wish to be understood, however, as saying that where there is a mutual mistake which is material to the agreement, that the contract may not be reformed in equity, or that either party might not treat it as a nullity because there was no agreement of mind; but so far as the facts appear in this case, as I gather them from the letter and the contract, the rules governing a mutual mistake, or the right to rescind a contract because of a mutual mistake, would hardly apply.

In case the lessee exercises the option to purchase, no gross sum as the purchase price for the quarter section being named, but a price per acre being named, a different question is presented. There is not the same

reason for holding that he should pay for a number of acres not actually contained in the contract. The language of the contract seems to justify the conclusion that whatever land is embraced within the description shall be paid for at a fixed price per acre, and if the tract contained more than 160 acres, the lessee would be required, upon purchasing, to pay for the number of acres actually contained in the tract, and I see no reason why the same rule should not be applied if it actually contains less than 160 acres.

In view of the different rules adopted by different county surveyors in ascertaining the amount of land in a given government tract and the repeated conflicts between the surveys of different surveyors, I suggest to the board that they satisfy themselves as to whether there is a shortage in this particular tract before they consent to accept less than the price of 160 acres.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

GAME LAW—Lakes owned by private parties are private waters and the fish thereon belong to the owner of the lake. He may seine therein without violating the law.

DES MOINES, IOWA, August 3, 1900.

Hon. Geo. E. Delevan, Estherville, Iowa:

DEAR SIR—Yours of the 30th ult. at hand, asking my opinion upon the following question:

> "Has the fish and game warden authority to grant permission to any person to seine a lake or bayou for the purpose of taking out certain kinds of fish and returning them to a river? Representative Letts, of Wapello, has a lake on his farm that he desires to take the buffalo and carp out of and promises to put them in the Iowa river. He desires to have nothing but game fish in the lake."

In regard thereto I will say that the statement that Representative Letts has a lake on his farm implies that he is the owner of the lake or bayou. Desiring to take the buffalo and carp out, leaving nothing but game fish in the lake, implies that there is no outlet or inlet through which such lake may become stocked or replenished with fish. Upon these facts, under section 2545, Mr. Letts is the owner of the fish in the lake, and may take them as he sees fit, or permit the same to be done. He needs no authority or permission from any person whomsoever.

In regard to the lakes owned by private parties, no authority is needed from the fish and game warden to seine, as the owner of the fish has absolute control thereof. In regard to public waters, or waters connected with the public, the law does not contemplate that the fish and game warden should give any permission to any person whomsoever to take fish by seining. Section 2546 authorizes the warden to take from the public waters of the state any fish for the purpose of propagating or restocking other waters, etc. He may do this by means of his employes or agents, but has no

authority under the law to give special privileges to any person which are not freely granted by law to others. Yours truly,

MILTON REMLEY.
Attorney-General.

AGRICULTURAL DEPARTMENT—1.—It is entitled to everything in the nature of printing, supplies, stationery and postage which it requires for the public, as distinguished from the expenses of the State fair.

2.—The act of the legislature creating this department is constitutional.

3.—It is entitled to the printing and all supplies necessary for use in the department in performing its public duties, the same as other state officers.

4.—EXECUTIVE COUNCIL—It is not authorized to purchase on competitive bids any printed matter, the printing of which the law contemplates shall be done by the state printer. The state printer is entitled to do the printing, which embraces the laws, journals and reports.

DES MOINES, IOWA, August 4, 1900.

Hon. A. H. Davison, Secretary Executive Council:

DEAR SIR—Yours of the 30th ult. duly at hand, in which you say the executive council desires my opinion,

> *First.*—"As to what, if any, printing, supplies, stationery and postage should be furnished the agricultural department by the executive council under the provisions of chapter 58, acts of the Twenty-eighth General Assembly."

Section 13 of said chapter, among other things, provides: "The said office shall be entitled to such supplies, stationery, postage and express as may be required, which shall be furnished by the executive council in the same manner as other officers are supplied."

This places the office of the department of agriculture upon exactly the same footing as other departments of state. Section 168 provides: "The executive council shall supply the governor * * * with all such articles required for the public use and necessary to enable them to perform the duties imposed upon them by law. * * * It shall also furnish the public printer with all paper required for the various kinds of public printing in such quantities as may be needed for the prompt discharge of his duties."

The suggestion that the executive council does not furnish printing is, in my judgment, without force. The paper upon which printing is done is furnished by the executive council, and the language of section 13 above quoted, fairly interpreted, places the department of agriculture upon the same plane exactly as other officers of the state.

Everything, then, which the office of the department of agriculture, as distinguished from the expenses of the State fair, requires for the public use, and is necessary, should be furnished the department of agriculture.

> *Second.*—You ask: "Is this department, organized under the provisions of said act, entitled to supplies purchased with state funds under the constitution?"

This inquiry is into the constitutionality of the act itself. When the act was under the consideration of the general assembly, Senator W. F. Harriman requested my opinion as to its constitutionality with reference to the two objections which had been urged against it, and after a careful examination of the matter, in an opinion given him March 14th, last, I expressed the view that the act was not obnoxious to the constitutional provisions referred to. I have no reason to change the views therein expressed.

> *Third.*—"Is this department entitled to printing as are state officers under the provisions of sections 117 to 120 of the code?"

Under section 13, chapter 58, acts of the Twenty-eighth General Assembly, the conclusion is irresistible that the department as such, and in all matters relating to the work of the department, except in regard to conducting the State fair, is entitled to the printing and all supplies necessary for use in the department in performing its public duties, the same as are other state officers.

> *Fourth.*—"Is the council authorized to purchase on competitive bids printing for said department under the provisions of sections 165 to 168 inclusive of the code?"

What the council may or may not purchase on competitive bids involves the consideration of a number of different sections. First, let me state that there is no express provision requiring matter to be furnished to the state printer for printing The duty to do so arises wholly from implication.

Section 117 of the code, concerning the election and duties of the state printer and binder, says: "They shall keep their respective offices at the seat of government and sufficiently equipped to enable them to promptly print and bind all laws, journals and reports, and do all other printing and binding required for state officers, boards or commissioners having their offices in the capitol, or by or for the general assembly." The clause, "and do all other printing and binding required for state officers," etc , is a general term following the specific terms, "laws, journals and reports," and under the familiar rule of construction, must be considered as referring to the printing of the class described in the specific terms. The duty of having an office sufficiently equipped to do printing for the state of the class which is defined by "laws, journals and reports," imposes an obligation by implication upon the officers of state to furnish all the printing for state officers of that class to the state printer. Section 2 of chapter 82, acts of the Twenty-second General Assembly, was in substantially the same language as section 117, but contained the proviso: "Nothing in this section shall be construed as including letter heads, envelopes or postal cards," which is omitted from the code. But the omission of such proviso is not significant, in view of the well established rule for interpreting statutes above referred to.

But section 138 contains the following provision: "The state printer shall be paid the following prices for all work done for the state in an acceptable manner: * * * for letter heads, envelopes, labels and postal cards, including composition and press work, $1.50 for each 1,000 impressions or less, and $1.25 for each additional thousand."

The executive council is not authorized to purchase on competitive bids any printed matter the printing of which the law contemplates shall be done by the state printer All other supplies of this nature not furnished by the state printer must be purchased on competitive bids If the legislature had intended that letter heads, envelopes, labels and postal cards should be included in the supplies which shall be purchased by the council on competitive bids, then there would be no authority for procuring the printing of such supplies by the state printer. Hence, the provision for the pay of the state printer with reference to such articles would be entirely nugatory.

It is my opinion that the state printer is entitled to do the printing of that class of work which embraces the laws, journals and reports, and none other except such items as are specifically named in paragraph 4 of section 138.

As further illustrating the correctness of this conclusion, the state printer can well say that the law requires him to keep an office sufficiently equipped to enable him to do no other kinds of work than the printing of the laws, journals and reports, and work of that class, and the printing referred to in paragraph 4. He could not be required to equip his office to do lithographic printing, or any other kind than contemplated in section 117.

It will not do to say that everything which contains printed matter must be printed by the state printer. Such an idea, carried to its extreme, would require all law books, for instance, used in this office, to be printed by the state printer, or any other books which must be bought upon the market. Blank books, whether they contain partly printed pages or not, properly come under the head of supplies, and may be furnished by blank book manufacturers Many blanks used in the different offices, as well as the department of agriculture, do not come within the definition of stationery; nor do they come within the term of "printing", although such blanks may be printed; nor is the printing thereon of the class required to be given to the state printer. They may be classified under the general head of supplies and in my judgment, all such blanks and record books may and should be procured by the executive council under the provisions of section 167 of the code on competitive bids.

To state the proposition generally, and without endeavoring to name the different kinds of blanks or office supplies which must be printed by the state printer, it may be said the state printer is entitled to do that class of printing which is illustrated or defined by the terms, "laws, journals and reports" He is also entitled to print the work described in subdivision 4 of section 138, and the ordinary circular letters which do not come within the general term of office supplies. But all other supplies, such as record books, blanks which are in constant use from year to year in an office not being of the general class referred to, may and should be purchased by the executive council by competitive bids.

Fifth.—"If said department is entitled to printing, must it include only such necessary stationery as is required for said department as a state office, or should it also include such printing as is required for the State fair, such as tickets, tags for exhibits, forms for application for entry of exhibits, statements of account with exhibitors, records of exhibits and of the fair, account records and all other similar State fair printing?"

The next inquiry is in regard to the same matter, only in a different form.

The last sentence of section 8 of said chapter 58 is in the following words: "All expenditures connected with the fair including the per diem and expenses of the managers thereof, shall be recorded separately and shall be paid from the State fair receipts."

This divorces entirely all expenses of all kinds connected with the fair from the office expenses of the department of agriculture. The printing of posters, advertisements, bills, and all printed matter connected with the fair, all postage in correspondence with reference to the fair all expressage on advertisements or other matters connected with the fair and, in fact, all expenses of all natures and kinds which have to do with the annual fairs cannot, under this provision, be paid for as a part of the office expenses of the department of agriculture.

It may be a little inconvenient to observe the provision above quoted, but the language seems plain, and even the stationery and postage which are procured from the supply department or furnished by the executive council, shall not be used in connection with the business of making the annual exhibits at the State fair. Rut when accustomed to it, there can be no serious difficulty in observing the requirements above quoted.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

EXECUTIVE COUNCIL—Resolution passed ordering attorney-general to bring suit on bond of clerk of supreme court.—This is a reply to said resolution expressing the views of the attorney-general as to the duties devolving upon him as such officer.

DES MOINES, IOWA, August 8, 1900.

To the Executive Council, Des Moines, Iowa:

GENTLEMEN—I have the honor to acknowledge the receipt of a copy of your resolution in which certain conclusions of fact are stated by you, and the attorney-general is ordered not only to bring suit upon the bond of the clerk of the supreme court, but is distinctly *ordered* "to include in the suit" certain claims stated in the resolution.

I am persuaded that the resolution was adopted by your honorable body without due consideration, else its form and substance would have been entirely different. I regret that the resolution was given to the public press some days before any attempt was made to communicate it to me for whom it is to be presumed it was intended. Had a different course been adopted, a few suggestions might have averted my present embarrassment.

Permit me to recall your resolution by quoting so much thereof as may be pertinent. It is stated: "The executive council have reached this conclusion: * * * That for more than twenty years it has been customary for the clerk of the supreme court to furnish West Publishing company with certified copies of opinions of the supreme court at rates far below the statutory fees for certified copies; that the clerk has employed others to make these copies and paid therefor personally. That had the clerk charged for such uncertified copies ten cents per hundred words as the statute expressly provides he shall charge for certified copies, West Publishing company would have hired others to make and prepare the same, so that in no event would the state have derived any revenue therefrom, and it therefore appears that the state of Iowa has not suffered any financial loss because of this procedure. * * * It also appears * * * that for several years it has been the custom to furnish carbon copies of opinions to attorneys at nominal expense; that these copies are prepared without expense to the state, and the clerk has claimed title to the price at which they have been furnished. * * * It is therefore ordered that the attorney-general bring suit on the bond of Chris T. Jones for the statutory fee of ten cents per hundred words for all copies of opinions furnished any person by the clerk of the supreme court during his term of office, with six per cent interest from the date such copies were furnished.

"It further appears that the clerk has caused lithograph certificates of admission to the bar to be prepared at his own expense, and has charged therefor an amount in excess of the statutory fee and accounted to the state for only the amount contemplated by statute, retaining the excess to reimburse himself. * * * It is therefore ordered that the attorney-general in his suit include a claim for these certificates."

The order made that the attorney-general bring suit upon the matters stated in said resolution seems to be imperative and intended to leave him no discretion in regard to the matter. I beg to remind you that section 208 gives to the executive council the right to request the attorney-general to prosecute or defend an action, but nowhere in the statute is the council authorized to order the attorney-general to bring a suit, or to base an action upon specific claims which are pointed out to him by the executive council.

After a request is made by the executive council upon the attorney-general, the duty and responsibility of determining whether an action can be maintained, and the manner of prosecuting or defending the interests of the state, rest wholly upon him. If, in his judgment, no action can be maintained, he would not be justified in involving the state in useless and fruitless litigation because of any order or directions made by your honorable body. The law imposes certain responsibilities upon the attorney-general which he cannot escape. He cannot divide that responsibility with another, or permit another to usurp it. If he brings an action for the state, he is justly held responsible for that action, notwithstanding the fact that an unauthorized order may be made by the executive council for him to bring the action.

I am pleased, however, to receive your order as a request. I only call attention thereto for the purpose of emphasizing the fact that under the law the responsibility of determining whether an action can be maintained, and what shall be set forth as the basis of the action, devolves upon me alone.

If the council thinks an action should be brought, it can properly submit the matter to the attorney-general and request him to bring a suit, and there its responsibility with the matter ends. In case useless and expensive litigation be undertaken, after the state is defeated in the courts, the order of the council gives me no excuse for commencing it.

The conclusions which the executive council have come to, as stated in the resolution, have the effect of findings of fact. Under section 161 of the code, the executive council is authorized and empowered to settle with Mr. Jones. The executive council must keep a record of its proceedings. That record is a public record. The body, then, which is authorized by law to settle with Mr. Jones in effect finds that there have been violations of law. It finds, further, as an ultimate conclusion, that the state of Iowa "has not suffered any financial loss because of this procedure." The fees for furnishing copies to attorneys are substantially in the same category, as West Co's. fees.

In order for the state to recover on an official bond, the state must prove, first, that the officer has been guilty of some breach of official duty; second, that the state has suffered financial loss because thereof. No recovery can be had without proving both of these points.

I suppose you have examined the evidence carefully and reached that conclusion deliberately. I am not prepared to say that the finding of fact which you have made and entered upon your records, you being authorized to settle with Mr. Jones, may not be binding upon the state in case action were brought; but whether that be true or not, if, after your investigation, you believe that the state has not suffered any financial loss, no suit whatever should be brought against Mr. Jones. If the evidence before you justified the conclusion which you reached, then the state would surely lose any suit which may be brought, and ought to.

If, however, the law and the evidence do not justify the conclusion which you entered upon your record, then it is certainly impolitic and unwise to handicap the attorney-general and probably defeat the action which you have ordered him to bring. I certainly cannot be expected to try to maintain a suit for the state which the executive council has, by its finding of facts, probably defeated in advance, and I must decline to appear to play at cross purposes with the executive council. If you really wish a suit to be brought for the state, there is no good reason apparent for holding me down with a finding of facts which, for all practical purposes, insures the loss of the action before it is brought.

I do not wish to be understood as endorsing the conclusions of fact or of law stated in your resolution. You appear to make a distinction between fees for "certified copies" and "uncertified copies," whereas the law does not, but requires a fee of ten cents a hundred words to be collected by the clerk for both certified and uncertified copies. (Code, Sec. 205.)

The resolution, too, assumes that private parties would have the right to enter into competition with the custodian of a public record in furnishing copies for private use, when the law requires the custodian to furnish such copies and charge therefor for the benefit of the state. I am unwilling, without further examination, to assent to such an assumption.

I have no means of knowing the West Publishing company would have hired others to make and prepare copies of the opinions of the supreme court;

nor is it apparent to me how the executive council arrived at the conclusion that the state of Iowa has not suffered any financial loss because of this procedure. I am only dealing with the facts as stated in the resolution. If your conclusion is correct, then no suit ought to be brought; and if brought, would surely be defeated.

The same may be said with reference to the last claim you instruct me to include in the suit. If Mr. Jones has paid to the state all that the state, under the law, is entitled to, then the state has suffered no loss. If he has charged those admitted to the bar more than he was legally entitled to do, then every person overcharged has a cause of action against him. If he has extorted money from certain citizens, the state has no moral or legal right to any part of the money thus illegally extorted.

A part of the obligation of the oath of office of an attorney and counselor of law is "to counsel or maintain no other action, proceeding or defense than those which appear to him to be legal and just, except the defense of a person charged with a public offense." I have endeavored to observe this obligation in the past. I know the people of Iowa, whose servants we are, do not wish me to violate it now in trying to maintain an illegal and unjust claim against Mr. Jones. If Mr. Jones is liable to those whom he has overcharged, how can the state justly claim the overcharge of him, or why should the state sue on an illegal and unjust claim? If the object which the council had in mind is to punish Mr. Jones for extortion, if you think he is guilty, it is in the power of the governor to suspend him from office and the criminal courts are open for his punishment, but it is unreasonable to ask me to bring a civil suit on his bond for claims which are neither legal nor just, and I must respectfully decline, under the circumstances, to comply with your orders, which I am pleased to consider a request.

Do not infer that I am unwilling to bring a suit against Mr. Jones on his bond if a cause of action exists. If your ill-advised resolution be reconsidered, and the matter be submitted to me free from the embarrassment of your resolution, I will investigate the facts fully, and if the facts warrant me in bringing a suit, it will be brought and be prosecuted to a finish. The responsibility of maintaining the action devolving by law upon me, I must, of course, determine for myself what shall be included in the action. I have reason to believe that there is something due from Mr. Jones to the state. I do not understand that he wishes to avoid the payment of anything which is legally and justly due from him, but I cannot convince myself that it is right to bring an action against him if the conclusions stated in your resolution are correct. Nor do I think that I should go into court and attempt to disprove the truth of findings made by the only officers of the state who are empowered to settle with Mr. Jones. I cannot think that the council requesting me to bring a suit, at the same time intentionally adopted a resolution, the effect of which is to make success difficult if not utterly impossible.

Therefore, I respectfully request that you will reconsider the matter. If, upon reconsideration, you are satisfied that you have all the evidence before you, and that the state has not suffered any loss because of Mr. Jones' actions, then the controversy should end there, once and for all. But if you still think an action should be brought on his bond, let the matter be submitted to this office unhampered by your resolution, which practically insures defeat. If so submitted to me, it will receive prompt attention.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

PRISONERS IN PENITENTIARY—It is not necessary for a prisoner to be confined in solitary punishment before good time can be deducted.

DES MOINES, IOWA, August 9, 1900.

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

DEAR SIR—Yours of the 8th inst. at hand, in which you call my attention to sections 5682 and 5704 of the code, and ask:

"Is it necessary for a prisoner to be confined in solitary punishment before good time can be deducted?"

Section 5682 does not refer to the forfeiture of good time in any respect whatsoever. It provides that the number of days which the prisoner spends in solitary confinement for any violation of the rules and regulations of the prison shall be excluded from the term of his imprisonment as fixed by the court by which he was sentenced.

To illustrate: If a person were sentenced to the penitentiary for one year and should, by reason of the violation of the rules of the prison, spend ten days in solitary confinement, he could not claim his discharge from the penitentiary until a year and ten days had elapsed.

Section 5704 however, provides: "Any convict who shall violate any of the regulations and laws for the government of the penitentiary shall forfeit good time earned for the different offenses as therein stated." There is no intimation that the punishment of solitary confinement must be imposed in order to work a forfeiture of good time, but any violation which justifies a punishment of any kind, whether by solitary confinement or other kinds of punishment, works a forfeiture according to the schedule of forfeiture stated in said section. Hence, I think your inquiry must be answered in the negative.

I do not wish to be understood as saying that every infraction of the rules and regulations of the prison inadvertently or thoughtlessly made *ipso facto* works a forfeiture of good time earned, but only that every violation of the rules which demands punishment, whether that punishment be by solitary confinement or otherwise, under said section 5704, works a forfeiture:

Yours truly,

MILTON REMLEY,
Attorney-General

INDEXING OF THE JOURNALS OF THE SENATE AND HOUSE—Expense therefor.

DES MOINES, IOWA, August 21, 1900.

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

DEAR SIR—Yours of today at hand, asking my opinion as to whether the indexing of the journals of the Senate and the House of Representatives of the Twenty-eighth General Assembly should be paid for under the provisions of section 14, chapter 149 of the laws of the Twenty-eighth General Assembly, or whether the payment would be controlled by section 140 of the code.

Section 140 of the code is as follows: "The secretary of state shall cause indexes of the journals of the senate and house of representatives to be made, the cost thereof not to exceed the sum of $50."

Said section 14 of chapter 149, appropriates to the secretary of state "the sum of one hundred and twenty-five dollars as compensation for indexing the journals of the Senate and House of Representatives of the Twenty-eighth General Assembly."

There is no repeal of section 140. I do not think section 140 is repealed by said section 14 of said chapter 149, in the broad sense of the term. Said section 14 is a special act applying to the indexing of the journals of the Senate and House of Representatives of the Twenty-eighth General Assembly, whereas section 140 relates to the journals of the senate and house of all general assemblies which are not otherwise provided for. Said section 14, so far as providing compensation is concerned, takes the indexing of the journals of the Senate and House of the Twenty-eighth General Assembly out of the operation of the general law as expressed in section 140. It is a specific appropriation of $125 for the work therein contemplated. It appropriates $125 "as compensation." That means full compensation for the indexing. It is not amendatory to said section 140, and the secretary would not be authorized to expend the sum of $50, and also $125 appropriated by said section 14.

I think it was clearly the intent of the legislature, in making said appropriation, that for indexing the journals of the Senate and the House of the Twenty-eighth General Assembly, the secretary was authorized to expend the $125 appropriated thereby. The modification thus made in said section 140 relates alone to the journals of the Senate and House of the Twenty-eighth General Assembly, and said section 140 remains unaffected except with reference to the Twenty-eighth General Assembly.

I have no doubt that you are authorized to draw from the state treasury the sum of $125 for indexing the journals of the last general assembly.

Yours truly,

MILTON REMLEY,
Attorney-General.

BALLOT BOXES.—No separate ballot box is required for the deposit of ballots at an election where a proposed amendment to the constitution is to be voted for by the people.

DES MOINES, IOWA, August 21, 1900.

Hon. Frank F. Merriam, Auditor of State:

DEAR SIR—Yours of the 21st inst. at hand, in which you ask whether, when the proposed amendments to the constitution are submitted to a vote of the people, it is necessary to use separate ballot boxes for the deposit of the ballots relating to that question.

In reply thereto I will say that chapter 35 of the acts of the Twenty-eighth General Assembly requires a separate ballot for voting upon the adoption of a constitutional amendment, or any other measure upon which the people are authorized to vote.

The statute does not prescribe that a separate ballot box shall be provided. Section 1130 of the code provides that the board of supervisors shall provide for each precinct in the county for the purpose of election, one ballot box with lock and key. Township trustees provide a separate ballot box to receive the votes for supervisors of roads, with as many different compartments as there are road districts in the township.

Section 1106 of the code, as amended by said chapter 35 of the acts of the Twenty-eighth General Assembly provides that ballots for constitutional amendments shall be printed upon yellow paper, but there is no provision of law requiring a separate ballot box for the reception of the ballots containing the vote on a constitutional amendment or other public question. Section 1130, to which I have referred, negatives the idea that more than one ballot box is needed. There is no reason why the ballot containing the regular ticket and the ballot used for voting upon the constitutional amendment or other public measure, cannot be placed in the same box. Each ballot, when the vote is canvassed, must be handled separately, and there will be no difficulty in readily distinguishing between the ballots. The difference in size and color will make them easily distinguishable, and no good reason suggests itself to me why separate ballot boxes should be used. The ballots will be sent out in the same envelope to the judges of the election, the returns will be made in the same envelope, both ballots have to be counted by the same judges of the election, and the results recorded in the same poll books. To require separate ballot boxes would make a useless expense.

But it is sufficient to say that the law requires but one ballot box to be used. Yours respectfully,

MILTON REMLEY,
Attorney-General.

FISH LAW—No person can use more than two lines with one hook attached, regardless of whether said lines be attached to a pole held in the hand or attached to a floating buoy or jug.

DES MOINES, IOWA, August 22, 1900.

Geo. J. Stillwell, Esq., Farmington, Iowa:

DEAR SIR—Your favor of the 16th inst. at hand, in which you ask my opinion as to whether what you call jugging for fish is lawful in this state.

You state that lines with baited hooks attached are fastened to jugs and a number placed in the river and carried down stream with the current, and that many fish are caught in this manner.

Section 2542 of the code prohibits any person from using "more than two lines with one hook on each line in still fishing or otherwise." If any person use more than two lines with one hook attached, whether the lines are fastened to a pole, held in the hand, or whether they are fastened to a buoy as jug, floating down the stream, he is unquestionably violating said section.

At the proper season of the year a person is authorized to fish with two lines with one hook upon each line, but to use more than two lines in anv manner whatsoever is a violation of said section. It matters not to what the line may be fastened, whether a stationery object along the bank, or whether to a floating bouy as a jug; the lines are used in fishing in violation of law.

Very respectfully,

MILTON REMLEY,
Attorney-General.

PENITENTIARY—General support fund of—Such fund cannot be diverted from or used for other purposes than furnishing food, clothing, guards, medicines, and such other things as may be necessary and proper for the sustenance and safe keeping of the convicts.

DES MOINES, IOWA, August 24, 1900.

Board of Control of State Institutions:

GENTLEMEN—Yours of the 23rd inst. at hand, in which you ask for my opinion as to whether a surplus of the general support fund of the penitentiary at Ft. Madison may legally be used, or sufficient thereof for the purchase of a boiler, and of the necessary pipes and connections and radiators for heating a new shop building at said penitentiary, and also for putting a suitable building or protection over said boiler; or in other words, whether the accumulations of the support fund now on hand may be used for putting up a heating plant, including a building for the boiler, the purchase of a boiler, and all material and labor necessary to make a heating plant for the new shop building.

Section 5718 provides: "For the general support of the convicts confined in the penitentiary there shall be paid out of the state treasury the sum of nine dollars monthly for each convict at Ft. Madison, or so much thereof as may be necessary."

I know of no statute which authorizes the diversion of the support fund to such purpose. I can think of no theory or principle which would justify such diversion. The building of a work shop, or the furnishing of the same, or the putting in of a heating plant for such work shop, is very far removed, in my judgment, from the general support of the convicts. The legislature usually makes special appropriations for such purposes. I do not think it was ever contemplated by the legislature that the support fund should be used for purposes disconnected with furnishing food, clothing, guards, medicines, and such things as may be necessary and proper for the sustenance and safe keeping of the convicts. If the support fund could be used for the purpose indicated in your inquiry, there would be no limit to the objects and purposes for which it might be applied.

Yours very truly,

MILTON REMLEY,
Attorney-General.

GAME LAWS—Section 2552 thereof construed.

DES MOINES, IOWA, August 27, 1900.

Hon. George E. Delavan, Fish and Game Warden, Estherville, Iowa:

DEAR SIR—Yours of the 24th inst. at hand, if your deputy will examine section 2552 carefully, he will see that it is made unlawful to kill in any one day in the open period more than twenty-five birds of either kind named in said section.

This section does not restrain a person from killing more than twenty-five ducks during the open period because such ducks are not named in said section. Section 2554 prohibits the buying or selling or having in possession any of the birds or animals named in this chapter during the period when the killing of such birds is prohibited. This by no means is a contradiction of section 2552. The purpose of the two sections is altogether different. Section 2552 is to afford a certain means of protection to the birds named therein during the open period. Section 2554 is to aid in enforcing the law against any killing in the closed season. Section 2555 first prohibits the shipping of any birds named in the chapter out of the state at any time during the open or closed period. Second, it permits any person, during the period when such birds may be lawfully killed, to ship to any person within the state any of the game birds named, not to exceed a dozen in any one day. There it provides certain regulations for the shipment.

The second provision in said section above stated does operate as a regulation upon the disposition of birds which may be lawfully killed, and I think is in perfect harmony with other sections. Prohibiting the shipment of more than a dozen to one person within the state makes it impossible for a person to engage to kill a large number of birds for some dealer. It takes away the opportunity for engaging in a wholesale killing of the birds for the purpose of traffic.

Yours truly,

MILTON REMLEY,
Attorney-General.

TAXES—Collection of—Chapter 50 of the acts of the Twenty-eighth General Assembly construed, with relation to section 1374 of the code.

DES MOINES, IOWA, August 29, 1900.

Hon. Henry Stone, County Attorney, Marshalltown, Iowa:

DEAR SIR—Some days ago Mr. Smith, your county treasurer, came with a request from you for my construction of chapter 50 of the acts of the

Twenty-eighth General Assembly, with reference to section 1374 of the code. He propounded verbally several questions with reference to the manner of procedure in the collection of the amount due as taxes upon property not heretofore listed. Without undertaking to answer all the questions in detail, I will state generally what appears to me to be the fair interpretation of said chapter 50.

The difficulty arises because of the provisions of the first section, except the first sentence thereof. It is evident that all except the first sentence of section 1 was an amendment offered on the floor of the senate or the house without due consideration of its effect. It certainly destroys the harmony of the act. The act in question does not purport to be an amendment to section 1374 of the code; nor does it purport to prescribe the manner in which the treasurer shall discharge the duties imposed upon him by section 1374.

We may say, then, that section 1374 is not amended, or any part thereof repealed, unless the provisions of said chapter 50 are inconsistent therewith. There is nothing in section 1374 that requires the listing of property for taxation. That section was evidently intended to give a cause of action to the county treasurer for the benefit of the county against all persons who concealed their property or omitted to list the same whereby such citizens escaped the payment of their just proportion of the public burdens. The supreme court, in Worthington v. Whitman, 67 Iowa, 190, and in Appanoose County v. Vermillion, 70 Iowa, 365, held that no recovery could be had in such a case; that the statutory method for levying the tax and collecting it was exclusive. The latter had been held in former cases.

This section, then, authorizes the bringing of an action to recover not a tax duly levied upon a due assessment of property, but because of a failure to assess when it ought to have been assessed. Hence, we will see that nothing in section 1 of said chapter 50 can be construed as an amendment to the method of procedure in said section 1374.

I am strengthened in this view because the right of action given to the treasurer is only in cases where the property is subject to taxation has not been listed and assessed. If the treasurer lists the property and it becomes subject to the levy and is put upon the tax lists with the amount of tax due, then, under the decisions above referred to, a cause of action would not exist, but the treasurer would be limited to the statutory method of collecting the tax by a sale of the property. Many cases might arise where the property which ought to have been assessed five years ago is out of existence and could not be listed or levied upon, and the party may have no real estate upon which to make it a lien. So the listing of the property by the treasurer and putting it upon the tax list, might, in many cases, defeat the very object had in mind by the enactment of said section 1374.

It may be asked, then, what the purpose and meaning of the following clause of said section is: "Before listing the property discovered, the treasurer shall give the person in whose name it is proposed to assess the same, or his agent, ten days notice thereof by registered letter addressed to him at the usual place of residence, fixing the time and place where objection to such proposed listing and assessment may be made. An appeal may be taken to the district court from the final action of the treasurer by serving written notice upon him and otherwise proceeding as provided in section 1373 of the code."

This clause above quoted may fairly be construed as extending to personal property the power to list and assess the same which the treasurer has under section 1398 with reference to real estate. Where personal property is discovered in the hands of the taxpayer which has been omitted from the list, the treasurer may put the same upon the list, thereby subjecting it to the taxes of the current year, and in that case, notice must be given to the taxpayer in the same manner substantially as chapter 47 of the Twenty-eighth General Assembly requires the auditor to give in case he makes the assessment. The listing by the treasurer, under the provision above quoted, it occurs to me, should only be for the taxes for the current year. There is no direct reference to or connection with said section 1374, and I see no reason why the clause above quoted should be construed as an amendment to section 1374.

Suppose, for instance, a taxpayer had $5,000 of moneys and credits which he had held for five years and had omitted to list the same, and still held the same. The treasurer finds that nothing is assessed to him for the current year. I am inclined to the view that he may assess the taxpayer with $5,000 of moneys and credits and put it upon the tax list for the coming year, but before doing so, he must give the notice required in the clause above quoted, and at the same time he may demand, without putting it upon the tax list, the amount of money due for the four preceding years under the provisions of section 1374. In case he should bring suit for taxes due under section 1374, he could not include therein the amount not yet due as taxes for the current year. If, however, he should bring suit for all previous years, and then list the moneys and credits for the current year, the state and the county would receive their dues and no more.

I think it unquestionably true that if the treasurer places upon the tax list for the five previous years the amount which should have been listed, and gives the notice required in section 1 of said chapter 50, then two things would follow: *First*, he would be required to proceed in the statutory method for collecting the tax thus levied and assessed, and the right to maintain an action therefor, under the cases above quoted, would be cut off. *Second*, the taxpayer, after receiving such notice, would be estopped from denying the correctness of the amount of taxes thus found to be due from him, it partaking of the nature of an adjudication, and he could not be heard, even if an action could be brought to recover the same, to dispute the amount, because it was determined by a proper tribunal after due notice, either of which conclusions would practically abrogate the provisions of section 1374, which, to my mind, the act did not intend to do.

In my opinion, when property is discovered which has been omitted from the tax lists for five years past, it is the duty of the treasurer to make demand therefor, and to collect the same by action, giving to the defendant therein the right to contest before the court the amount of the recovery, and as preliminary to bringing such suit, he is not required to give the notice which is required in section 1 of chapter 50, but if he places the property upon the tax list for the current year, such notice is required to be given.

In reply to several other questions asked me, I will say generally, in proceeding under section 1374, the treasurer must determine the amount which he shall demand from the delinquent taxpayer. He must, in the light of all the facts of which he has knowledge, determine the amount which shall be

demanded of the taxpayer. The amount to be demanded must be the result of his judgment and not the judgment of another. His duties are somewhat of a *quasi* judicial nature. He cannot delegate them to any person whomsoever. There is, of course, clerical work that can be done by others under his direction, but in determining how much shall be demanded of or paid by the taxpayer, the taxpayer is entitled to have the deliberate judgment of the treasurer himself, and not that of a clerk or tax ferret. Nor can he authorize other persons to compromise between the county and the taxpayer.

I do not wish to be understood as saying, however, that when he makes a demand, based upon the best information he can obtain, when the taxpayer comes and convinces him the demand is unreasonable, he cannot change the demand and accept less than he thought was due in the first place. But whatever is done in regard thereto must be the result of the treasurer's judgment, based upon all the obtainable facts.

I think this covers all the points presented to me.

Yours very truly,

MILTON REMLEY,
Attorney-General.

VOTING MACHINE COMMISSION—Members of are not entitled to receive from the owners of such machines examined their expenses in addition to the one hundred and fifty dollars allowed them for examining said machines.

DES MOINES, IOWA, September 10, 1900.

Hon. H. M. Belvel, Des Moines, Iowa:

DEAR SIR—Your favor of the 8th inst. at hand, in which you ask whether the members of the Iowa Voting Machine Commission are entitled to receive from the owners of the machine examined expenses in addition to the one hundred and fifty dollars allowed them for examining the machines. The language of the statute which governs in this case is as follows: "Each Commissioner is entitled to one hundred and fifty dollars for his compensation and expense in making such examination and report, to be paid by the persons or corporation applying for such examination." I think this language clearly means that the one hundred and fifty dollars which shall be paid by the persons or corporation for such examination shall cover both the compensation and the expenses of the commission.

The last sentence of section 4 in chapter 34, limits the amount to be received by each commission to $1,500, in any one year, and reasonable expenses, but this by no means implies that the owners of the machines shall pay any sum in excess of the statutory amount, viz., one hundred and fifty dollars. I think there is no authority to charge the person applying for an examination more than one hundred and fifty dollars for each commissioner.

This law, however, does not state where such examinations shall be made. The commissioner can require the parties who wish the examination

to be made to bring their machines to such place as will put the commissioners to as little expense as possible.

Yours truly,

MILTON REMLEY,
Attorney-General.

PENITENTIARY—Warden of—He has no authority under the law to appropriate money placed in his hands for safe keeping to the payment of damages done to state property by the wilful and malicious acts of a convict.

DES MOINES, IOWA, September 11, 1900.

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

DEAR SIR—Replying to yours of the 7th inst., I will say, I do not think a warden has any authority under the law to appropriate money placed in his hands for safe keeping to the payment of damages done to state property by the wilful and malicious acts of a convict.

If the damage is of sufficient importance to justify it, suit might be brought against him and the damage proved up and judgment obtained; then the money could be garnished and appropriated under order of the court; or he might be indicted for malicious mischief, which would probably be productive of more good than the other course.

But I do not think you have any authority to appropriate money to pay for damages done by him to state property without his consent thereto.

Yours truly,

MILTON REMLEY,
Attorney-General.

BOARD OF CONTROL—Money received for corn grown upon the farm connected with the hospital for the insane at Cherokee, should be credited to the Cherokee hospital fund, and be expended the same as other funds appropriated directly by the general assembly for said hospital.

DES MOINES, IOWA, September 12, 1900.

The Board of Control of State Institutions, Des Moines, Iowa:

DEAR SIRS—In your letter of the 10th inst., you state that money received from crops grown upon the farm connected with the hospital for insane at Cherokee has been paid into the state treasury and credited to the support fund. You now have a bill for shelling corn and hauling it to the cars at that place. The question arises whether the money, the proceeds of produce of the farm, should not be credited to the institution generally, and whether such bills as this should not be paid therefrom, and ask my opinion whether this bill under the circumstances can be properly paid from the construction fund, or must it be paid from the amount to the credit of the institution in the support fund, and if so, under what law will the auditor be justified in drawing his warrant on said support fund for payment.

It is evident as you state, there being no patients at the hospital at Cherokee, there is and can be no support fund in the sense in which the term is applied to other hospitals where patients are supported. If the hospital were completed and funds were drawn from the state treasury for the support of patients therein, then it is evident that the produce of the farm or garden connected with said hospital should and would properly go to the support of the patients therein; and if any were sold, the proceeds thereof should properly be credited to the support fund as stated in an opinion given you June 2, 1898.

In regard to the hospital at Cherokee, which is not yet completed: There is, so far as is disclosed by the statute, but one fund, a fund appropriated by the different acts of the legislature for the erection of a hospital. There is then no necessity or appropriateness in attempting to maintain a distinction between different funds, such as the support fund, the repair fund, or a contingent fund; or the many funds which the legislature has appropriated for specific purposes, for so far as is disclosed by the statute there is but one fund which we may call the Cherokee hospital fund, the object and purpose of which is to erect and equip a hospital at Cherokee, Iowa.

In providing for the erection and equipment of any institution involving the outlay of many thousands of dollars, from the nature of the case, there must be much left to the wise discretion of those entrusted with the expenditure of the funds. It is impossible for the legislature to anticipate every possible incident or circumstance that may arise. There is to be found in the statute nothing whatsoever in regard to the proceeds of the produce raised upon the farm or the land owned by the state. There is nothing, in fact, requiring the board of control to rent the land, but no one can question the propriety of its so doing and of selling the produce raised upon the farm. It is equally evident that the expense of raising and marketing the produce should be paid out of the proceeds of the sale thereof and the net proceeds turned into the Cherokee hospital fund. If the fund be turned into the state treasury before the cost of shelling and marketing the corn or produce is paid, the board of control, in my judgment, should audit and allow the bills therefor, in the same manner that bills for the superintendent and other employes are allowed, and certify the case to the auditor, and that a warrant be drawn upon the Cherokee hospital fund to pay therefor.

It may be asked whether the auditor is authorized to issue warrants in the aggregate amounting to more than the appropriation made by the general assembly. I think he is authorized to issue a warrant under the board of control law, so long as there is money standing to the credit of the fund against which it is drawn. Of course the aggregate amount taken from the state treasury, as distinguished from the treasury of the institution, should not exceed the amount of the appropriations. Or in a case of this kind, the money placed in the hands of the treasurer of the Cherokee hospital must not be included as a part of the unappropriated money in the hands of the state treasurer. To illustrate: suppose the legislature appropriated $360,000 for the Cherokee hospital; that sum passes to the credit of the Cherokee hospital as fast as it becomes available; suppose $5,000 were received by the board of control for corn and products of the farm sold; it passes to the credit of the Cherokee hospital fund; then the auditor would be justified, under the board of control law, to issue warrants against this fund credited

to the hospital until it is exhausted. In my opinion, the money received for the corn in question should be credited simply to the Cherokee hospital fund and be expended the same as other funds appropriated directly by the general assembly. Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF CONTROL—The appropriation made by chapter 165 of acts of the Twenty-eighth General Assembly, can only be used to reimburse patients in the Hospital for the Insane at Mt. Pleasant whose claims are not secured by the bond of the deceased superintendent.

DES MOINES, IOWA, September 24, 1900.

Board of Control of State Institutions, Des Moines, Iowa:

GENTLEMEN—Yours of the 24th inst. at hand in which you state that

> "Dr. H. A. Gilman, deceased, late superintendent of the Hospital for the Insane, Mt. Pleasant, Iowa, gave no official bond for the time prior to July 1, 1898, but gave such a bond which was in force from and after that date. He died insolvent about October 8, 1898, indebted to patients for money received from them both before and after July 1, 1898. A portion of the indebtedness incurred for money received after July 1, 1898, was discharged by the sureties on the bond, but other indebtedness incurred by Gilman for money received from patients both before and after July 1, 1898, remains unpaid.
>
> "We desire to know whether money appropriated by chapter 165 of the acts of the Twenty-eighth General Assembly, may legally be used to pay sums received by Gilman from patients after July 1, 1898, and still unpaid."

It is a fundamental rule of construction in the interpretation of statutes that the intent of the legislature shall be ascertained if possible and force and effect given to such intent. Without entering upon a refined discussion of the effect of the preamble and whether its recitals may be used to enlarge or restrict the language of an enacting clause, all authorities hold that it may be used to ascertain the intent of the legislature. The preamble of chapter 165 shows that it was the intent of the legislature to reimburse only such patients as had suffered loss by the reason of the late Dr. H. A. Gilman giving no bond. Those patients from whom he received money and those for whose benefit he received money at the time the law did not require him to give a bond are the patients pointed out by the preamble for whom the appropriation made in section 1 of the act was intended. Nothing in the entire act discloses the intent to appropriate funds for patients whose claims are secured or to relieve the sureties on the bond executed by the late Dr. Gilman on July 1, 1898.

The amount appropriated was just enough to reimburse those patients whose claims are unsecured and it would be unjust and certainly not in accordance with the legislative intent to deprive such patients of any part of such fund appropriated for their benefit and give it to other patients whose

claims are secured, the effect of which is to release the sureties on the bond executed July 1, 1898, from their liability on the bond.

It is a rule of construction of a statute that the circumstances under which it was enacted, the evil to be remedied, or the good to be accomplished, shall be taken into consideration. The preamble of this statute shows conclusively that it was the intent of the legislature to make good, losses which would be otherwise sustained by certain patients depositing their money with the superintendent of the hospital at a time when under the law he was not required to give bond, and that there is no intention to release the sureties on a bond which was given in accordance with law from any liability thereof, hence, in my opinion, the appropriation made by said chapter 165 can only be used to reimburse patients whose claims are not secured by the bond of the late Dr. Gilman. Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF CONTROL—The support fund for the Institution for Feeble-Minded Children at Glenwood cannot be used for the purpose of putting a new roof upon one of the new buildings of said institution.

DES MOINES, IOWA, October 5, 1900.

Board of Control State Institutions, the Capitol:

DEAR SIRS—Yours of the 3d inst. at hand. You request my opinion as to whether it would be proper to pay the expenses of putting a new roof upon one of the buildings of the Institution for Feeble-Minded Children at Glenwood out of the support fund, mentioning the fact that the appropriation for contingencies and repairs was insufficient to meet such expense, and the further fact that all expenses of said institution except clothing and transportation are paid by the state and no part, with the exception of the above, is paid by the county or other persons.

Section 2700 of the code as amended by chapter 79 of the acts of the Twenty-seventh General Assembly appropriated $12.00 monthly for each inmate supported therein by the state. The purpose of this appropriation is for the support of the institution. It might be difficult to determine what expense might properly be included within the term "the support of the institution" if this section stood alone.

The Twenty-eighth General Asssembly, chapter 150, made appropriation for contingent and repair fund $6,000. Nearly every general assembly has made special appropriation for buildings, changes in the buildings, heat, light, the erection of necessary buildings and for contingencies and repairs. We cannot suppose the legislature which has made appropriations biennially for contingent expenses and repairs intended that such expense should be paid out of the support fund. The appropriation of $6,000 for contingencies and repairs is, I think, fairly to be considered a limitation upon the amount that may be expended for that purpose, and negatives any inference that the support of an institution includes the repairs which are otherwise provided for.

In my judgment, the support fund for the Institution of Feeble-Minded Children at Glenwood cannot be used to put a new roof upon one of the buildings of said Institution. Yours truly,

MILTON REMLEY,
Attorney-General.

GAME LAW—Section 2551 of the code makes it illegal to use any artificial ambush built upon the edge of the water.

DES MOINES, IOWA, October 6, 1900.

Hon. George E. Delavan, Estherville, Iowa:

DEAR SIR—Yours of the 4th inst. at hand, asking my opinion upon the construction of section 2551 in regard to an artificial ambush in shooting ducks and geese. The question is presented to you whether an ambush built on the land at the edge of the pond is against the law, and in regard to this you wish my opinion. Said section among other things provides, "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 device used for concealment in the open water, or use "any artificial light, battery or any other deception, contrivance or device "whatever, with the intent to attract or deceive any of the birds mentioned "in this chapter," etc. The language "no person shall kill any of the birds mentioned in this chapter from any artificial ambush of any kind" is very general. There is nothing in such language to indicate that it intended to prohibit the killing of such birds from such ambush built out in the water only.

In view of the second clause, "or with the aid of any sneak boat or sink box or other device used for concealment in open water," would indicate that the first clause intended to prevent ambush on the land more especially. An ambush on the open water would ordinarily be a sneak boat or sink box and the two clauses were intended to cover all kinds of ambush whether upon the land or upon the water, including therein sneak boats and sink boxes.

I cannot conceive of any possible rule of construction that would exclude artificial ambushes built on the land near the water from the prohibitions of this section. Said section clearly makes it illegal to use any artificial ambush built upon the edge of the water. Yours truly,

MILTON REMLEY,
Attorney-General.

ESCAPED CONVICT—There is no statute which makes it a crime for a person to give shelter, clothing, and food to an escaped convict.

DES MOINES, IOWA, October 10, 1900.

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

DEAR SIR—Your favor of the 5th inst., enclosing a letter from Frank Desmond, sheriff of Osceola county, at hand. The facts stated in Mr. Des-

mond's letter do not show that the person named therein in any manner assisted or aided a prisoner detained in the penitentiary to escape. I think sections 4894 and 4895 are the only sections of the code under which such prosecutions could be brought, but unfortunately they relate to assisting or aiding a prisoner to escape from a penitentiary or jail.

Sibley is probably 250 miles from Anamosa. These sections do not make it a crime to assist, giving aid, comfort or relief to an escaped prisoner. The prisoner in question undoubtedly had escaped, and while he had been detained in the Anamosa penitentiary, he was not detained at the time the assistance was given him. In fact, the prisoner had already escaped before the assistance was given him, as shown by Mr. Desmond's letter. However reprehensible the conduct of the man referred to was, and however much he deserved punishment, yet in the absence of a statute making it a crime, I do not think it would be worth while to attempt any prosecution.

Your letter, however, presents a very different case. If, while the prisoner was in custody at Anamosa, any person furnished him clothes, or communicated to him where other clothes could be found, and planned his escape, aiding and assisting him in making the escape by furnishing him means of concealment of his character as a prisoner, or any other way while he was in the penitentiary, then such person would be guilty under the section above referred to.

You say his prison clothing was found within a quarter of a mile of the farm where he was employed. Evidently he put on citizen's garb at that place, which must have been furnished him by some one. Possibly it was furnished by the man up in Osceola county, either personally or through another. If you could connect the man in Osceola county with the acts done while the man was in prison, then undoubtedly he could be prosecuted. Or if you could find the one who furnished him clothing while he was in the prison, or detained by the officers of the prison, he could be prosecuted under said sections.

But I know of no statute which makes it a crime for a person to give shelter and clothing and food to an escaped convict.

Yours truly,

MILTON REMLEY,
Attorney-General.

BOARD OF CONTROL—PENSION MONEY OF INMATE AT SOLDIERS HOME.—Pension checks not endorsed cannot be considered as money in the hands of the commandant of said home.

DES MOINES, Iowa, October 19, 1900.

To the Board of Control of State Institutions, Des Moines, Iowa:

DEAR SIRS—Yours of the 12th inst. at hand, enclosing the letter of Commandant Horton of the soldiers home at Marshalltown, from which it appears that certain members of the home have been twice convicted or found guilty of intoxication or other misdemeanors so as to be required, under section 2 of chapter 92 of the acts of the Twenty-eighth General Assembly, "to deposit the money received from the United States government as a pension with the commandant immediately on the receipt of his

pension check." It appears also that some such members now refuse to endorse their pension checks, and have demanded their papers and asked for a discharge from the home. Commandant Horton asks this question: "May the money be considered to be in my hands where the check is not signed, and will it be a violation of the state law to deliver the check to such pensioner on his demand, giving him at the same time his discharge?" This is the inquiry upon which you request my opinion.

In regard to this I will say that said chapter 92 does not contemplate that the pension check itself shall be in the hands of the commandant. It assumes that the pensioner himself will receive the money upon said check, and deposit it with the commandant. So far as appears in the law, the commandant has nothing whatsoever to do with the pension check. It is only the money which the party deposits with him after receiving the pension check with which he has to do.

I think, under the law, he is not required to receive the pension check, or to hold the same, or to do anything therewith. It is not improper for him, if the pensioner brings the check to him, duly endorsed for him, to receive it and treat it as money deposited with him. But if the pensioner refuses to deposit the money received by him upon the check, such money cannot be said to go into the hands of the commandant. By so refusing, he violates the law and should be promptly discharged, in which case, he would be entitled to receive at the end of thirty days, the money theretofore deposited to his credit with the commandant.

I do not think the commandant, if perchance the pension check goes into his hands, would be entitled under the law to retain the check or consider it, without an endorsement, as the payment to him of so much money. Such pensioner, upon being discharged, is entitled to receive any pension papers, including the pension certificate, which he may have deposited with the commandant for safe keeping, but is not entitled to the money which he has deposited until after thirty days.

I do not agree with the commandant's views, that he might be liable for a violation of the federal statute if he held a pension check after the same had been demanded by the pensioner. It is made a misdemeanor to retain the pension certificate of a pensioner, and refuse to surrender the same upon his demand, by the act of February 28, 1883; 22 Stat. L., 431; Sup. to U. S. Rev. Stat., Vol. 1, 398.

There is a vast difference between a pension certificate and a pension check, but this inquiry does not enter into the question of the duties of the commandant, inasmuch as the law imposes upon him no duty whatsoever with reference to the pension check.

Yours truly,

MILTON REMLEY,
Attorney-General.

COLLATERAL INHERITANCE TAX—Section 3281 of the Code construed and applied to a given statement of facts.

DES MOINES, IOWA, October 19, 1900.

M. W. Herrick, Esq., County Attorney, Monticello, Iowa:

MY DEAR SIR—Treasurer Herriott has shown me your letter to him of October 13th, and requests that I write you giving you my views upon the point presented.

Mr. Proctor, of your city, died testate. By his will he bequeathed to a sister of his deceased wife $3,000; the balance of his estate to his two daughters. At the time of Mr. Proctor's death, the legatee sister-in-law was deceased, so that the portion willed to her goes to her heirs. Her heirs are a surviving brother and sister and the children of Mr. Proctor, Mr. Proctor's deceased wife being a sister of the legatee. The question arises whether the portion of the $3,000, going to the testator's two daughters as heirs of their deceased aunt is subject to the collateral inheritance tax.

The relationship of the heirs to the testator in all cases determines whether such heirs are collateral heirs or direct heirs. It is the portion of the estate passing to collateral heirs that is subject to the collateral inheritance tax. The property received by the daughters of the testator not passing to collateral heirs is not subject to the tax. This, I think, will be admitted by everyone.

The only consideration which appears to lead to any doubt is that the $3,000 passes theoretically to the estate of the testator's deceased sister-in-law, and from such estate to the daughters of the testator as her heirs. If this line be followed, and is the correct view, then the legacy would be entitled to two charges of collateral inheritance tax; first from the Proctor estate to the estate of the legatee, and the daughters and their uncle and aunt who are heirs with them, would be required to pay another tax because they are collateral heirs of the deceased legatee

That doctrine proves either too much or too little. I do not think the position is tenable. The $1,000 which passes to the children of the testator goes from the estate of their father. They are heirs to that portion of their father's estate under the provisions of the will. Section 3281 of the Code is as follows: "If the devisee died before the testator, his heirs shall inherit the property devised to him, unless, from the terms of the will, a contrary intent is manifest." The term "devisee" includes also "legatee."

The death, then, of the legatee, under the provisions of this section, has the effect to make the heirs of the deceased legatee the legatees under that provision of the will the same as if their names had been written in the will respectively.

In other words, they become the heirs of the property devised, *i. e.*, the property belonging to the testator and devised by his will. The property thus devised is not the property of the deceased legatee, and could not pass to the administrator of such deceased legatee's estate.

The law of the land becomes no less a part of a will than of a contract. After the death of the legatee of the $3,000, this section of the statute has the effect to read into the will a provision that $1,000 shall be paid to the sister of the legatee, another $1,000 to the brother, and another $1,000 to the two daughters of the testator. The $1,000 going to the two daughters,

passing not to collateral heirs but to direct heirs, in my judgment is not subject to the collateral inheritance tax, but the $2,000 going to the brother and sister of the legatee, I think should properly be charged with the tax.

Yours very truly,

MILTON REMLEY,
Attorney-General.

BUILDING AND LOAN AND SAVINGS AND LOAN ASSOCIATIONS—Voluntary Liquidation of—1. In case the shareholders of such associations should decide to go into voluntary liquidation, such associations would still be subject to supervision by the auditor of state.

2.—When any shareholder of such association sees that his interests are being jeopardized through the fraud, speculation, and dishonesty of those having the affairs of such association in charge, he has the right to apply to a court of equity for the appointment of a receiver, notwithstanding the association may have resolved to go into liquidation.

3.—The statements made in paragraphs 1 and 2 will apply likewise to a case where such association elect to go into voluntary liquidation under a plan approved by the executive council.

October 31, 1900.

Hon. Frank F. Merriam, Auditor of State, Des Moines, Iowa:

DEAR SIR—Your favor of the 26th inst. at hand in which you say:

> "Section 7 of chapter 69, laws of the Twenty-eighth General Assembly, provides a method by which building and loan or savings and loan associations may go into voluntary liquidation. Three questions regarding this subject have arisen, upon which I would be pleased to have your opinion. In case the shareholders should decide to go into voluntary liquidation, as provided under section 7:
>
> *First*—Would such association be still subject to supervision by this department, and could I legally make application for a receiver for such an association during the process of such liquidation?
>
> *Second*—Could a shareholder legally make application for a receiver for such an association during the process of such liquidation?
>
> *Third*—Would the answers you have given to questions 1 and 2 still apply in case an association did not accept the plan provided for in section 7, but went into voluntary liquidation under a plan of their own, properly approved by the executive council as provided for in said section?"

The first inquiry that suggests itself is: "What is the status of an association after its shareholders have by a three-fourths vote resolved to go into voluntary liquidation upon either the plan outlined in said section 7 or upon a plan of their own which has been approved by the executive council? Does it cease by such act or resolution to be a building and loan or savings and loan association? It may and unquestionably does, cease taking in new

business, but I think it is unquestionably a building and loan association; has not lost its corporate identity or power. Said section 7 or any other section of said chapter 69 does not abridge or limit the power given in chapter 13, title 9, of the code to the auditor of state. The purpose of the law requiring reports to be made by the associations and requiring examinations of the affairs of the association by the auditor, is to protect the shareholders from improvidence, frauds or the misdeeds of the officers. The fact that the association has voted to go into liquidation affords no guarantee against the mismanagement, misdeeds, fraud or speculation of the officers, and in the nature of the case, there appears to be no reason for a less degree of watchfulness on the part of the auditor than if it was a going institution. If such an association after having resolved to go into liquidation were exempt from any control of the auditor's office or examination, the winding up of the affairs of the association might be prolonged year after year and the funds paid in by the shareholders might be dissipated without let or hindrance so far as the auditor is concerned. The same reasoning that would prohibit the auditor from interfering would also prohibit a shareholder from applying for a receiver. Such a construction of the law would leave every shareholder at the mercy of the persons in charge of the winding up of the affairs of the company. I do not think this was the intent of the legislature.

Hence, in answer to your first question, my opinion is that such an association is still subject to the supervision of the auditor and he will be justified in making an application for a receiver for such an association during the process of such liquidation whenever said association is not carrying out the provisions of the law in good faith or is squandering the property of the association which belongs to the shareholders, or pursuing a method of liquidation not contemplated by law.

Second—In regard to the second inquiry, a shareholder in any corporation whenever he sees that his interests are being jeopardized through the fraud, speculation and dishonesty of those having the affairs of the corporation in charge, I do not doubt has full right to apply to a court of equity for the appointment of a receiver notwithstanding the association may have resolved to go into liquidation.

Third—I think the same rule applies when such association has adopted a plan of liquidation of its own other than that outlined in section 7, which plan has been approved by the executive council, but in either case, if the association is carrying out the plan honestly and in good faith approved by the executive council or provided under said section 7, doing the acts therein authorized would not be considered a violation of law, and ought not and could not properly be made a basis of complaint. But if such an association through its officers is wasting the property of the association by which the rights of any member are jeopardized or a wrong being perpetrated upon him, then the right of the state or of any shareholder to apply for the appointment of a receiver to wind up the affairs of the company under the directions of a court of equity exists the same as that no resolution had been passed by the shareholders to go into voluntary liquidation. Said section 7 while giving power to an association which it did not prior thereto possess, to go into voluntary liquidation, does not diminish or limit the power of the auditor to see that the affairs of the association are administered according to law.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

GAME WARDEN—License for non-residents who hunt within this state—Persons residing on islands in the Mississippi river on the Iowa side thereof are within the state of Iowa, and are not required to procure a license, and there is no provision of law which authorizes the game and fish warden to issue a permit to persons to violate the provisions of the law.

October 31, 1900.

Hon. Geo. E. Delavan, Fish and Game Warden, Spirit Lake, Iowa:

DEAR SIR—Your favor of recent date came duly to hand, enclosing a letter from Mr. Geo. S. Tracy, of Burlington, in which inquiries were made of you, in substance:

> "Whether you have power to waive the requirements of chapter 86 of the acts of the Twenty-eighth General Assembly by which a person not a *bona fide* resident of the state of Iowa is prohibited from hunting or killing any game, bird or animal in the state without first procuring a license," etc.

It is claimed that a law requiring a license to be paid works a hardship not only upon residents of this state, but also residents of Illinois, inasmuch as both states claim concurrent jurisdiction over the river.

Without passing upon the question how far the acts of congress admitting Illinois and Iowa into the Union, and the statutes of both states relative to a concurrent jurisdiction over the Mississippi river may apply to one shooting game birds anywhere upon the Mississippi river, I will say there is no provision of law which authorizes the game and fish warden to issue any permit to any person whomsoever, to violate the provision of the law. The law applies to all persons who violate its provisions, and does not provide for any person to grant indulgences to any wishing to violate it or grant immunity from punishment in case of violation. Mr. Tracy's letter advances the idea that persons living on islands in the Mississippi river which are near the Iowa shore and belong to the state of Iowa, are prohibited by the law from shooting game upon the islands on which they live. Such persons being residents of the state are not required to procure a license under the provisions of said chapter 86. The islands in question being a part of the state and wholly within the jurisdiction of the state, I do not think they could be held amenable to the laws of Illinois for doing what is lawful to be done in the state in which they are citizens, and of which the *locus in quo* forms a part. The islands in question form no part of the waters of the Mississippi, and Illinois can certainly claim no jurisdiction over the lands belonging to the state of Iowa.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

GAME LAWS—A person who does not own the bed of a lake is liable for seining therein. And he may be liable even though he owns the bed of the lake if the outlet to the lake is such that in times of ordinary high water it is connected with other bodies of water and thereby be restocked.

November 9, 1900.

Hon. Geo. E. Delavan, Fish and Game Warden, Estherville, Iowa:

DEAR SIR—Yours of the 7th inst. at hand requesting my opinion as to the liability to arrest and prosecute for violating the game and fish laws of the state, all persons seining in lake Spitznoggle near Wapello, Iowa.

The facts stated by you are hardly sufficient for me to form a positive conclusion. You say: "The farmer owns a farm on which is lake Spitznoggle." This would imply that he also owned the lake, yet it appears in another place that the lake covers possibly 250 acres of land and is the resort for business men of Wapello. I know of no lake of such an extent which was not meandered. If the lake is a meandered lake then it is not owned by the farmer although he may have land surrounding it. The riparian owners of meandered lakes own only to high water mark. In that case, the farmer does not own the lake and is amenable to the law if he seins therein.

If, as a matter of fact, the farmer owns the lake, then his right to seine would depend upon whether the lake has no natural inlet or outlet through which it may be stocked or replenished with fish. If it has no outlet by which it may be stocked or replenished with fish, and he owns the lake, he may then fish with seine or in any manner he is disposed under section 2545 of the code. The character of the inlet or outlet is not stated by you. If there is a natural outlet or inlet which in times of ordinary high water connects with the river so that the lake may be replenished or restocked with fish, then the farmer is not authorized to seine in said lake. The fact that there may be no connection between the lake and the river in times of low water, does not change the rule above stated. If the condition is such that the lake depends upon its connection with the river to be replenished with fish, certainly under the law, the owner of the lake is prohibited from seining therein. On the other hand, if the farmer owns the lake and there is no connecting outlet or inlet from the river except in times of excessive high water when the river may overflow its banks, such high water or floods as occur very seldom and are extraordinary, the fact that an occasional overflow of the river makes the connection with the lake would not in my judgment, deprive the lake of its character as private waters nor preclude the farmer from fishing with a seine therein. I think it plain that if the farmer does not own the bed of the lake, he is liable to the law in case he seines therein, and second, if he does own the bed of the lake and the outlet is such that in times of ordinary high water there is a connection by means of an outlet or inlet into the lake by which the lake may be restocked with fish from the river, then he is prohibited from fishing and is amenable.

Yours very truly,

MILTON REMLEY,
Attorney-General.

BOARD OF CONTROL.—The settlement by the executive council with said board should embrace all matters in or for which public money is expended under the direction of said board.

DES MOINES, IOWA, November 13, 1900.

Hon. A. H. Davison, Secretary Executive Council.

DEAR SIR—In yours of the 12th inst., you say that the executive council request my opinion "as to whether the board of control is one of the offices that should be settled with by the executive council under the provisions of section 161 of the code, and if so, should the settlement take in all of the financial doings of the said board, or be limited to the office, or the expenses of the office as such."

Section 161 is as follows: "The executive council shall annually, and oftener in its discretion, make a full settlement between the state of Iowa and the officers of the state, officers and superintendents of the state institutions, and all persons receiving, handling, or expending state funds." Section 159 requires the executive council to cause the books, accounts, vouchers, expenditures and conduct of each state institution to be examined by a skillful accountant. The settlement referred to in section 161 contemplates the examination of the accounts as a prerequisite to making a settlement.

The language of section 161 is comprehensive and includes within its terms all officers of the state and all persons receiving, handling or expending state funds. It is a general law and applies to all persons coming within the terms. The fact that the board of control was created after this general law was enacted does not, in my judgment, exempt it from the examination and settlement required by said section 161 of all state officers. The creation of a state office a ter the enactment of a general law governing the conduct of state officers, is as much subject to the general law as a public officer whose office was created prior to the enactment of the general law. I know of no distinction between them, and in my judgment, the board of control is embraced within the class of state officers with whom the executive council is required to make settlement.

In regard to the second branch of the inquiry, viz., "Should the settlement take in all of the financial doings of the board, or be limited to the office, or the expenses of the office as such," I will say chapter 116 of the acts of the Twenty-seventh General Assembly, creating the board of control, places the management of the state institutions under the control of the said board. Said board becomes the managers of each of the institutions placed under its control. The board of control expends public money for the different institutions. The accounts of the different institutions are kept in the office of the board of control, and an examination of the financial doings of the said board is practically an examination of the books, accounts, vouchers, expenditures and conduct of each state institution referred to in section 159.

The purpose of the law is evidently to have a check upon the public officers who are expending the public money. The expenditure for the state institutions, by said chapter 118 of the acts of the Twenty-seventh General Assembly, is transferred from the boards of trustees and superintendents of the i stitutions who formerly had control thereof to the board of control.

The board of control stands in place of the governing boards of the institutions as they existed at the time the present code was enacted. I do not think it was intended by the legislature that a part of the accounts of the board of control,—for instance, their office expenses,—should be examined and settled by the executive council, and that by far the greater part of the expenditures of public money should be released from examination. The policy of the law being to secure an examination of the accounts of every public officer to the end that mistakes should be corrected and frauds and embezzlements detected, it is not, in my judgment, repealed and set aside by transferring the management of state institutions to the board of control.

I am of the opinion that the settlement by the executive council with the board of control should embrace all matters in or for which public money is expended under the direction of the board.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF CONTROL—The abstract of title submitted for an opinion shows a good title in the present holder thereof.

December 8, 1900.

The Board of Control of State Institutions, Des Moines, Iowa:

DEAR SIRS—I have examined the abstracts of title which you submitted to me of the following tracts of land:

First—A part of the south-east quarter of section 13, of township 78 north, of range 3 east, of the 5th P. M., as follows: Beginning at the north-east corner of said south-east quarter of said section 13, thence south along the center of a sixty foot road, 18 chains and 34 links to a stone, thence west along the center of a 40 foot road, 33 chains 97 links to a stone, thence north, 18 chains and 34 links to a stone in the center of a 40 foot road, thence east along the center of last named road, 33 chains and 97 links to the place of beginning, containing 62.30 acres, more or less, subject to right of way of C. M. & St. P. Railway Co.

Second—A part of the south-east ¼ of section 13—78—3 E. of the 5th P. M., described as follows, to-wit: Beginning at a stone 10.79 chains due north from a stone and mound at the corner of sections 13—18—19 and 24; thence west 4 chains; thence north 2.50 chains; thence west 18.84 chains; thence south 2.50 chains; thence west 21.23 chains; thence north 10.87 chains; thence east 44.07 chains; thence south 10.87 chains to the place of beginning. Containing 43 10-100 acres, more or less, except the right of way of the Davenport & St. Paul Railway company.

In regard thereto I will say that while there are minor criticisms that might be made, yet there appears to be no practical objection to the title. Anything which might be considered as a defect is of such ancient date that there appears to be no human probability of anything arising thereunder.

I think you would be justified in accepting the title thus shown as a good title. There is no serious defect in the title or cloud thereon. Some apparent ones have been cured by the statute of limitation.

Yours very truly,

MILTON REMLEY,
Attorney-General.

DENTISTS DULY REGISTERED—Where a dentist has been duly registered as such under the law in force at the time of registration, a new certificate or license is not necessary to enable him to practice as such where he has failed for one or more years to pay the renewal fee.

2.—One who has been given a temporary license to practice dentistry cannot continue to do so without an examination and obtaining a license as required by chapter 91, laws of the Twenty-eighth General Assembly.

December 27, 1900.

Dr. F. A. Lewis, Secretary and Treasurer State Board Dental Examiners, Ottumwa, Iowa:

DEAR SIR—Yours came duly to hand requesting my opinion upon the following points:

First.—You call attention to the fact that heretofore dentists duly registered have failed for one or two years to pay the renewal fee of $1 and ask in effect, if the payment of such fees and fines provided under prior laws be made, is the board "justified in issuing a renewal certificate to, and reinstating in the register the one who has paid such fees and fines?"

Second.—Whether persons to whom have been issued temporary licenses under the provisions of section 2598 of the code prohibited to practice dentistry in this state without an examination and obtaining a license as required by chapter 91 of the laws of the Twenty-eighth General Assembly.

In regard to this point I will say that to reach a correct conclusion it will be necessary to review the legislation upon this subject. The end and purpose to be obtained must ever be had in mind in construing any statute. The first law with reference to the practice of dentistry is chapter 36 of the laws of the Nineteenth General Assembly. The purpose thereof is correctly stated in the title, "An act to insure the better education of practitioners of dentistry in the state of Iowa." It will be noticed that said act provided for licenses to be issued:

First.—To those who upon the examination by the board or some member of the board, were found to be qualified.

Second.—To all persons having a diploma from the faculty of some reputable dental college.

Third.—To every person who is engaged in the practice of dentistry within six months from the date of the taking effect of this act.

The act provided for the payment of certain fees by which the expenses of the board were to be met.

It will be noticed under the first act that examinations were required only of those who after the passage of the act, commenced the practice of dentistry and were not graduates of some reputable dental college. The fact that one was engaged in the practice of dentistry six months of the date of taking effect of the act or was a graduate of some reputable dental college, was by the law considered evidence of qualification sufficient to entitle one to practice.

The law remained substantially the same until the adoption of title 12, chapter 19 of the code of 1897. By section 2599 of the code we find that persons "who are registered practitioners of dentistry under laws heretofore in force," are excepte l from the law prohibiting persons to engage in the practice of dentistry without a license from the state board of examiners. Section 2597 however required "any one who desires to continue the practice of dentistry shall on or before May 15th of each year, pay to the board of examiners the sum of $1 for which he shall receive a renewal of his certificate, unless his name has been stricken from the register for violation of law." This compelled all persons who are engaged in the practice of dentistry to pay an annual fee in order to lawfully continue the business, but it will be noticed that the failure to pay such fee did not have the effect of revoking his certificate. The failure to pay such fee incurred a fine of $10 for each month during which he continued to practice. But the certificate showing his qualifications to practice was not thereby annulled.

The Twenty-eighth General Assembly, chapter 91, repealed chapter 19 of title 12 of the code and enacted a substitute therefor. It provides for the examination of all persons who shall engage in the practice of dentistry and permits none to be examined except graduates of a reputable dental college. Section 10 makes it unlawful for any person to practice medicine without having complied with the provisions of this act, but section 12 provides "and nothing herein shall be construed to prohibit the practice of dentistry in this state by any practitioner who has been duly registered in accordance with the laws of Iowa existing prior to the passage of this act." What does this exception mean? Does it mean that any practitioner who at the time of the passage of this act held a valid license to practice, or does it mean that any practitioner who had shown his qualification to practice and had been duly registered in accordance with the laws of Iowa existing prior to the passage of this act, should be permitted to continue the practice or excepted from the requirement laid down in chapter 91?

I have called attention to the fact that a failure to pay an annual fee of $1 to the secretary of the state dental board did not work a forfeiture of the certificate authorizing the practice of dentistry. It subjected the person continuing the practice of dentistry without the payment of such fee, to a fine or penalty. Under section 2599 of the code, failure to register the certificate with the clerk of the district court of the county for six months worked a forfeiture of the license. The license could be restored upon the payment to the board of the sum of $25 but no new examination was required. Where one had been for some time duly registered I know of no provision of any statute requiring him to again submit to a new examination. The fact that one suspended practice for one year say, prior to the taking effect of said chapter 91 of the Twenty-eighth General Assembly and did not pay his annual fee for a renewal of the certificate, would not be evidence of disqualification to practice dentistry. In my opinion, the language quoted above from section 12 of said chapter 91, exempts any one who has been duly registered in accordance with any law in existence prior to the passage of said chapter 91, from the provisions requiring an examination and a license, and this is true whether at the time the said chapter 91 took effect he was lawfully engaged in the practice of medicine or not. In other words, the language above quoted makes the fact that one has been registered at some time, conclusive evidence of his qualification to practice dentistry irrespective of the fact, if it be a fact, that at the time of the taking effect of said chapter 91 he may not have been engaged in the practice of dentistry or may have failed to pay the annual fee required by section 2597 of the code. We cannot attach penalties to the failure to pay such fee which the statute did not. There is nothing in the said chapter 91 which requires or authorizes the board to issue certificates or licenses to any except those who are required under said act to be examined. Said chapter 91 does not apply to any persons practicing dentistry who has been duly registered in accordance with the laws of Iowa existing prior to the passage of this act. Hence I do not think that a new certificate or license is necessary to enable one to practice dentistry who has been heretofore registered under the law then in force, as the fact of their having been registered is declared by the legislature to be sufficient evidence of their qualification to entitle them to practice without being subject to the penalties provided in said chapter 91.

Second.—In regard to your second question I will say chapter 36 of the laws of the Nineteenth General Assembly provide that "any member of said board shall issue a temporary license to any applicant upon the presentation by such applicant of evidence of the necessary qualifications to practice dentistry, and such temporary license shall remain in force until the next regular meeting of the said board occurring after the date of such temporary license and no longer." This is substantially the same as section 2598 of the code. An examination for a temporary license was not required. Evidence of qualification could be submitted to any member of the board. This was only a temporary make-shift to enable one who furnished *prima facie* evidence of his qualification to commence the practice until such time as he had an opportunity to take the examination or procure a certificate or license in due form from the board as a whole. Such license was not issued by the board but by a member. He was not required by section 10 of said act to be registered with the county clerk of any county. Only those persons who shall be licensed by the said board were required to be registered by by the county clerk of any county. And the temporary license issued by one member of the board does not mean the same as duly registered, and I am of the opinion that such a one does not come within the exception quoted above from section 12 of said chapter 91, but in order to practice dentistry must take the regular examination provided for in said chapter 91.

Yours very truly,

MILTON REMLEY,
Attorney-General.

NOTARY PUBLIC—A district judge who has resigned his office is ineligible to the office of notary public during the term for which he was elected.

December 31, 1900.

Hon W. H. Fleming, Private Secretary, Des Moines, Iowa:

DEAR SIR—Yours informing me of the request of the governor for my opinion upon the following questions, came duly to hand. The press of other matters has delayed my response. You ask:

First—"Can a district judge be a notary public?

Second—"Can a district judge who has resigned, be a notary public during the time for which he is elected."

Section 5, article 5 of the constitution contains the following provision: "The judge of the district court shall hold his office for a term of four years and until his successor shall have been elected and qualified, and shall be ineligible to any other office except that of judge of the supreme court during the term for which he is elected. There is no question but that notary public is an office. Section 22 of article 3 of the constitution so recognizes it. But without such recognition it is clearly settled by authorities that a notary public is a public officer. 16 Am. Eng. Enc. of Law, page 733.

In reply, then, to your first inquiry, I will say that I do not think a person can hold the office of a district judge and a notary public at the same time.

In regard to the second inquiry, whether he is ineligible for the office of notary public during the time for which he was elected, I will say that, technically speaking, he is ineligible. It is very evident to my mind that the case does not come within the spirit of the constitution, although within the letter. From the nature of the case, the appointment of notary public being made by the governor, could not be secured by reason of any favors shown by a judge in the discharge of his duties on the bench. The purpose of the constitutional prohibition is to prevent one holding the office of district judge being subjected to the temptation of showing partiality to this person or that person, or this faction or that faction, for the purpose of gaining support for the appointment or election to some other office. It is to remove the district judge from any suspicion of using the office of judge for the purpose of making friends, which would help him to another position. The appointment to the office of notary public could not be influenced by anything done by the judge upon the bench. Hence, I say it is not within the spirit of the constitution.

But the constitution makes no exception, as is found in section 22 of article 3 of the constitution. It is difficult to anticipate what the supreme court would ultimately determine in regard to it, but I am of the opinion that the court would be forced to hold that a judge who has resigned is ineligible to the office of notary public during the term for which he was elected. If there were any doubt about it whatsoever, in view of the serious consequences that might follow by having the acts of a notary public declared of no effect, it is far better to take no risk whatever, but follow the letter of the constitution.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSURANCE COMPANIES—Foreign companies must substantially comply with chapter 65, laws of the Twenty-eighth General Assembly, before they can be permitted to do a stipulated premium business in this state.

December 31, 1900.

Hon. Frank F. Merriam, Auditor of State, Des Moines, Iowa:

DEAR SIR—I have the honor to acknowledge receipt of your request for my opinion "as to the standing of insurance organizations which have formerly been admitted to do business in this state under the provisions of chapter 7, which, until amended by the last general assembly, governed stipulated premium and assessment life insurance companies and associations. Nearly all the associations or companies from other states which are authorized under chapter 7 to do business in this state are doing what is ordinarily termed 'stipulated premium' business, and I desire to advise these companies what change will be required of them in order to comply with the new stipulated premium law in this state, and whether or not a company organized under the laws of some other state as an assessment company and doing a stipulated premium bu iness can be authorized to do business in this state as an assessment company, or must they comply with chapter 65 of the laws of the Twenty-eighth General Assembly; and if they must comply with chapter 65, laws of the Twenty-eighth General Assembly, should this department require them to have their policies valued and listed as a liability?"

In regard to this, I will say that chapter 65 of the acts of the Twenty-eighth General Assembly in effect eliminates from chapter 7, title 9 of the code, all provisions relating to stipulated premium companies. Said chapter 65 is an amendment to chapter 7, title 9 of the code. Section 5 defines what is a stipulated premium company, and provides "that the business of life insurance upon a stipulated premium plan shall be subject to the provisions of this act." This definition of a stipulated premium company is the test or standard by which a foreign insurance company is to be measured. The purpose of the act is to divorce those insurance companies which require a fixed payment or stipulated premiums to be paid, from those associations which conduct the business upon the assessment plan. It is very evident to my mind that an Iowa company or association cannot lawfully do a stipulated premium business, and at the same time an assessment business. For a stipulated premium company which is required to have a reserve sufficient to enable it to comply with the contract it makes with the policy holder to continue an as-essment business which might, and in all human probability will, jeopardize the funds which have been accumulated to pay the stipulated premium policies at their maturity, would defeat the end and purpose of this act. Section 16 prescribes a penalty for any company attempting or claiming to transact business under this act, or using the term stipulated premium in its policies, contracts, advertisements or literature, without having complied with the provisions hereof. Hence, it is unlawful for any company, doing an assessment business, to write stipulated premium policies without having complied with the provisions of said chapter 65, and if said company does not comply with the provisions of said chapter 65, then it is

prohibited from carrying on the business of assessment insurance. This is unquestionably true with reference to companies organized under the laws of this state.

The question still remains, whether the provisions of said chapter 65 applies to foreign companies? Section 14 of said chapter 65 provides the terms or conditions under which any corporation or association organized under the laws of any state for the purpose of insuring lives of persons on a stipulated premium plan, may be permitted to do business in this state under the provisions of this act. It cannot be supposed or contended for one moment, that the legislature ever intended that any company organized under the laws of another state, should be permitted to do business of a kind, or with less securities for the policies, than is required or demanded of companies organized under the laws of this state. Unless, then, the plan of business of a foreign insurance company is substantially the same as that referred to in said chapter 65, and the securities and reserve are accumulated as contemplated in said chapter 65, so as to make such company equally able to fulfill its contracts of insurance as a company organized under the laws of this state, I am clearly of the opinion such foreign company should not be permitted to do a stipulated premium business in this state.

Section 8 of said chapter 65 provides as follows: "All policies issued under the provisions of this act shall be valued as provided in section 1774 of the code, and the net value thereof shall be deposited with the auditor of state as therein provided." In order to determine the responsible and financial standing of any foreign company doing business in the state, it will be the duty of the auditor to have all policies issued by the said company valued as required by section 1774 of the code, and if such company does not show it has assets sufficient to meet the requirement of said section, then I am of the opinion that such company should not be permitted to continue business in this state. While the statute does not contemplate that the securities of a foreign insurance company shall be deposited with the auditor of this state, yet it does contemplate that the solvency of such company shall be tested by the same rules as are applied to a company or association organized under the laws of this state.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

APPROPRIATION FOR STATE UNIVERSITY—The taking effect of the code of 1897 did not annul the appropriation made for the university by chapter 76 of the laws of the Seventeenth General Assembly, and chapter 115 of the laws of the Twentieth General Assembly. Section 2643 of the code supersedes the former statutes, and the university cannot now claim the benefit of such former appropriation.

DES MOINES, IOWA, December 31, 1900.

Hon. Frank F. Merriam, Auditor of State:

DEAR SIR—Your request for my opinion upon the following questions was duly received. You call my attention to chapter 76 of the laws of the

Seventeenth General Assembly, and chapter 115 of the laws of the Twentieth General Assembly, making appropriations for the support of the state university, and state that under chapter 76, the first payment was made July 1878, and the last August 7, 897, and under chapter 115 of the laws of the Twentieth General Assembly you say that the first payment of $8,000 was in July, 1884, and last August 7, 1897. The points upon which you request my opinion are these:

First.—Was there at said date, October 1, 1897, any of said appropriation available, and is there at this time?

Second.—Did the taking effect of section 2643 of the new code appropriating for the support of the university, annul the appropriations referred to by said chapter 76 of the Seventeenth General Assembly, and chapter 115 of the laws of the Twentieth General Assembly?

The answer to the first question depends upon the conclusion reached in regard to the second.

It will be noticed that chapter 76 of the Seventeenth General Assembly appropriated $20,000 annually to be paid in installments of $5,000 each, the first installment of $5,000 to be paid on the first day of July, 1878, and the same quarterly thereafter. While this is an appropriation of the sum of $20,000 annually, the manner of the payment thereof makes it in effect an appropriation of $5,000 quarterly for each quarter on the first day of July 1878, and each successive quarter beginning the first day of October, January and April of each year so long as the law shall remain in force.

It will be further noticed that chapter 115 of the laws of the Twentieth General Assembly makes an appropriation of $8,000 which appropriation becomes available and hence due upon the taking effect of the act. The act was published and took effect April 4, 1884. It thereby becomes evident that there was due from the state treasury on the first of every April since 1884 up to to the time the code of 1897 took effect, the sum of $8,000. These appropriations are for a fixed and definite sum. They are not for a sum named "or so much thereof as may be necessary," but they are absolute appropriations for the university in a definite and fixed sum, and so long as the law remains in force and effect, the appropriations become due at the times above specified.

The real question then is whether said acts have been repealed by the code, and if so, the effect of such repeal upon the unpaid appropriations, if any.

Section 49 of the code contains this provision: "All public and general statutes adopted prior to the present session of the general assembly, except acts appropriating money when the same has not been fully paid out, and all public and special acts the subjects whereof are herein revised or which are repugnant thereto, are repealed, subject to the limitations and exceptions hereinafter referred to."

This act being for the appropriation of money, any sum which could have been drawn prior to the adoption of the code would not be affected by reason of the exception above referred to, viz, "acts appropriating money when the same has not been fully paid out." There is no express provision repealing said acts, and the exception above referred to was evidently intended to authorize the payment of all money which had been appropriated

when the same had not been fully paid out. I do not think the taking effect of the code annulled the appropriations referred to in said chapter in the sense in which such language is ordinarily understood.

While there is no repeal in express language, yet it is evident to my mind that section 2643 of the code supercedes the former statutes, and I do not think the university could claim the benefit of section 2643 and the continued quarterly appropriation under chapter 76 of the acts of the Seventeenth General Assembly and an annual appropriation under chapter 115 of the Twentieth General assembly, but from and after the taking effect of the code such acts are merged unto section 2643, and thereafter such acts cease to be operative. They are, I think, without question, revised by the adoption of the code, and payments which would otherwise have become due under said acts by their terms on or after the first of October, 1897, must afterwards be drawn under the authority of said section 2643. But this does not, in my judgment, cut off the right of the university to receive all that was payable before October 1, 1897. Such unpaid portion of the appropriations comes clearly within the exception referred to in said section 49 of the code.

Now, applying these views to the case in hand: If payments were made for each quarter under the appropriation made in chapter 76 of the laws of the Seventeenth General Assembly, between the first day of July, 1878, and the first day of October, 1897, then I do not think any further payments should be made thereon. Under section 2643 of the code an annual appropriation of $65,500 is made. That, presumably, is the amount the legislature intended the university should draw between the first day of October, 1897, and the first day of October, 1898, and I cannot think that the legislature intended that $5,000 more should be drawn for the quarter commencing October 1, 1897, and ending December 31, 1897. If, however, no sum had been drawn for the quarter beginning July 1, 1897, and ending September 30, 1897, I am of the opinion that $5,000 would be due to the university for such quarter. It follows that the appropriation under chapter 115 of the Twentieth General Assembly being payable, all on the fourth day of April, 1897, such appropriation, if not fully paid out, would be available, and requisition for that amount would be honored.

I regard section 2643 of the code as providing a new basis for appropriations for the support of the university, and it takes the place and stands in lieu of all previous acts making appropriation for the support of the university from and after October 1, 1887. But this does not cut off any sum which under the previous acts was properly payable before the first day of October. Any part, then, of the $8,000 which was due on the fourth day of April, 1897, which has not yet been paid, should, in my judgment, be paid, and if any quarterly appropriation under chapter 76 of the Seventeenth General Assembly, which became due prior to October 1, 1897, has not been paid in full, I am fully satisfied you are authorized to draw a warrant therefor, but not for any sum which became due and payable on or after October 1, 1897.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF CONTROL—The board has authority to require a certificate to be furnished to the chief executive officer of the state institutions, except the penitentiaries, that the person who is to be received therein has not for seventeen days next preceding been exposed to smallpox, diptheria or scarlet fever.

DES MOINES, IOWA, January 2, 1901.

Board of Control of State Institutions:

GENTLEMEN—Your favor of the 31st ult. at hand, in which you submit to me the following resolution:

> "*Resolved*, That whenever any person shall be sent to any institution under the control of this board, except to either of the penitentiaries, from a locality where smallpox, diptheria or scarlet fever is prevalent, at the time of the reception of the said person in the institution there shall be furnished to the chief executive officer so receiving said person a certificate that said person has not for seventeen days next preceding the time of sending, or commitment, been exposed to any of such diseases. And if in such cases no certificate is furnished, said chief executive officer shall refuse to receive said person into his institution. In any case, when said chief executive officer shall have good reason to believe that a person committed, or sent, to his institution has been thus exposed, it shall be his duty to require the certificate above mentioned before admitting him or her into the institution. The certificate above mentioned shall be made and signed by the board of health of the locality where such contagious disease exists and in insane cases certified to by the commissioners of insanity of the county."

You desire my opinion as to whether or not the board of control has authority under the law to adopt such a rule as that contemplated in the resolution.

In regard thereto permit me to say that section 8 of chapter 118 of the laws of the Twenty-seventh General Assembly, contains the following: "The board of control shall have full power to manage, control and govern, subject only to the limitations contained in this act, the Soldiers' Home," etc.

Section 46 of said chapter contains this provision: "The board of control is authorized to make its own rules for the proper execution of its powers, and may require the performance of aditional duties by the officers of the several institutions so as to fully enforce the requirements, intents and purposes of this enactment."

It will be observed that the powers of the board of control to manage, control and govern the state institutions committed to its care are plenary, subject only to the limitations contained in said chapter 118. The trust imposed upon the board consists in more than looking after the safety, or feeding and clothing the inmates of the state institutions. It goes without saying that it is its duty, and one of the greatest importance, to look after the health and physical well being of the persons whom such institutions are intended to benefit. The health and life of the inmates of the insane hospitals, for instance, is of more importance than their actual confinement.

No management of such institutions could be considered good or capable which would ignore every reasonable precaution necessary for their health and to prevent the spreading of contagious diseases in such institutions. The legislature has given to the board full power in the matter, with full authority to make such rules and resolutions as shall best carry out the powers bestowed, and unless such powers are limited by said chapter 118, there can be no reasonable question that such a resolution is authorized. I find nothing whatsoever in said chapter 118 which limits the power of the board so as to preclude such a resolution being adopted.

It may be thought, however, by some, that the management, control and government of such institutions does not relate to determining who shall be admitted to such institutions, and it may be thought that the provisions of section 2266 of the code, relating to the admission to the insane hospitals, shall in all cases control. It is provided in said section 2266: "The sheriff shall execute the warrant and shall deliver a duplicate with a physician's certificate and finding to the superintendent, who shall over his official signature acknowledge such delivery on the original warrant, which the sheriff shall return to the clerk of the commissioners." This implies a duty on the part of the superintendent to receive the person thus delivered to him, and to treat such person in the insane hospital.

With reference to other institutions, similar provisions are found which, by inference, impose a like duty upon the managing officers of the different institutions. If we were to concede that the board of control act does not modify the duties imposed by fair inference upon the executive officers of such institutions, yet such language, being in general terms, has, from the necessities of the case, its limitations.

The supreme court of the United States has said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequences. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character."

If, then, the law by fair inference imposed the duty in general terms upon the superintendent of the insane hospital to receive and admit thereto all persons who were brought with a proper warrant from the commissioners of insanity, it must be presumed that the legislature intended exceptions when to so receive them would work injustice, oppression, or would be absurd. No greater injustice could be done to those wards of the state than to admit one inoculated with a contagious disease, or one actually having such disease. The hospitals for the insane being intended as a place for the treatment of those who may be benefited thereby, it could not be contemplated that the legislature intended one hopelessly insane should be received. If the hospital were crowded to its utmost capacity, it certainly would not be contemplated that the legislature intended to receive another one when the hospital had no facilities for caring for such a one.

This illustrates that there may be exceptions to general language, and from the necessities of the case there must ever be. I would have no hesitation in saying that the legislature never contemplated, even before the board of control act was passed, that the superintendent of an insane hospital should receive one into the hospital whose presence would be a menace to the life and health of those already confined therein. But the board of

control act gives to the board of control much more extended powers than were ever given to the superintendents and executive officers of the different state institutions prior thereto. The full power to manage, control and govern an institution cannot be said to exist if, against the judgment of the managing board, a discordant and unruly or a dangerous element may force an entrance therein. If the board has no power to close the doors of state institutions against a dangerous element which is a menace to the safety of the inmates of the state institutions, then its power to control is limited and is not a full power. It is limited then, by some provisions other than those contained in said chapter 118, but said section 8 gives it full power except as the same may be limited by the provisions of said chapter 118.

Another consideration: It is the beneficent purpose of the state, in providing state institutions, to restore to health, physically, mentally and morally, those unfortunates who become the wards of the state. Every provision of law with reference to such institution, is made to accomplish this end. The state, in confining its unfortunate wards within walls for their own good would be guilty of a crime against civilization if, while thus confined, it subjected them to innoculation from smallpox or other contagious diseases by bringing a person thus affected or inoculated into contact with them. Whatever lapse of legislation may be thought to exist with reference to such institutions, it is evident that the people of the state, through its legislature, never intended to commit such a crime, and if there were anything in the statute which seemed to impose upon the board the duty of receiving one affected say with smallpox as an inmate of a state institution, it must be conclusively presumed that the legislature intended such exemption in the general language as would not compel the perpetration of such a wrong, which is repulsive alike to common sense and the better sentiments of our natures.

I am clearly of the opinion that the board of control has full power to adopt and enforce the resolution above referred to.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

INSURANCE COMPANIES—Chapter 21 of the Acts of the Twenty-sixth General Assembly applies to every organization that was doing insurance business which claimed tne right so to do under section 21, chapter 65, Acts of the Twenty-first General Assembly.

January 2, 1901.

Hon. Frank F. Merriam, Auditor of State, Des Moines, Iowa:

DEAR SIR—You submitted to me the following statement and inquiry:

"Section 1798 of the code makes some exemptions as to insurance organizations being required to comply with the provisions of chapter 7, title 9 of the code. Under this exemption it has been held by my predecessor in this office that such organizations as the Locomotive

Firemen, the Locomotive Engineers, and the Order of Railway Conducters, and some others which confine their membership wholly to one religious denomination, were exempt entirely from complying with any state law. I desire your opinion as to whether such organizations which have a lodge system, ritualistic form of work, and a representative form of government, and pay death and other benefits, should or should not be required to comply with the provisions of chapter 9, title IX of the code if they desire to operate in this state."

With reference to the ruling of your predecessor as stated by you, I will say that it was undoubtedly made before the enactment of chapter 21 of the acts of the Twenty-sixth General Assembly and prior to that time such ruling was undoubtedly correct. The enactment, however, of said chapter 21 put entirely a different phase upon the question. Said chapter 21 was undoubtedly for the purpose of placing under control of the state in the manner provided in the said act, all associations which had grown up under the exception made by section 21 of chapter 65 of the acts of the Twenty-first General Assembly.

Chapter 21 of the acts of the Twenty-sixth General Assembly now appears as chapter 9, title IX of the code, and section 21 of chapter 65 of the Twenty-first General Assembly now appears as section 1798 of the code. There is no inconsistency between said section 1798 and chapter 9 of title IX. I do not think there is room for a doubt that such beneficiary associations as are described in section 1822 of the code must comply with every provision made in said chapter 9, title IX of the code.

It will be noticed that said section 1798 does not provide that such associations shall not be amenable to any law, but it says: "Nothing in this chapter shall be construed to apply to any association organized solely for benevolent purposes and composed wholly of persons of any one occupation, guild, profession, or religious denomination, but any such society may by complying with the provisions hereof, become entitled to all the privileges thereof, in which event it shall be amenable to the provisions of this chapter so far as they are applicable." It only excepts such associations from the provisions of said chapter 7 of title IX of the code, and does not except them from the provisions of chapter 9 of title IX.

It would be to my mind, an absurd conclusion, that because certain insurance companies are excepted from the provisions of one chapter, that they become thereby excepted from the provisions of another chapter, which expressly includes them within its terms. I am of the opinion that such organizations "which have a lodge system, ritualistic form of work and a representative form of government, and pay death or other benefits, should be required to comply with the provisions of chapter 9, title IX of the code, if they desire to operate in this state."

In regard to whether or not there may be an association which comes within the terms of said section 1798, which may not be subject to the provisions of said chapter 9, title IX of the code, I do not now express any views, although it was originally contemplated, I think without doubt, that said chapter 21 of the acts of the Twenty-sixth General Assembly should apply to every organization that was doing insurance business, which claimed the

right so to do under said section 21 of chapter 65 of the acts of the Twenty-first General Assembly.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF CONTROL—It has no authority in law to furnish cut stone free, from the Anamosa penitentiary, for the public library at Anamosa.

January 4, 1901.

Board of Control of State Institutions, Des Moines, Iowa:

DEAR SIRS—Your inquiry with reference to whether the board of control had authority under the law to furnish cut stone free, from the Anamosa penitentiary for the library at Anamosa, I find has not been formally answered, although my views were stated to you personally.

I find no authority of law whatsoever, for complying with the request of the Daughters of the American Revolution to furnish stone or the labor of convicts for such purpose. In the absence of any authority given by statute, it is evident that the board may not comply with the request.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF CONTROL—(1) Said board is not authorized to receive a resident of the state who is less than five years of age or more than twenty-one years of age as a pupil in the school for the deaf at Council Bluffs. (2) A person properly received as a pupil in said institution, under the age of twenty-one years, may be retained in said school after he has attained that age, for the purpose of completing the prescribed course of study, or to pursue special studies.

January 4, 1901.

Board of Control of State Institutions, Des Moines, Iowa;

DEAR SIRS—Yours duly at hand in which you desire my opinion upon the following questions:

First.—"Whether any person who is less than five or more than twenty-one years of age, can be received as a pupil into the school for the deaf at Council Bluffs?"

Second.—"Whether a person properly received as a pupil may be retained in the school after he has attained the age of twenty-one years, for the purpose of completing the prescribed course of study, or to pursue special studies?"

The only provision of the statute which throws any light upon these questions is contained in section 2724 of the code. "Every resident of the state,

of school age and suitable capacity, who is deaf and dumb, or so deaf as to be unable to acquire an education in the common schools, shall be entitled to receive an education in the institution at the expense of the state, and non-residents similarly situated may be entitled to an education therein, upon the payment of forty dollars quarterly, in advance." Section 2723 provides that the trustees of the institution "shall appoint a superintendent, employ teachers and servants to do any other act or thing necessary and proper to be done to carry into effect the objects of the institution." All the powers of the board of trustees has been transferred to the board of control. The object of the institution is to give an education to the unfortunate who are deprived of hearing or speech, and I do not think the law should be construed so as to defeat the beneficent objects of the institution or limit them more than the language of the statute demands. The language quoted from section 2724 gives to every resident of the state of school age and suitable capacity, the right to receive an education in the institution at the expense of the state. That right attaches to a resident of school age. The right is to receive an education at the expense of the state. One a few months under twenty-one years of age cannot in that few months receive an education at the expense of the state, but the statute says he is entitled to receive it. It does not say that he is entitled to receive an education at the expense of the state provided he can complete his education by the time he is twenty-one years of age. Taking into consideration the object of the institution and the provision of section 2724, I am of the opinion that the board of control would not be authorized to receive a resident of the state who is less than five years of age nor more than twenty-one years of age, as a pupil in the institution. It must be presumed that in the judgment of the legislature one who was over twenty-one years of age could not be benefited in said institution to an extent commensurate with the cost of such education. While this may be a mistaken view, and the statute might be with great propriety enlarged so as to receive persons over twenty-one years of age, yet we must take the law as it is written.

In reply to the second inquiry, I will say the right to receive an education having attached to one between the ages of five and twenty-one years, he may be received in the institution, and at such institution is entitled to receive the education contemplated in said section, notwithstanding the fact that it may require years beyond the time that he attains his majority.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF CONTROL—The law of the state governs the question as to when minors cease to be such in relation to a parent pensioner residing at the soldiers' home.

January 4, 1901.

Board of Control of State Institutions, Des Moines, Iowa:

DEAR SIRS—Your favor came duly to hand requesting my "construction of our law in connection with the United States pension law, as to when a child ceases to be a minor." This is asked with reference to chapter 92 of the laws of the Twenty-eighth General Assembly relating to the disposition of the pension money of members of the Iowa Soldiers' Home.

I presume the doubt has arisen because of the fact that the United States government allows a pension for minosr under sixteen years of age. Section 3 of said chapter 92 is as follows: "All members of the home who are pensioners and have a wife or minor children, shall be required to deposit with the commandant at once upon receipt of his pension check, one half of his pension money, which shall be sent at once to said wife or minor children, unless the said wife is proven to be a woman of immoral character." This being the law of the state of Iowa, we cannot go to the statute of some other government to ascertain the meaning of the terms employed. That would not be permissible. The law of this state defines what is a minor, and to the law of this state alone we must look for its definition. All unmarried females under the age of eighteen are minors. All males under the age of twenty-one are also minors, and in applying said section 3, reference must be had to the law of this state alone.

But even if a different rule prevailed, there is nothing in the Unites States statute which defines a minor to be other and different from the law of this state. The fact that the United States government allows a pension for minors under sixteen years of age, does not change the meaning of the term minor as it is used in the statute of the United States. The enforcement of the provisions of section 3 in some cases may work a serious hardship, as in the case under which the inquiry arose. There may be cases continually arising where it is practically impossible to pay one half of the pension to the minor child of the member of the home. The law requires no impossible thing to be done. The spirit of the law is that dependent minors shall be entitled to receive one half of the pension of the members of the home. Where a minor is not dependent and has cut loose from all connection with his father and his residence is unknown, I do not think that the spirit of the statute would require one half of the pension money of a member of the home should be retained for an indefinite time for the purpose of carrying out the exact letter of the statute. But what should be done in each particular case must be determined by the wise discretion of the commandant and the board.

Yours respectfully,

MILTON REMLEY,
Attorney-General.

BOARD OF SUPERVISORS—It has no power to demand the keys of the recorder's office and take possession thereof by force.

DEAR SIR—I beg to acknowledge the receipt of the esteemed favor signed by yourself and Mr. Barr, chairman of your board of supervisors, asking my opinion as to what ought to be done in the conflict between the newly elected officers and those whose terms of office would have expired on the seventh day of January, 1901, except for the Titus amendment.

In reply, I will say that the board of supervisors has no power to demand the keys of the recorder's office and take possession thereof by force. The only way to test the right of the newly elected officers is by an action of

quo warranto in the court. The officers elected at the last general election should make a demand for the possession of the office after they have filed their bonds and qualified, and then the natural course would be an action of *quo warranto* to oust the incumbent. In as much, however, as such an action has been tried between two county attorneys in Washington county, and will be submitted to the supreme court at as early a day as possible for its decision thereon, as a test case, I would suggest that the necessity of bringing other actions in different counties can probably be avoided by waiting for the decision in the Washington county case. A decision in the Washington county case is expected to be handed down by the supreme court upon the second or third day of its session, and the delay to the new officers in taking possession of their offices, in case the court holds they are entitled to do so, will be slight. The old officers holding over and refusing to surrender their respective offices, are in my opinion officers *de facto* between the time of the expiration of their terms of office and the time when the newly elected officers assume their duties, and the business transacted by them is valid, and I do not see how loss or litigation can arise therefrom.

Yours very truly,

CHAS. W. MULLAN,
Attorney-General.

To Mr. A. P. Olsen, County Attorney, Leon, Iowa:

January 9, 1901.

SCHOOL FUND--Judgment rendered in favor of--While the law provides no method for the compromise of judgments rendered in favor of the school fund of the state, yet there are circumstances under which compromises of this kind are very desirable and may be made.

DEAR SIR—Your favor of the 14th inst. has been received. There is no method, so far as I know, provided by law for the compromise of judgments rendered in favor of the school fund of the state, but sometimes compromises of this kind are very desirable, and should be made, even though there is no direct provision of law therefor.

I would suggest this course of action: Have the auditor, treasurer, clerk, and the board of supervisors agree upon what they consider a fair compromise. Have the money paid to the auditor, and a resolution adopted by the board of supervisors directing him to cancel the judgment, and under such resolution he can satisfy the record in the clerk's office.

The money upon the judgment goes to the temporary school fund of your county, and it is a matter which should be adjusted by the officers of that county, and the mode of procedure which I suggested recommends itself to my mind, as being the best. Very truly yours,

CHAS. W. MULLAN,
Attorney-General.

To Mr. George A. Jeffers, Le Mars, Iowa:

January 13, 1901.

WARRANTS FOR PER DIEM AND MILEAGE FOR EX OFFICIO MEMBERS OF THE BOARD OF REGENTS OF STATE UNIVERSITY—The auditor of state is authorized and empowered to draw warrants for their *per diem* and mileage the same as for other regents not drawing salaries from the state for the performance of the duties of another office.

DEAR SIR—Your favor of the 15th inst. is received, in which you say:

> "Your opinion is requested on the following, are the above named officers, when acting in the capacity of regents or trustees, entitled to the compensation referred to in sections 2617 and 2618, and is the auditor of state authorized and empowered to draw warrants for their *per diem* and mileage, the same as for other regents and trustees not drawing salaries from the state of Iowa, as provided in section 1289 of the code?" (The officers referred to being the governor and superintendent of public instruction, both of whom are *ex officio* officers and members of the board of regents of the state university.)

Upon determining the question, I have made an examination of the history of the legislation in regard to the salary of the governor and superintendent of public instruction, as now fixed by law, and the compensation provided for regents of the state university, and submit the following opinion:

The Thirteenth General Assembly increased the governor's salary from $2,000 to $3,000 per annum. The act by which such increase was made went into effect on the fifteenth day of April, 1870. From that time to the present the salary of the governor has remained the same.

The governor and superintendent of public instruction were made members of the board of regents of the state university by the same legislature. The act by which they were made members of the board of regents provided: "The regents shall receive no compensation except for mileage in traveling to and from the meetings of the board; which shall be at the same rate, and computed in the same manner, as the mileage allowed to members of the general assembly," etc.

This provision was embodied in the code of 1873, and remained the law until 1888, at which time the Twenty-second General Assembly increased the compensation of the trustees of state institutions and regents of the state university by providing, "that the trustees of state institutions, members of visiting committees of the hospitals for the insane, and regents of the state university, shall receive as their compensation four dollars ($4.00) per day for each and every day actually employed in the discharge of their duties, and the actual and necessary expense incurred while so engaged; but in no case shall the amount allowed for expenses exceed five cents per mile by the nearest traveled route necessarily traveled in such business."

Chapter 77 of the laws of the Twenty-second General Assembly, with some changes, was embodied in the code as section 2617 thereof.

The Sixteenth General Assembly repealed the act of the Thirteenth General Assembly whereby the governor and superintendent of public instruction were made members of the board of regents of the state university, and enacted chapter 147 of the laws of the Sixteenth General Assembly in lieu thereof. This chapter, with some slight changes, was embodied in the code as section 2635, which is the present law in relation thereto.

From this outline of the history of this legislation, it will be seen that the provisions of the legislature increasing the compensation of the members of the board of regents of the Iowa State University were made long after the governor's salary was increased to three thousand dollars ($3,000.00) a year.

The governor and superintendent of public instruction are both by law made members of the board, and all provisions of the statute, including that by which the compensation of the members of the board of regents is fixed, applies to them, as it does to every other member of such board. The duties of the two offices held by them are separate and distinct, and different and distinct duties are required in each. It is a rule of law that is well settled that the statutory recognition, whether direct or indirect, of the right to hold separate offices, implies that the officer may have the salary or compensation attached to each.

Collins v. United States, 15 Court of Claims, 22.
United States v. Saunders, 120 U. S. 126.
In re Conrad, 15 Fed. Rep., 641.
Landram v. United States, 16 Court of Claims, 74.
Hartson v. United States, 21 Court of Claims, 451.
State v. Harrison, 116 Ind., 300.
State v. Walker, 97 Missouri, 162.
Philadelphia v. Martin, 125 Penn. State, 583.
Crosman v. Nightingill, 1 Nevada, 323.
Preston v. United States, 37 Fed. Rep., 417.
Irwin v. United States, 37 Fed. Rep., 470.

The legislature of our state, having provided that the governor and superintendent of public instruction shall be *ex officio* members of the board of regents of the state university, and perform the duties of such office, and having provided that all of the members of such board shall receive as compensation for their services four dollars ($4.00) per day and expenses, such provision gives them the right to have paid to them the same compensation as is paid to the other members of such board, and under the rule of law above cited, they are entitled to take and receive the compensation paid.

The auditor of state is, therefore, in my opinion, authorized and empowered to draw warrants for their *per diem* and mileage, the same as for other regents of the university not drawing salaries from the state for the performance of the duties of another office.

CHAS. W. MULLAN,
Attorney-General.

January 15, 1901.
Hon. Frank F. Merriam, Auditor of State.

TRUSTEES OF IOWA AGRICULTURAL COLLEGE—Endowment fund—Loans made on account of—Loans may be made by the board of trustees, under section 2667, without being submitted to and approved by the executive council before being consummated.

DEAR SIR—I am in receipt of your favor of the 15th inst., in which you say:

> "I am directed by the executive council of Iowa to request your opinion, in writing, as to whether loans made on account of the endowment funds of the Iowa Agricultural College, under the provisions of code, section 2667, should be submitted to and approved by the executive council, as are investments made under section 2666."

Sections 2665, 2666 and 2667 of the code all refer to the endowment fund of the State College of Agriculture and Mechanic Arts and provide for the safe keeping and safe investment of such fund.

Section 2665 provides that the principal of such endowment fund must be paid to, and held by the treasurer of state, except when it is drawn out by the board of trustees for investment.

Section 2666 provides that the board of trustees shall manage and invest the endowment fund, which may be done in the bonds of the United States or this state, or in some other safe bonds yielding not less than five per cent interest on the par value thereof. Then follows the provision, "But the proposed investment shall be submitted to, and approved by the executive council, before being consummated."

This provision was clearly intended by the legislature to apply to the investment of the endowment funds in bonds of the United States or of this state, or in some other safe bonds yielding not less than five per cent interest. That is to say, under the provisions of section 2666, the trustees are not allowed to invest the funds in the bonds named therein, without such proposed investment being first submitted to, and approved by the executive council.

Section 2667 provides that it (the board of trustees of the State College of Agriculture and Mechanic Arts) may loan the state funds; that is, the endowment fund of the college, upon approved real estate security, subject to the following regulations: Then follow the regulations adopted by the legislature for the control of the board of trustees in loaning such funds upon real estate security. Power is conferred by this section upon the board to loan the endowment fund of the college, upon the conditions, provisions and regulations expressed therein.

As the legislature did not see fit to provide that the loan of such funds upon approved real estate security should be submitted to, and approved by the executive council before the loan was consummated, the provision contained in section 2666, which was clearly intended by the legislature to relate to the investment in bonds only, cannot be extended to loans made upon real estate security, under the power conferred by section 2667.

Under this construction of the statute, I am clearly of the opinion that loans made by the board of trustees, under section 2667, do not have to be submitted to, and approved by the executive council before being consummated, as do loans made under the provisions of section 2666.

Respectfully submitted,

CHAS. M. MULLAN,
Attorney-General.

January 16, 1901.
To A. H. Davidson, Secretary Executive Council.

SCHOOL TOWNSHIPS—Independent districts—Consolidation of—Under such consolidation the township or district whose boundaries are so extended becomes by operation of law the school township or district, having entire control for school purposes over the territory within the boundaries as extended.

DEAR SIR—I am in receipt of your favor of the the 14th inst., in which you say:

"Your official opinion is requested on the following question:

"Chapter 89 of the acts of the Twenty-seventh General Assembly provides that 'the boundaries of a school township or independent district may in the same manner be extended to the line between civil townships, even though by such change one of the districts shall be included within and consolidated with the other as a single district.'

"By this provision, is authority given the board of directors of an independent district to abandon its school organization by uniting its territory with that of the school township? If so, does the school township have the same authority?"

The language of section 1 of chapter 89 of the acts of the Twenty-seventh General Asssembly does not very clearly express the meaning and intent of the legislature, but the construction which must be put upon this language is, that a school township or an independent district may, by the concurrence of the boards of directors of each, extend the boundaries of either so as to embrace and include the school township or independent district whose boundaries are not extended. That is to say, an independent district located in a school township may, by the concurrence of the board of the independent district and the board of the school township, so extend the boundaries of the independent district that it will take in and include the school township; or the school township may, in like manner, with the concurrence of the two boards, extend its boundaries so as to take in and include the independent district.

Whenever the boundaries of either the school township or independent district are thus extended, the district whose boundaries are not extended is by operation of law consolidated with the district whose boundaries are extended, and ceases to exist as a school district or a school township, and the township or district whose boundaries are so extended becomes by operation of law the school township or district having entire control for school purposes over the territory within the boundaries as extended.

The object of the legislature in enacting chapter 89 of the laws of the Twenty-seventh General Assembly, was to permit the consolidation of school townships and independent districts for the purpose of enlarging the same, and to enable them to carry out the plan of central schoolhouses, to which the pupils are brought and returned home at the expense of the district. And such construction should, in my opinion, be given to the language of that chapter as will enable such plan to be put in successful operation.

CHAS. W. MULLAN,
Attorney-General.

January 17, 1901.

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

RURAL INDEPENDENT DISTRICT—How formed—The phrase "independent districts," as used in section 2799, is a generic term, and includes and is applicable to all independent school districts in the state, whether known as independent districts or rural independent districts. Rural independent districts may unite, consolidate, and form a single rural independent district under the provisions in the above section.

DEAR SIR—I am in receipt of your favor of the 14th inst., in which you say:

"Your official opinion is requested on the following question:

"Section 2799 provides that independent districts located contiguous to each other may unite and form one and a single independent district. May rural districts located in the same manner unite and form a single rural independent district?"

The meaning of section 2799 is not very clear, and a short statement as to the history of its adoption by the legislature will materially aid in ascertaining its true meaning and intent.

Section 1716 of the code of 1873, which was compiled from chapter 172 of the laws of the Ninth General Assembly, and chapter 33 of the laws of the Eleventh General Assembly, made two classes of school corporations—the "district township" and the "independent district."

These continued to be the only class of school corporations until section 2744 of the code was enacted.

Chapter 9 of title XII of the code of 1873 authorized the erection and creation of independent districts in cities and towns and contiguous territory, of school townships, and of subdistricts in district townships. All were governed by the law applicable to independent districts, and practically stood upon the same footing.

Sections 1800, 1814, 1815 and 1819, code of 1873, section 1819 being as follows:

"Districts organized under the provisions of the preceding four sections shall be governed and treated in every respect as provided by the law creating independent districts."

Section 1811 of the code of 1873 provides, "independent districts located contiguous to each other may unite and form one and the same independent district, in the same manner," etc.

Then follow the provisions as to the mode of uniting independent districts. This law clearly applied to all independent districts, whether cities, towns, townships or subdistricts, which had been erected into independent districts under the provision of law.

Under the provisions of chapter 9, independent districts, whether including cities, towns, or rural territory, could consolidate and form one independent district.

Section 1811 of the code of 1873 was re-enacted as section 2799 of the present code, with but slight changes in its language. The words "or if there be not ten, then a majority of such voters" was interpolated in the fourth and fifth lines of the section, as re-enacted; and the words "including cities and towns" was added to the section.

These additions to section 1811 indicate that it was the intention of the legislature to make section 2799 apply to all independent school districts.

Any independent district which comprised a city or town which had more than ten legal voters residing within its territory, and if section 2799 had been by the legislature intended to apply only to urban independent dlstricts, then the words which were interpolated in the section, viz: ''or if there be not ten, then a majority of such voters,'' would be without force; and the words ''including cities and towns,'' which were added to section 1811, clearly indicate that the provisions of section 2799 were intended to apply to rural districts, as well as to independent districts in cities and towns.

In my opinion the phrase ''independent districts,'' as used in section 2799, is a generic term, and includes and is applicable to all independent school districts in the state, whether known as independent districts or rural independent districts.

This being true, rural independent districts may unite, consolidate and form a single rural independent district, by the method provided in section 2799 of the code. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

January 19, 1901.

To the Hon. R. C. Barrett, Superintendent Public Instruction.

MULCT SALOONS—Statement of general consent for—Witness to signature—(1) Signatures to the petition, which are not witnessed by some one other than the signer thereof, should not be counted. (2) Withdrawal of signature—When names have been withdrawn from the petition by a written statement filed with the county auditor, such names cannot afterwards be restored to said petition by a subsequent written statement of such persons.

DEAR SIR—Your favor of the 18th inst., asking my opinion,

First.—''Can a person who signs a statement of general consent for mulct saloons, under chapter 6, title 12 of the code, witness the signing of his own name thereto?''

Second.—''Where signers to a petition of consent have withdrawn their names therefrom by a written statement filed with the board of supervisors, can they afterwards withdraw such written statement and have their names counted upon the petition?''

I am very clear upon the first proposition, that a person signing a petition of general consent for mulct saloons, under chapter 6, title 12 of the code, cannot sign his own name as a witness to his signature.

The purpose and object of section 2452 of the code was to prevent the forgery of names upon petitions of consent, or names being attached thereto by fraud, and absolutely require that every signature upon such petition should be personally witnessed by some reputable person who was present at the time of, and saw the name signed to the petition.

It would certainly be contrary to all rules of law relating to the witnessing of signatures to written instruments, to say that anyone signing a written instrument might be a witness to his own signature, where such a witness is required by law.

Under this view of the law of the case, the signatures to the petition, which are not witnessed by some other than the signer thereof, should not be counted, under the provisions of section 2452.

The second question is not so easy of solution. So far as I know there has been no adjudication of the question, and the true interpretation of the statute can only be arrived at upon the general principles governing statutory construction,

It is of course true, that anyone signing a petition of consent for mulct saloons has the absolute right to withdraw his name from such petition by a written statement of consent filed with the auditor of the county, before action is taken upon such petition.

When such a statement is filed, the petition, and every subsequent action thereon by the board, is as though the name of the person who has withdrawn his consent by such statement, was never signed to the petition. By such statement his name is, in effect, expunged and stricken from the petition.

While it is true, as is said in Green v. Smith, 82 N. W. Rep., 448, that the board has only to deal with the petition as it comes to it, and that any person that has signed such petition can withdraw his name therefrom before action by the board, I am of the opinion that under section 2452, which provides that ''no name shall be counted that was not signed within thirty days prior to the filing of said statement of consent'' limits the time in which names can be signed to a statement of general consent between the time of the filing thereof with the auditor and thirty days prior thereto; that is, that no name can be counted upon such statement of general consent which was not signed thereto within thirty days prior to the time such statement was filed with the auditor.

If a statement filed with the auditor withdrawing names from a petition of consent has the effect of striking such names from the petition, then a subsequent statement by which such names were sought to be replaced upon such petition, and the consent of the persons signing such subsequent statement thereby given for the sale of intoxicating liquors, under the provisions of what is known as the mulct law, such action would be, in effect, the attaching of new names to the petition of consent after it had been filed with the auditor.

The provision of section 2452 above quoted, in my opinion, prohibits the attaching of any names to a petition of consent after the same is filed with the auditor.

Every signature attached to the statement of consent is required to be witnessed by some reputable person, and this provision of law would not be complied with by the attaching or reattaching of names to such statement of consent by a subsequent written statement filed with the county auditor asking that the names of the signers thereof be counted upon such petition of consent, after they had been previously withdrawn therefrom. Such action would, in effect, be the attaching of signatures to the statement of consent in another and different manner than that provided by law.

In view of these facts, my conclusion is, that when names have been withdrawn from a petition of consent by a written statement filed with the county auditor before action by the board of supervisors, that such names cannot be afterwards restored to the petition and counted by the board under any subsequent written statement of the persons whose names have been withdrawn; and that the petition must go to the board of supervisors, and they must act thereon as though such names had never been attached to the petition of consent. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

January 21, 1901.
To the Hon. N. J. Lee, County Attorney, Estherville, Iowa.

CITIES AND TOWNS—Election of officers thereof—Plan of change to be pursued by towns changing from such to cities of the second class.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 21st inst., asking my opinion in regard to the course to be pursued by towns, which under the census of 1900 are eligible to become cities of the second class, in organizing into cities and electing the officers thereof.

I desire to preface my opinion hereafter given you with this statement: The attorney-general is not by law made the legal adviser of the mayor and officers of cities and towns; neither is the executive council of the state of Iowa. The mayor and officers of a town eligible to become a city of the second class should submit these questions to its solicitor instead of to the attorney general, through your office. Inasmuch, however, as you have requested my opinion, it is respectfully submitted.

The notice given by the executive council to such towns as are, by the census of 1900 eligible to become cities of the second class, having been given in accordance with the provisions of section 639 of the code, the town council, upon receipt thereof, should meet and enact an ordinance whereby the town is declared a city of the second class, and providing the framework of its government.

This ordinance should provide for the election of the officers of the city, their duties, compensation, and provide for the perfecting of the organization of the town into a city of the second class. All of the assets of the town and property belonging to it, by operation of law then becomes the property of the city. Wards should be created and their boundaries defined.

Notice should then be given by the mayor and recorder, that at the regular municipal election to be held on the last Monday in March the officers of the city will be elected, and such notice should state where the polling places of such election will be located.

The election should be conducted in the manner provided by law for general elections, and every qualified elector who is a resident of the city or town at the time of the election and has been a resident of the precinct ten days prior thereto, is entitled to vote at such election.

There should be elected at such election, and biennially thereafter, a mayor, solicitor, treasurer, and assessor, who will hold their respective offices for the term of two years, and until their successors are elected and qualified. Two councilmen should also be elected from each ward, who shall determine by lot the length of their respective terms of office, and one shall hold office for one year and the other for two years after such election. Thereafter, one councilman shall be elected from each ward, who shall serve two years.

All of the old officers of the town go out of office upon the new organization being perfected, and the new officers take their places and the control of the government of the city under the new organization.

Sections 639 to 648 point out specifically the method to be followed in making the change from a town to a city of the second class, and if careful attention is given to the provisions of these sections, no mistake will be made. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

January 23, 1901.
To Hon. A. H. Davidson, Secretary Executive Council.

SCHOOL DIRECTORS—Discretion of—It is a well settled rule of law that where a discretion is vested in a board or person, there is no power to compel the exercise of such discretion. If the board refuses to make an order for the withholding of money by the treasurer for the purchase of books for library purposes, it is doubtful whether there is any authority to compel the board to act in the premises.

DEAR SIR—In my letter to Anna White, your county superintendent, I think I said to her that if a request came to me through you, as county attorney, the law required me to give an opinion.

Such statement in my letter, however, was through inadvertence, as the law does not make it my duty to render opinions upon questions referred to me by county attorneys, and it is a rule of this office that the attorney-general will not give an opinion where he is not required by law to do so. However, as I wrote your county superintendent that I would give an opinion if the request came through you, as county attorney, I will, in this instance, waive the rule and answer the questions asked by you in your letter.

Section 1 of chapter 110 of the acts of the Twenty-eighth General Assembly is not very clear or concise in its language.

It provides that the treasurer of each school township, and each rural independent district in the state, shall withhold annually from the money received from the appointment of the several school districts, not less than five, nor more than fifteen cents, *as may be ordered by the board*, for each person of school age residing in each school corporation, etc., etc., for the purchase of books, as provided therein. And when ordered by the board of directors, the provisions of section 1 shall apply to any independent district.

This section, by its provisions, vests in the board of directors of the school township or school district, the right, in its discretion, to fix the amount of money which shall be withheld annually by the treasurer, for library purposes, within the limit named in the section.

The money in the hands of the treasurer of the school township or school district, can only be paid out upon the order of the board of directors, and he has no authority to withhold any part of the money in his hands, or to pay it out for any purpose whatever, except on the order of the board.

If the board refuses to make the order upon the treasurer to withhold money, and the president and secretary refuses to sign an order for its payment for library purposes, I doubt if there is any power to compel it to do so, as it appears by the language of the act, that it was the intention of the legislature to vest in the board the discretion to have the money withheld and used for library purposes as in its judgment is deemed advisable.

That is, the board, in its discretion, may order not less than five or more than fifteen cents for each person residing in the school district or school township, to be withheld by the treasurer from the money received from the apportionment, for library purposes, and paid out for that purpose on its order.

It is a well settled rule of law, that where a discretion is vested in any board or person, there is no power to compel the exercise of such discretion. This being true, if the board refuses to make the order for the withholding of the money by the treasurer, or its payment by the treasurer for the purchase of books for library purposes, I doubt if there is any authority which can compel the board to act in the premises.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

January 23, 1901.

To Hon. Arthur G. Jordan, County Attorney, Fairfield, Iowa.

BANKS—Savings—Articles of incorporation—The articles of a certain bank having been submitted for approval, are examined and approved.

DEAR SIR—I have examined the articles of incorporation of the Citizen's Savings Bank of Lester, Iowa, and have given particular attention to the provisions of article 3 thereof.

It is a general rule in the organization of corporations for pecuniary profit, that its charter or articles of incorporation may provide that it can commence the transaction of its business when a portion of its authorized capital stock has been subscribed and paid in.

The statute of Iowa providing for the organization of savings banks does not make any change in this general rule as to the organization of corporations for pecuniary profit.

Section 1842 provides that the articles must name the amount of the capital.

Section 1843 provides that the paid up capital of any savings bank shall not be less than ten thousand dollars ($10,000) in cities, towns or villages having a population of ten thousand or less.

Section 1853 provides "the capital stock of savings banks shall be divided into shares of one hundred dollars ($100) each, issued or acquired only upon full payment of the sums represented by them."

Section 1856 provides that the capital stock of savings banks may be increased by an affirmative vote of two-thirds of the shares thereof at the stockholders' meeting, called as provided in the section.

Under these provisions of the statute relating to the organization and conduct of savings banks, I see no objection to making the authorized capital stock of the savings bank twenty-five thousand dollars ($25,000), and permitting it to commence to transact business when twelve thousand dollars ($12,000) of that stock has been subscribed and fully paid.

I think such a provision is in harmony with the statute, and that article 3 of the articles of incorporation submitted, is not objectionable upon that ground.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

January 26, 1901.

To Hon. Frank F. Merriam, Auditor of State.

DEPARTMENT OF AGRICULTURE—Use of funds—Its board has no power or authority in law to expend any part of its fund for the purpose of maintaining an exhibit of Iowa products at the Pan-American Exposition, to be held at Buffalo, N. Y.

DEAR SIR—Upon a careful examination of chapter 58 of the laws of the Twenty-eighth General Assembly, by which the department of agriculture was organized, and which confers the powers and prescribed the duties of its officers, I find no authority for the board to use any part of the funds in its treasury for the purpose of making an exhibition of agricultural products of the state at the Pan-American Exposition to be held at Buffalo, N. Y.

Section 6 of the act confers upon the board the general supervision of the several branches, bureaus and officers embraced in the department of agriculture, and imposes upon the board the duty of looking after and promoting the interest of agriculture, agricultural education, animal and other industries throughout the state; of investigating all subjects relating to improved methods, appliances, machinery, and the diversification of crops and products, also the investigation of the prevalence of contagious diseases among domestic animals, of destructive insects and fungi in grain, grasses and other plants; of the adulteration of foods, etc., and of reporting the results of such investigations with recommendations as to remedial measures for the prevention of damage resulting therefrom.

These powers and duties are broad and general in their nature, and should be liberally construed. It cannot, however, be said that an exhibition of agricultural products of the state at the Pan-American Exposition falls within any of the powers conferred upon the board, giving the statute the most liberal construction of which its language is susceptible.

The use of the funds of the agricultural department for the purpose suggested, would open the door for their use for many purposes not named in the statute.

It might be thought advisable for the board to appoint a commission to visit Europe or South America, for the purpose of investigating the latest approved agricultural methods in either of those countries, or to make an exhibition of agricultural products in a foreign country, and to appropriate the money of the department for the payment of the expenses connected with such investigation or exhibit.

And it could be claimed with equal reason that such commission or exhibition in a foreign country, would be in the interest of Iowa agriculture.

I am clear that the powers of the board to expend the funds of the department do not permit the expenditure for either of the purposes named, as such expenditure would be wholly outside of, and beyond those contemplated by the legislature when the department was created, and the powers of the board defined.

I am therefore of the opinion that the board of the department of agriculture, however much it might be desirable, has no power or authority in law for the expenditure of any part of its funds for the purpose of maintaining an exhibit of Iowa products at the Pan-American Exposition to be held at Buffalo, N. Y. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

January 29, 1901.
To Hon. S. B. Packard, Marshalltown, Iowa.

BOARD OF SCHOOL DIRECTORS—(1) Under section 2801 of the code, the school board of a township is authorized to reduce the number of school districts within the township. (2) It may provide that there shall be no subdistricts, and that the schools of the corporation shall be governed by a board of three directors chosen from the township at large.

DEAR SIR—Your favor of January 14th is received, in which you request my opinion upon the following questions, viz:

"Does the board have authority to reduce the number of subdistricts?"

"May it provide that there shall be no subdistricts, and that the schools of the corporation shall be governed by a board of three directors chosen from the township at large?"

Section 2801 of the code provides:

"The board of any school township may, by a vote of a majority of all the members thereof, at the regular meeting in September, or at any special meeting called thereafter for that purpose, divide the school township into sub-districts, such as justice, equity and the interests of the people require, and may make such alterations of the boundaries of sub-districts heretofore formed as may be deemed necessary."

Then follow provisions in relation to the boundaries of such districts and of subsequent alterations thereof being legibly and distinctly designated upon the plat, etc.

This section gives to the board full power to establish sub-districts within the township, to alter or change their boundaries, as shall be deemed to the best interest of the people, and to discontinue any district or districts within the township, in the discretion of the board.

The section is a re-enactment, in all of its material parts, of section 1796 of the code of 1873, which was construed by the supreme court in Morgan v. Wilfley et al., 70 Iowa, 338.

Judge Beck, in delivering the opinion in that case, said:

"While the redistricting and the organization of a new district are to be regarded as valid, having been approved by the county superintendent, it cannot be held that the district board may not, in the exercise of its discretion, change the sub-districts and dispense with the new sub-districts in a lawful manner, if in the exercise of its lawful discretion the board finds it to the best interest of all the parts of the district. The new district is not to be regarded as a permanent thing, which the board, or any subsequent board cannot change, for sufficient cause. The power to redistrict and change sub-districts, as conferred upon the board by the statute, and action in that direction, if sufficient cause, cannot be regarded as unauthorized."

It follows as a logical sequence, that if authority is given the board of directors by section 2801 to discontinue any sub-district within the school township, it may, if the best interest of the people demand such action, discontinue all, and restore the territory to a school township.

If this is done by the board, then the provisions of the statute for the government of school townships will at once become applicable to the changed conditions, and the territory within its boundaries will be governed by the provisions of statute relating to the government of school townships, as though the same had not been previously sub-divided.

Section 2752 of the code provides:

"When a school township is not divided into sub-districts, a board of three directors shall be elected at large, on the second Monday in March, by all the voters of the school township."

After the sub-districts have been discontinued, the township is, of course, no longer divided into sub-districts, and necessarily falls within the provisions of section 2752, and its affairs should be controlled by a board of three directors, as therein provided.

Under this construction of section 2801, I am of the opinion that the school board of a school township has the authority to reduce the number of school districts within the township.

Second.—That it may provide that there shall be no sub-districts, and that the schools of the corporation shall be governed by a board of three directors, chosen from the township at large.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

January 31, 1901.
To Hon. R. C. Barrett, Superintendent Public Instruction.

BOARD OF SUPERVISORS—Power of to contract with private hospital for the care of insane—A contract by said board with a private hospital for the care of the insane who are county charges, for a period of ten years, is against public policy and absolutely void.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 26th inst., in which you ask an opinion as to the right of a board of supervisors to make a contract with a private hospital for the care of the insane which are a county charge, for a term of ten years.

Upon this question I submit the following opinion:

The question is one of some difficulty, and perhaps its true solution can only be reached by determining the principles upon which the power of boards of supervisors of counties are based.

A county organization is created almost exclusively with a view of the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, education, of provision for the power of military organization, of the means of travel and transport, and especially for the general administration of justice.

With scarcely an exception, all the powers and functions of a county organization are for the direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy.

They possess such powers as have been conferred by the constitution and legislative department of the state. Such powers are of a public nature, and should be exercised in such manner as will best promote the interest and advance the welfare of the people.

The right to exercise the power so conferred by the state is lodged almost wholly in the board of supervisors, and under the statute, the duty is imposed upon them to make proper provision for the care, custody and support of the poor and insane of the county, who are public charges.

In making such provision, however, they must act within the scope of the authority conferred by the state, and if they attempt to go beyond that and enter into any contract which is contrary to public policy, such contract is invalid, and cannot be enforced.

Section 410 of the code provides for the election of the members of the board of supervisors, and that their term of office shall be three years.

Section 415 of the code provides:

"The board of supervisors at its first meeting in each year, shall organize, by choosing one of its members as chairman, who shall preside at all its meetings during the year."

The membership of the board, and its organization, would therefore be changed many times during the existence of such a contract, and the question presented is: Can a board of supervisors make a contract which shall take away from the newly elected members, and the board as annually organized, the control over affairs which has been vested in it by the state as part of the governmental powers.

In Milliken v. County of Edgar, 142 Ill., 528, it is said:

"At the time the contract was attempted to be made, the members of the board of supervisors were elected annually. Each member held his office for the term of year and no longer. The board was clothed with authority to levy taxes to raise funds to support paupers, or this power was acquired to be exercised annually. In view of these provisions of the statute, it would be unreasonable construction of the statute relied upon to hold that the legislature intended to clothe the board with authority to enter into a contract with the keeper of the poorhouse to run for the term of three years."

In Board of Commissioners v. Taylor, 123 Ind., 148, it is said:

"We note, as a matter of law, * * * that the membership of the board will be changed as many as three times from the date of the employment to the expiration of the term of service, unless some of its members are re-elected, and in that case the term of office will be different.

"Unless some of the members are re-elected there must be an entire change in the membership of the board between the date of the employment and the expiration of the time covered by the contract.

"This contract deprives the board, as re-organized from year to year, of the right to employ its attorneys for the next following year."

In Sheldon v. Board of Commissioners, 48 Kan., 356, it is said:

"If the board of county commissioners of a county could tie the hands of a subsequent board in designating the official newspaper, and in contracting for county printing, it might tie the hands of subsequent boards for several years. At least for what would be a reasonable time; and it would be difficult to determine what, under all of the circumstances of the case, would be a reasonable time. It follows logically that a board of commissioners of a county must be limited to one year, or until the body if dissolved, or else its power is unlimited in this respect."

The opinion announced in Sheldon v. Commissioners, was reaffirmed in Commissioners v. Smith, 50 Kan., 350. The same principle of law is laid down in State v. Layton, 28 New Jersey Law, 244.

The same principle is recognized in State v. Planter, 43 Iowa, 140, and Adams, justice, in delivering the opinion in that case, said:

"As the statute provides that the steward may be removed at the pleasure of the board, the defendant was of course removable, unless the board had deprived themselves of that power by the said contract which they had made with him; but we are of the opinion that a board of supervisors cannot contract with a favorite appointee for such a time and salary as they may see fit, so as to deprive subsequent boards, or even themselves, of all control over the matter."

The taxes necessary to be levied in a county for the support of the poor and insane, are required by statute to be levied annually, and the board of supervisors must make such levy upon the estimated cost of the care of the poor and insane for the ensuing year, and it certainly would be against public policy to permit a board of supervisors to make a contract for the support of its insane and poor which would leave nothing to its successors except the levy of the tax to raise the money necessary to carry out such contract.

The board of supervisors as it is annually organized, must, in my opinion, be absolutely free to exercise the governmental powers which have been conferred upon it by the state; and such freedom cannot be abridged by any contract, the effect of which is to take from the newly-elected and newly-organized board the right to exercise such powers.

In Burkhead v. Independent District of Independence, 107 Iowa, 29, it was held that the board of directors of an independent school district did not have the power to enter into a contract for the employment of a superintendent of schools for a term of five years, although such contract is not expressly limited by statute. This decision is in harmony with those of Illinois, Indiana and Ohio, and is founded upon reason and sound principles of law.

Under the principles of law enunciated in the cases referred to, I am clearly of the opinion that a contract by a board of supervisors with a private hospital for the care of the insane who are county charges for a period of ten years, is, for the reasons stated, against public policy, and absolutely void.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 1, 1901.

To Hon. W. H. Killpack, Council Bluffs, Iowa.

SECRETARY OF STATE—Power of to refund part of fee charged for filing amended articles of incorporation—Under the facts herein stated the secretary of state cannot refund a part of such filing fee already paid.

DEAR SIR—I beg to acknowledge receipt of your favor of the 1st inst., asking my opinion as to whether you can refund to the Working Men's Building and Loan Association of Missouri Valley, Iowa, any part of the fee of $314 paid by it for the filing of its amended articles of incorporation, on the 24th day of August, 1900?

Section 1891 of the code requires building and loan associations to become incorporated under the general incorporation laws of the state.

Section 1618 provides that such corporations may endure for a term not exceeding twenty years, and the amendment thereto—chapter 56 of the laws of the Twenty-eighth General Assembly—provides that upon the renewal of such corporation, and the filing with the secretary of state of its articles of incorporation by which the renewal is made, it shall pay a fee of twenty-five dollars, and an additional fee of one dollar for all shares of stock in excess of ten thousand dollars, the entire fee in no event to exceed two thousand dollars.

And upon the filing of its amended articles of incorporation, as provided therein, the secretary of state shall issue a proper certificate for the renewal of the corporation.

The act of the Working Men's Building and Loan Association, in filing in the office of the secretary of state its articles of incorporation, which were approved by the executive council July 9, 1900, was in effect a renewal of the corporation, which extended the time of its existence twenty years from July 9, 1900.

By so doing it became liable to pay the fees required to be paid the secretary of state, under chapter 56 of the laws of the Twenty-eighth General Assembly, and having complied with this requirement of law by the payment of the fees provided for in said chapter, it is, in my opinion, not entitled to have repaid to it any portion of such fee.

From July 9, 1900, to the present time, it has been transacting its business under its amended articles of incorporation, which renew the time of its existence, and it cannot now, in my judgment, by any amendment which it may make in reducing the time which such corporation shall endure under its articles of incorporation, alter or change its liability to pay the fees which were required when its articles were approved July 9, 1900.

I am therefore of the opinion that no portion of the fee paid by the Working Men's Building and Loan Association of Missouri Valley, Iowa, can, under the circumstances, be repaid or refunded to it.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 2, 1901.

To Hon. W. B. Martin, Secretary of State.

DEPARTMENT OF AGRICULTURE—Printing and binding of Iowa Year Book.

The provision of section 2 of chapter 58 of the laws of the Twenty-eighth General Assembly is inoperative and such book must be printed in the regular and usual way by the state and paid for out of the state's funds, the same as other reports and documents required by law to be printed.

DEAR SIR—I have given your request, that I make an examination of the statute, and determine how and where the year book of the agricultural department shall be printed, and from what fund the cost of such printing shall be paid, careful consideration, and have arrived at the following conclusion:

Section 11 of chapter 58 of the laws of the Twenty-eighth General Assembly, by which the department of agriculture is created, provides:

> "The Iowa Year Book of Agriculture shall be printed and bound in cloth, in such number as the executive council may direct, to be distributed as follows: One copy to each state officer and member of the general assembly; ten copies to the state library; and ten copies to the libraries of the state university and state college of agriculture and mechanic arts; one copy to each library in the state open to the general public; one copy to the president and secretary of each county and district agricultural society; [one copy to the board of supervisors of each county in which there is no agricultural society, and the balance as may be directed by the board of agriculture."

This provision of section 11 directs the printing and distribution of the agricultural year book, and if there is no particular or specific method provided by the statute as to the manner in which the same should be printed, or the fund from which the cost of such printing should be paid, it would

be the duty of the state printer, under the provisions of chapter 5 of the code, to print such book as one of the reports of a state department, and he would be paid therefor at the same rate, and in the same manner as he is paid for other books of like character which he is required by law to print.

Following the provision of section 11 above quoted, is this provision:

> "The executive council shall receive competitive bids for the printing and binding of the year book, and let the contract to the lowest responsible bidder; such bidding, however, shall be confined to concerns in Iowa, and to persons or corporations paying the union scale of wages."

This provision is entirely separate from the first part of the section quoted, and relates to the duty to be performed by the executive council in reference to the manner in which the year book shall be printed, and in no way modifies the provisions which require that the book shall be printed and distributed as provided in such section.

Section 10 of the same chapter, in prescribing the duties of the secretary of the board provides:

> "He shall compile and superintend the printing of the annual report of the state department of agriculture, which shall be entitled the Iowa Year Book of Agriculture, and shall include the annual report of the dairy commissioner, the state dairy association, and the Iowa agricultural experiment station, the annual report of the state veterinarian, the Iowa weather and crop service report, the Iowa improved stock breeders' association, or such part thereof as the executive committee may direct, and such other reports and statistics as the board may direct, which shall be published by the state."

This provision in express terms provides what shall be included within the year book as compiled by the secretary, and that it shall be published by the state.

It is clearly, therefore, the duty of the secretary of the agricultural department to prepare and compile a year book, and of the department to have the same published by the state, as provided in section 10.

By the provisions of section 11 above quoted, the legislature attempted to provide a method by which the contract for the printing and binding of the year book should be let to the lowest bidder, and if such provision has become effective, it undoubtedly takes the printing and binding of the book out of the hands of the state printer and binder, unless the contract should be awarded to them upon competitive bids. If, on the other hand, such provision is for any reason inoperative, then the book must be printed and bound by the state, the same as are the reports of other departments—that is, by the state printer and binder.

Before the provision of section 11, for the letting of the contract to the lowest responsible bidder could become operative, it was necessary that the legislature should provide, by appropriation or otherwise, a fund out of which the cost of the printing and binding under such contract could be paid. It would be idle to say that the executive council should receive competitive bids for the printing and binding of a year book, open such bids and award the contract to the lowest responsible bidder, when no funds

were provided by the legislature to carry out the contract, or pay for the work done thereunder.

It is therefore in my opinion absolutely necessary that the legislature should provide the means by which such contract can be carried out by the executive council before the provision of section 11 above quoted can become operative.

No provision was made by the Twenty-eighth General Assembly to pay the cost of the printing and binding of the agricultural year book, and no fund was designated out of which the cost thereof could be paid.

I am therefore of the opinion that the provision of section 11, in relation to receiving competitive bids for the printing and binding of the year book by the executive council is inoperative, and that such book must be printed in the regular and usual way by the state, and paid for out of the state funds the same as other reports and documents required by law to be printed.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 4, 1901.

To Hon. G. H. Van Houten, Secretary Department of Agriculture.

INSURANCE COMPANIES—LIFE—(1) Such companies desiring to take and carry casualty risks must first adopt amendments to their articles of incorporation, unless their articles at the time give them the power to accept and carry such risks.

(2) Such companies desiring to write such risks should organize a separate casualty or accident department, and all of the business of such department should be transacted directly in accordance with chapter 4, title IX of the code.

DEAR SIR—I beg to acknowledge the receipt of your favor of February 1st, enclosing a communication from Messrs. Dudley & Coffin, asking the position of the auditor's department upon life insurance companies taking and carrying casualty risks, under chapter 61 of the laws of the Twenty-eighth General Assembly.

The questions asked by Messrs Dudley & Coffin refer to the policy of the auditor's department of the state rather than to the questions of law.

It is important that a correct policy of action be adopted by the auditor's department which shall be adhered to hereafter in passing upon the various questions that will arise in regard to life insurance companies taking and carrying casualty risks; in view of this, I will give in a general way what appears to me to be the policy which should be adopted by the auditor's department and the attorney-general.

First.—All life insurance companies desiring to take and carry casualty risks, as specified in subdivision 5 of section 1709 of the code, must first adopt amendments to their articles of incorporation clothing them with power to do so, unless their articles now give them the power to accept and carry such risks.

Second.—Every life insurance company which sees fit to avail itself of he provisions of chapter 61 of the acts of the Twenty-eighth General Assembly, should organize a separate casualty or accident department, and all the business of such department should be transacted strictly in contormity with chapter 4 of title IX of the code.

This chapter provides that the articles of incorporation of all companies which seek to take and carry casualty and accident risks, must be submitted to the auditor and attorney-general for approval, before they are permitted to transact business within the state.

When any life insurance company desires to bring itself within the provisions of chapter 61 of the acts of the Twenty-eighth General Assembly, and to clothe itself with the power of taking and carrying casualty and accident risks, it must submit to the auditor and the attorney-general its articles of incorporation for their approval, as such articles constitute the charter under which it is authorized to transact business of any character. It follows, therefore, that before it is authorized to transact the business of taking and carrying casualty risks its entire articles of incorporation, under which it is authorized to do business, must be submitted to and approved by the auditor and attorney-general.

The provisions in regard to electing a first board of directors, and other provisions which apply to new companies organized for the purpose of taking and carrying casualty risks, would not apply to a life insurance company organized at the time chapter 61 of the acts of the Twenty-eighth General Assembly became a law, and therefore such provision would not have to be followed by a life insurance company availing itself of the provisions of such chapter.

As before suggested, the casualty insurance should be strictly a separate department of a life insurance company, and the funds of such separate department should be handled and invested strictly in accordance with the provisions of chapter 4, and the provisions of chapters 6 and 8 of title IX of the code would not be applicable to the funds of such department. Its life funds would be invested in compliance with the provisions of chapter 6 and 8.

The provisions of chapter 4—that companies doing business thereunder shall charge as a liability a reserve equal to forty per cent. of the amount received as premiums or unexpired risks, which amount of reserve shall be considered unearned premiums—would be applicable to the casualty department alone, and the provisions of chapter 6, which provides for a reserve upon life policies computed according to the American table of mortality, etc., would be applicable to the life department alone, and neither should be confused with the other.

The provisions of chapter 4 would apply to the accident department alone, and the provisions of chapter 6 above referred to would apply to the life department alone.

I think the provisions of chapter 4, which does not permit companies organized thereunder to incur any risk to an amount in excess of ten per cent. of the paid up capital of the company unless such excess is reinsured, is applicable to the casualty department as organized under the provisions of chapter 61, and such percentage should be computed upon the paid up capital of the life insurance company seeking to avail itself of the provisions thereof.

Under this view, a life insurance company seeking to transact accident business, would be limited in taking casualty risks to ten per cent. of its paid up capital, but this provision would in no way affect its right to take life risks in excess thereof, as now provided by law.

The fact that a life insurance company avails itself of the provisions of chapter 61, in no way changes its obligation to deposit its securities as a life insurance company with the auditor of state, but it will not be required to deposit the securities taken by its accident department. That is, it will still be required to deposit its securities with the auditor of state, so far as its life department is concerned precisely as it is now required to do, and will be permitted to retain its securities, so far as the accident department is concerned, the same as other accident insurance companies organized under chapter 4.

The provisions of chapter 4, in regard to forfeiture, suspension and cancellation of policy for nonpayment of premiums, and notice in writing to be served upon the insured by registered letter or otherwise, and the customary short rates to cancel policies, etc., cannot be held to apply to the life department, and its life policies will not be subject to such provisions. Its casualty or accident policies only will be governed by these provisions of chapter 4. This, I believe, answers all the inquires made by Messrs. Dudley & Coffin, and states my views of the law, and the policy which I think should be adopted as to life insurance companies taking accident and casualty risks, under chapter 61 of the laws of the Twenty-eighth General Assembly.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 5, 1901.

To Hon. Frank F. Merriam, Auditor of State.

STATE LIBRARY—State Historical Department—Consolidation of—(1) The debts contracted by the state historical department prior to January 1, 1901, should be paid out of the annual appropriation credited to that department for the year 1900, except such as hereafter referred to.

If, after paying such debts, any portion of such appropriation remains unexpended on January 1, 1901, the auditor should charge the same off.

(2) The appropriation of $4,000 made by the Twenty-eighth General Assembly, was not discontinued by the provisions of chapter 114 thereof, or upon the consolidation of the two boards. It, therefore, remains as a separate and additional appropriation made to the historical department for its support and maintenance.

DEAR SIR—In reference to your inquiry as to the effect of the consolidation of the state library and state historical department, under chapter 114 of the laws of the Twenty-eighth General Assembly, upon the different appropriations made by the legislature for the support of these departments, I submit the following opinion:

Section 1 of chapter 114 of the laws of the Twenty-eighth General Assembly provides:

> "That the board of trustees of the Iowa state library, and the board of trustees of the Iowa historical department, be, and the same are hereby empowered and directed to consolidate the miscellaneous portion of the Iowa state library (exclusive of the law section) or so much thereof as shall be regarded by said board as advisable, with the historical department; the aforesaid consolidation to take effect on the first day of January, 1901, or at any such later date as said trustees may direct; and that on and after January 1, 1901, the board of trustees of the Iowa state library and the board of trustees of the Iowa state historical department shall cease to exist as such and the aforesaid boards shall by this act become the board of trustees of the state library and historical department of Iowa, and the newly constituted board shall thereafter be charged with all the duties and responsibilities imposed upon the boards aforementioned, and possess all the powers thereof."

This section provides for two distinct consolidations:

First.—The consolidation of the miscellaneous portions of the Iowa state library, or so much thereof as may be regarded by the board as advisable, with the historical department.

This is the consolidation of the material and tangible property of the library and historical department, and the board is authorized to make such consolidation on the first day of January, 1901, or at such time thereafter as it may direct.

Second.—The consolidation of the board of trustees of the Iowa state library and the board of trustees of the Iowa state historical department.

On the 1st day of January, 1901, by operation of law, under the provisions of section 1, of chapter 114, of the laws of the Twenty-eighth General Assembly, the board of trustees of the Iowa state library and the board of trustees of the state historical department were consolidated and ceased to exist as independent boards.

The consolidated board is thereafter known as the board of trustees of the state library and historical department, and it at once became charged with the management and control of the state library and historical department of Iowa, and was invested with all the powers theretofore exercised by the board of trustees of the Iowa state library and the board of trustees of the Iowa historical department.

Upon such consolidation, the Iowa state historical department, as a separate and independent department, ceased to exist, and the control and management of its business and affairs was vested in the newly constituted board.

Section 2879 of the code provides for an annual appropriation for the support of the historical department of six thousand dollars. This section remained in force until the provisions of chapter 114, of the laws of the

Twenty-eighth General Assembly, became operative; and the appropriation of six thousand dollars for the year 1900 for the support of the historical department is a fund out of which all of the expenses of that department should be paid until the boards of the two departments were consolidated under chapter 114.

That this was the intention of the legislature when chapter 114 was enacted, is made clear by the language of section 5 of that chapter, which provides:

> "There shall be annually appropriated from any money in the state treasury not otherwise appropriated, the sum of ten thousand dollars for the use of the state library and historical department and museum, and the sum of twenty-five hundred dollars for the separate use of the law department, the money to be expended under the direction of the board of trustees of the state library and historical department; and the existing appropriations of five thousand dollars for the state library and six thousand dollars for the historical department shall be discontinued upon the consolidation aforesaid."

That is, the appropriations made to the state library and to the historical department, under sections 2667 and 2897 of the code, were to continue and remain as the funds out of which the expenses, and support of the two departments should be paid until the 1st day of January, 1901, when the new appropriation made by section 5, of chapter 114, became available upon the consolidation of the two departments.

Under this view of the law, I am clearly of the opinion that all of the debts contracted by the state historical department prior to January 1, 1901, should be paid out of the annual appropriation of six thousand dollars credited to that department for the year 1900, except such as should be charged to the four thousand dollar appropriation hereafter referred to; and, if after paying all of the debts incurred by that department before January 1, 1901, any portion of the six thousand dollars so credited remains unexpended, such unexpended balance should be by the auditor recovered into the treasury of the state; and that all bills and indebtedness of either the Iowa state library or the historical department of Iowa, contracted after January 1, 1901, must be paid from the appropriations made by section 5, of chapter 114, of the laws of the Twenty-eighth General Assembly, except such as should be paid from the appropriation of four thousand dollars made by the Twenty-eighth General Assembly, which stands upon an entirely different footing than the annual appropriation made by section 2879 of the code.

Chapter 114 was approved on the 12th day of March, 1900, and went into effect upon publication, on the 13th day of March of that year.

Chapter 155 of the laws of the Twenty-eighth General Assembly provides for an appropriation of four thousand dollars "in addition to the sum now provided by law for the support of the historical department for the purpose of printing and binding, for the purchase of books and periodicals, and for additional assistance and incidental expenses." This chapter became a law on the 4th day of July, 1900, after chapter 114 became operative as a law of the state.

The appropriation carried by section 5 of chapter 114 was an appropriation made by the Twenty-eighth General Assembly before chapter 155 went

into effect, and the appropriation carried by chapter 155 of the laws of the Twenty-eighth General Assembly was in addition to such former appropriation.

Section 5 of chapter 114 provides:

> "And the existing appropriations of five thousand dollars for the state library and six thousand dollars for the historical department shall be discontinued upon consolidation thereof."

No other appropriation to the state library or the historical department is referred to or discontinued by the provisions of chapter 114.

It is therefore clear that the appropriation of four thousand dollars made by the Twenty-eighth General Assembly, and which became operative after chapter 114 became a law, was not discontinued by the provisions of chapter 114, or upon the consolidation of the two boards. It therefore remains as a separate and additional appropriation made by the legislature of Iowa to the historical department for its support and maintenance, and should be credited to that department upon the books of the auditor, and paid out upon bills and vouchers properly approved and certified upon such fund.

This I believe covers all of the questions referred to me by both the auditor and the board of trustees of the state library and historical department of Iowa. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 8, 1901.

To Hon. Frank F. Merriam, Auditor of State, and the Board of Trustees of the Iowa State Library and Historical Department.

GAME LAW—Power of Game Warden Under—He has no power or authority to grant permission to anyone to trap quail and prairie chicken for the purpose of propagation.

DEAR SIR—I beg to acknowledge the receipt of your esteemed favor of the 11th inst., in which you ask my opinion as to whether it would be unlawful to trap quail and prairie chicken for the purpose of propagation or not.

Section 2552 of the code is as broad as language can make it, and specifically provides:

> "No person shall at any time, or at any place within the state, trap, shoot or kill for traffic any pinnated grouse or prairie chicken, woodcock, quail, rough grouse or pheasant, * * or catch or take, or attempt to catch or take with any trap, snare or net, any of the birds or animals named in the preceding section * * ".

This provision clearly prohibits the trapping, catching or attempting to take or catch within any trap, snare or net, by any one or at any time or place, any pinnated grouse or quail. The prohibition is absolute, and applies to all purposes alike.

Under this section it is unlawful to trap quail or prairie chicken for any purpose whatever, and I know of no authority vested in the fish and game warden of the state by which the provisions of the statutes can be suspended, and that which is made unlawful by law be permitted under any permission given by the warden.

I am therefore compelled to hold that it is unlawful for any one to trap or attempt to trap or catch any quail or prairie chicken for the purposes of propagation. Such an exception might be a wise provision of the law, but the legislature has not made it, and I must construe the law as it exists upon the statute book.

This being my view, I think you have no power or authority to grant permission to any one to trap either of the birds named for propagating purposes. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 12, 1901.

To Hon. Geo. E. Delavan, Fish and Game Warden, Estherville, Iowa.

OIL INSPECTOR—Duties of State Board of Health—Section 2505 is mandatory and no deviation from its strict requirements can be permitted on the part of the inspector.

Any illuminating oil inspected by him which fails to meet the test required by the statute must be branded by him "rejected for illuminating purposes."

Any attempt on the part of the state board of health to have such products branded differently than is required by the statute, is without force and must be disregarded by the state oil inspectors.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 9th inst., requesting my opinion as to the construction of section 2505 of the code as amended by section 2, of chapter 83 of the laws of the Twenty-eighth General Assembly, relating to the branding of oils by the inspector of petroleum products. In reply thereto, I submit the following opinion:

> Section 2505 provides: "He (the inspector) shall reject all oils for illuminating purposes which will emit a combustible vapor at the temperature of one hundred and five degrees standard Fahrenheit thermometer, closed test, not less than one-half pint of oil to be used in the flash test. If upon test and examination the oil shall meet the requirements, he shall brand over his official signature and date on barrel or package holding the same, 'Approved flash test ..... degrees, inserting in the brand the number. Should it fail to meet the requirements, it shall be branded under his official signature and date 'Rejected for illuminating purposes.' "

This provision of the statute is clearly mandatory, and no deviation from its strict requirements can be permitted on the part of the inspector.

Any illuminating oil inspected by him which fails to meet the test required by the statute must be branded by him "Rejected for illuminating purposes."

Chapter 83 of the laws of the Twenty-eighth General Assembly simply amends section 2508 of the code by striking out thereof the words "the Welsbach hydro-carbon incandescent lamp," and inserting in lieu thereof the words "such lamps which, having been submitted to the state board of health and having been examined and tested by said board shall be found safe for the use of the public," and then prescribing the duties of the state board of health as to making a full and careful examination of the mechanism of lamps submitted for their inspection.

The effect of this amendment is to substitute in section 2508 of the code lamps which have been examined by the state board of health and found to be safe for the use of the public in the burning of the lighter products of petroleum, for the Welsbach hydro-carbon incandescent lamp, in which such products were permitted to be used only, prior to the amendment.

Chapter 83 of the laws of the Twenty-eighth General Assembly in no way changes the duties of the inspector of petroleum products, as prescribed by the code. He must inspect the same, and brand them as is thereby required, without reference to the uses which may be made of them under the provisions of chapter 83, after they are inspected and branded.

Chapter 83 simply permits the use of the lighter products of petroleum which have been branded by the inspector "Rejected for illuminating purposes" to be used in lamps which have been examined and approved by the state board of health as safe to be used in burning such products for illuminating purposes, and the state board of health has no power or authority, by resolution or otherwise, to change the brand which by law the inspector is required to put upon such lighter products of petroleum. And any attempt upon the part of the state board of health to have such products branded differently than is required by the statute, is without force, and must necessarily be disregarded by the state oil inspectors.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 12, 1901.

To J. F. Kennedy, M. D., Secretary State Board of Health.

INSURANCE COMPANIES—How Limited—Sections 1709 and 1710, construed with chapter 60, laws of the Twenty-eighth General Assembly, limits the business of such companies, organized under chapter 4, title IX, of the code, to one of seven kinds or classes specified in the seven subdivisions of section 1709.

DEAR SIR—I have your favor of the 7th inst., asking for a construction of sections 1709 and 1710, of the code, as amended by chapter 60, of the laws of the Twenty-eighth General Assembly, and in reply thereto submit the following opinion:

It was evidently the intent of the legislature in enacting chapter 60, of the laws of the Twenty-eighth General Assembly, to add another subdivision to section 1709, of the code, and to permit companies organized under chapter 4, of title IX, of the code, to insure against loss or damage resulting from burglary, robbery, or attempts thereat, and against loss of moneys and securities in the course of transportation.

The subdivision of section 1709, so added, makes seven classes or kinds of insurance for which companies may be organized and operated, under chapter 4.

Section 1710, of the code, provides that no company organized under chapter 4, or authorized to do business in the state, shall issue policies of insurance for more than one of the six purposes mentioned in section 1709. This provision of 1710 was modified by chapter 61, of the laws of the Twenty-eighth General Assembly, but such modification is not involved in the present inquiry.

It was clearly the intent of the legislature in enacting section 1710, to limit every insurance company organized under chapter 4, of title IX, and every insurance company of like character authorized to do business in the state of Iowa, to one of the classes of insurance named in the subdivision of section 1709. That is to say, a company authorized to insure against loss or injury to the person or property, or both, growing out of the explosion or rupture of steam boilers, must confine its business strictly to that class of insurance, as is provided in subdivision 6, of said section.

And so with every other insurance company organized for the purpose of issuing policies under either of the other subdivisions of said section.

The adding of chapter 60, of the laws of the Twenty-eighth General Assembly, as the seventh subdivision of section 1709, does not, in my opinion, alter, change, or enlarge the rights or powers of insurance companies organized under chapter 4, to issue policies for more than one of the purposes named in section 1709.

If a company is organized for the purpose of insuring against loss or damage by burglary, robbery, etc., it must, in my judgment, confine itself strictly to that class of insurance, and is not authorized to issue policies for any other of the purposes named in the subdivision of section 1709.

If a company is organized to insure houses, buildings, etc., against loss or damage by fire or other casualty, it must, in my judgment, confine its business strictly to that class of insurance, and it cannot issue policies for any of the other purposes mentioned in section 1709, as amended.

The key to the construction and interpretation of all statutes is the general intent of the legislature. Such general intent should be kept in view in determining the scope and meaning of every part of the statute sought to be interpreted. This is necessary to ascertain the purpose of the act, and to make the parts harmonious, and thus, if possible, give a sensible and intelligible effect to each, in furtherance of the general design of the legislature.

With this rule of construction, which is elementary, I am clear that section 1709 and section 1710, taken in connection with chapter 60, of the laws of the Twenty-eighth General Assembly, limits the business of all insurance companies organized under chapter 4, of title IX, of the code, and all companies authorized to do business in the state, to one of the seven kinds or classes of insurance specified in the seven subdivisions of section 1709. And

that such companies cannot be permitted, under the provisions of law, to transact more than one kind or class of fnsurance.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 12, 1901.
To Hon. Frank F. Merriam, Auditor of State.

ATTORNEY'S FEES—Such fees do not constitute any part of the court costs, and cannot be deducted from an estate of a decedent under any of the provisions of section 1, chapter 51, of the laws of the Twenty-eighth General Assembly.

DEAR SIR—I am in receipt of your favor of the 11th inst., in which you ask my opinion "as to whether attorney's fees constitute a part of the court costs or can be construed as proper deduction under the provisions of section 1, chapter 51 of the laws of the Twenty-eighth General Assembly."

In reply thereto, I submit the following opinion:

Section 1467 of the code provides for a tax of five per cent upon the estate of a decedent above the sum of one thousand dollars, after deducting all debts, which go to collateral heirs.

In *Magee v. State*, 74 Northwestern Rep., 695, the supreme court held that the debts referred to in section 1467 were the debts owing by the decedent at the time of his death.

By section 1, of chapter 51, of the laws of the Twenty-eighth General Assembly, the term "debt" as used in section 1467 of the code, was extended so as to include local or state taxes due from the estate prior to the death of the decedent, a reasonable sum for funeral expenses, court costs, including the cost of appraisment made for the purpose of assessing the collateral inheritance tax, the statutory fees of executors, administrators or trustees, and by its terms expressly prohibits the deduction of any other sum of money from the estate of the decedent.

Attorney's fees paid or agreed to be paid by the executor, administrator or heirs of a decedent does not fall within any of the classes of debts or demands specified in section 1 of chapter 51. Such charges are not a part of the court costs, and cannot be taken into consideration and deducted from an estate as such.

The legislature has clearly and specifically named the demands and debts which may be deducted from the estate of a decedent and has not included attorney's fees therein.

Under the familiar rule of statutory construction "the expression of one excludes all others" it must be held that it was the intention of the legislature to exclude attorney's fees from the demands which could be deducted from an estate.

I am therefore clearly of the opinion that attorney's fees do not constitute any part of the court costs, and that they cannot be deducted from an estate of a decedent, under any of the provisions of section 1 of chapter 51 of the laws of the Twenty-eighth General Assembly.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 13, 1901.
To Hon. G. S. Gilberson, Treasurer of State.

SCHOOL LANDS—School Funds—Rate of Interest to be Charged—It is the duty of the auditor of state to charge five per cent interest upon the amount of all sales and resales of school and escheated lands reported to him by the county auditors for the previous year; and under chapter 113 of the laws of the Twenty-eighth General Assembly to charge four and one-half per cent to each county upon the amount of the permanent school fund under its control.

DEAR SIR—I am in receipt of your favor of February 11th, in which my official opinion is requested upon the following questions:

First.—You say "Will it be my duty to charge the different counties of the state on sales or resales of school land and also on escheated estates interest at the rate of five per cent, and the balance of the school fund at the rate of four and one-half per cent?"

Second.—You say "Will it be my duty from the time chapter 113, acts of the Twenty-eighth General Assembly became a law to charge the different counties of the state interest on this school fund for all sales, resales and escheated estates, at the rate of five per cent, or what length of time will it require for a sale, resale or escheated estate to become a part of the permanent school fund, and interest be computed at the rate of four and one half per cent?"

Section 2855 of the code, before it was amended by chapter 113 of the laws of the Twenty-eighth General Assembly, provided:

> "County auditor's shall on the first day of January report to the state auditor the amount of all sales and resales on the sixteenth section five thousand acres grant and escheated estates made the year previous, who shall charge the same to the counties, with interest upon the same from the date of such sales or resales, at the rate of five per cent per annum. He shall also on the first day of January, charge up to each county having permanent school fund under its control, interest on the whole amount in said county, at the rate of five per cent, payable semi-annually, on the first day of January and July of the year following, and include it in the semi-annual apportionment of the interest collected for the year, which shall be taken as the whole sum due from each county. Any surplus collected over the five per cent charged, shall be paid into the county treasury."

This provision of the statute makes it the duty of the county auditors to report to the state auditor on the first day of January of each year the amount of all sales and resales of school lands and escheated estates made during the preceding year.

It also makes it the duty of the state auditor to charge to the county from which the report is received the total amount of all such sales and resales, with interest thereon from date of such sales or resales, at the rate of five per cent per annum.

This provision of section 2855 stands alone, and imposes upon the county auditors and state auditor duties which are independent of the other duties prescribed in the section. It stands as a mandatory provision of the statute, and one that must be strictly complied with and followed, unless it has been repealed or modified by subsequent legislative action.

The provision of section 2855 immediately following, makes it the duty of the state auditor on the first day of January of each year, to charge to each county having permanent school fund under its control, interest on the whole amount of such fund, at the rate of five per cent per annum.

By this provision an entirely separate and distinct duty is imposed upon the auditor of state. He is required thereby to charge to every county in the state five per cent interest upon the total amount of school fund under the control of such county. That such provision was intended by the legislature to be a separate and distinct duty imposed upon the auditor of state, is manifest by the language of the statute, which provides:

> "He (the state auditor) shall also, on the first day of January, charge up to each county having permanent school fund under its control, interest on the whole amount in said county at the rate of five per cent."

Under the provisions of section 2855, the legislature has imposed upon the auditor of state two separate and distinct duties:

First: To charge the county with the full amount of all sales and re-sales of school and escheated lands made therein during the year previous, with five per cent interest thereon from the date of such sales.

Second. To charge to each county in the state having permanent school fund under its control, interest on the whole amount of such fund at the rate of five per cent per annum, such interest to become due and payable semi-annually, on the first day of January and July of the year following.

By the provisions of section 2 of chapter 113 of the laws of the Twenty-eighth General Assembly, the rate of interest to be charged by the state auditor to the counties upon the permanent school fund, under the provision of section 2855 above quoted, was changed from five to four and one half per cent; and the question arises whether the amendment made to section 2855 by section 2 of chapter 113 of the laws of the Twenty-eighth General Assembly changing the rate of interest to be charged by the auditor of state upon the permanent school fund, also changes the rate of interest to be charged by him upon the amount of all sales and re-sales of school and escheated lands.

As I have shown, the provisions of this section impose entirely separate and distinct duties upon the state auditor, and while it may be well said that the charging of a different rate of interest upon the permanent school fund than is charged upon the amount of the sales and re-sales of school and escheated lands is inharmonious, can it be said that because the legislature has seen fit to change the rate of interest in the one case, the rate of interest, by implication, is also changed in the other?

It is a well settled rule of law in the construction of statutes that the presumption is that the legislature does not intend to change or modify the law beyond what it explicitly declares either in express terms or by unmistakable implication:

McGinnis v. State, 49 American Decisions, 697.
Cadwallader v. Harris, 76 Ill., 372.
Bertles v. Nunan, 44 American Rep., 361.
Keach v. Baltimore, etc., R. Co., 17 Maryland, 32.

It is not to be supposed that the legislature will overturn the established law without expressing a clear intention so to do.

United States v. Fisher, 2 Cranch, 358.
Horton v. Mobile School Com'r., 43 Ala., 604.
Harwood v. Lowell, 4 Cushing, 318.

While it is true that legislative enactments are not to be defeated on account of mistakes, errors or omissions, provided the intention of the legislature can be collected from the whole statute, it is equally true, where the language presents no ambiguity, courts will not attempt to qualify its plain language from what can be ingeniously argued was the intent of the legislature.

Doe v. Considine, 6 Wallace, 458.

It is certainly the duty of the auditor of state, under section 2855, to charge to the respective counties the amounts of all sales and resales of schools and escheated lands reported to him by the county auditor for the year previous, with five per cent interest thereon from the date of such sales or resales, unless it can be fairly said from the context of the statute that the word "five" in line 13 of that section was changed to, and must be read as four and one-half, because the word "five" in line 15, and the same word in line 19 is changed to four and one-half by section 2 of chapter 113 of the laws of the Twenty-eighth general assembly.

The only grounds upon which such a construction could possibly be had are that there is an apparent and manifest error or clerical mistake or omission in the amendatory statute, which the courts have power to correct or supply, or, second, there is such an inconsistency and repugnancy between the amendatory statute and that which preceded it that the two cannot possibly stand or be construed together. In such case the prior statute must yield to the extent of the conflict.

In the amendment under consideration there is no apparent mistake, error or omission, which can possibly be ascertained from the context, and second, there is no such inconsistency, repugnancy or conflict between the two provisions of section 2855, as amended by the laws of the Twenty-eighth General Assembly, that such provisions cannot stand and be construed together.

It was competent and proper for the legislature to say that four and one-half per cent should be charged by the state auditor to the counties upon the permanent school fund, and at the same time leave the statute in full force

and effect which provides that counties shall be charged with five per cent upon all sales and resales of school and escheated lands. There is no real conflict or repugnancy between the two statutes.

It may be said that the acts of the law making power, in creating such a distinction are inconsistent, but it is not such an inconsistency as will repeal or change the former statute by implication.

I am therefore of the opinion that it is the duty of the auditor of state, under the statute as amended, to charge five per cent interest upon the amount of all sales and resales of school and escheated lands reported to him by the county auditors for the previous year; and under chapter 113 of the laws of the Twenty eighth General Assembly, to charge four and one-half per cent to each county upon the amount of the permanent school fund under its control.

Another question here arises, which has not been directly referred to in the request for my opinion, but which will certainly arise under the construction I have given this statute, viz:

Whether the surplus collected over four and one-half per cent upon the amount of the sales of school and escheated lands, shall be paid into the county treasury?

Section 2855 as amended reads:

> "Any surplus collected over the four and one-half per cent charged shall be paid into the county treasury."

This provision clearly relates to the interest charged upon the permanent school fund, and not to that charged upon the sales and resales of school and escheated lands. The amount to be paid into the treasury of the county is the surplus collected above the four and one-half per cent provided by the statute. The four and one-half per cent thus referred to is only chargeable upon the permanent school fund, and the provision of the statute that the surplus collected above that amount shall be paid into the county treasury, must necessarily refer to the four and one-half per cent required to be charged upon the permanent school fund, and not to the amounts upon which the auditor is directed to charge five per cent.

Second—When the county auditors make their report to the auditor of state, on the first day of January each year, of all sales and resales of school and escheated lands the auditor must compute interest at the rate of five per cent per annum on each sale from its date to the first day of January, and charge the entire amount to the county in which such sale has been made; when the interest as thus computed, and with the principal is charged to the county, the amount at once becomes a part of the permanent school fund of the state, and interest must thereafter be charged upon such amount, as a part of the permanent school fund of the state, at the rate of four and one-half per cent per annum, under the provisions of section 2855, as amended by the laws of the Twenty-eighth General Assembly.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 14, 1901.
To the Hon. Frank F. Merriam, Auditor of State.

SCHOOL DISTRICTS—Rural Independent Districts and Independent Districts—How Formed Into a Single School Corporation—Such districts, containing a city, town or village of a civil township, may be formed into a single school corporation in the manner provided by section 2799.

DEAR SIR—We are in receipt of your favor of the 14th ult., in which you say "your official opinion is requested on the following question:"

> "By what process, if any, may the several rural independent districts and an independent district containing a city, town or village, of a civil township, be formed into a single school corporation?"

In a former opinion to you, under date of January 19, 1901, it was said, after giving a brief history of the law, "in my opinion the phrase 'independent districts' as used in section 2799, is a generic term, and includes and is applicable to all independent school districts in the state, whether known as independent districts or rural independent districts. This being true, rural independent districts may unite, consolidate and form a single rural independent district, by the method provided in section 2799 of the code."

From the above holding we conclude that there is no difference or distinction between what are denominated "independent districts" and "rural independent districts."

Section 2799 provides that independent districts located contiguous to each other may unite and form a single independent district.

Section 2800 provides that a township which has been divided into rural independent districts may be erected into a school township.

From the ruling in the above opinion, that the term "independent district" is generic, and includes rural independent districts, we are of the opinion that rural independent districts, and independent districts containing a city, town or village, of a civil township, may be formed into a single school corporation,

Respectfully submitted,

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

February 16, 1901.
To Hon. R. C. Barrett, Superintendent Public Instruction.

INSURANCE COMPANIES—Mutual—Section 1689 of the code is mandatory. Every mutual company must embody the word "mutual" in its title, which must appear upon the first page of every policy or renewal receipt. Any attempt at evasion by printing in small type or letters or by an attempt to obscure the word "mutual" is a violation of law, and makes the company liable to have its certificate revoked .

DEAR SIR—Your avor of the 13th inst. has been received, in which you ask my construction of the provision of section 1689 of the code which requires the word "mutual" to be embodied in the title of all insurance

companies organized under chapter 4 of title IX of the code doing business upon the mutual plan, and such word to appear upon the first page of every policy and renewal receipt issued by such companies.

Section 1689 of the code provides:

> "Every insurance company organized as provided in this chapter, shall, if it be a mutual company, embody the word "mutual" in its title, which must appear upon the first page of every policy and renewal receipt."

This provision of the statute is clearly mandatory. Section 1747 requires every insurance company organized and doing business under chapter 4 of title IX, to conform to all the provisions of chapter 4.

Section 1748 prescribes the punishment to which the officers of any company doing, or attempting to do business under the provisions of chapter 4, become liable, for a failure upon their part to comply with the requirements of chapter 4; and section 1715 authorizes the auditor to withhold his permission or certificate of authority from every company organized or doing business under chapter 4, which neglects or fails to comply with the provisions of that chapter.

Under the mandatory provision of section 1689, every mutual company organized under chapter 4, must embody the word "mutual" in its title. And its title, with the word "mutual" embodied therein, must appear upon the first page of every policy and renewal receipt.

Any deviation by an insurance company so organized, from this express provision of the statute, makes the officers of such company liable to the punishment prescribed in section 1748 of the code, and the permission and authority of such company to transact business within the state should be withheld by the auditor.

The printing of the word "mutual" upon the first page of the policy or renewal receipt of such company, enclosed in parentheses, or printed elsewhere than in the title of the company, is a failure on the part of the insurance company so doing to comply with the provisions of section 1689.

It was clearly the intent of the legislature that every insurance company organized upon the mutual plan, under chapter 4 title IX, should declare in its title that it is a mutual company, and that its title, so declaratory of the character of the company, should be printed, lithographed or engraved—as the case may be—upon the first page of each policy and renewal receipt, in such manner that from an ordinary reading of the title, it would be readily seen that it is a mutual company.

Any attempt on the part of an insurance company organized upon the mutual plan, under chapter 4 title IX of the code; to prevent the word "mutual" from being read, as a part of the title, by the use of small type or letters, or by printing, engraving or lithographing the word "mutual" at a place upon the first page of its policies or renewal receipts where it would not be readily seen in an ordinary reading of the title of the company, is an evasion of the express provisions of section 1689, and a violation of law.

While your department may not be able to designate the manner, style or type in which the title of an insurance company shall be lithographed, engraved or printed, it has the power, in my opinion, to require such title

to so appear upon the first page of every policy and renewal receipt, that an ordinary reading of the title of such company will disclose that it is a mutual insurance company.

Wherever there is an attempt to evade the plain provisions of section 1689, by not embodying the word "mutual" in the title of the company, as required by law, or by having it printed in parentheses, or in small type or letters, or at an obscure place upon the page, so that it would not be likely to be seen or read, upon an ordinary reading of the title of the company, it is, in my opinion, your duty to at once require such company to fully comply with the provisions of section 1689; and upon a failure to do so upon the part of the company, its authority to transact business within the state should be revoked.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 18, 1901.
To Hon. Frank F. Merriam, Auditor of State.

INSURANCE COMPANIES—It is advisable that all companies seeking to avail themselves of the provisions of subdivision 7, section 1709 of the code, should prepare amended and substituted articles of incorporation upon which the auditor and attorney-general can act.

DEAR SIR—Herewith I return to you the articles of incorporation of the National Life & Trust Company, of Des Moines, Iowa, and the amendments thereto, with this suggestion:

I find the proposed amendment to conform to the laws of the United States, the constitution and laws of Iowa, and to be in regular and proper form.

As it becomes, however, the duty of the auditor of state and attorney-general to pass upon the articles of incorporation under which an insurance company seeks to do business as specified in the seventh subdivision of section 1709 of the code, I believe the articles of incorporation of such company should be submitted in their entirety to the auditor and the attorney-general for their approval. I therefore think it advisable that all companies seeking to avail themselves of the provisions of subdivision seven, should prepare amended and substituted articles of incorporation, which can be submitted to these offices as complete articles of organization, upon which the auditor and attorney-general can act.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 18, 1901.
To Hon. Frank F. Merriam, Auditor of State.

GAME LAWS—It is unlawful to ship either quail or grouse from any point within to any point without the state, or from one

point to another within the state, except as is specifically provided in section 2555 and 2557 of the code. A common carrier transporting any such birds at any other season of the year than when they may be lawfully killed would be liable to the punishment provided in the last section.

DEAR SIR—Your favor of the 14th inst., enclosing letter of H. W. Kerr, publisher of the Naturalist and Fancier's Review, is at hand.

You ask my opinion upon the question of shipping live quail or grouse for breeding or propagating purposes either within or without the state, during the period of the year when the killing of such birds is prohibited by law.

Section 2555 of the code provides:

> "But it shall be lawful for any person to ship to any person within this state any game birds, not to exceed one dozen in any one day, during the period when the killing of such birds is not prohibited, but he shall first make an affidavit before some person authorized to administer oaths, that said birds have not been unlawfully killed, bought, sold or had in possession, are not being shipped for sale or profit, giving the name and post office address of the person to whom shipped, and the number of birds to be so shipped."

The section then provides that a copy of an affidavit of such facts shall be furnished the common carrier who receives the birds for transportation, and such affidavit shall operate as a release of such carrier for any liability in the shipment of such birds.

Section 2557 provides:

> "If any railway or express company, or other common carrier, or any of their agents or servants, receive any of th fish, birds or animals mentioned or referred to in this chapter, for transportation or other purpose, during the period herein limited and prohibited, or at any other time except in the manner provided in this chapter, he or it shall be punished by a fine of not less than one hundred dollars * * *."

Under the provisions of these two sections of the code, it is unlawful to ship either quail or grouse from any point within to any point without the state, or from one point to another within the state, except as is specifically provided in these two sections; and any common carrier transporting any of such birds at any other season of the year than when they may be lawfully killed, would be liable to the punishment provided by section 2557.

I regret being compelled to put this construction upon the present game and fish law, but no provision has been made by the legislature for the shipping or transportation of birds for propagating or breeding purposes; and as the law now stands upon the statute books, the shipping or transporting, for any purpose other than that mentioned in section 2555, and at any other time, or manner than is therein provided, is unlawful, and a common carrier so doing would be liable under section 2557.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

February 18, 1901.

To Hon. Geo. E. Delavan, Estherville, Iowa.

BOARD OF CONTROL—Authority of to Receive Prisoners From a Sister State for Safe Keeping in the Penitentiaries—The power to manage, control, and govern the penitentiaries is vested in the board of control, and it is held to be no abuse of such discretion for them to receive into the penitentiaries of this state prisoners from the state of Nebraska, under the circumstances mentioned herein.

DEAR SIR—We are in receipt of your favor of the 2d inst. in which you say:

> "Application has been made to this board by the governor of Nebraska through the governor of Iowa to know if we will receive into the penitentiaries of this state some of the prisoners of that state, owing to the burning of their penitentiary. We desire to know from you if we have the legal right and authority so to do in case we find we can properly and conveniently do so."

Upon a careful examination of the laws of this state, we find no statute directly or indirectly authorizing the reception of prisoners from another state into the penitentiaries of this state. Neither do we find any statute directly or indirectly forbidding the same.

> Section 5676 of the code provides: "Convicts sentenced for a life or less term at hard labor shall be received by the warden into the penitentiary designated by the executive council, and those so sentenced by any court of the United States may be so received," etc.

As we understand the above language it defines the duty of the warden of the penitentiary to receive such prisoners as are designated by the executive council, whether within the district where such penitentiary is located, or outside of the district named by said council if so ordered; and also such prisoners so sentenced by any court of the United States if so recommended by said council. It is not our understanding that the above section limits or forbids the reception of prisoners from another state not sentenced by a federal court, if in the opinion of the executive council, the reception of such prisoners would be proper and wise.

Section 8 of chapter 118, acts of the Twenty-seventh General Assembly, provides:

> "The board of control shall have full power to manage, control, and govern, subject only to the limitations contained in this act, * * * the state penitentiaries."
>
> Section 9 provides: "The powers possessed by the governor and executive council, with reference to the management and control of the state penitentiaries, shall, on July 1, 1898, cease to exist in the governor and executive council, and shall become vested in the board of control; and the said board is, on July 1, 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 executive 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 power given to the several managing boards of the state institutions were general powers; the manner of exercising such powers was left to their sound discretion. They were 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. Having then been endowed with all of the powers and duties to manage, control, and govern said penitentiaries, which theretofore existed in the governor, executive council, and managing boards of said institutions, the board of control became vested with all sound discretionary powers relative to the management, control and government of said institutions with few, if any limitations.

It is further provided by said act creating the board of control that said powers were "subject only to the limitations contained in this act. Nowhere in this act do we find the sound discretionary power of the board of control limited as to what prisoners may be received in said penitentiaries. Whether the exigencies of this particular case require this board of control to receive some of the prisoners from the state of Nebraska is a question which addresses itself to the discretion and judgment of this board. It is in the nature of a judicial, or discretionary, and not of a ministerial act. The power of the board of control to authorize the reception of prisoners into the penitentiaries of this state not being limited by statute, we think it is clearly within their sound discretion as to whether they will receive prisoners from another state.

In *Martin v. Mott*, 18 Wheaton 31, it is said by Mr. Justice Story that "Whenever the statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of these facts."

Having thus found that the power to manage, control and govern the penitentiaries of this state vested in the board of control is discretionary, and that such discretion is not limited as to what prisoners shall be received into said penitentiaries, we therefore conclude, and it is our opinion, that the board of control has legal right and authority to receive prisoners from the state of Nebraska into the penitentiaries of this state.

Respectfully submitted,

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

March 4, 1901.

To Hon. L. G. Kinne, Chairman, Board of Control.

ASSESSMENT OF MONEYS AND CREDITS—Promissory notes taken for rent, and not yet due, are obligations for rent not yet due, within the meaning of subdivision three of section 1304 of the code, and being such obligations, are exempt from taxation.

If such notes have been sold or deposited by the original payee and are in the hands of a third party at the time of the assessment, they fall within the provisions of section 1304, and should be assessed to the holder thereof as moneys and credits.

DEAR SIR—I beg to acknowledge the receipt of your esteemed favor of March 15th, in which you say:

> "Will you please give me your official opinion, in writing, as to whether promissory notes taken for rent should be listed by the holder thereof and assessed as moneys and credits, prior to the maturity thereof."

Complying with your request I submit the following opinion:

Section 1309 of the code is as follows:

> "The term credit as used in this chapter, includes every claim or demand due or to become due for money, labor, or other valuable thing, and every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title bond, mortgage or otherwise; but pensions of the United States, or any of them, or salaries or payments expected for services to be rendered are not included in the above term."

This section is broad enough in its language to include promissory notes given for rent which are not yet due, and if we were confined to the provisions of this section alone, such notes would undoubtedly fall within the definition of moneys and credits which are to be listed and assessed.

Subdivision 3 of section 1304, which specifies the classes of property which are not to be taxed, provides that obligations for rent not yet due, in the hands of the original payees, shall be exempt from taxation. Promissory notes taken for rent, and not yet due, are clearly obligations for rent not yet due, within the meaning of the provisions of subdivision 3 of section 1304 of the code; and being such obligations, are exempt from taxation, and should not be listed by the holder thereof, if he is the original payee, or assessed to him as moneys and credits.

If, however, such notes have been sold or disposed of by the original payee, and are in the hands of a third party at the time of the assessment, they then fall within the provisions of section 1304 above quoted, and should be assessed to the holder thereof as moneys and credits.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

March 16, 1901.

To Hon. Frank F. Merriam, Auditor of State.

ATTORNEY'S FEE FOR FINES COLLECTED, AND SCHOOL FUND MORTGAGES FORECLOSED—Under the facts stated in the opinion, the county attorney is not entitled to commission or fees upon a penalty collected by him in a civil proceeding.

DEAR SIR—I am in receipt of your favor of March 5th, enclosing a letter from N. Willett, of Decorah, Iowa, in which he asks whether he is entitled to any commission, or any fee for services rendered in recovering $50.00 penalty against T. A. Jaynes for violation of sections 1800 and 1801 of the code.

In reply will say that section 308 of the code provides:

> "In addition to the salary above provided, he (the county attorney) shall receive the fee as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected, and school fund mortgages foreclosed * * *."

I think the word "fine" as used here must be taken in its legal sense, which in ordinary language means a sum of money, the payment of which is imposed by a court according to law, as a punishment for a crime or misdemeanor, or, as has been aptly defined by the supreme court of Texas, a pecuniary punishment imposed by the judgment of the court upon a person convicted of a crime.

State v. Stein, 14 Texas, 396.

While a penalty is a sum of money the payment of which the law exacts by way of punishment for doing some act which is prohibited, or omitting to do some act which is required, it does not necessarily involve a conviction for a crime.

The legislature has only seen fit to give to a county attorney fees for fines collected, and has not included penalties within its provisions.

The sum for which judgment has been entered against Mr. Jaynes is strictly a penalty imposed by sections 1800 and 1801 of the code for a failure on the part of an agent of an insurance company to conform to the provisions of chapter 8. Such penalty is a forfeiture imposed by law for such failure, and must be collected by a civil suit, and does not involve criminality under the statute.

I am therefore of the opinion that Mr. Willett is not entitled to commission or fees upon the penalty so collected by him in civil proceedings against Mr. Jaynes. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

March 16, 1901.

To Hon. Frank F. Merriam, Auditor of State.

SCHOOL FOR INDIGENT CHILDREN AND THE SOLDIER'S ORPHAN'S HOME—Appropriation Unexpended.—The unexpended balances referred to in the opinion were charged off the books of the auditor of state on the first day of October, 1898. They, therefore, came within the provisions of section one, of chapter three, of the laws of the Twenty-eighth General Assembly and are available for the support of the institutions for which the appropriations were made.

DEAR SIR—I am in receipt of your favor of the 21st inst., in which you ask whether the unexpended appropriations made to the school for indigent children and the soldiers' orphans' home, for the year 1898, and which

were charged off the auditor's books October 1, 1898, are now available and can be used by the board of control for the support of these institutions.

I also note what you say as to the opinion of Attorney-General Remley, given June 2, 1898, in which he says:

> "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 l ss is needed to meet the wants of the institution, less should be drawn."

Under the law as it was at the time the opinion of Mr. Remley was given, it was undoubtedly the duty of the auditor and treasurer of state to charge off any unexpended balance at the end of the fiscal year. The money appropriated by the legislature was for the yearly support of such institutions, and if a less amount than the whole appropiation was required to meet the needs of an institution it was the duty of the auditor and treasurer of state to make such entries upon their books as would return the unexpended balance to the unappropriated funds in the treasury.

The Twenty-eighth General Assembly, however, made a very material change in the law. Section 1 of chapter 3 is as follows:

> "That section 123 of the code be and is amended by adding thereto the following: The maximum amount named as appropriations made for the support of inmates or for pay of officers or teachers or for any other purpose whatever connected with the operating of any state institution under the control of the board of control of state institutions shall be available until used for the purpose for which said appropriation was made, and no part of the same shall be, by the auditor of state or treasurer of state, charged off as an unexpended balance unless said officers shall be notified in writing by said board that said balance so unexpended will not be needed, and any sums charged off as unexpended balance by the auditor or treasurer of state, since chapter one hundred and eighteen (118) acts of the Twenty-seventh General Assembly took effect, shall still be available and subject to the provisions of this section."

Under this section, any unexpended balance of an appropriation made to a state institution, remains available for the support of such institution, until such time as the auditor or treasurer of state shall be notified by the board of control that such unexpended balance will not be needed for the support of the institution, and the unexpended balance cannot be charged off until such notice is received.

The section also provides that any sums charged off as unexpended balances by the auditor or treasurer of state since chapter 118 of the acts of the Twenty-seventh General Assembly took effect, shall still be available, and subject to the provisions of this section.

Chapter 118 of the acts of the Twenty-seventh General Assembly took effect on the first day of April, 1898, by publication in the Iowa State Register and Des Moines Leader. By an examination of the books of the auditor of state, I find that the unexpended balances referred to in your communication were charged off the books on the first day of October, 1898. They therefore come within the provisions of section one of chapter three of the

laws of the Twenty-eighth General Assembly, and are now available for the support of the institutions for which the appropriations were made.

These amounts should therefore be credited by the auditor and treasurer to the funds of the institutions for which the appropriations were made, and the auditor is authorized by law to draw his warrant against the same, upon proper vouchers of the board of control, showing that such sums are to be used by the board for the general support of the institutions for which the appropriations were made.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

March 22, 1901.

To Hon. Frank F. Merriam, Auditor of State.

PENITENTIARIES—Duty of Warden to Punish Prisoner—Under the facts stated in the opinion, it is the duty of the warden of the penitentiary to punish the prisoner by confining him at hard labor in the penitentiary, although the court may have omitted the words, "at hard labor," in the sentence and in the mittimus under which the prisoner was delivered.

DEAR SIR—I beg to acknowledge the receipt of your favor of the 27th inst., enclosing letter from W. A. Hunter, warden of the penitentiary at Anamosa, the mittimus issued in the case of the *State of Iowa v. P. E. Pierce*, and his affidavit in reference to his wishes in regard to his sentence, and letter of the clerk of the district court of Plymouth county, Iowa, submitting to me the question as to whether the warden of the penitentiary at Anamosa can legally require Mr. Pierce to perform hard labor, under the sentence of the district court.

Section 5675 of the code provides:

> "All punishment in a penitentiary by imprisonment must be by confinement to hard labor, and not by solitary imprisonment; * *."

This provision of the statute regulating the character of punishment to which prisoners in a penitentiary shall be subjected, applies to all prisoners sentenced to a penitentiary by the judgment of a district court, except where otherwise provided by the statute.

If a person is sentenced to a term in a penitentiary by the judgment of the district court, and the sentence and mittimus do not particularly specify the character of punishment which he is to receive, he must, in my opinion, be punished by confinement at hard labor, as provided by section 5675.

It is not absolutely necessary that the judgment, sentence, or mittimus rendered or issued by the district court should particularly specify that the person sentenced shall be confined to hard labor in the penitentiary, as the law itself specifically provides that all punishment in a penitentiary by imprisonment must be by confinement to hard labor, and the judgment, sentence, and mittimus of the court must all be construed with reference to such provision.

This view finds support in the case of the *State v. Cole*, 63 Iowa, 702, where the jury found by their verdict that the defendant was guilty of murder, and that he should be punished by imprisonment in the penitentiary at hard labor for life. The court, in entering its judgment upon the verdict, and in sentencing the prisoner, omitted the words, "at hard labor." The court, upon appeal, however, held that the judgment and sentence of the court should be construed to mean that the defendant was sentenced to the penitentiary at hard labor for life, under the provisions of the statute.

In the particular case in which I am asked to construe the sentence and mittimus of the district court, I am of the opinion that it is the duty of the warden of the Anamosa penitentiary to punish the defendant, Pierce, by confining him at hard labor in the penitentiary, under the provisions of section 5675, although the court may have omitted the words, "at hard labor," in the sentence and in the mittimus under which Pierce was delivered.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

March 28, 1901.

To Hon. L. G. Kinne, Chairman Board of Control.

FEE TO BE PAID FOR FILING AMENDMENT TO ARTICLES OF INCORPORATION—Although a corporation may have paid a fee of $2,000 upon the filing of original articles of incorporation, if it subsequently files an amendment to such original articles of incorporation, increasing its capital stock, it must pay the secretary of state a fee of $1.00 for each $1,000 of such increase, not exceeding the sum of $2,000.

DEAR SIR—I am in receipt of your favor of the 6th inst., in which you ask for a construction of the provisions of section 1610 of the code, relating to the amount of the fee required to be paid by corporations for pecuniary profit, upon filing amendments to their articles of incorporation increasing their capital stock, and in response thereto, I submit the following opinion:

Section 1610 of the code, as amended by chapter 40 of the laws of the Twenty-seventh General Assembly, provides:

> "Such corporation shall pay to the secretary of state, before a certificate of incorporation is issued, a fee of twenty-five dollars, and for all authorized stock in excess of ten thousand dollars an additional fee of one dollar per thousand. Should any corporation thereafter increase its capital stock, it shall pay to the secretary of state one dollar for each one thousand dollars of such increase, but in no event shall a fee in excess of two thousand dollars be charged under this provision of this section. The recording fee shall be paid in all cases * * *."

As shown by the facts submitted in your letter, the Union Pacific Railroad company filed its original articles of incorporation on the twenty-second day of January, 1898, in which the capital stock of the company was fixed at one hundred and thirty-six million dollars. At that time it paid to the secretary

of state three hundred and fifty dollars, which was the maximum fee fixed by the statute then in force.

On the first day of February, 1899, the company filed an amendment to its articles of incorporation, increasing its capital stock to one hundred sixty-three million four hundred sixty thousand one hundred dollars, and paid to the secretary of state a fee of sixteen hundred fifty dollars and fifty cents.

On November fourteenth, 1899, a second amendment was filed, increasing the capital stock of the company to one hundred ninety-six million one hundred seventy-eight thousand seven hundred dollars, for the filing of which no fee was charged by the secretary of state.

The company now presents to the secretary of state a third amendment to its articles of incorporation, which increases its capital stock to two hundred ninety-six million one hundred seventy-eight thousand seven hundred dollars, and the question to be determined is whether the secretary of state is required by law to charge a filing fee, under section 1610, for the filing of such amendment.

As I am informed, it is the contention of the corporation that having paid a fee of three hundred and fifty dollars on the twenty-second day of January, 1898, for the filing of its original articles of incorporation, and a further fee of sixteen hundred and fifty dollars on the first day of February, 1899, for the filing of its first amendment thereto, thus making a total aggregate amount of fees paid by the corporation of two thousand dollars, the secretary of state is not authorized to charge, or require to be paid, any further fee for the filing of any other amendment to its articles of incorporation by which its capital stock is increased.

That is, it is claimed that the corporation has paid the maximum fee fixed by the statute, and that it is now entitled to file any number of amendments to its articles of incorporation, and to increase its capital stock indefinitely, without paying a further fee to the state.

Whether such contention is true must be determined from the interpretation given section 1610 of the code, as amended by the acts of the Twenty-seventh General Assembly.

The construction of this statute depends largely upon the meaning of the clause—"but in no event shall a fee in excess of two thousand dollars be charged under the provisions of this section."

Was it the intent of the legislature that this clause should be construed to cover the aggregate amount of fees paid at different times by a corporation for the filing of its original articles of incorporation and subsequent amendments thereto increasing its capital stock, or did the legislature intend to limit the amount of the fee which the secretary of state is entitled to charge for a single transaction in the filing of the articles of incorporation or subsequent amendments thereto increasing the capital stock of the corporation?

If the former interpretation is given to this clause, then the contention of the corporation is right. If, however, it was the intention of the legislature to limit the amount of the fee to be charged by the secretary of state for the filing of the original articles of incorporation to $2,000.00, and to limit the charge for the filing of any subsequent amendment thereto increasing the capital stock of the corporation to $2,000.00, and not to limit the aggregate fees which the secretary of state is authorized to charge for separate and

distinct transactions, then the contention of the corporation cannot be sustained.

The statute provides that the corporation must pay to the secretary of state a fee of $25.00, and $1.00 per thousand for all authorized stock in excess of $10,000.00, upon the filing of its original articles of incorporation. The maximum amount of such fee is, however, limited by the clause above quoted, to $2,000.00, and the secretary of state is entitled to charge a fee of $2,000.00 for the filing of the original articles of incorporation, if the authorized capital stock in excess of $10,000.00 is sufficient to bring the fee to that amount. The filing of the original articles of incorporation, and the fee paid therefor, constitutes one transaction.

The statute further provides, "should any corporation thereafter increase its capital stock, it shall pay a fee to the secretary of state of $1.00 for each $1,000.00 of such increase, but in no event shall a fee in excess of $2,000.00 be charged under the provisions of this section."

It will be observed that wherever the fee to be paid is referred to in the section, it is stated in the singular and not in the plural number, in terms which do not include aggregate fees. Thus, in the first clause quoted, it is provided that a fee of $25.00, and for all authorized stock in excess of $10,000.00, an additional fee of $1.00 per thousand shall be paid; and in the last clause above quoted, it is provided, "should any corporation thereafter increase its capital stock, it shall pay a fee to the secretary of state of $1.00 for each $1,000.00 of such increase, but in no event shall a fee in excess of $2,000.00 be charged."

When a corporation files its original articles of incorporation, it must pay a fee therefor, and if it subsequently files an amendment increasing its capital stock, it must pay another fee for the filing of such amendment; each is a separate and independent transaction, for which a separate fee is authorized and required by statute, and in my opinion the clause of limitation applies to each of the fees thus to be charged by the secretary of state, separately, and not to the aggregate amount, which may be paid as fees for such separate transactions.

Under this view, I am compelled to hold that although a corporation may have paid a fee of $2,000.00 upon the filing of original articles of incorporation, if it subsequently files an amendment to such original articles of incorporation increasing its capital stock, it must pay to the secretary of state a fee of $1.00 for each $1,000.00 of such increase, not exceeding the sum of $2,000.00.

I am therefore of the opinion, in the case submitted, that the Union Pacific Railroad company must pay to the secretary of state the maximum fee of $2,000.00 upon the filing of the amendment to its articles of incorporation whereby its capital stock is increased $100,000,000.00 as provided in section 1610 of the code.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

April 13, 1901.

To Hon. W. B. Martin, Secretary of State.

STATE NORMAL SCHOOL—Authority of Board of Trustees to Use Money Derived from Certain Tuition Fees for the Purpose of Equipping New Buildings Erected.—The contingent fund provided for in section 2676 of the code cannot be used to equip the new building or to enlarge the present heating plant in order toobtain sufficient capacity to heat the same.

DEAR SIR—Your letter of the 6th inst., requesting an official opinion on the following question, has been referred to me for answer:

> You state that "section 2676 of the code authorizes the board of trustees of the state normal school to 'charge a fee for contingent expenses not to exceed one dollar monthly, and a tuition fee of not more than six dollars a term, if necessary, for the proper support of the institution.'
>
> "May fees derived from the above sources be used to equip the new building now being erected by act of the Twenty-eighth General Assembly, chapter 152, and to enlarge the present heating plant, in order to obtain sufficient capacity to heat the same?"

Chapter 152 of the above act, in making an appropriation for an additional building at the state normal school, provides that "there be and is hereby appropriated out of any money in the state treasury not otherwise appropriated, to be expended in the erection and equipment of an additional building, the sum of one hundred thousand dollars, or so much thereof as may be necessary."

In making this appropriation, it must have been clearly the intention of the legislature that the sum so appropriated should cover the entire expense of erecting and equipping said building, as it designates said amount for such specific purpose.

From the reading of the above act, we are led to the conclusion that no other moneys except such as are therein appropriated can be used in equipping said building, certainly not any ot the money derived from fees and tuition provided for in section 2676.

That section of the statute makes such fees and tuition a part of the contingent fund, to be used solely for contingent expenses. To equip a new building is not contingent expenses.

Ordinary repairs should be paid out of the contingent fund, but when such repairs assume the magnitude of a rebuilding, or of an expensive addition, they should be charged to the schoolhouse or building fund.

It has been held that the seating of a new schoolhouse could not be paid out of the contingent fund, but should be paid out of the schoolhouse fund.

In *Williams et al. v. Pienny et al.*, 25 Iowa, 438, it was held that the law does not authorize the use of the contingent fund for the erection or completion of schoolhouses, but when the house needs re-seating or other repairs, the cost may be defrayed either from the contingent fund, or from any unappropriated schoolhouse fund in the treasury,

The equipping of a new building is not in the nature of repairs, but is a completion of the new building.

For these reasons, expenses for equipment could not be charged to, or paid out of the contingent fund.

Neither do we think the enlargement of the present heating plant, in order to obtain sufficient capacity to heat this new building, can be paid out of the contingent fund provided for in section 2676 of the code.

The enlargement of the present heating plant is made necessary by the fact that the new building has been erected. This expense is clearly incident to the erection and equipment of the new building, and is not in the nature of repairs.

We are unable to see any distinction between the placing of an entirely new heating plant and the enlarging and extending of the present plant so as to meet the same requirements. Both would be incident to the equipping of the new building, and not in the nature of repairs.

For the reasons above given, we are clearly of the opinion that the contingent fund provided for in section 2676 of the code cannot be used to equip the new building or to enlarge the present heating plant in order to obtain sufficient capacity to heat the same.

Respectfully submitted,

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

May 6, 1901.

To Hon. R. C. Barrett, Superintendent Public Iustruction.

SCHOOLS—Instruction to be Given in Vocal Music by Special Teachers—When instruction is given as stated in the opinion, there is a compliance with the law, and regular teachers under such circumstances would be clearly exempt from passing an examination in the elements of vocal music.

DEAR SIR—Your favor of the 6th inst., asking an official opinion on the following question has been referred to me for answer:

> "Section 1 of chapter 109, the acts of the Twenty-eighth General Assembly, provides that where instruction is not given in vocal music by special teachers, all teachers shall be required to satisfy the county superintendent of their ability to teach the subject.
>
> "Under present conditions, a large number of cities and towns now employ supervisors, or special teachers. These experts in some places visit the different rooms under their supervision semi-weekly, in others bi-weekly, and in still others only once in three weeks.
>
> "Where instruction is given as above, is there a compliance with the law, and may regular teachers be excused from examination?"

From a careful reading of the section above referred to, we are led to the conclusion that where a special teacher is provided to instruct in the elements of vocal music, this clearly exempts those teachers in general charge of such schools from satisfying the county superintendent of their ability to teach the elements of vocal music in a proper manner.

The question of the number of times such special teacher may instruct in such schools in the elements of vocal music, is one to be determined by the board of directors, and clearly can have no bearing upon the question of the examination of the other teachers, who instruct in other branches. The fact

that a special teacher is provided for the purpose of teaching the elements of vocal music, we believe clearly exempts such other teachers from furnishing proof of ability to teach that branch.

We are therefore of the opinion that when instruction is given, as stated in your inquiry, there is a compliance with the law, and that regular teachers under such circumstances would be clearly exempt from such examination.

Respectfully submitted,

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

May 7, 1901.
To Hon. R. C. Barrett, Superintendent of Public Instruction.

BUREAU OF LABOR STATISTICS—Whether it is advisable to send out blanks, provided for in section 2474 of the code, more than once during the biennial period is a matter of discretion with the commissioner.

DEAR SIR—I am in receipt of your favor of the 31st ultimo, in which you ask my opinion as to the construction of section 2474 of the code.

This section must be taken in connection with section 2470, in determining the duties of the commissioner of labor statistics in collecting information with reference to the industries of the state.

Without going into a lengthy discussion of the questions involved, I will say that the statute does not provide when, or how frequently it is the duty of the commissioner to obtain information as to the labor statistics of the state, except that he must obtain such information in time to embody it in his biennial report to the governor.

The intent of the statute is that the commissioner shall collect, assort and systematize all of the information whish he is able in relation to the commercial, social, educational and sanitary condition of the laboring classes of the state during his term of office, and in time to embody such information in his biennial report.

Whether it is desirable to send out the blank provided for in section 2474 of the code more than once during the biennial period, is a matter which he must determine in his sound discretion and judgment, as there is no statutory requirement in relation thereto.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

June 1, 1901.
To Hon. C. F. Wennerstrum, Commissioner Bureau Labor Statistics.

COLLATERAL INHERITANCE TAX—From an examination of the will of Francis G. Boyd, it is held that the fourth paragraph thereof makes a bequest to charity and is therefor not liable to the payment of a collateral inheritance tax.

DEAR SIR—I have given the fourth paragraph of the will of Francis G. Boyd, of Clinton, careful consideration, and made an examination of the authorities bearing upon the question involved, for the purpose of determining whether the bequest contained in that paragraph is one for a charitable purpose, and exempt from the payment of the collateral inheritance tax, under the provisions of section 1467 of the code.

The weight of authority is: That where a bequest is made for a purpose which benefits the general public, it falls within the definition of charity.

In the case In re Vaughan, 33 Chancery Division, 187, North, J., delivering the opinion of the English court of chancery, holds that a bequest to keep a churchyard in repair is a charitable bequest.

This case has been cited and approved in numerous American decisions. In *Wolford v. Crystal Lake Association*, 54 Minn., 440, the supreme court of Minnesota recognizes the principle as being sound, and substantially holds the same doctrine.

The only case I have been able to find which can be said to tend to the establishment of a different principle, is a Massachusetts case in which a cemetery association was held liable for a tort, on the ground that it was not a charitable organization.

The question involved here, however, was not in the Massachusetts case, as it may well be true that a cemetery association is not a charitable organization, and yet, a bequest made to such association, for the benefit of the public, be a charitable bequest, which can be held and administered by the association.

In the case under consideration, it is probably true that the Oakland Cemetery association is not, strictly speaking, a charitable organization. It may, however, take and hold a gift or bequest to charity, and if the execution thereof falls within the powers of such organization, it may carry into effect such gift or bequest.

The bequest under consideration is for the purpose of beautifying the grounds of Oakland cemetery. The public will be benefited by its expenditure, as directed in the will, as it is a recognized duty of all communities to improve and beautify their cemeteries. The execution of the bequest, and its expenditure as directed in the will, come within the powers of the association.

I am therefore of the opinion that the judgment of the district court, holding the bequest is to charity, and not liable to pay the collateral inheritance tax, is correct, and that the interest of the state will not be subserved by an appeal to the supreme court.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

June 10, 1901.
To Hon. G. S. Gilbertson, Treasurer of State.

BOARD OF DENTAL EXAMINERS—Expenses of—All costs, outlay and charges which are necessarily incidental to the perform-

ance by the board of the duties imposed upon them, under chapter 91, acts of the Twenty-eighth General Assembly, are included in the term "expenses".

DEAR SIR—In answer to your personal request for an opinion from this office as to what may reasonably and necessarily be included in the clause ''with the actual expenses incurred by him in the discharge of such duties,'' appearing in section 7, chapter 91, acts of the Twenty-eighth General Assembly, relating to the board of dental examiners and the practice of dentistry, we have to say:

We are of the opinion that all costs, outlay and charges which are necessarily incidental to the performance by the board of the duties imposed upon them under this chapter are included in the term ''expenses.''

Webster defines the word ''expenses'' to mean ''cost, outlay, charges, etc.'' As to what is necessary and reasonable cost, outlay and charges in the performance of your duties, we are of the opinion that the railroad fare, hotel bills, cost or outlay for books and stationery, actually expended in going to and from your place of meeting and the carrying out of the duties imposed upon you by this chapter, are included therein.

You further inquire, ''Is it the duty of the secretary and treasurer of the board to take the records, financial and otherwise, to and from the different places of meeting?''

Section 4 of the above chapter requires that a book of registration shall be kept by the secretary in his office, which shall be open to inspection of the public. In no other part of said chapter do we find anything said as to where other books of the board shall be kept. It is the rule and custom of all boards of this character, to keep the books used in the performance of their duty at the office of the secretary, and we can see no reason why any different rule should apply to this board. The secretary's office is the proper place for keeping the records of the board, and we think it would not be wise for such board to carry the records about with them from place to place where they hold their meetings.

You also ask ''Is the board expected to correct the examination papers at the time and place of examination, or at home?''

We think this is clearly a matter of discretion with the board, as to whether they examine and mark the papers at the place of examination, or not until they have returned home. The above chapter is silent as to this, and it is our opinion that it is a matter left entirely within the discretion of the board.

Again, you ask ''When is the biennial report of the treasurer to be made?''

Subdivision 5 of section 122 of the code provides that the biennial report of the board of dental examiners shall be laid before the governor on or before November 15th, in odd numbered years.

Respectfully submitted,

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

June 21, 1901.

To Dr. F. A. Lewis, Secretary and Treasurer State Board of Dental Examiners.

ATTORNEY'S FEES—Such fees should be paid by the state, as well as court costs, where such costs and fees are incurred in a prosecution for the violation of section 4897, as provided by chapter 128, acts of the Twenty-eighth General Assembly.

DEAR SIR—I have examined the certificate of the clerk of the district court of Jones county as to the fees and costs taxed in the case of the *State of Iowa v. Thomas King*, who was indicted for escaping from the penitentiary, and the affidavits of the county attorney and attorney for defendant attached thereto, and am of the opinion that the bill should be paid in full.

Chapter 128 of the acts of the Twenty-eighth General Assembly provides that all costs and fees incurred in prosecutions for violation of section 4897 of the code, shall be paid out of the state treasury from the general fund, where the prosecution fails, or where such fees and costs cannot be made from the person liable to pay the same.

In the case of the *State v. King*, the certificate of the clerk shows that it is impossible to collect any part of the costs from the defendant. They are therefore certified by the clerk of the district court to the auditor, under the provisions of chapter 128.

I think the phrase—' all costs and fees incurred in prosecution, etc.'' in section 1 of said chapter includes attorney's fees fixed by the court to be paid to the attorney appointed to defend in the case.

The provisions of section 2, which provides that the clerk of the district court shall certify to the state auditor the amount of fees or costs incurred in each case, etc., indicates that the purpose of the legislature was to include attorney's fees as a part of the cost of the prosecution of such cases. The purpose of the statute is to relieve the counties in which the state penitentiaries are located from the burden of paying the costs of the prosecution of this character, and to put such burden upon the state at large.

Persons confined in the state penitentiaries are wards of the state, and the state, and not the county in which the penitentiary is located should bear the expense incurred in caring for the persons so confined, or in prosecuting them for escaping or attempting to escape from the prison in which they are confined.

No reason can be assigned why the county in which one of the penitentiaries of the state is located should pay either the court costs or the attorney's fees, in an action against a defendant for escaping or attempting to escape from prison. Both are necessary expenses incurred in prosecuting such action. The legislature, by chapter 128 of the acts of the Twenty-eighth General Assembly, has undertaken to relieve such county from the paoment of such expenses, and such construction should be given to the language of the act, if it can be done, as will carry out the intent of the legislature.

I am therefore of the opinion that attorney's fees should be paid by the state, as well as what are strictly known as court costs.

In accordance with the provisions of chapter 123, therefore, you should draw your warrant on the treasurer for the amount of the claim.

Respectfully submitted,

CHAS. W. MULLAN.
Attorney-General.

June 22, 1901.

To Hon. Frank F. Merriam, Auditor of State.

SURVEY AND RE-SURVEY OF PUBLIC LANDS—(1) The lands described in the opinion, for which patents are asked, are not of the class claimed by the state under its right of sovereignty in lakes and lake beds within its territory, and a re-survey thereof, or patents issued therefor, do not conflict with the position maintained by the state as to its ownership of lakes and lake beds, which were correctly meandered by the original government survey.

(2) It is held that the Chicago, Milwaukee & St. Paul railway is entitled to lands described in paragraph two of the opinion, which are included within the railway grant, from the general government, and were erroneously included from the original government survey.

(3) Clay county is entitled, under the Swamp Land Grant from the government, to certain lands described in paragraph three of the opinion, which are excluded in such re-survey.

No patent has yet been issued to the state by the government for any of these lands.

SIR—I beg to report that I have made a careful examination of the evidence offered as to the original and re-survey of lands by the government in townships ninety-six (96) and ninety-seven (97), ranges thirty-four (34) and thirty-five (35), west of the fifth principal meridian, for a re survey of which an application was made to the commissioner of the land office, and a re-survey thereof made under the direction of the commissioner in the months of May and June, 1900, and have found the following facts, with my conclusions thereon, to wit:

First.—I find that a mistake was made in the meander lines of the original survey of said lands. These lines do not follow the shores of any body of water, and a considerable amount of dry tillable lands were excluded from the original survey by reason of such mistake. The lands thus excluded are not lakes or lake beds, and were erroneously included with Trumbull and Lo t Island lakes, and bounded by the meander lines of such survey. No reason exists why such mistake in the original survey should not be corrected, and patents to said lands be issued from the state to the parties entitled thereto. The lands for which patents are asked are not of the class claimed by the state under its right of sovereignty in lakes and lake beds within its territory, and a re-survey thereof, or patents issued therefor

do not conflict with the position maintained by the state as to the ownership of lakes and lake beds, which were correctly meandered by the original government survey.

Second.—I find that the Chicago, Milwaukee & St. Paul Railway is entitled to the following lands, which are included within the railway grant from the general government, and were erroneously excluded from the original government survey.

Lots numbered six (6), seven (7), eight (8), nine (9) and ten (10), the southeast quarter of the northeast quarter, the southwest quarter of the southe st quarter, and the east half of the southeast quarter of section nineteen (19); lots numbered nine (9), ten (10) and eleven (11), in section twenty-nine (29), all in township n nety-seven (97), range thirty-four west of the fifth principal meridian.

Lots five (5), six (6), seven (7) and nine (9), in section one (1); lots five (5) and six (6) in section (11); lots four (4) and five (5) in section thirteen (13), all in township ninety-six (96), range (35), west of the fifth principal meridian.

Lots five (5) in section twenty-three (23); lots five (5) six (6) and seven in section twenty-seven (27); lots seven (7) and (8), in section thirty-five (35), all in township ninety-seven (97), range thirty-five (35), west of the fifth principal meridian.

A patent has been issued by the government to the state for the lands in township ninety-seven (97), range thirty-four (34) aforesaid, and no reason exists why the state should not at once issue its patent to the railway company for these lands.

No patent has as yet been issued by the government to the state for lands in townships ninety-six (96) and (97), range thirty-five (35), and the patent from the state to the railway company should not issue until such lands are patented to the state by the government.

Third.—I find that Clay county is entitled, under the Swamp Land Grant from the government to the following decrib d lands, which are included in such re-survey, namely:

Lots eight (8), ten (10) and eleven (11), in section one (1), the east one-half (½) of the southeast one-fouth (¼) and lots seven (7) and eight (8) of section eleven (11); lots five (5) and six (6) of section twelve (12); lots four (4) and five (5) of section fourteen (14), all in township ninety-six (96), range thirty-five (35), west of the fifth principal meridian.

Lot eleven (11) in section twenty-five (25); lots four (4), five (5) and six (6) in section twenty-six (26); lot five (5) in section thirty-four (34), and lot six (6) in section thirty-five (35), all in township ninety-seven (97), range thirty-five (35), west of the fifth principal meridian.

No patent has as yet been issued to the state by the government for any of these lands, and the patent from the state to Clay county should not issue until the state receives its patent from the government.

Repectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

July, 3, 1901.

To the Honorable Leslie M. Shaw, Governor of Iowa.

CLAIM OF THE STATE OF IOWA UPON THE UNITED STATES FOR INTEREST UPON BONDS ISSUED IN 1860—(1) It is held that the state, at the time of the payment of the interest npon its war bonds, and for at least six years after the last payment of such interest made, had a valid claim against the United States for the interest so paid upon its war bonds, which could have been enforced against the government.

(2) It is doubtful whether such claim is now barred by the statute of limitations.

(3) No authority is lodged in the governor, executive council, or other body to employ and compensate counsel for prosecuting a claim of this character against the United States.

SIR—Replying to your favor of the 22d ult., in which you ask my opinion upon the following questions:

First.—"Has the state of Iowa any claim upon the United States for interest paid by the state upon bonds issued in 1861, and paid in 1881, such bonds being issued in aid of the government in prosecuting the war against the insurgent forces in arms against the United States?"

Second.—"If the state has such claim, is there any authority lodged by law in the governor or executive council or any other body to employ and provide for compensating counsel for prosecuting the claim?"

I respectfully submit the following opinion:

First.—Nearly all of the northern states raised large amounts of money, either by bonds or taxation or both, in 1861 and 1862, for the purpose of aiding the federal government in enlisting and equipping soldiers for the war of the rebellion. This was done pursuant to an act of congress of July 27, 1861, which provided that the secretary of the treasury was directed out of the money in the treasury, not otherwise appropriated, to pay to the governor of any state, or his duly authorized agents, the costs, charges and expenses properly incurred by such states for enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops employed in aiding to suppress the insurrection against the United States.

By a joint resolution of congress, approved March 8, 1862, it was declared that this act of congress should be construed to apply to expenses incurred as well after as before the date of the approval of the act.

The state of Iowa expended in equipping, clothing, arming and subsisting its troops, enlisted in aid of the general government, something over one million of dollars, for which interest bearing bonds were issued by the state, as there was no available money in the treasury with which to pay such expenditure.

A large portion of this sum has since been repaid by the general government to the state, but the interest upon what are known as the war bonds has never been allowed or paid.

An almost identical condition obtains in many other states of the Union.

A claim of like character was transmitted by the secretary of the treasury to the court of claims on the third day of January, 1889, by the state of New York against the general government, for interest upon money used by that state in arming, equipping, clothing and subsisting its soldiers.

This claim of the state of New York was allowed by the court of claims, and an appeal was taken from the decision of that court to the supreme court of the United States, the case being reported in the 160 United States Report at page 598.

Without going into detail as to all of the questions raised and passed upon by the court in that case, it is sufficient to say that the claim of the state of New York was upheld by the United States supreme court in every point and its claim for interest paid upon money borrowed by the state to pay for the expense of equipping, arming, clothing, and subsisting its soldiers, enlisted in defense of the general government, was held to be a valid claim against the United States.

In passing upon the question, Judge Harlan said:

> "We cannot doubt that the interest paid by the state on its bonds, issued to raise money for the purposes expressed by congress, constitutes a part of the cost, charges, and expense properly incurred by it for those objects. Such interest when paid became a principal sum as between the state and the United States,—that is, became a part of the aggregate sum properly paid by the state for the United States. The principal and interest so paid constitutes a debt from the United States to the state. It is as if the United States had itself borrowed the money through the agency of the state."

I can see no reason why the principles enunciated by Judge Harlan, upon which the New York case was decided, do not apply with equal force to the claim of the state of Iowa for the interest paid by it upon bonds issued to raise money to arm, equip, and subsist soldiers furnished the general government, to aid in suppressing the rebellion. The decision in the New York case is, in my judgment, conclusive as to the validity of the claim of the state of Iowa for such interest.

I am, therefore, of the opinion that the state, at the time of the payment of the interest upon its war bonds, and for at least six years after the last payment of such interest was made, had a valid claim against the United States for the interest so paid upon its war bonds, which could have been enforced against the government.

Second.—The serious question arising as to the enforcing of such claim against the United States at the present time is whether the claim of the state is now barred by the statute of limitations. The last of the war bonds, and interest thereon, was paid by the state in 1881. Prior to 1894 the state had filed its claim against the government for its costs and expenses in enlisting, arming, and equipping its soldiers, for the sum of $1,095,303.09. By the report of the committee on war claims, submitted to congress February 28, 1895, $1,062,453.84 of the claim was allowed, and afterward paid by the United States to the state of Iowa, leaving an unpaid balance of the claim then made by the state against the government of $32,849.25.

No claim appears to have been made against the government for the interest paid upon the war bonds, and the question of the validity of such

claim has, therefore, never been passed upon by any of the departments or courts of the United States.

Section 1069, of the Revised Statutes of the United States, provides:

> "Every claim against the United States cognizable by the court of claims, shall be forever barred, unless the petition, setting forth a statement thereof, is filed in the court, or transmitted to it by the secretary of the senate, or clerk of the house of representatives, as provided by law, within six years after the first claim accrues."

This statute was held in the case of the United States against New York supra, not to affect claims which had been filled with an executive department of the state, although such claims did not reach the court of claims within six years after the same accrued.

Prior to the decision in the New York case, the accounting officers of the treasury department were disallowing and refusing to pay all claims for interest paid by the states for money borrowed upon bonds, or otherwise, for the purpose of arming and equipping their soldiers, and prior to that time it was not believed by the state of Iowa, or other northern states, that any valid claim against the gouernment existed for the repayment of such interest.

It is a well settled rule of law that laches is an equitable defense, controlled by equitable considerations, and varies with the peculiar circumstances of each case. Unless it is shown that owing to the neglect of the complainant, some right or advantage has been lost to the defendant, a lapse of time is of very little consequence. The rule is stated strongly and tersely in *Dagger v. Van Dyke*, 37 New Jersey Equity, 130, as follows:

> "It is only when the complainant has slept over his wrongs so long that great and serious wrong will be done to the defendant, that laches will constitute a complete de ense. Here the parties are in almost exactly the same position now that they were at the time the wrong, for which redress is sought, was done, and relief may be given to the complainant without doing any harm whatever to the defendant."

This principle was recognized in the case of *United States v. New York*, *supra*.

Since the decision of that case, many other states have filed their claims against the general government, and are now prosecuting the same with vigor, in the belief that the United States courts will finally hold that the statute of limitations, above quoted, does not apply to this class of claims.

This is notably true of Pennsylvania, which has a very large claim now pending, which stands exactly in the position of the claim of the state of Iowa.

So much depends upon the view taken by the courts as to whether a complainant should be barred from prosecuting his claim by reason of laches, that, in my judgment, the facts in this case warrant the prosecution of the claim of the state against the government, for the interest paid upon its war bonds. I do not feel justified in taking the responsibility under the circumstances of saying that the United States courts will hold that the claim of the state is barred by the statute of limitations, because of the laches of the state in prosecuting the same, and for that reason no effort should be made to collect such claim.

Third.—As to the question whether any authority is lodged by law in the governor, executive council or other body, to employ and provide compensation for counsel for prosecuting the claim, I am of the opinion that no authority is lodged in the governor, executive council or other body to employ and compensate counsel for prosecuting a claim of this character against the United States.

The claim against the government should be prepared and filed by the executive department of the state. It then becomes the duty of the attorney-general to appear in behalf of the state to prosecute such claim, and if it is thought desirable to employ additional counsel to assist him in its prosecution, a provision for such assistant counsel, and their compensation, must be made by the legislature, as no power is lodged elsewhere under which a contract can be entered into for the employment or payment of such additional counsel. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

July 9, 1901.

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

FEES FOR FILING ARTICLES OF INCORPORATION—The corporation mentioned in the opinion does not fall within the exemption provided for in section 1637, and it must file with the secretary of state a certified copy of its articles of incorporation, pay the statutory fee, and receive a permit, before it is entitled to carry on its business within the state.

SIR—In response to your request for my opinion as to whether the American Grain Purifier Constructing company should pay the fees provided in section 1637 of the code, for filing a certified copy of its articles of incorporation with the secretary of state, and receiving from the secretary a permit to transact business in the state of Iowa, I submit the following opinion:

All corporations seeking to do business within the state of Iowa, by filing certified copies of their articles of incorporation with the secretary of state, and receiving from him a permit to transact business within the state, must pay statutory fees, except such corporations as are specifically exempted from the payment thereof by the provisions of section 1637 of the code.

Does the corporation referred to come within the exception named in section 1637?

The language of the section is as follows:

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

agents in this state, engaged in the transaction of its business, and requesting the issuance to such corporation of a permit to transact business in this state; said application to contain a stipulation that such permit shall be subject to the provisions of this chapter. Before such permit is issued the said corporation shall pay to the secretary of state the same fee required for the organization of corporations in this state, and if the capital of such corporation is increased it shall pay the same fee as is in such event required of corporations organized under the law of this state. * * *."

The exception provided for in the statute is intended to apply only to corporations carrying on a mercantile or manufacturing business outside of the state, which desire to ship into the state, and sell their goods or manufactured products; the purpose of the exception is to permit such corporation to ship into the state and sell their goods or manufactured products wi hout filing a certified copy of their articles of incorporation with the secretary of state, or obtaining a permit to transact that class of business within the state.

When, however, any corporation, organized under the laws of another state, or of a territory of the United States, or of a foreign country, except corporations organized exclusively for the purpose of carrying on a mercantile or manufacturing business, d sires to enter the state, and transact its business therein, such corporation must file a certified copy of its articles of incorporation with the secretary of state, pay the statutory fee therefor and receive a permit from the secretary, before engaging in the transaction of its business within the state.

I think it is also true that the exception provided for in the statute applies only to corporations organized for the purpose of carrying on an exclusive mercantile or manufacturing business, and if the corporation is organized for the purpose of carrying on or conducting any other class of business, although the same may be connected with mercantile or manufacturing business, such corporation does not fall within the exemption of the statute; and if it desires to transact its business within the state it must file a certified copy of its articles of incorporation with the secretary of state, pay the statutory fee and receive from him a permit to transact business within the state.

In saying this, however, I do not intend to be understood as holding that such a corporation might not ship its goods or manufactured products into the state, and sell them here, without filing with the secretary of state a certified copy of its articles of incorporation, and receiving from him a permit so to do.

The American Grain Purifier Constructing company is not a corporation organized outside of the state of Iowa for the purpose of carrying on an exclusive mercanti e or manufacturing business, which simply desires to ship its goods or manufactured products into the state for the purpose of selling them therein; it is a corporation which des res to enter the state for the purpose of transacting its ordinary business.

The purpose and business of the corporation is set forth in the second article of its articles of incorporation as follows:

"The purpose for which this corporation is formed is to manufacture and sell a patent grain purifier and dryer; to acquire, own, sell and dispose of patents pertaining thereto, or any right therein; to acquire, manufacture, sell, lease or otherwise dispose of the right to construct all our patent purifiers and dryers; to purify grain, and to do and perform all acts necessary in the business of purifying grain, or manufacturing grain purifiers and dryers, and selling or acquiring patents pertaining to purifiers and dryers, or to sell or otherwise dispose of the manufactured product of this company, or of any right, in whole or in part, in and to the patents now owned by this company."

Under this provision of its articles of incorporation the company has the right to manufacture and sell its patent grain purifier and dryer. It also, however, takes to itself the right to acquire, own, sell and dispose of patents pertaining to such grain purifier and dryer, or any right therein; also to sell, lease or otherwise dispose of the right to construct or use patent purifiers and dryers; to acquire and sell patents pertaining to purifiers and dryers, or any right in whole or in part, to the patents owned by the company.

That is to say, coupled with its right to manufacture and sell patent grain purifiers and dryers, the corporation is organized for the purpose of selling to any other person or persons the right to manufacture and sell its grain purifi rs and dryers, within any designated territory of the state of Iowa, and to sell to any person or persons any or all of its patents pertaining to purifiers and dryers, or any right, in whole or in part, to the patents owned by the company.

It is, therefore, clear that the corporation does not fall within the exemption provided for in section 1637, above quoted, and that it must file with the secretary of state a certified copy of its articles of incorporation, pay the statutory fee provided therefor and receive a permit from the secretary of state to transact its business within the state, before it is entitled to carry on its business therein.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

July 12, 1901.

To Hon. W. B. Martin, Secretary of State.

DAIRY COMMISSIONER.—So far as section 2523 of the code refers to the testing of milk by operators of creameries, cheese or condensed milk factories, the word "milk" includes "cream."

SIR—I beg to acknowledge receipt of your request of this date, in which you ask my opinion:

First.—"Does the word 'milk' therein contained (section 2523 of the code) include the word 'cream'?"

In my opinion, so far as the section refers to the testing of milk by operators of creameries, cheese or condensed milk factories, the word "milk" includes cream. Wherever a test is made either of milk or cream, it must be in the manner provided in section 2523 of the code.

In answering your second and third inquiries, which I do not deem necessary to quote in full, I will say that under section 2523 operators of creameries, cheese or condensed milk factories, whenever a test of the quality of

milk or cream is made, are required to use such appliances and tests as shall be clear oil, free from any foreign substance, and produce correct measurements of butter fat.

The kind or character of the appliance used for this purpose is within the discretion of the dairy commissioner, the statute requiring that every such appliance so used for testing milk or cream, must be certified by him as an approved appliance for making such measurements, before the same can be used by operators.

The statute practically leaves the character of the implement used in making such tests, and the manner in which such tests shall be made within the control of the dairy commissioner, and any appliance which gives a correct measurement, which has been approved and certified by him, can be lawfully used in making such tests.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

July 15, 1901.

To the Hon. B. P. Norton, Dairy Commissioner.

COLLATERAL INHERITANCE TAX—Interest Thereon—It is held that the interest which accrues upon the estate, after the death of the testator or intestate, and before the distribution, is not liable to pay the collateral inheritance tax.

SIR—In response to your inquiry as to whether interest accumulations, upon property liable to pay a collateral inheritance tax, which accrues after the death of the testator or intestate, and before the property is distributed, is liable to pay collateral inheritance tax, I submit the following opinion:

Our statute, providing for the collection of a collateral inheritance tax, is modeled after the statutes of New York and Pennsylvania, and in determining the interpretation which our courts will give the statute, we naturally turn to see what construction has been placed upon similar statutes in those states.

The question submitted arose early in Pennsylvania, and in *Miller's Estate*, reported in Pennsylvania County Court Reports, at page 522, it was held that accumulations of interest, after the death of the decedent, and before the distribution to the heirs, was not liable to pay the collateral inheritance tax.

The court in that case said:

> "Collateral inheritance tax is imposed only upon the estate owned by the decedent at the time of his death, and not upon interest or income subsequently arising."

This doctrine was subsequently adhered to by the supreme court of Pennsylvania, in *Williamson's Estate*, 153 Pa. St. Report, page 508, in which it is stated:

> "The orphans' court was also in error in holding that our decision *In re Williamson's Estate*, 143 Pa., 150, subjects the income for the first year to the collateral inheritance tax. This tax fastens upon so much of the estate as passes to collaterals as it stands at the death of the testator. It comes out of the corpus of the gift, upon its descent or transmission upon the death of the former owner to the beneficiary. Income accruing subsequently comes not from the testator, but from the property held by, or for the use of the legatee or other beneficiary, and is not to be distinguished from income derived by the same persons from any other source."

In *Matter of Will of Vassar*, reported in the 127 New York, at page 1, the court of appeals of New York squarely holds that interest accruing after the death of the testator, and before distribution, is not chargeable with collateral inheritance tax The court in passing u on the question says:

> "The better and more reasonable construction of the statute is that the property of which the person died seised or possessed is subject to the tax; that the increase or interest thereafter obtained by the executors is property of which the testator was not seised or possessed at the time of his death; that the property should be appraised, and the tax assessed as soon after death as practicable, and that the tax should then become immediately due and payable; the provision for charging interest thereon in case it is not paid is in lieu of any increase or interest that may be derived from the estate by the executors."

Substantially the same provision found in the New York statute, relating to the charging of interest for the non-payment of the collateral inheritance tax, if not paid within the time fixed by the statute, was enacted in our own statute on the subject, in these words:

> "All taxes imposed by this chapter shall be payable to the treasurer of state, and those which are made 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 of the trust by the trustee, unless a longer period is fixed by the court. All taxes not paid within the time prescribed by this act shall draw interest at the rate of eight per centum per annum until paid."

By this provision the legislature has imposed a penalty of eight per cent per annum upon all property liable to pay the collateral inheritance tax, if the same is not paid within fifteen months. One of the purposes of such provision is to compel the payment of such penalty in lieu of any increase or interest that may be derived from the estate by the executor or administrator.

Under the holding of these cases, decided upon a statute almost identical to ours, both in New York and Pennsylvania, I am very clear that the interest which accrues upon the estate after the death of the testator or intestate, and before the distribution, is not liable to pay the collateral inheritance tax, and our courts will so hold when they are called upon to pass upon the question.

Under section 5 of chapter 51 of the laws of the Twenty-eighth General Assembly the entire estate, subject in whole or in part to the payment of the collateral inheritance tax, should be appraised for the purpose of computing such tax, by the collateral inheritance tax appraisers. From the value so fixed by the appraisers, the debts of the decedent, as defined in section 1 of this chapter, should be deducted, and the computation of the collateral inheritance tax made upon the amount of the value of the estate, after such debts are deducted, without adding accumulated interest.

The case of *Hooper v. Shaw*, 176 Mass., has sometimes been cited as holding a doctrine contrary to that herein expressed, but a careful reading of that case will disclose that the question whether interest accruing upon property in the hands of an executor or administrator, after the death of the testator or intestate, and before distribution, was liable to pay collateral inheritance tax, was not involved in the decision of that case, the issue determined by the court being as to whether the United States legacy tax should be deducted as a debt before computing the state collateral inheritance tax, and while the court has used language which possibly might be construed as adhering to a different doctrine, I cannot regard the case as authority against the rule laid down by the New York and Pennsylvania courts.

Another rule of construction which obtains as to statutes of this character, and which leads me to the conclusion arrived at, is that taxes imposed by the collateral inheritance acts are special and not general.

In Matter of McPherson, 104 New York, 306.

And it is the rule that special tax laws are to be construed strictly against the government, and favorable to the taxpayer; that a citizen cannot be subject to special burdens without clear warrant of law.

Dos Passos on Collateral Inheritance Taxes, 41

Matter of Enston, 113 New York, 174.

This, I believe, covers the question submitted to me for my opinion.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

July 20, 1901.

To Hon. G. S. Gilbertson, Treasurer of State.

BUREAU OF LABOR STATISTICS—No use should be made of names of individuals, firms, or corporations supplying information obtained under the authority vested in the commissioner by section 2472.

SIR—You ask our opinion as to whether the information obtained through inspection provided for in section 2472 of the code, is such information as is deemed confidential, and the publication of the names of individuals, firms, or corporations is prohibited by section 2475 of the code.

Our answer to this inquiry must be in the negative. In order to answer this question intelligently, it is necessary that we consider the entire chapter 8, relative to the creation and duties of the commissioner of labor statistics.

Section 2470 defines the duties of the commissioner, and specifies the kind and class of information which it is his duty to collect, assort, systematize, and present in his report to the governor.

Section 2474 provides that such information shall be furnished upon request of the commissioner.

Section 2471 vests the commissioner with power to secure such information, when not otherwise furnished, by the issuance of subpœnas, administering oaths, and taking testimony of witnesses.

Section 2472 also furnishes another means of obtaining such information, where the commissioner is unable to procure the same under section 2474 or 2471.

Neither of the last above mentioned sections provides for any other class of information to be obtained by the commissioner than that specified in section 2470. This last mentioned section enumerates and specifies all of the information which the commissioner is required to collect, assort, systematize, and present in his report.

Sections 2471, 2472, and 2474 only provide the means, or vests the commissioner with certain powers, by which he may obtain such information.

Section 2475 clearly prohibits the use of the names of individuals, firms, or corporations, in supplying information called for by sections 2470 and 2471.

It certainly could not have been the intent of the legislature to permit the use of confidential information obtained by the means provided in section 2472, and prohibit its use when obtained either under section 2474 or 2471.

The real purpose and intention of the legislature in prohibiting the use of information is because the same is in its nature deemed confidential. Such information is as much confidential information when obtained under the power vested in the commissioner by section 2472, as it would be if obtained by either of the other methods.

We, therefore, are clearly of the opinion that no use should be made of names of individuals, firms, or corporations, supplying the information obtained under the authority vested in the commissioner by section 2472.

Respectfully submitted,

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

July 22, 1901.

To Hon. C. F. Wennerstrum, Commissioner Bureau of Labor Statistics.

IOWA STATE COLLEGE—Expenses of Trustees—The board of trustees of such college cannot use any portion of the appropriation made by chapter 152 of the acts of the Twenty-eighth General Assembly for the expenses to be incurred on a proposed trip to inspect college buildings in the East.

SIR—You ask our opinion as to whether the board of trustees of the Iowa State college can make an appropriation for the expenses incurred on a proposed trip to inspect college buildings in the East, for the purpose of enabling them better to prepare plans for a new building to be asked for at the next session of the legislature.

The appropriation to the Iowa State college by section 1, chapter 152, acts of the Twenty-eighth General Assembly, was made for certain specific purposes, viz:

"For repairs, general improvements, current expenses, and additional support."

To hold that expenses incurred in the manner spec fied in your inquiry could be paid out of the above appropriation, would be giving an interpretation to the specified purposes therein mentioned which the rules of interpretation do not justify.

Such expenses not coming within the above mentioned specific purposes, we are clearly of the opinion that they cannot legally be paid out of said appropriation. Respectfully submitted,

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

August 17, 1901.
To J. B. Hungerfo d, Chairman Board of Trustees, Iowa State College.

INSURANCE POLICIES—The clause contained in lines 31 to 40 inclusive in the printed portion of what is known as Iowa Standard Policy. should be eliminated from all fire insurance polic es within the state of Iowa.

SIR—I have examined what is known as the Iowa Standard Policy, with reference to the clause co tained in the printed portion of the policy embraced in lines 31 to 40 inclusive, which provides that in case the policy holder obtains other additional insurance, which is permitted by the policy, and such insurance shall not be valid and collectible, the ob aining of such insurance shall be held to be an election on the part of the insured to cancel the policy, and the same shall stand canceled from the time such invalid insurance is obtained, and the insured shall be entitled to receive upon return of the policy to the company, the unearned premium from the date of surrender.

I can put no other construction upon this provision than that which its language imports. That is, that the insurance company and the policy holder agree that if such invalid insurance is obtained by the policy holder, the previous policy held by him under his contract of insurance shall at once be canceled, and he loses all right to recover thereunder..

The clause is certainly a remarkable one, and one which in my judgment should be eliminated from all fire policies within the state of Iowa. I can see no particular benefits which will accrue to the insurance company by the retention of the clause, and clearly see many hardships which may be sustained by the policy holders if the clause is permitted to remain.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

August 22, 1901.
To Hon. Frank F. Merriam, Auditor of State.

IOWA STATE COLLEGE—Use of Funds Appropriated for Support of Experiment Station.—The experiment station is a department and part of said college. The board of trustees may legally use such portion of the money appropriated by section one of chapter 152 of the laws of the Twenty-eighth General Assembly as is, in their judgment, required to meet the current expenses and support of such department.

It is also held that the trustees may also use the annual appropriation granted by section 2674 of the code for the purpose of paying the current expense of the experiment station.

SIR—Your favor of July 23d, asking for my opinion and construction of section one of chapter 152 of the laws of the Twenty-eighth General Assembly, and also of the legality of using funds appropriated by section 2674 of the code, which request is as follows,—

> "*Resolved* that we, the board of trustees of the Iowa State College of Agriculture and Mechanic Arts, hereby request the Attorney-General of Iowa to render a decision as to the legality of using funds appropriated by section one of chapter 152 of the laws of the Twenty-eighth General Assembly for the support and current expenses of the experiment station, and also the legality of using funds appropriated by section 2674 of the code of Iowa in the same manner,"—

came to hand some time ago, and I have delayed answering the same for two reasons:

First.—The letter was received during my absence from my office in Des Moines, and it was necessary that I have access to the records of that office before giving an opinion upon the questions involved:

Second.—I find that my predecessor, Mr. Remley, for whose legal opinion I have a high regard, rendered an opinion which is somewhat in conflict with the conclusions I have reached.

After a careful consideration of the matter in all its various phases, I submit the following opinion in response to the resolution of the board of trustees of the Iowa State College of Agriculture and Mechanic Arts:

The solution of the questions called for by the resolution turns and depends entirely upon a single proposition, *i e.:*

Is the Agricultural Experiment Station at Ames a part of, or a department of, the Iowa State College of Agriculture and Mechanic Arts?

An affirmative or negative answer to this question determines the solution of all the questions involved in the resolution. It is therefore important to examine the history of the agricultural experiment station, for the purpose of ascertaining whether it was established as a department of the college, or as a separate institution.

July 2, 1862, an act of congress was passed granting to the several states and territories an amount of public land to be apportioned to each, equal to thirty thousand acres for each senator and representative in congress, to which the states were respectively entitled. The land so granted to be sold by the states, and the money received therefor to be invested in stocks and bonds of the United States, or other safe securities, yielding not less than five per centum upon the par value thereof, which money so invested shall constitute a perpetual endowment fund, the interest of which may be used to support and maintain a college, where the leading object shall be to teach such branches of learning as relate to agriculture and mechanic arts, in such manner as the legislatures of the states may respectively prescribe.

Subdivision three of section five of the act of congress referred to, provides:

> "Any state which may take and claim the benefit of the provisions of this act, shall provide within five years at least not less than one college, as described in the fourth section of this act, or the grant to such state shall cease, and the state shall be bound to pay to the United States the amount received for any lands previously sold."

Other provisions relating to the manner of locating the script issued for such lands, and the annual report to be made by the governors of the several states to congress, etc., are incorporated in the act.

The state of Iowa, as early as 1858, by an act of the Seventh General Assembly, had established a state agricultural college and model farm, to be connected with the entire agricultural interests of the state, and when the act of congress referred to became a law, Iowa was one of the first states to accept its benefits.

This acceptance was enacted at the extra session of the Ninth General Assembly, approved on the twenty-fifth day of September, 1862, and is embodied in the code of 1873, in the following language:

> "Section 1604. The lands, rights, powers and privileges granted to and conferred upon the state of Iowa by the act of congress entitled 'An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts,' approved July 2, 1862, are hereby accepted by the state of Iowa, upon the terms, conditions and restrictions contained in said act, and there hereby is established an agricultural college and model farm, to be connected with the entire agricultural and mechanical interests of the state; the said college and farm to be under the control and management of a board of five trustees, no two of whom shall be elected from the same congressional district."

Under this section, all of the benefits derived from the act of congress were made a part of the agricultural college and model farm of the state of Iowa, and placed under the control and management of its board of trustees.

On the second day of March, 1887, an act of congress was passed which is supplemental to the act of July 2, 1862. Section 1 of the act of 1887 provides:

> "That in order to aid in acquiring and diffusing among the people of the United States useful and practical information on subjects connected with agriculture, and to promote scientific investigation and experiment respecting the principles and application of agricultural science, there shall be established, under direction of the college or colleges or agricultural department of colleges in each state or territory established, or which may hereafter be established, in accordance with the provisions of an act approved July second, eighteen hundred and sixty-two, entitled 'An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts,' or any of the supplements to said act, a department to be known and designated as an 'Agricultural Experiment Station.' "

Under the provisions of this section, each state or territory which accepted the benefits of the act of July 2, 1862, and established an agricultural college in conformity with the provisions thereof, was required to establish as a department of such college, and under its direction and control, an "Agricultural Experiment Station."

Section 9 of the act of May 2, 1887, provides that the grants of money authorized by the act may be subject to the legislative assent of the several states and territories to the purposes of said grants.

It is clear from the language of this act, that congress intended the experiment stations established under the provisions of the act should be a part of the agricultural colleges established by the states and territories which accepted the benefits of the act of 1862, and not separate and independent institutions.

The assent of the state to the provisions of the act of 1887, was given by the Twenty-second General Assembly by chapter 180, which became a law on the third day of March, 1888, and by the same act an experiment station was established by the legislature of Iowa as a department of the Iowa Agricultural College, such act being as follows:

> "WHEREAS,—The congress of the United States, by an act approved March 2, 1887, and entitled 'An act to establish agricultural experiment stations in connection with the colleges established in the several states under the provisions of an act approved July 2, 1862, and of the acts supplementary thereto,' did provide in section 9 thereof 'that the grants of money authorized by this act are made subject to the legislative assent of the several states and territories to the purposes of said grants'; therefore,
>
> *Be it Enacted by the General Assembly of the State of Iowa:*
>
> Section 1. That such legislative assent be and is hereby given to the purposes of the grants authorized by the said act of March 2, 1887, and that in accordance with the requirements thereof, the state agrees to devote the moneys thus received to the establishment and support of an agricultural experiment station as a department of the Iowa agricultural college, as provided in said act of congress."

This assent of the legislature to the grant of congress is embodied in section 2645 of the present code, which is as follows:

> "Section 2645. Grant accepted. Legislative assent is given to the purposes of the various congressional grants to the state for the endowment and support of a college of agriculture and mechanic arts, and an agricultural experiment station as a department thereof, upon the terms, conditions and restrictions contained in all acts of congress relating thereto, and the state assumes the duties, obligations and responsibilities thereby imposed.
>
> All moneys appropriated by the state because of the obligations thus assumed, and all funds arising from said congressional grants, shall be invested or expended in accordance with the provisions of such grant, for the use and support of said college located at Ames."

Thus taking the entire history of the legislation relating to the establishment of the experiment station of the Iowa College of Agriculture and Mechanic Arts, we find that from the time that it is first mentioned in an act

of congress to the time of the enactment of the present code, every legislative body has undertaken to make it a part of the college and a department thereof. It is no where treated or referred to as a separate and independent institution; and when the state of Iowa accepted the benefits of the provisions of the acts of congress referred to, it by such assent agreed and bound itself to establish and maintain an Agricultural Experiment Station as a part of the State Agricultural College, under the control and management of its board of trustees.

The control of the experiment station is by congress and the state legislature given to the trustees of the college. They have full power to manage and control the property of the college and farm, whether real or personal.

The fact that there is an annual appropriation of congress to aid in paying the necessary expenses of conducting investigations and experiments, and for printing and distributing the results of the work, does not tend to make the experiment station an independent institution, or give it existence separate and apart from the college.

It is a matter of common knowledge that in colleges throughout the country many of the departments have separate endowment funds and resources, the income of which can only be used to pay the expenses of the particular department to which the endowment belongs; but no one has ever thought that the possession of such endowment made the department an institution separate and apart from the college to which it belongs.

I can see no reason why the Agricultural Experiment Station is not as much a part of the State College of Agriculture and Mechanic Arts, as is the medical department a part of the State University at Iowa City.

I am therefore clearly of the opinion that the Agricultural Experiment Station is a part and a department of the Iowa State College of Agriculture and Mechanic Arts, and that the annual appropriation granted by section 2674 of the code can be used by the board of trustees of the college as their judgment shall direct for the purpose of paying current expenses of the experiment station, as a department of that college, precisely as it can be used to pay the expenses of any other department.

The conclusion which I have arrived at, and the construction which I have placed upon section 2674 of the code, applies with equal force to section 1 of chapter 152 of the laws of the Twenty-eighth General Assembly. This section provides:

> "There is hereby appropriated to the Iowa State College of Agriculture and Mechanic Arts, out of any money in the state treasury not otherwise appropriated, for repairs, general improvements, current expenses and additional support, the sum of twenty-five thousand dollars annually hereafter; said sum to be paid in quarterly installments on the order of the trustees, the first installment to be paid July 1, 1900."

The Experiment Station, being, as we have seen, a department and part of the Iowa State College of Agriculture and Mechanic Arts, the board of trustees may legally use such portion of the money appropriated by section 1 of chapter 152 of the laws of the Twenty-eighth General Assembly as is in their judgment required to meet the current expenses and support of such department.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

August 24, 1901.

To E. W. Stanton, Secretary of the Board of Trustees of the Iowa State College of Agriculture and Mechanic Arts.

GAME LAWS—Pinnated grouse, quail and other game birds protected by law may be, under the present statute, lawfully sold during the period when it is lawful to kill such birds within the state.

SIR—I am in receipt of your favor of the 31st ult., asking for a construction of sections 2552, 2554 and 2555 of the code, relating to the killing and selling of certain game birds.

There is a slight incongruity in these sections, and it appears to me that the legislature had the thought to prohibit the sale of game birds within the state at the time the law was enacted, but the interpretation of the law itself will not bear this out.

Section 2552 of the code prohibits and makes it a crime for any person to trap, shoot or kill prairie chicken, woodcock, quail or rough grouse for traffic.

Section 2554 makes it an offense for any person, company or corporation to buy or sell or have in possession any such birds or animals during the period when the killing thereof is prohibited, except during the first five days of such prohibited period.

Section 2555 provides that no person, company or corporation shall at any time ship, take or carry out of the state any of the birds or animals named, but it shall be lawful to ship to any person within the state any of the game birds named, not to exceed one dozen in any one day, during the period when the killing of such birds is not prohibited, providing an affidavit, made before some person authorized to administer oaths, that the birds have not been unlawfully killed, bought, sold or had in possession, and are not shipped for sale or profit, is made and attached to the birds so shipped.

Neither of these sections in terms, or in language which will bear such construction, prohibits the sale of such game birds within the state during the open period.

I am therefore of the opinion that pinnated grouse, quail, and other game birds protected by law, may be under the present statute lawfully sold, during the period when it is lawful to kill such birds within the state of Iowa.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

September 6, 1901.

To Hon. George A. Lincoln, Fish and Game Warden, Cedar Rapids, Iowa.

LABELS, TRADE MARKS AND FORMS OF ADVERTISEMENT—Each is separate and independent of the other, and in order that the person applying to have the three which he has adopted registered, and he be secured in the exclusive benefits thereof under section 5049 of the code, he must register each separately and receive separate certificates therefor.

SIR—In compliance with your request, I have examined section 5049 of the code, with reference to the duties of the secretary of state as to issuing certificates of registration of labels, trade marks and forms of advertisement, as provided in such section, and after a careful reading thereof, I am of the opinion that a separate certificate must be issued by the secretary for each of the purposes desired. The provisions of the section are as follows:

> "Every person or association, or union of workingmen, or others, that has adopted, or shall adopt for their protection any label, trade mark, or form of advertisement, may file the same for record in the office of the secretary of state, by leaving two copies, counterparts or facsimiles thereof, with the secretary of state. Said secretary shall thereupon deliver to such person, association or union so filing the same, a duly attested certificate of the record of the same, for which he shall receive a fee of one dollar."

The section provides for the filing of a label, a trade mark, and a form of advertisement. A label is not necessarily a trade mark or a form of advertisement, nor is a trade mark a label or form of advertisement, nor is a form of advertisement necessarily a label or trade mark.

Any one desiring to place a particular label or brand upon the goods which he sells, must apply to have such label registered. If he desires to adopt any particular trade mark, he must have such trade mark registered, and if he desires to adopt any particular form of advertisement, and to be protected in the exclusive use thereof, he must register such form of advertisement.

I think the three are separate and independent of each other, and in order that the person applying to have the label, trade mark or form of advertisement which he has adopted registered, and he be secured in the exclusive benefits thereof under the statute, he must register each separately and receive separate certificates therefor from the secretary of state.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

September 11, 1901.
To Hon. W. B. Martin, Secretary of State.

DEPARTMENT OF AGRICULTURE—Use of Funds Appropriated—Under section 21 of chapter 58 of the laws of the Twenty-eighth General Assembly, making an annual appropriation of $1,000 for insurance and improvements to buildings on the state fair grounds, if it is admitted desirable to use the whole sum thus appropriated for insurance, it is within the power of the department to do so.

SIR—In compliance with your request for a construction of section 21 of chapter 58 of the laws of the Twenty-eighth General Assembly as to the right of the Department of Agriculture to draw and use the funds thereby appropriated, I submit the following opinion:

Section 21 provides for an annual appropriation of one thousand dollars for insurance and improvements to buildings on the state fair grounds, the auditor to draw the warrant therefor upon the order of the department of agriculture, signed by the president and secretary thereof, in such sums and at such times as the department may deem necessary.

This provision gives to the department the discretion and right to use the one thousand dollars appropriated for either of the purposes designated, as shall be deemed advisable by them.

If a better rate of insurance can be obtained and the department of agriculture be thereby benefited financially by taking the insurance for a long term and using the sum so appropriated to pay for such insurance, it is within the power of the department of agriculture to so use the money.

The legislature has simply made the appropriation for insurance and improvements, and left it wholly to the discretion of the department as to the use of the same for either of the purposes for which it is appropriated.

If it is deemed advisable to use the whole sum thus appropriated for insurance, it is, in my judgment, within the power of the department to do so, and the auditor should issue his warrant for the payment of such sum, upon the order of the agricultural department signed by the president and secretary thereof. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

September 25, 1901.
To Hon. Frank F. Merriam, Auditor of State.

BALLOT—Name of City Officer on at General Election—The name of a city officer should not go on the ballot at the general November election, and a vacancy in a municipal office cannot be legally filled at such election.

SIR—I am in receipt of your favor of the 20th inst., asking my construction of section 1278 of the code, upon the question as to whether, under its provisions, the name of a city officer should be placed upon the ballot at a general election.

I have hesitated somewhat about expressing an opinion as to the proper construction of this section, for two reasons:

First.—I am not required by law to render such an opinion, unless the matter is referred to me by one of the departments of the state.

Second.—This section is so out of harmony with other provisions of the statute, that it is extremely difficult to determine what the intent of the legislature was, when it was enacted.

As the request comes from a brother lawyer, however, in his capacity as city solicitor, I will answer the inquiry to the best of my ability.

The term "General Election" has always been understood to mean the election at which officers of the general government, either federal or state —as distinguished from local officers—are elected.

This definition of the term appears to have been adopted by the legislature in sections 1057 and 1089 of the code, and were it not for the fact that the provisions of section 1278, if construed to mean that city officers shall be elected at general elections are repugnant to other provisions of the code, which must be given full force and effect, I should hold that the term ' general election," as used in that section, means the general November election at which federal, state and county officers are elected.

Under the constitution, every elector at a general election must have been a resident of the state six months and of the county sixty days, to entitle him to cast his vote, and if he possesses such qualifications as to residence, and is a citizen of the United States, he is entitled to have his name placed upon the registry list, and to vote at any general election.

Section 642, which provides for municipal elections, requires that in addition to the six months' residence in the state and sixty days in the county, he must have been, at the time of such election, a resident of the precinct in which he offers to vote ten days prior to such election; and in cities where registration is required, his name cannot be placed upon the registry list, nor will he be entitled to vote at a municipal election, unless he possesses such qualifications as to residence in the voting precinct.

If the name of a city officer is placed upon the ballot of a general election, at which electors having the general qualification as to residence in the state and county are permitted to vote, it would render the provision of section 642, as to the ten days' residence in the voting precinct, nugatory, as each elector voting at such general election would have the right to cast his ballot and have it counted for all of the offices named thereon, and no distinction could be made between persons entitled to vote at the municipal election under section 642, and those who are entitled to vote at a general election, under the provisions of the constitution.

The effect would be that ballots would be cast for the city office by persons not legally entitled to vote at a municipal election, and the result of the election might be very different from what it would be were the legal electors at a municipal election only permitted to vote.

Section 1272 provides that vacancies in all city elective offices, when there are sixty days of an unexpired term, shall be filled by a special election, to be called by the council as soon after the vacancy occurs as is practicable.

This section clearly contemplates that all vacancies in elective city offices shall be filled by a municipal election, at which only electors possessing the qualification required by section 642, shall be permitted to vote.

I do not believe that it was the intention of the legislature, by the provisions of section 1278, to permit city officers to be elected by electors not having such qualification. The provisions of sections 642 and 1272, in my opinion, control the construction which must be given to the provisions of 1278, and I think the term, "general election," as used in that section, when applied to the election of city officers, must be held to be the general city election held on the last Monday in March, instead of the general election for federal, state, and county officers, held in November.

Taking this view of the statute, I am of the opinion that the name of a city officer should not go on the ballot at the general November election, and that a vacancy in a municipal office cannot be legally filled at such election. Respectfully subm tted,

CHAS. W. MULLAN,
Attorney-General.

September 26, 1901.
To F. A. Harriman, Hampton, Iowa.

BOARD OF TRUSTEES OF STATE LIBRARY—Right to Sign Requisition for funds—The governor is *ex officio* president of the board. The power to draw money upon requisition made is necessarily lodged in the board. In the absence of the president, the board may authorize its president *pro tem* to sign the requisitions made upon the auditor, and when this is done, such requisition should be honored by the auditor as though signed by the president himself.

DEAR SIR—I am in receipt of your communication of the 15th instant, asking my opinion as to whether the auditor can recognize the signature of any other person than the governor to requisitions made by the board of trustees of the library, for the funds appropriated by the general assembly for the support of the library and historical department.

There appears to be no direct provision by statute as to the manner in which requisitions shall be made upon the auditor for the money so appropriated, and as no specific method is pointed out by statute as to how such requisition shall be made, and the money drawn for the use of the library and historical department, the details of the method of making such requisitions is left to the discretion of the board.

Ordinarily such requisitions should perhaps be signed by the president of the board. If, however, the president for any reason is absent, or unable to act at times when it is necessary for the board to meet to transact its business, the president *pro tem*, who should be elected by the board, may legally perform the duties of the president, and sign such requisitions upon the auditor for the money appropriated by the general assembly as shall be authorized by the board itself.

In other words, the power to draw money upon requisitions made is necessarily lodged in the board. The board may authorize its president *pro tem* to sign the requisitions made upon the auditor, and when this is done, such requisitions should be honored by the auditor, as though signed by the president himself.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

October 17, 1901.
To Hon. Frank F. Merriam, Auditor of State.

INSURANCE COMPANIES—Mutual Life—Such companies, organized under chapter 65 of the laws of the Twenty-eighth General Assembly may, if they so provide in their articles of incorporation, insure against the casualties named in subdivision 5 of chapter 1709 of the code.

SIR—Chapter 61 of the laws of the Twenty-eighth General Assembly provides:

> "That section 1710 of the code be amended by inserting after the word 'company' in the sixth line, the following provision: *Provided*, however, that any life insurance company organized on the stock or mutual plan, and authorized by its charter or articles of incorporation so to do, may, on complying with the provisions of this chapter, in addition to such life insurance, insure against all of the casualties specified in subdivision 5 of section 1709 of the code."

Chapter 65 of the laws of the Twenty-eighth General Assembly authorizes the organization of both stock and mutual insurance companies upon the stipulated premium plan, for the purpose of issuing policies of insurance on the lives of individuals.

Under the chapter quoted, a mutual life insurance company organized under chapter 65, would have the right, if its articles of incorporation so provided, to insure against the casualties specified in subdivision 5 of section 1709, it being the express intent of the legislature that all life insurance companies doing business within the state, either upon the stock or mutual plan, shall have the right to provide in their articles of incorporation for such insurance.

It is a rule of construction of statutes, that where there are apparently conflicting provisions, they must be construed if possible, to give force to each of the provisions of the statute.

In view of the acts of the legislature embodied in chapter 61 of the laws of the Twenty-eighth General Assembly, which authorizes mutual companies to insure against personal injuries and general accidents, I think the clause contained in section 1710, which is as follows: "or expose itself to loss on any one risk or hazard to an amount exceeding ten per cent of its paid up capital, unless the excess shall be reinsured in some other good and reliable company," must be held to apply to companies organized on the stock plan, and that it was the intention of the legislature, in enacting chapter 61 of the laws of the Twenty-eighth General Assembly, to permit mutual insurance companies to insure against the casualties named in subdivision 5 of section 1709, although such companies had no paid up capital stock.

Companies organized under chapter 65 of the laws of the Twenty-eighth General Assembly may be, as we have seen, mutual life insurance companies, and as such, would come within the provisions of chapter 61.

I am therefore of the opinion that mutual companies, organized under chapter 65 of the laws of the Twenty-eighth General Assembly, may, if they so provide in their articles of incorporation, insure against the casualties named in subdivision 5 of chapter 1709 of the code.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

October 29, 1901.

To Hon. Frank F. Merriam, Auditor of State.

COLLATERAL INHERITANCE TAX—It is held that real estate situated within the jurisdiction of Iowa, although the same has been by provisions in the will of a testator directed to be sold, and the proceeds distributed, is liable to pay the collateral inheritance tax imposed by our statute.

SIR—Upon the liability of lands in the state of Iowa, owned by William Huber at the time of his decease, to pay a collateral inheritance tax, I submit the following opinion:

William Huber, a resident of the state of Pennsylvania, died in March, 1901.

At the time of his death he was the owner of land in the state of Iowa, which, under the provisions of his will is to be sold by his executor and the proceeds thereof distributed among collateral heirs named in the will.

It is claimed by the executor that such provision in the will is an equitable conversion of the real estate situated in Iowa into personalty, and that the domicile of the deceased draws to the state of Pennsylvania jurisdiction over all his personalty, wherever situate, and that, by fiction of law, the real estate in Iowa being converted into personalty by the terms of the will, is within the jurisdiction of Pennsylvania and not liable to the collateral inheritance tax imposed by the statutes of this state.

In support of this proposition I have received from Mr. William S. Hosmer, attorney for the executor, a very able brief and argument, setting forth very clearly the claims of the executor and the holding of the Pennsylvania courts upon the questions involved.

The position taken by the executor, through his counsel, is undoubtedly the law of Pennsylvania.

The courts of that state have carried the principle contended for to a complete logical conclusion.

In *Miller v. Commonwealth*, 111 Pa. St., 321, it is held that where a testator provided in his will that land in another state should be sold by the executor and the proceeds thereof distributed among collateral heirs of the testator, such provision was an equitable conversion of the real estate into personalty, and the domicile of the testator being in Pennsylvania drew to the jurisdiction of that state all personalty of which the testator died seised; the proceeds of the land being part of his personal estate in Pennsylvania, was liable to pay the collateral inheritance tax imposed by that state.

This principle was subsequently reaffirmed in later cases, and the court has applied the doctrine with equal force to land in the state of Pennsylvania as to lands in other states.

Coleman's Estate, 159 Pa. St., 231.

I cannot, however, agree with the rule of law announced by these decisions, or the reasoning which leads to the conclusion reached.

Our statute provides:

> "All property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, sale or gift made or intended to take effect in possession or in enjoyment after the death of the grantor or donor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of an adopted child of a decedent, or to or for charitable, educational or religious societies or institutions within this state, shall be subject to a tax of five per centum of its value, above the sum of one thousand dollars, after the payment of all debts, for the use of the state; * * *"

The real estate owned by Huber at the time of his decease is within the jurisdiction of the state of Iowa.

The proposition that real estate cannot be taxed or charged except in the jurisdiction where it is situate applies equally to succession taxes as to other forms of taxation. This principle has been enunciated in a large number of cases.

The rule that real estate, and everything pertaining to its devolution, transmission and tenure, is governed and controlled by the law of its *situs*, is a vital principle of the inter-state law of this country, and one which probably more than any other, has maintained the equilibrium and avoided the clashing of the taxing powers of the several states.

To charge the succession of foreign real estate with the payment of collateral inheritance taxes is inconsistent with the spirit of such taxation.

Land situated abroad and devised by a domestic will to persons living within the state, does not devolve by force of the will, nor of the domestic law, but by permission of the state where the land is situated and under the provisions of the laws of that state.

The doctrine that real estate may be converted into personalty, by a provision of the will of the testator that the same shall be sold and the proceeds distributed upon his death, is an equitable fiction of the law, which can have no place in a system of taxation.

The conversion thus effected by a court of equity is designed to prevent injury, or to better carry out and further the intentions of the testator; but a fiction in equity will not bring within the jurisdiction of the state, for the purpose of taxation, lands which cannot otherwise be taxed under the laws of that state, nor can it take out of or remove from the jurisdiction of a state lands situated therein. The land remains as realty within the state where it is situate, subject to the laws of inheritance of that state, and subject to the laws providing for a succession tax thereon.

This question was ably considered in *Swift's Estate*, 137 N. Y., in which Gray, J., said:

> "The question of the right of a state to tax is one of fact, and cannot turn upon theories or fictions, which, however serviceable to adjust the rights of parties, were never intended to furnish a basis of constitutional power."

I am clearly of the opinion that the supreme court of this state will not adopt the reasoning or conclusion of the Pennsylvania courts upon this question, and will hold that real estate situate within the jusisdiction of Iowa, although the same has been, by a provision in the will of a testator, directed to be sold and the proceeds distributed, is liable to pay the collateral inheritance tax imposed by our statute.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

November 1, 1901.

To Hon. G. S. Gilbertson, Treasurer of State.

TRUSTEES OF IOWA STATE NORMAL SCHOOL—Per diem charges—Mileage for traveling outside of state—A member of the board of trustees acting as a member of the building committee of such institution, is not entitled to draw from the state treasury *per diem* while traveling beyond the state, nor is he entitled to have pay for mileage computed under provision of section 2618.

The opinion of Attorney-General Remley under date of June 19, 1899, to the auditor of state, is concurred in.

SIR—In compliance with your request of September 17th, in which you ask the following questions—

First—Whether as a member of the building committee, a trustee of the Iowa State Normal School is entitled to charge *per diem* for services rendered outside of the state

Second—Whether such trustee is entitled to mileage for travel outside of the state.

Third—Whether he is entitled to *per diem* and mileage as a member of the building committee to any other point in the state other than that where the institution is located—

I submit the following opinion:

Section 2617 provides that regents and trustees shall be allowed four dollars for each day actually and necessarily engaged in the performance of official duties, not exceeding thirty days in any one year.

This provision restricts the per diem compensation which may be allowed and paid to trustees of the Iowa State Normal School, to the time they are actually and necessarily engaged in the performance of official duties.

In an opinion given by my predecessor, Mr. Remley, as to whether members of the board of regents of the Iowa State University should receive compensation and mileage for trips made outside of the state of Iowa, he used this language:

> "The language of section 5104 is that they should 'receive as compensation four dollars per day for each and every day actually employed in the discharge of their duties, and the actual and necessary

expenses incurred while so engaged.' The term, 'their duties,' evidently refers to their duties as regents. It may be said generally that in the duties of the board of regents to govern the university and manage and control its affairs, the regents act as a unit, as a board. It may be, and probably is proper for the board of regents to send some one to inspect articles to be purchased or needed by the institution, or to obtain information as to the best methods of making needed repairs, and it is not improper to send a member of the board to obtain the information needed. But I do not like to say that a person thus sent was discharging his duty as a regent. Some person other than a regent could be employed to make any inspection or examination and obtain information needed by the board. He obtains information and data which the board of regents may act upon when they are called upon to discharge their duties as regents. Such trips, I believe, are always undertaken for the purpose of obtaining information to enable the regents to act intelligently upon any matter before them. While it is undoubtedly incumbent upon one holding the office of regent to obtain information and knowledge necessary to enable him to discharge the duties of regent intelligently, yet obtaining such information and knowledge is not discharging the duties of regent.

"There is, to my mind, clearly a distinction to be made between the duties of a regent and the duties of one appointed, who may be a member of the board or not, to go elsewhere and obtain information upon which the regents may act.

"Section 5104 of McClain's code provides for the compensation and expenses of the regents while actually engaged in the discharge of their duties, but does not provide for the payment of agents or employes appointed by the board of regents."

In an opinion given by Mr. Remley, June 19, 1899, to the auditor of state, he further says:

> "'The limitation of thirty days shall not apply to building committees, which shall not consist of more than three members, but such committee 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 appointing committees to discharge certain duties which can be more appropriately done by a committee than by a full board."

The reasoning given in this opinion of Mr. Remley applies with equal force to the trustees of the Iowa State Normal school, and I concur in the conclusion reached, with a slight exception.

Whenever a building committee is appointed by a board, it acts for and in behalf of the board, and whenever meetings of such committee are called, and are necessary for the transaction of the official business of the board, the members of such committee are entitled to their *per diem* and mileage.

I am of the opinion that it is not necessary that such meetings shall be called or held at the place where the institution is located, but may be called and held at any convenient and suitable place within the state, and the members attending such meeting would be entitled to *per diem* and mileage, computed by the nearest traveled route from the home of the member to the place where the meeting is held.

Where, however, a member of the board or a member of the building committee is selected as an agent of the board or of the committee to travel beyond the state for the purpose of obtaining information which may be laid before the board or the committee, to enable it to act intelligently upon the questions coming before it, the work thus done by such member cannot be said to be the official act of such trustee or regent. He is simply acting as the agent of the board or of the committee in obtaining information for it, to enable the board or committee to act officially in relation thereto.

In such case, I am of the opinion that the person so traveling beyond the state is not entitled to draw from the state treasury a compensation of four dollars per day, or to have his mileage computed by the auditor and paid to him under the provisions of section 2618.

In so holding, I do not wish to be understood that such person is not entitled to compensation and expenses under the circumstances suggested, but only as saying that the auditor has no authority, under the provisions of the statute, to draw a warrant for his *per diem* and mileage.

It is within the power of the board of trustees to pay to the person who is thus employed by them a reasonable compensation and expenses for the services performed at their request, out of the funds of the institution under their control. Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

November 16, 1901.

To Hon. Frank F. Merriam, Auditor of State.

BOARD OF CONTROL—Authority to Employ Assistant Architect—Under section 23 of chapter 118 of the laws of the Twenty-seventh General Assembly, the board of control has no power to employ a consulting architect or additional skilled assistance for the purpose of informing themselves as to the adoption of the plans of a public building, until the legislature has authorized the erection of such building, and made an appropriation therefor.

SIR—I am in receipt of your favor of the 6th instant, asking my opinion as to the construction of section 23 of chapter 118 of the laws of the Twenty-seventh General Assembly, relating to the employment of an assistant architect, and as to whether such assistant architect can, under the provisions of that section, be employed in anticipation of an appropriation by the legislature for the construction of a public building.

The portion of the section applicable to the question at issue, is as follows:

> "In cases of sufficient magnitute, the board may secure the advice of a consulting architect, or secure additional skilled assistance before the adoption of the plans of the state architect, but the expense thereof shall not exceed fifteen hundred dollars in any one year."

It appears to me clear that the intent of the legislature was, where an appropriation is made for the erection of an important public building, of such magnitude as, in the judgment of the board of control, the advice of a consulting architect or skilled assistant is desirable before the adoption of the plan of the state architect, for the purpose of obtaining the knowledge and information necessary to determine as to whether the plan of the state architect should be adopted, the board has the right to secure the advice of a consulting architect, or the services of an additional skilled assistant for such purpose.

I think, however, that the provisions of the section do not go to the length of authorizing the board of control to secure the advice of a consulting architect or additional skilled assistance, in anticipation of an appropriation by the legislature for the erection of a public building.

Prior to the making of such an appropriation, the whole matter is within the authority of the legislature, and not the board of control. If the legislature requires any information imparted to it through the medium of a consulting architect or otherwise, to enable it to act intelligently in making an appropriation for a public building, it has full power to obtain such information in any manner it may deem best.

Authority is not given to the board of control by section 23 to incur the expense of obtaining such information in behalf of the legislature.

Under this construction of section 23, I am of the opinion that it is not within the power of the board of control to employ a consulting architect or additional skilled assistance, for the purpose of informing themselves as to the adoption of the plans of a public building, until the legislature has authorized the erection of such building, and made an appropriation therefor.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

December 12, 1901.

To Hon. L. G. Kinne, Chairman Board of Control.

GASOLINE LABELS TO BE USED ON PACKAGES, BARRELS AND CASKS CONTAINING GASOLINE—The law makes it the duty of dealers in gasoline to label and mark the packages, barrels and casks sold by them, and they must be at the expense of procuring the labels necessary for that purpose, as there is no authority of law for the furnishing of such labels, or for paying therefor by the state.

SIR—I am in receipt of your favor of the 12th inst., requesting my opinion as to the construction of sections 2505, 2506, 2507 and 2508 of the code, with reference to the duty of the state to purchase and furnish free of expense to retail dealers gasoline labels to be used by them in labeling packages, barrels, or casks containing gasoline sold to their customers.

Section 2505 provides:

> "Each inspector shall be furnished at reasonable expense to the state, the necessary instruments and apparatus for testing, and shall promptly make inspection, and test and brand all illuminating oils kept for sale, and for such purpose may enter upon the premises of any person * * * .
>
> "If, upon test and examination, the oil shall meet the requirements, he shall brand over his official signature and date on the barrel or package holding the same, 'Approved, flash test, ... degrees,' inserting in the blank the number.
>
> "Should it fail to meet the requirements, it shall be branded under his official signature and date, 'Rejected for illuminating purposes.'"

Then follow certain provisions regulating the manner of making the inspection, by whom the inspector shall be paid, and what disposition shall be made of the money received by him.

Following, and in the same section, is this provision.

> "No gasoline shall be sold, given away, or delivered to any person in this state until the package, cask, barrel, or vessel containing the same has been plainly marked gasoline."

This is a regulation by the legislature of the sale of gasoline by wholesale and retail dealers, as being a commodity which it is necessary to regulate the sale of for public safety.

This regulation is a restriction upon its sale precisely as is the regulation made in regard to the sale of many other commodities within the state. Many articles kept are sold by pharmacists, and required by the statute to be plainly marked as to their character, and the fact that the same are poisonous, and no one has ever thought that it was the duty of the state to furnish the labels for so marking such commodities.

I find no provision of law in chapter 11, title 12, or elsewhere, which can be construed as requiring the state to furnish labels to be put upon gasoline packages, casks or barrels sold by retail dealers.

The law makes it the duty of such dealers to label and mark the packages, casks and barrels sold by them, and I am clearly of the opinion that they must be at the expense of procuring the labels necessary for that purpose, and that there is no authority of law for the furnishing of such labels, or for paying therefor by the state.

Respectfully submitted,

CHAS. W. MULLAN,
Attorney-General.

December 14, 1901.

To Hon. W. B. Martin, Secretary of State.

INDEX

BIENNIAL REPORT

OF THE

STATE LIBRARIAN

TO THE

GOVERNOR OF THE STATE OF IOWA

July 1, 1901

JOHNSON BRIGHAM

STATE LIBRARIAN

PRINTED BY ORDER OF THE GENERAL ASSEMBLY

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