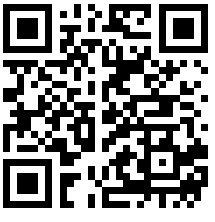

OPINIONS

OF THE

ATTORNEYS GENERAL

OF THE

STATE OF MINNESOTA

From the Organization of the State to Jan. 1, 1884.

PUBLISHED PURSUANT TO CHAPTER 129, GENERAL LAWS 1883.

SAINT PAUL:
WEST PUBLISHING COMPANY.
1884.

PREFACE.

THE following comprise all the opinions of the several Attorneys General, from the organization of the State until January 1, 1884, which, in the opinion of the Attorney General, were of sufficient importance to warrant their publication. Many opinions, doubtless, have been included which in the judgment of many might have been omitted; but the purpose has been to err in this direction rather than in the opposite. A few have been omitted because they were solely applicable to some peculiar statute which has long since been repealed.

The publication of the work has been superintended by E. F. LANE, Esq., of the Attorney General's office, under the direction and supervision of the Secretary of State and Attorney General, and the index to the same has been prepared by him.

ST. PAUL, MAY, 1884.

ATTORNEYS GENERAL OF MINNESOTA.

HON. CHARLES H. BERRY,	MAY 24, 1858, TO JAN. 2, 1860.
HON. GORDON E. COLE,	JAN. 4, 1860, TO JAN. 8, 1866.
HON. WILLIAM COLVILLE,	JAN. 8, 1866, TO JAN. 10, 1868.
HON. F. R. E. CORNELL,	JAN. 10, 1868, TO JAN. 9, 1874.
HON. GEO. P. WILSON,	JAN. 9, 1874, TO JAN. 10, 1880.
HON. CHAS. M. START,[1]	JAN. 10, 1880, TO MAR. 11, 1881.
HON. WILLIAM J. HAHN,	MAR. 11, 1881, TO ———

[1] Appointed, March 11, 1881, Judge of Third Judicial District.

OPINIONS

OF THE

ATTORNEYS GENERAL.

CHARLES H. BERRY, ATTY. GEN.—MAY 24, 1858, TO JANUARY 2, 1860.

To his Excellency, H. H. Sibley:

SIR: In reply to your inquiry as to whether the Minneapolis and Cedar Valley Railroad Company, in case the amount of lands to which they may be entitled by act of Congress granting lands to the Territory for railroad purposes, approved March 3d, 1857, cannot be found on the line of such road, may lawfully claim to have the deficiency made up out of lands on the line of railroad from St. Paul and from St. Anthony, by way of Minneapolis, to the southern boundary of the Territory, in the direction of the mouth of the Big Sioux, and, also, as to whether, if they may supply the deficiency out of lands of the last-named road, the Governor is authorized to receive the lands so selected in security for the loan of State credit for railroad purposes, under amendment of the constitution, April 13th, 1858, I have to state:

The act of Congress approved March 3d, 1857, among other grants to the Territory, contains a grant for the purpose of aiding in the construction of railroads, from St. Paul and from St. Anthony, via Minneapolis, to the southern boundary of the Territory, in the direction of the mouth of the Big Sioux river, with a branch via Faribault, to the north line of the State of Iowa, west of range sixteen. This main line and branch, I think, if not one road, is certainly one route. But I think they are one road. Congress evidently so intended it. In the same act the language referring to the roads from Winona to the Big Sioux, and from La Crescent to a point of junction with the former, is equally clear in designating these as separate roads. The construction put upon this act of Congress by the Territorial Legislature of 1857, in this particular at least, is evidently correct.

These two roads being included as one, by the act of Congress, it was in the power of the legislature to make such grants of lands appropriated for their building, and to impose such conditions and restrictions as it might think proper.

In chapter 3, sec. 14, of the act of the Territorial Legislature, approved May 3d, 1857, it is provided, that any deficiency on the branch road shall be made up from lands on the main line.

It provides the manner of these selections; and the companies have accepted the grants by the Legislature with all these conditions, none of which conflict with the granting act of Congress, of March 3d, 1857. In view of these facts, I think, if the main line in the direction of the Big Sioux river shall have more land than the branch by way of Faribault, in proportion to the length of road to be built, the company having the building of the branch road may lawfully claim that the deficiency be made up from lands on the main line, as provided.

Of course it follows that should there be such a deficiency on the Cedar Valley Road that the amount of 240 sections of land cannot be obtained, as required by the constitutional amendment authorizing a loan of State credit, for railroad purposes, a conveyance of those lands on the main trunk may be received by the State to supply the deficiency, and entitle the Cedar Valley Railroad Company to the benefit of the loan of State credit.

ST. PAUL, June 21st, 1858. C. H. BERRY, Atty. Gen.

Hon. W. F. Dunbar, State Auditor:

SIR: In answer to your communication of the first instant, as to "when the salaries of the State Officers are to commence," I have to say:

On the 3d day of March, 1857, Congress passed an act authorizing the inhabitants of Minnesota to form for themselves a constitution and State government, by the name of the State of Minnesota, and to come into the Union.

On the 23d day of May, 1857, the Territorial Legislature provided for the acceptance of this enabling act, and in compliance with both the Federal and Territorial law, our State Constitution was formed and adopted by the people. From the time of the adoption of this constitution, Minnesota was a sovereign state. Not even conditional on the acceptance or ratification by congress of what we had done. There was no restriction in the enabling act reserving to Congress the right to interfere with our formation of a Constitution *and a State Government.*

Had the authority been only to form a constitution our rights might have been different, but beyond a mere constitution, Minnesota might form a "State Government."

Further still, Congress also authorized the State to "come into the Union, &c." Not to apply to come in, but "to come in." After this privilege by Congress, nothing short of the Constitution of the United States could interfere with our action, and not that if our constitution was "republican in form." It was so. It seems to follow, therefore, that our Territorial existence was merged on the adoption of the constitution, and the assumption to act under it as a State Government.

It cannot be denied that on the assembling of the Legislature the State government as such was in operation. All the departments of State government under the constitution were brought into existence simultaneously, for every part of that instrument was operative.

It not only fixed each State office, but designated how they should be filled. And, except in the case of the judges and clerk of the Supreme Court, when the incumbents should commence to act. By the const. art. 5, sec. 7, it is provided that the term of each of the executive officers shall commence "upon taking the oath of office after the State shall be admitted into the Union," and continue until the first Monday in January, 1860, except the Auditor, who shall continue in office until the first Monday in January, 1861.

This section, with the qualifying provisions of the constitution, I think must be held merely to prescribe the time when the executive officers should commence to act.

By sec. 3 of the same article it is provided that "the official term of the Governor and Lieutenant Governor shall be *two years*," and by sec. 5 the official term of the Secretary of State, Treasurer and Attorney General shall be *two years.* The official term of the Auditor shall be *three years.*

Or, in other words, the "official terms" of all the executive officers, except the Auditor, shall be two years prior to the first Monday of January, 1860, and his three years prior to the first Monday in January, 1861. This, of course, fixes the time of the commencement of the "term" of each of these officers on the first Monday of January, 1858.

The salaries of these officers are prescribed by the constitution at a given sum per annum, and the provisions last cited, if they have any effect whatever, must be to fix the time at which such salaries should commence.

Unless the Legislature shall otherwise provide, no pay can be had for any time after the adoption of the constitution and before the first Monday of January, 1858.

The next question is, as to when these salaries are to be paid. There is no provision in the constitution for any salary to be paid to any Territorial or United States officer, and only to State officers as such. The Territorial incumbents were provided for by the laws of the United States and of the Territory. To this there was no objection in the constitution, and these laws are, by that instrument, continued in force. See Schedule, sec. 2d.

They were never State officers, but by courtesy permitted "to hold and exercise

their offices until they should be superseded by the authority of the State." It is *not until other* State officers shall supersede them, but until State officers shall supersede those who hold "under the authority of the United States or of the Territory of Minnesota." See Schedule, sec. 5.

They were not State officers in any sense, but did the duties of such, by sufferance of the constitution merely. This permission went no further than such adoption of acts, and leaves the State incumbents as though the same had never been given or duty performed.

They acquire no rights under the constitution, which they did not have before, and of course, are not entitled to pay beyond what they could heretofore receive. I can not escape the conclusion, therefore, that the salaries of the State executive officers should commence on the first Monday in January, 1858.

As to the Judges and Clerk of the Supreme Court, the Legislature will have to determine that question.

July 2d, 1858. C. H. BERRY, Atty. Gen.

To the President of the Senate:

SIR: In reply to the resolution of your honorable body, of the 10th inst., calling for my opinion as to whether the members are entitled to *per diem* during the vacation of this Legislature, I would say, the constitution appears to be specific on this point. In Art. 4, Sec. 7, it is provided that the compensation of Senators and Representatives shall be three dollars *per diem* during the first session, but may afterwards be prescribed by law; but no increase of compensation shall be prescribed which shall take effect during the period for which the existing House of Representatives may have been elected. No pre-existing law can affect this question, because, if it varies in its provisions from the constitution, it is inconsistent with, and not adopted by that instrument. (See Schedule, Sec. 2.)

This compensation is three dollars *per diem* during the first session. Was the Legislature legally or constructively in session from the 29th day of March last, to the 2d day of June, within the meaning of the constitution?

It is conceded that neither House was in actual session during that time, a period of about two months. Is there, then, any legal presumption that a session of the Legislature must be continuous or unbroken? I do not see any such presumption; in fact, numerous precedents clearly show the reverse. Indeed, taking the concurrent judgment of both Houses of this Legislature, and this interval was excluded from the constructive time which every Legislative body must be to some extent allowed. In the daily journals the days are numbered consecutively from 1 to 149.

The commencement of the session was early in December, 1857, and if the time in question is to be counted as a part of the session, there is evidently a large error in the records of the Legislature. But, beyond the reason of the case, or precedent, the constitution of the State seems to fully set the question at rest. It is provided in the section above quoted, that "No increase of compensation shall be prescribed which shall take effect during the period for which the members of the existing House of Representatives may have been elected." To allow compensation during the recess, would be a violation of this provision. If the Legislature can adjourn for two months, go home, and still receive pay for the time, such adjournment may be for eight months, or any other number of months. In this way the constructive services would amount to more than double the amount of actual services, and more than double what the constitution would allow. Any extraordinary adjournment would be an increase of compensation, and the amount of the increase would depend upon the length of the vacation. I must, therefore, very respectfully state, that in my opinion, Senators and members of the Legislature are not entitled to *per diem* during the vacation from the 29th of March to the 2d of June, 1858.

August 11th, 1858. C. H. BERRY, Atty. Gen.

Hon. I. B. Atkinson, Chairman Committee, &c.:

DEAR SIR: I regret the absence of the House resolution of to-day, but from your statement I understand the inquiry to be, whether the certificates to be issued pursuant to a resolution of the House of the 9th inst., granting to each member 75 dollars for pay during vacation, can be paid out of the appropriation of forty thousand dollars made February 11, 1858.

This question I answer in the negative. I herewith enclose a copy of a communication, this day addressed to the Senate, in reply to the inquiry whether Senators are entitled to *per diem* during the vacation. Had the inquiry included mileage as well as *per diem*, or a substitute for either, the answer would have been the same; there is no power under the Constitution to do either, and hence the certificate under the resolution of Mr. M. Thompson cannot be paid out of any appropriation within the power of this Legislature to make. It is a provision for extra compensation which the Constitution (Art. 4, Sec. 7) expressly forbids.

August 11th, 1858. C. H. BERRY, Atty. Gen.

H. W. Pratt, Esq.:

DEAR SIR: Yours of the eleventh is received. To your question as to who is the rightful incumbent of the office of Judge of Probate of Dodge County I answer: The office of the Judge of Probate was adopted by the Constitution, and its term of continuance specifically designated. I do not see that further legislation was necessary to enable the incumbent of this office to act if elected at the first State election. The laws of the Territory, when not repugnant to that instrument, were adopted. In the case of Justices of the Peace and some other officers further legislation was necessary before the provisions of Section 16 of the schedule could apply to them.

That last-named section seems to be imperative where it can possibly be followed out. In Mr. Pierce's case I see no reason why it cannot be followed. I am, therefore, of opinion that he is properly the Judge of Probate for Dodge county.

August 16th, 1858. C. H. BERRY, Atty. Gen.

R. S. Reinbull, Esq., Register of Deeds, Mower Co.:

SIR: To your communication of July 30th I answer that if your Treasurer has not qualified under the act of the 20th March, 1858, providing for township organization, he has no right to interfere with the collection of taxes, or to interfere in any other manner more than he would be entitled to had such act not been passed. By that act none of your duties devolved upon him except he qualifies. Under the new township organization act the Governor will see that an organization of each county shall be effected.

This will result in the proper qualification of the Treasurer. It will then be his duty to sell these lands; until then I think it is yours. The Sheriff is not entitled to fees for each piece of land returned by him. Whether the lands be sold or not, a dollar for return or advertising of the whole is the utmost he can claim. This, of course, does not include percentage and fees for other items of service. The claim he sets up to retain money belonging to the county is unlawful not only for the reason above stated, but a set off for services will not be allowed in such case. The rights of the public are that a collector shall promptly pay over all moneys in his hands, and if he refuses to do so, there is a summary and stringent remedy. If this money is not paid over it is the duty of your District Attorney to institute prosecution both against the Sheriff and his bail. No set offs of any kind should be allowed. Of course, any claim he may have against the county will be *audited* and *paid* by the county and not by the Sheriff, out of any moneys belonging *to the county* in his hands.

August 17th, 1858. C. H. BERRY, Atty. Gen.

Hon. W. F. Dunbar, State Auditor:

SIR: To your question as to "Whether under the amendment to the act to authorize and regulate the business of banking, approved August 14th, 1858, you are authorized to receive the stocks of the State of Minnesota at par?" I answer, you are not authorized to receive such stocks as a basis for banking at anything beyond their "current value," be that more or less. The stocks of this State and of the United States will be received at their current value, whereas, the stocks of any other State, to be received as a banking basis, must "not have been sold at less than their par value at the Stock Exchange in the city of New York, within the next six months preceding the time when such stocks may be deposited" with you.

ST. PAUL, August 21st, 1858. C. H. BERRY, Atty. Gen.

Hon. W. F. Dunbar, State Auditor:

SIR: In reply to your inquiry as to "what items are chargeable to the fund provided by Sec. 1, Sub-Div. 20, of the act making appropriations for the support of government, approved August 12, 1858," I answer, any sum due *to* any of the late *Territorial* or *State* officers, either on account of "*salaries*" or for "contingent or necessary expenditures or expenses of any such office or officer, chargeable to the State." You will observe that any sum to be paid out of this fund, must be due and owing from the State to a late Territorial or State officer, for one or more of the following causes:

1. For salaries.
2. For contingent and necessary expenses of such officer; or
3. For contingent and necessary expenses of his office, which such officer has paid.

He must have paid or assumed such demand, before such demand can be chargeable by him to the State. And in no case can any demand be paid out of this fund, which is not a demand in favor of such officer.

ST. PAUL, August 25th, 1858. C. H. BERRY, Atty. Gen.

John A. Remine, Esq.:

SIR: Yours of the 28th ult. is received, in which you ask answer to substantially the following questions:

1. Is the sheriff entitled to one dollar for each delinquent on his return of unpaid taxes; or is he only entitled to one dollar for the return?
2. Is he entitled to travel fees from his office to the office of the Register only? or
3. Is he entitled to fees for travel one way, or for the whole distance travelled in looking after the delinquent tax.

To the first inquiry I answer, he is *not entitled* to one dollar for each delinquent. By Sec. 40, page 102 of the Revised Statutes, the form of the return is prescribed and required to be "tabular;" to make the thing certain that this "return" must not be for single names or cases, the names of no less than four delinquents are given in the statutory form. It is perfectly clear that only one return is contemplated for all the delinquents within the bailiwick of the collector. That point established, and the conclusion which I have arrived at, follows of course. By Sec. 144, "The sheriff shall make an affidavit to be annexed to such *statement* (not statements) that the sums returned have not been paid;" which *statement* and affidavit shall be filed with the Register of Deeds, and the sheriff shall thereupon be credited with the amount of taxes so returned as unpaid, and *shall be entitled to receive one dollar for making such return.* There is to be but one return, and for that he is to receive but one dollar.

To the second and third inquiries I answer: He is not restricted in his demand for travel fees to the distance between his office and the office of the Register or the Treasurer. Such a construction would not only be unjust to the collector but against public policy. The compensation here provided for is for services actually performed

for the public; a failure to pay fairly for such services would induce laxity in public officers, and which especially in the office of tax collector would be followed by serious results. The collector should receive travel fees for all distances actually and necessarily travelled in the performance of his duty. Under the Revised Statutes the County Treasurer is the proper auditing officer, and in determining the amount in each case he must be governed by the facts. I will here add that the same rule which will give a liberal pay for travel fees in this case would refuse pay for returns for unpaid taxes, for as in one case the pay is for diligency, in the other it is a bounty for neglect.

ST. PAUL, September 2, 1858. C. H. BERRY, Atty. Gen.

To His Excellency, H. H. Sibley, Governor of Minnesota:

SIR: To your note of 6th inst. making inquiry in the case of Wm. Sprigg Hall, I answer: Mr. Hall was appointed superintendent of common schools under the Territorial government previous to the adoption of the Constitution of the State of Minnesota.

While an incumbent of that office, and on the 13th of October last, he was elected to the Senate of the State from the 2nd Senatorial District, on the 3d day of December, 1857, qualified under that election, entered upon the duties of his office, and continued to act through the first session of the Legislature.

It being the right of the Legislature under the constitution to establish a general and uniform system of public schools, the duties of that office are not inappropriate, or the provisions of the law under which Mr. Hall was appointed "repugnant" to it. I think that law was continued in force and the services of Mr. Hall would have been retained under the State government. The question is, then, did the acceptance of the office of State Senator, work a forfeiture of the office of Superintendent of Common Schools?

By art. 4, sec. 9, of the constitution, "No Senator or Representative shall, during the time for which he is elected, hold any office under the authority of the United States, or of the State of Minnesota, except that of Postmaster."

On the adoption of the constitution by the people, Minnesota was a sovereign State. If the office of Superintendent is to be regarded in any sense a State office, it is clearly incompatible with the office of State Senator, and the acceptance of the latter makes the former void. In 2d Hill, 93, it is held that "the appointment of a person to an office incompatible with the first is not absolutely void; but on his subsequently accepting the office and qualifying, the first office is *ipso facto* void. This is well established law. But was this office held by Mr. Hall, an "office under the authority of the United States or of the State of Minnesota?" I think it was not. The constitution does not adopt the Federal or Territorial officers as State officers. They do not receive their official character by virtue of any power created or allowed by that instrument, but as Federal or Territorial officers, "until they are superseded by the authority of the State." Thereby raising a plain line of demarkation between the two classes, and, most emphatically, declaring that those who were to be "superseded by the authority of the State" did not themselves hold "under the authority of the State of Minnesota." For this reason I do not think Mr. Hall is within the prohibition of the constitution above referred to, but his services being adopted by that instrument his compensation must, of course, follow. If I am right in this, Mr. Hall is one of those provided for in the act for the support of government approved August 12, 1858, in sec. 1, sub. div. 20. The item of office rent, in my opinion, is not allowable.

ST. PAUL, Sept. 7th, 1858. C. H. BERRY, Atty. Gen.

T. C. Jewitt, Esq., Sheriff of Meeker County:

SIR: Your communication asking my opinion as to your right to hold over under the election of 1857, is received. Your case would have been free from embarrassment had the Territorial organization continued to the present time. There are questions of public policy which will have more or less weight with our courts in the settlement of questions of this character, the result of which it is not easy to foresee. However, after carefully considering the facts submitted by you, I have come to the following conclusion: Under the Territorial laws the regular term of the Sheriff of Meeker county would have expired on the last of December, 1858, and any incumbent, whether appointed or elected during that time, must of necessity, be for a portion of the unexpired term. If appointed, the appointee would hold until the next election; if elected, he would hold for the remainder of the term, and in both cases until a successor should be duly elected and qualified. In such case, after your appointment as sheriff, your successor would have to be chosen at the next general election. But another order of things has been introduced, and the matter as presented is susceptible of another view. A vacancy occurred in the regular term in the year of 1857, and you are appointed to fill it. Your appointment would expire on the qualification of a successor, to be elected on the 15th of October, 1857. Under the Territory this qualification would be immediately on receipt of his certificate of election. How was this under the State?

The laws of the Territory, whenever consistent with the constitution of the State, were adopted by that instrument. County officers were provided for by the Territorial law, and on the adoption of these laws, such offices were thereby created under the state. The office of sheriff became an office under authority of the State. The manner of electing, the time at which he should enter upon the duties of his office, and the length of his term, were all fixed. It is further provided, (schedule to the constitution, sec. 5,) "That all Territorial officers, *civil and military, now holding their offices* under the authority of the United States or the Territory of Minnesota, shall continue to hold and exercise their respective offices until they shall be superseded by the authority of the State." The appointee was the acting Territorial sheriff, under this provision at the adoption of the constitution, and by a law paramount to the enactments of the Legislature, he was continued in office until the authority of the State should supersede him. This section of the constitution does not apply to any one not in office on the 13th of October, 1857, and hence you as sheriff by appointment, continued to hold until the State sheriff should supplant you, had section 5, of the schedule to the constitution been left out. This of course, adopting the laws relating to county organizations, would have required sheriffs to be elected under the State Government, and in every organized county. These first elections would have been in every instance for the full term of two years. I am, therefore, of the opinion that your office does not terminate until the last day of December, 1859.

ST. PAUL, September 8th, 1858. C. H. BERRY, Atty. Gen.

Hon. G. W. Armstrong, State Treasurer:

SIR: In answer to your communication asking for my construction of Sec. 46, of the act to provide for government of the State Prison, approved Aug. 12th, 1858, I have respectfully to state, Art. 9, Section 9, of the Constitution of Minnesota provides that all moneys paid by the State must be paid "in pursuance of an appropriation by law." The question you raise is, whether Section 46 of the act providing for the government of the State Prison is in any instance to be regarded as "an appropriation." In other words does that section merely define *what* charges shall be paid by the State, or does it undertake to provide the manner of payment? Which is the leading idea? There is a broad distinction between specifying *what* shall be a charge against the State, and an authority to pay that charge. Many an item is conceded to be justly due and owing by the State which there is no legal authority to pay. In all such cases of course further legislation is necessary in order

to enable the Auditor to "draw his warrant." By the law prescribing the duties of State Auditor it is made obligatory upon that officer to issue "bills or warrants payable at the State Treasury, for such sums, *and only such*," as shall be by law, directed to be paid out of the "Treasury of the State." (See Sec. 4 of last named act.) There is even in that Section a distinction between "accounts and claims against the State" and such as "are by law directed to be paid." I do not find that he has in any instance a right to draw his warrant for immediate payment, except when that warrant is authorized to be paid, or certified by you; an authority to issue such warrant is equivalent to an authority for you to pay it, if you have funds; and if not, to countersign the same. In this case the Auditor is more than authorized to issue his warrant; on the order of the inspectors of the prison, he is commanded to do so. The language is "The Auditor is hereby authorized and required to draw his warrant on the Treasury, for such sums as the inspectors may from time to time direct, to defray the expenses in and about the State Prison." There is but one contingency, only one condition precedent to the issue of the Auditor's warrant, and that is, the direction of the inspectors. In the present instance they did give such direction and the auditor had no discretion.

It was to all intent a demand authorized to be paid out of the Treasury of the State. Money paid by you on such a warrant I think is clearly paid "in pursuance of an appropriation by law." What could the legislature mean by authorizing the issue of a warrant unless it was designed to be paid? If it was the intent that such warrants should not be paid, their issue is a swindle on the recipients. They release their claim on the reception of paper dishonored in advance, and which will command at best, but a nominal price. There are considerations of public policy, in view of which their warrants should be promptly paid. It is not however necessary to enter into the matter in detail, further than to say that an opposite conclusion to the one I have arrived at, would in my view, render the State Prison useless, and a burden upon the state.

The warrants should be paid, if you have funds for that purpose; if not, it is your duty to endorse the same to be paid when you shall have funds, according to the provisions of Sec. 8 of the act of August 12th, prescribing the duties of your office.

ST. PAUL, September 20th, 1858. C. H. BERRY, Atty. Gen.

T. H. Skinner, Esq., Clerk of the Board of Supervisors of Meeker County:

SIR: Yours of the 16th inst., making inquiries as to the right of the Territorial District Attorney of your county to receive pay for services as such attorney since the admission of the State by Congress, has been received. The case you present is by no means peculiar to your county, but the difficulties suggested by you exist in many other counties of this State, and also with reference to other officers besides District Attorneys. Such being the case, I have endeavored to arrive at a just conclusion, with a view of settling, as far as this office can do so, questions of a similar nature. State governments must have a beginning. It is conceded that the State of Minnesota is now fully organized, and it has become important to determine the precise time when such organization was perfected so as to be operative.

Prior to the calling of the Constitutional Convention of 1857, an act was passed by Congress providing "That the inhabitants of that portion of the Territory of Minnesota which is embraced within the following limits, viz.: (describing such limits) be and they are thereby authorized to form for themselves a constitution and State government by the name of the State of Minnesota, *and to come into the Union* on an equal footing with the original States." Such act then provides for a convention to meet in July, 1857, "and first to determine by vote whether it was the wish of the people of the proposed State to be admitted at that time." If the decision on this point should be affirmative a constitution and State government were to be formed "subject to the ratification of the *people of the proposed State.*" In pursuance of this act of Congress, on the 23d day of May, 1857, the Territorial Legislature provided by act for a Constitutional Convention. Members were elected

in pursuance of such act, and assembled at the time and place designated by Congress. Their first act after their organization was the passage of the resolution as follows:

"*Resolved*, That it is the wish of the people embraced within the limits prescribed by the first section of the (Enabling) Act, to be admitted into the Union as a State at this time, and that the conditions named in said act, between the people of said State and the United States, be fully accepted and ratified." In the fifth section of the Enabling Act Congress recognized the convention as having authority to speak for the people of the State of Minnesota, as follows:

"And be it further enacted, That the following propositions be, and the same are hereby offered to the said convention of the people of Minnesota for their acceptance or rejection; which if accepted by the convention shall be obligatory on the United States, and upon the said state of Minnesota, to wit:" (here follows the proposition.) This is an emphatic acknowledgment of a separate and distinct sovereignty in the State of Minnesota; a declaration that such convention was the lawful exponent of the will of the people of the State; expressly authorizing the same to assume a separate and independent existence on the second Monday of July, 1857. Of course nothing more than an expression of a wish could be accomplished on that day—the carrying it out could only depend on the future action of the convention. But it is significant as an expression of the views of Congress. There were only two conditions to the action of this convention: one was, that the constitution formed should "be in accordance with the federal constitution;" and the other, that it must be subject to approval and ratification by the people of the proposed State. The latter was done on the 13th day of October last, and the former no one could be likely to question. On the day the constitution of the State of Minnesota was ratified, the provisional obligations between the two powers were made forever binding and absolute. But that was not all. Minnesota was not only a distinct sovereignty, but she was "authorized to come into the Union with an equal footing with the original States according to the Federal constitution." Not merely to apply to come in, and wait the pleasure of Congress for such admission, but to "come in" without preliminaries or conditions. It was a part of the compact from which, after the State agreed to it through her constitutional convention, neither party had a right to recede. It may be said we are not properly within the Union until our Senators and Representatives are admitted to their seats in Congress; but I think not with any force. When we had done our part, although our Senators and Representatives might be rejected, still they were representatives of a sovereign State; and however she might feel the indignity, she could not be affected by it. She was not under tutelage, but independent, and within the laws framed for her reception. If I am right in this, all Territorial offices terminated on the ratification of the State constitution, except such as were expressly continued by that instrument. The constitution was itself, alone, the source of the incumbents' authority. Previous elections or appointments had nothing to do with it. These mere designations of persons, and the duties which the constitution and the laws adopted by it, permitted such persons to exercise for the time being, but in no instance constituting such parties State officers.

The constitution says: "All Territorial officers, civil and military, now holding their offices under the authority of the United States or of the Territory of Minnesota, shall continue to hold and exercise their respective offices until they shall be superseded by the authority of the State." The object of this provision is plain. The change from a Territorial to a State government, required the retention of provisional officers until State officers could be elected or appointed; otherwise their duties must have been unperformed. For this reason, and no other, these officers were permitted to act. It follows, then, that wherever, under the State organization, an officer was provided as a State officer, to do the duties of the Territorial incumbent, the qualification of such State officer, at any time after the Territory became a State, was a supersession of such United States or Territorial officer. It would make no difference whether the jurisdiction or general scope of duties of the two officers were co-extensive or not, if the jurisdiction and duties of the State of-

fice included the other. The formal admission of the State, on the 12th day of May last, had nothing whatever to do with the matter. Previous to the State organization, each county was entitled to a District Attorney. By the 15th section of the schedule to the constitution, "Each of the Judicial Districts might at the first election elect one Prosecuting Attorney for the District."

The State was divided into six Judicial Districts, and of course six Prosecuting Attorneys were provided for, each one for the district in which he should be elected; the laws of this Territory being adopted by the State, the duties of the officer were not materially changed. But there was no time prescribed for him to qualify. In the case of the Executive State Officers, the Constitution fixes the time of the commencement of their terms, and the Legislature following, has fixed the commencement of the terms of the Judges at the first Monday in January next after their election.

By the Revised Statutes, page 53, Section 45, it is provided "The regular term of office of all *county, town,* or precinct officers when elected for a full term, shall commence on the first day of January next succeeding their election." Although statutes relating to the office of the District Attorney should, and doubtless do apply to a similar office under the State so far at least as to prescribe the duties and guide in their execution; yet it is not certain that such laws apply in this case so as to fix the time of the commencement of these officers elected at such election. The State Prosecuting Attorney is in no sense a county, town or precinct officer; and there is a manifest impropriety in subjecting officers of a more extended jurisdiction, to the same rules in the details of time and place, as under the Territorial organization, applied to those here contemplated. I do not see any valid reason why the Prosecuting Attorneys could not have taken the oath of office, and entered upon their duties immediately on the adoption of the State Constitution. Their duties being, in the main, the same as the duties of the County District Attorneys, such qualification would put an end to the duties of the last named officer.

You do not specify whether your Prosecuting Attorney has yet qualified. If he has not, the District Attorney will continue to act and receive pay as a Territorial officer until such qualification.

ST. PAUL, September 20th, 1858. C. H. BERRY, Atty. Gen.

Hon. W. F. Dunbar, State Auditor:

SIR: In answer to your letter of the 20th inst., inquiring whether you are authorized to issue warrants on appropriations made by the Legislature, and payable out of the Legislative fund for the year 1859, I have respectfully to say: The action of the Legislature in making the appropriations to the individuals named, was a final liquidation of their demands, leaving you no discretion as to their adjustment. Your position with reference to them is only a ministerial one. You are charged with carrying out the provisions of the law. The law to these parties is the creation of a right, and invests them with such right. It is by no means clear that even the Legislature can abrogate or modify this law so as to affect the rights of the beneficiaries. The rights of the parties being fixed, therefore, and no time prescribed by law for the performance of your duty with reference to this matter, I see no valid reason for delay. I think you are fully authorized in this and similar cases to issue your warrant for the payment of these appropriations.

ST. PAUL, September 21st, 1858. C. H. BERRY, Atty. Gen.

To John B. Downer, Esq., and others, a Committee appointed by the Board of Supervisors for the County of Wabashaw:

GENTLEMEN: In your communication of this date, you do not state what informalities appear in the assessment in and for your county for the year 1857. The

presumption is in favor of a performance of duty by the county officers until the contrary appears. As to the tax rolls in the specific defects the same remark will apply. But I learn from sources other than your communication, that the defect complained of, is that the assessment and assessment roll, were not completed in time, as required by sec. 3, art. 9, of the Revised Statutes. On this point I have to say, the section referred to is directory. If not done in time this work is not void, but the parties entrusted with it are liable to censure, and costs if proceeded against for their delay. A *mandamus* would lie against them to compel them to do their duty, as soon as this time had elapsed, and they would have to pay the costs of it.

But when done, the acts would be valid. The assessors are answerable, no doubt, for the delay, but their acts are binding.

Again you ask, had the commissioners in 1857 a right to apportion the school fund of the county, on "verbal return" of the number of minor children in the school districts?

To this I answer, no. Verbal returns are not contemplated by sections 10 and 11 of page 146 of the Revised Statutes. Such a return to the commissioners, to be valid, must be a list which may be copied. Of course a mere verbal return is not "a list," nor can a copy be taken of it; nothing less than a writing will do; such a statement is not a legal return, and hence no division of money can be made upon it.

You further say, "The sheriff has not paid over the moneys collected nor returned his roll as required by the law extending the time for the collection of taxes," passed at the last session of the legislature.

If he has not complied with such law, he may be proceeded against by writ of *mandamus*, to compel him to do so. If, however, he should now come forward and make proper returns of the money, collected and uncollected, the supervisors are bound to receive such return. The lateness of the time does not authorize the refusal of such roll and return, however improper and unbusinesslike such may be.

As to his liabilities—if his delay be wilful, it is a misdemeanor—if when made his return is not correct he may be prosecuted, either civilly or otherwise, according to the facts. As to whether the receipts of the County Commissioners are valid in the hands of the sheriff, for moneys collected by him, I answer, if executed in good faith, I have no doubt such certificates are good. It was his duty to make settlement with the Commissioners for taxes and money collected by him, (see sec. 11, page 68, of the Revised Statutes;) and when such settlement is made, of course the evidence in the hands of such sheriff, is good.

Whatever the Commissioners did with the money is of no consequence to the sheriff. If they did not pay it into the treasury, they are still liable, and it may be collected of them by the county. It would be well, in view of the facts as presented, to submit the results of your investigations of County Officers to the Prosecuting Attorney of the District. If there are delinquencies it is proper they should be brought to light, and I therefore recommend such a course on the part of your County Board.

WABASHAW, October 13th, 1858. C. H. BERRY, Atty. Gen.

Lyman C. Dayton, Esq.:

SIR: As to whether the Board of Supervisors of a county has power to remit or modify a tax previous to its payment, I answer, a county "is a body corporate," and as such may make such rules and regulations as it deems proper, with reference to its own property. Sec. 1, art. 14, sub. div. 4 of the act for township organization.

When a tax has been assessed by the county against an individual, that tax becomes a debt due and owing to the county, and which the county has a right to enforce. It is the corporate property of the county, as much as a court house or jail. By sec. 4, art. 15 of same act, sub. div. 1, the Board of Supervisors of the county have power, at their annual or any other meeting, "to make all such orders concerning the corporate property of the county, as they may deem expedient." Hence the Board of Supervisors may modify or wholly remit any tax, and for any cause

deemed satisfactory to them. An improper assessment may arise in many ways, such as assessing property to a wrong person, over valuation and in other ways. Any of which, if the Board think proper, may be made the basis of action, and such tax may be modified or wholly remitted as above stated. The restriction in the last clause of sec. 24, Rev. Stats. page 100, only apply in the valuation of the property of the town and not in a case like this.

ST. PAUL, October 23d, 1858. C. H. BERRY, Atty. Gen.

Miles Hollister, Esq.:

SIR: Yours of the 25th is received. You make several points in your communication, all of which, perhaps, it is not necessary to answer. It will be sufficient to say,

1st. The office of Clerk of the District Court, is a county office. See constitution, article 6, section 18.

2d. A "General Election," is an election held in pursuance of section 3, page 45, Revised Statutes, affirmed by section 7 of schedule to the constitution. The election on the second Tuesday of October, 1857, and also on the same day of the present month, were general elections.

3d. The appointing power of the Judge, in case the office of Clerk is vacant, is unquestionable, either at common law, or under our Revised Statutes. Section 1, of page 83, is not so far repugnant to the constitution as to deny to the Judge the appointing power, in case of a vacancy. But the constitution so far changes that provision as to make the office elective, "like other county offices." The rule governing appointments of this character, and which seems clearly to include this case, is comprised in sections 45 and 46, page 53 of the Revised Statutes. If appointed to fill a vacancy, the appointee will hold until the next election after the appointment; if *elected*, he will hold for the *remainder* of the *term*, and in both cases until a successor shall be duly elected and qualified. If you were elected at the last general election, on qualifying you will supersede the appointee of the Judge.

ST. PAUL, October 28th, 1858. C. H. BERRY, Atty. Gen.

W. G. Le Duc, Esq.:

SIR: In answer to the inquiry as to what is meant by the words "survey and open out a road" in Sec. 1 of the act of the last legislature, published as law No. 3, I have to say: That in making a road under our law, the steps are first, to perform the act or acts which entitle such road to be laid out—second, to lay it out, and third, to open it for travel. It is as much opening a road to remove rocks and stumps as it is to remove trees or brush or anything else; and if to remove rocks and stumps is opening a road, the same thing is true of earth or any obstruction that hinders travel. Any more work on the road with a view to make it passable, such as digging and making culverts or bridges is "opening it up." Whatever the result of such construction may be, the same should be followed out.

ST. PAUL, November 9th, 1858. C. H. BERRY, Atty. Gen.

To His Excellency, H. H. Sibley:

SIR: Your inquiry as to whether the land grant railroad companies of the State can be permitted to issue, and secure by mortgage on their property, a larger amount of "first mortgage bonds" than the amount to be delivered to the state, in return for the Minnesota State railroad bonds to be received by such companies from the State, has been for some time before me. The answer is not without difficulties, and I shall state at some length the reasons for my conclusion:

When the constitution of the State of Minnesota was adopted by the Constitutional Convention a prohibition was inserted against loaning the State credit or incurring a public debt for more than two hundred and fifty thousand dollars at any one time. To this provision there was one exception arising from the necessities

of government. Invasion or civil war would justify the Legislature in increasing the public debt, but nothing short of such an emergency. This provision was dictated by a wholesome fear of public indebtedness. The constitution, with such provision, was brought before the people on the 13th of August, 1857, and ratified with very singular unanimity. At the time of the ratification of the State constitution a season of financial embarrassment prevailed which had seldom been witnessed. Legitimate business was brought almost to a standstill, and all the channels of trade were apparently dried up. The scarcity of money not only affected private interests, but effectually prostrated credit, so that public works were brought to share in the general cessation of business. Our railroad companies, notwithstanding the liberal grant of lands, by which they had been endowed, were unable to realize a dollar with which to prosecute their works. Public expectation had been fixed upon these roads without knowing precisely how or why; the people looked to them or to the grant to aid in their construction as a means of extricating themselves from the difficulties in which they were placed. A need of a home currency was strongly felt, and the proposition was made to make the acknowledged credit of the State available. First: To assist the railroad companies to realize funds sufficient to enable them to put their roads in process of construction, which, of course, would furnish immediate relief to the inhabitants among whom this money was to be expended; and, second, to serve as a basis for *banking* upon which the people could rely as permanent and safe. The benefits were to be reciprocal between the companies and the State. They were to be furnished with the means of prosecuting their enterprises, and the State, in addition to her own credit for her bonds, was to have additional security from the land grant railroads. Such was the condition of things when the act was passed known as the $5,000,000 loan bill. Like the constitution in October preceding, this amendment also passed by a large majority. This amendment was a proposition to increase the public debt beyond the maximum as at first established twenty fold. A change so sudden may only be accounted for as a scheme to use the public credit for the public benefit, in a manner calculated to discharge the liabilities contracted, without resort to the ordinary means of taxation. There was evidently no change in the financial condition since the constitution was adopted, calculated to induce liberality in the people, and, in fact, there was no change in the sentiment of the people, as to the policy of avoiding a public pecuniary burden.

The loan bill itself bears evidence of the caution manifested, and a fear that the credit of the State would be sought for, and pledged for other object, than those particularly in view, and which was supposed to be self-sustaining. Section 10 of the constitution was by the amendment made to read: "The credit of this State shall never be given or loaned in favor of any individual, association or corporation, except that for the purpose of expediting the construction of the lines of railroad, in aid of which the Congress of the United States has granted lands to the Territory of Minnesota, the Governor shall cause to be issued to each of the companies in which said grants are vested by the Legislative Assembly of the State of Minnesota the special bonds of the State, bearing an interest of seven per cent. per annum," &c. Nothing within the State, or that was ever thought likely to require aid, was thought worthy of it, except those railroad "companies in which said grants are vested by the Legislative Assembly of Minnesota," and this was not merely caprice. This special favor of these companies, was, in view of their supposed ability to meet their obligations, to be incurred on the reception of this aid. It was strictly a legitimate transaction. The instrument proceeds: "Whenever either of said companies shall produce to the Governor, satisfactory evidence, verified by the affidavit of the chief engineer, treasurer, and two directors of said company, that any ten miles of said road has been actually constructed and completed, ready for putting the superstructure thereon, the Governor shall cause to be issued and delivered to such company, bonds to the amount of one hundred thousand dollars.

"Within thirty days, after the Governor shall proclaim that the people have voted for a loan of State credit to railroads, any of said companies, proposing to avail themselves of the loan herein provided for, and to accept the conditions of the same,

shall notify the Governor thereof, and shall, within sixty days, commence the construction of their roads, and shall, within two years thereafter, construct ready for the superstructure, at least fifty miles of their road. Each company shall make provision for the punctual payment and redemption of all bonds issued and delivered as aforesaid, to said company, and for the punctual payment of the interest which shall accrue thereon in such manner as to exonerate the treasury of this State from any advances of money for that purpose; and as security therefor the Governor shall demand and receive from each of said companies before any of said bonds are issued, an instrument pledging the net profits of its road, for the payment of said interest, and a conveyance to the State of the first two hundred and forty sections of land free from prior incumbrances; and as a further security an amount of first mortgage bonds, on the roads, lands and franchises of the respective companies, corresponding to the State bonds issued, shall be transferred to the treasury of the State at the time of the issue of State bonds, and in case either of said companies shall make default in the payment of either the interest or principal of the bonds issued to said companies by the Governor, the Governor shall proceed in the manner described by law, to sell the bonds of the defaulting company or the lands held in trust as above, or may require a foreclosure of the mortgage executed to secure the same."

Not only were the parties who were to receive this loan to be responsible, but the language in other respects is still more positive. "Each company shall make provision for the punctual payment and redemption of all bonds issued and delivered as aforesaid to said company, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of this State from any advance of money for that purpose." All the securities to be received by the State, in return, were expressly designed to compass this end. In the commencement it is called a loan of State credit.

Every provision from first to last looks to a compensation, an indemnity to the State, for any liability on her part, and the ultimate payment, out of the means received from the roads, without resort to taxation. Nothing looks like a benevolence, further than a consent to endorse the company's paper on securities received. It cannot be said, therefore, that any material change in the policy of the State government had taken place, since the adoption of the constitution. But notwithstanding the extreme care to be explicit in this amendment, a question has arisen upon the construction of language used in the grant.

"And, as further security, an amount of *first mortgage bonds*, on the roads, lands and franchises of the respective companies, corresponding to the State bonds issued, shall be transferred to the treasury of the State at the time of the issue 'of State bonds.'"

Of all the provisions for security, as we shall see, this one is, or may be, of far the greatest consequence. It is the question whether the State may have ample security upon the works built with her money, or not. Shall the bonds given by the companies on their "roads, lands and franchises" be a lien which shall take precedence of all other liens? The railroad companies claim the right to issue bonds in any amount, and to whom they please, only making the state a party, with no greater interest than an individual bondholder, who shall possess the same amount of bonds. In construing this provision so as to make the rights of the State superior to any other, the Governor must, I think, adopt the construction more consistent with the known view of the people, as expressed by the constitutional convention, at the adoption of the constitution, and by the tenor of the amendment as stated above. It is a question between the public on the one hand, and individuals on the other. The companies, although acting under an authority derived from the State, do not act in its behalf, or as its agent or representative, nor with reference to the benefit of the public, as is the case when roads, or other public improvements, are made under the immediate direction of the State or its agents, and for the general accommodation and benefit of the people, but under a special grant of power, deemed to be acquired from the State, for valuable consideration, and for the promotion of their own direct and private advantage. Besides that they have assumed this individual character, by putting themselves in a position antagonistic to the State.

In examining this case, it is important to observe that the rules of construction which apply to general legislation, in regard to those subjects in which the public at large are interested, are essentially different from those which apply to private grants, to individuals, of powers and privileges designed to be exercised with special reference to their own advantage; although involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially for the purposes for which they were enacted; the latter liberally in favor of the public, and strictly as against the grantees. (2 A. R. R. Cas., 1855. 21 Conn. Rep. 294.) This case is one of the latter. The privileges claimed by the companies are special and exclusive in their character, and in derogation of common right, in the sense, that they include advantages to which the members of the community at large are not entitled. The rules governing in case of statutory construction, will apply here. Although a constitutional provision, it is regarded by the companies as a compact between the public and themselves, sustaining to them in all respects the relations of a grant, by statute, in the ordinary form.

But there is also another light in which this question must be viewed. It is to be judged of not only by the rules prescribed for expounding the language of legislators, but it is more clearly connected with the people in their primary capacity. It is not the understanding of professional men, men familiar with the technicalities of trade, but the masses, the understanding of the people at large, these must be consulted. The particular relation in which this instrument stands to the people, as deriving its force directly from them, seems to demand consideration of the time, the place, and all the material circumstances surrounding this act of the people, or in view of which it was performed. (2 Massachusetts Reports, 88; 1 Peters, 371; 4 Cowen, 410; 2 Kent, 39, 49; 4 Cowen, 517; 6 Peters, 740; 6 Massachusetts, 334–5; 5 Sergeant & Rawle, 110; 1 Taunton, 495, 500, 502; 7 Massachusetts, 6; 1 Bosanquet & Puller, 375; 2 John R., 321, 2; 6 id., 10; 11 id., 498, and 4 Yates, 153.) Hence, although the companies must be held to the strictest rules of statutory construction, one must go beyond such rules, and judge of it not as a question of verbal construction.

No merely technical sense in which terms may some times be employed, can have any controlling force here. It is true that the words employed have a meaning peculiar to financial circles, and applicable to this species of property. In a financial transaction involving the transfer of railroad securities, among men whose business it is, such a rule would apply. So in a statute, conferring privileges which one individual may enjoy, at the expense of another. But the rights of the people are paramount to such a consideration. (6 How. S. C. 507.)

Not only should the subject matter of the alleged grant be considered, but the habits and character of the parties negotiating. The end and aim of all construction, is to get at the real intent and meaning of the parties to be bound by the language; to balance the scales of justice not only according to the letter, but according to the true intent and meaning of the parties to be bound by the language.

Should a Legislature propose a constitutional amendment written in such characters, and the people should ratify it without interpretation, such an amendment could hardly be considered binding. At all events, the essence of all law the objects for which governments are instituted, the protection of the rights of the people, would demand for such a constitutional provision the most unsparing and severe scrutiny. So in this case, the understanding of the people in the ratification must be got at from all the circumstances, prominent among which, are the general character and business habits of the people who adopted this amendment. They are not a people of bankers, stockholders or brokers. They know but little and care less of the "talk on 'change" or the phraseology peculiar to that locality. However understandable it may be to those familiar with it, such language has no distinct meaning to the pioneers of Minnesota. The securities they are accustomed to are usually notes or bonds secured by mortgage on real estate. It will be readily perceived that had the words been concerning a "first mortgage upon real estate" of a given amount instead of "an amount of first mortgage bonds" upon "roads, lands and franchises," nominally of the same value, there would be no diffi-

culty of construction. All will concede that a first mortgage upon real estate, gives to the mortgagee an exclusive priority of claim. If a bond secured by a first mortgage upon real estate of one million dollars give to the obligee a priority of lien over all other claims, it is not difficult to see that any number of bonds of the same amount in the aggregate, should follow the same rule. And it is only by doing violence to the common acceptation of the terms used, by making them purely technical, that any pretence can be raised against the exclusive claim of the state. To give the words technical construction would be to lose sight of the fact that the people of Minnesota are a people of farmers and mechanics, and not of stock brokers or dealers in railroad securities. The rule of construction is not therefore a mere definition of terms, but a strict regard for the will and understanding of the people, (*vide* Sergeant and Rawle, 126.) If there was no other light by which the ambiguous words could be construed, it would be incumbent on the governor, as the conservator and protector of the public weal, to so construe these words, as to save the people from loss, and vindicate their wisdom in adopting the amendment to the constitution.

Whether the interest of the State would be subserved by adopting one or the other construction, we shall see. At first we are to get at the rules by which the construction is to be made; and then apply those rules with the reasons afterwards. From what has been said it will appear—*First*, That the question is between the public on the one hand, and individuals on the other. *Second*, That the rules of construction are here, as in cases of statutory construction, with the addition that this being a case of constitutional construction, and, as such, referring directly to the understanding of the people, that understanding is to be regarded, and not any technical sense in which the words may be taken. The matter being between the State and the railroad companies as individuals, what would be the duty of the court? In the case of the Richmond, &c., R. R. Co. vs. The Louisa Railroad Co. 13 Howard U. S. Reports, 71, which was a case involving principles analogous to this, the court say: "It is a settled rule of construction adopted by this court that public grants are to be construed strictly. This act contains the grant of certain privileges by the public to a private corporation, and in a matter where the public interest is concerned, and the rule of construction in all such cases is now fully established to be this, that any ambiguity in the terms of the contract must operate against the corporation and in favor of the public, and the corporation can claim nothing which is not clearly given by the act." In another case the same court (11 Peters, 544) hold as follows: "Much has been said in the argument of the principles of construction by which this law is to be expounded, and what understanding on the part of the state may be implied. The court thinks there can be no serious difficulty on that head, as it is the grant of certain franchises to a corporation in a matter *where the public interest is concerned*. The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals. In 2 Barnewall and Adolphus, 793, in the case of the proprietor of the Stourbridge Canal Company vs. Wheeley and others, the court say: 'The canal having been made under an act of parliament the rights of the plaintiff are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute, and the rule of construction is, that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public.'"

In commenting upon that case the judge, Taney, further says: "The case itself was as strong a one as could well be imagined, for giving to the Canal Company the right to the tolls they demanded. Their canal had been used by the defendants to a very considerable extent in transporting large quantities of coal. The rights of all persons to navigate the canal were expressly secured by act of Parliament, so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet as they only used one of the levels of the canal, and did not pass through the locks, and the statute in giving the right to exact toll, had given it for articles, 'which passed through any one or more of the locks,' and had said nothing as to toll for navigating one of the levels, the court

held that the right to demand toll in this case, could not be applied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant, if such a rule of construction could ever be permitted in a law of that description. The canal had been made at the expense of the company; the defendants had availed themselves of the fruits of the company's labors, and used the canal freely and extensively for their own profit; still the right to exact toll could not be implied, because such a privilege was not found in their charter."

On the subject of the necessity for engrafting this principle into the jurisprudence of the United States, the Chief Justice further says: "Borrowing, as we have done, our system of jurisprudence from the English law, and having adopted in every other case its rules for the construction of statutes, is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and by implication, make a charter in one of the States, more unfavorable to the public, than, upon an act of parliament framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases, from the operation of the general principles, and for introducing a new and adverse rule of construction known to the English common law, in every other case without exception? We think not—and it would produce a singular spectacle, if, while the courts of England are restraining within the strictest limits the spirit of monopoly, and exclusive privileges in the nature of monopolies, and confining corporations to the privileges clearly given to them in their charter, the courts of this country should be found enlarging these privileges by implication, and construction of statutes, more unfavorably to the public and to the rights of the community than would be done in a like case in an English court of justice." In the case of the United States vs. Arredondo, 6 Pet. 738, the leading cases upon this subject are collected together by the learned Judge who delivered the opinion of the court, and the principle recognized, that in grants by the public, nothing passes by implication. Again, in Jackson vs. Lamphire, 3 Pet. 289, in speaking of this doctrine of implied covenants by the State, the court uses the following language: "The only contract made by the State is to John Cornelius, his heirs and assigns, of the land in question. The patent contains no covenant to do, or not to do, any further act in relation to the land, and we do not feel ourselves at liberty in this case to create one by implication. On this point the law is too well settled to admit of any reasonable question. Where there is an ambiguity the public must have the benefit of the doubt. But how far may courts go with a view of protecting the rights of the public? It is an ancient maxim of the English law that 'the general words of a King's grant, shall never be so construed, as to deprive him of a greater amount of revenue than he intended to grant, or be deemed to be to his or the prejudice of the commonwealth.'" I Coke's Rep. 112, 13 v. It is another maxim that "Judges will invent reasons, and means, to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the Act." Hobart's Rep. 277.

It is not claimed that courts can supply defects in Statutes; 1 R. R. Co.'s, 139; and in this case it is not necessary to arm them with any such power. It is not necessary for them to "invent reasons and means" to avoid wrong and injury, which might be wrought out of this provision upon the constructions claimed. Their duties are merely negative. They are but to say there is no authority in the Constitution for issuing more first mortgage bonds than are to be received by the State. I have before said the question at issue is whether the State shall have security on the work built with her money. In saying this, I do not mean to prejudice the action of the companies; I do not concede the right of the companies, to ask of the State, what is equivalent to an expenditure of money on her part. The Constitution demands of such companies that they shall make provision for the punctual payment of both principal and interest, of the State bonds, so as to exonerate the Treasury from any liability thereon. It is their duty to do this. If they do, the credit of the State advanced to

them will never injure her, and the roads built by the help of such aid, cannot properly be said to have been built with her money. But security is given as against a possible liability. Should the contingency never happen calling for a resort to security, the fact of its having been given is of no consequence to either party. In a business transaction common prudence demands that the events calling for a resort to such means, should be taken as being certain to occur; and should be provided against accordingly. To ask the railroad companies to make the security to the State ample and sure, is nothing of which they have a right to complain. If this loan of State credit is not intended as a benevolence, which, as I think, we have already seen it is not, then it becomes us to consider carefully the indemnity of the State, before she assumes her liabilities.

Let us consider the items of this proposed contract as they actually stand.

First. The State is expected to issue bonds amounting in the aggregate to five millions of dollars payable twenty-five years from date, with interest semi-annually at seven per cent. per annum. Or, in other words, an agreement to pay $175,000 semi-annually for twenty-five years, and at the expiration of that time the whole sum of five millions of dollars. That is an obligation on the part of a young and yet feeble State, not to be lightly entered into. The liability to pay this debt is woven into the very frame work of our government. By the constitution, the faith and credit of the State are bound for the redemption of these bonds, if the companies fail to do so. And

Second. What guaranty do they give that they will keep their word? The first security is a grant by deed from each of the four companies, recipients of these bonds, of two hundred and forty sections of land each, making in the aggregate 960 sections or 614,400 acres, which, at the maximum government price for lands, situated as this must be, amounts to one million five hundred and thirty-six dollars. I will not speculate upon the liabilities of the general government of the United States, meeting the expectations of the companies under the granting acts of Congress, as expounded by the Territorial Legislature of 1857. I think the engagements of Congress will be carried out, and the full amount of lands to which the companies believe themselves entitled, in proportion to the amount of road built, will be confirmed to them or to their grantees. But, allowing for the costs of sale, the sum to be realized by the State, from this source, cannot reach beyond the amount as above stated. The next item is a pledge of the net profits of the roads, for the payment of the accruing interest. What these net profits may be, will of course depend entirely upon circumstances. Questions of skill in the managers of the road, considerations of economy, and of honesty on the part of the companies, all bear directly on the amount of the net earnings. What other roads have done similarly situated is not of necessity a criterion for these. The sum to be derived from this source may far exceed even the expectations of the companies themselves, and on the other hand, it may fall far short. To say the best, it is an uncertain security, on which the State cannot calculate with assurance. It is evident from this consideration, that the mortgage bonds of the companies are by far the most important item in the State security. It is in its nature, more available than either of the others, said bonds being convertible into money without expense, with certainty, and without loss of time.

These bonds are equal in amount with the bonds of the State; they bear the same interest; and upon the security for their redemption, their value with the other securities is fully equal to the State bonds, to be received by the companies. The State is deeply interested in this question. What would be the relative position of the parties under the ruling claimed by the applicants? The proposition is to issue bonds, of like tenor and effect with those held by the State, to the amount of thirty-four thousand dollars to the mile; provided that twenty thousand dollars of State bonds are received by the companies, in exchange for an equal amount of railroad bonds. Beside the interest of the State there will be an outstanding incumbrance, beyond the security of the state of $14,000 upon every mile of road; which incumbrance will vest in the hands of the companies, or of individuals. It is easy to foresee the result should a foreclosure upon these bonds become necessary. The individual does, and always will have, the advantage of the public creditor.

It therefore appears that should the ruling asked for be adopted, nearly one-half of the security which otherwise would be available to the State, passes at once into other, and for her interests, most dangerous hands. It is true Minnesota is a sovereign State, and has within herself the elements of wealth and greatness. But these to a large extent are dormant. To be available, they must be developed and brought out. In doing this we are dependent upon our sister States in many ways, and in none more than in the estimate in which they hold our financial system. It is proposed to use these State bonds, as the basis of a circulating medium. I have already said it was one object had in view, in adopting the amendment to the constitution. Our Legislature has passed a general banking law, some provisions of which clearly invite the use of these bonds for banking purposes. Not only are the people at large interested in this view of the case, but no men, or set of men, are so directly interested in having a sound currency and credit abroad as these same railroad companies of Minnesota. The more security these bonds have, the better they will be for this purpose, and the more confidence they will command. Whatever the companies may lose in one respect, they go far towards making up in another.

It is not, as has been said, crippling the companies and tying their hands. They still have large resources in lands, and when fifty miles of each of the roads, or any considerable distance shall be completed, and in operation under a prosperous state of the country, the railroads, with such aids, will be profitable investments; they will invite and repay capitalists, and go on of their own inherent strength to completion. I am therefore of opinion that such issue should not be allowed.

ST. PAUL, November 9th, 1858. C. H. BERRY, Atty. Gen.

Hon. W. F. Dunbar, State Auditor:

SIR: Yours of this date is received. In answer to your inquiry as to the right of the Auditor to demand and receive pay for the various items of service, under the act to authorize and regulate the business of banking, approved July 26, 1858, I have to very respectfully state:

First. The Auditor is not obliged to incur any liability or expense under section number one of said act, either for engraving, printing, transportation or any other matter required by parties wishing to organize under said act, unless such application is accompanied with money sufficient to pay all necessary expenses in procuring such circulating notes in blank. He is not required to give credit. The terms "shall be charged, &c.," will not bear such construction. If he should give credit it would be at his peril.

Second. Under section forty-one of said act, he is entitled to one-fourth of one per cent. on the amount of circulating notes countersigned and registered as hereinbefore provided, "for the services performed by him or under his direction in behalf of such banker or banking association," and the payment of such sum may be a condition precedent to the delivery of such notes. This is for such service as he is required by the act to perform, such as countersigning, registering, cancelling, receiving mutilated notes, and issuing others in their stead, and some other acts, the payment of which is not otherwise provided for; *but it does not apply to services which he may or may not render in his discretion.* On the final winding up of any bank, he is entitled (sec. 42,) to one-eighth per cent. on all moneys received on sale of securities deposited with him, besides all necessary expenses attendant upon such sale.

Third. But there are many things which for uniformity as well as for the convenience and safety of banks and bankers should perhaps emanate from the auditor's office—but over which the law only gives him a supervisory power, leaving it entirely optional to do or not to do the services involved. I allude to the preparation of certificates and papers preliminary to the organization of banks and banking associations, powers of attorney, forms for increase of capital stock, blank reports, and such other instruments as are necessary in the transaction of business in the

banking department of the auditor's office. The consideration for blanks or any services in the preparation of such papers is entirely discretionary with the auditor.

ST. PAUL, December 17th, 1858. C. H. BERRY, Atty. Gen.

Hon. L. Branson, District Judge, &c.:

SIR: Yours of the 9th is received. I will say that in the case of Judge Chatfield's refusal to give up papers, &c., relating to town sites entered by him in trust, it appears to me that it would be better to bring the matter at once before the Supreme Court. That can be done by applying to that court for a writ of *mandamus*. An alternative writ would issue of course, and on application to make it peremptory the whole matter would be brought up and determined.

I can see no harm in your executing the trust received from Judge Flandreau, and yet if the question is not decided by the Supreme Court, I think it would be as well to take a deed from the trustee, conveying his rights and substituting you in the execution of the trust, and also, wherever you have given deeds it can do no harm for him to ratify them. In fact, I think something of the kind *is necessary*. The law of Congress on this subject is very loose, the statutes of the Territory, even if valid, are uncertain in form, and the peculiar wording of the patents, in making the grant to the judge in trust, and "*to his heirs and and assigns forever*," do not make the matter any plainer. The questions involved are probably destined to command attention, as very large amounts of property are involved. It will sometime come before the Supreme Court, and the sooner the better. I think you would be doing a great service in sending it there in the first instance.

In regard to the county seat matter, I think that only one place should have been voted for. Voting for more might invalidate the election. The spirit of the law of 1858 is, that a majority of all the votes of the county should be cast for a location before it should be adopted as the county seat. To effect this, of course but two places could be voted for. In case of proposed removal, which was the case in Le Sueur county, the place voted for would be one of these places, and the negative votes would be for its present location. The provision that "but one place shall be voted for," is necessary in order that a removal shall be effected by a majority of all the votes in the county. If it were not for this provision, it would be easy to avoid the majority rule, and effect a removal by only a plurality vote; all that would be necessary would be to designate a sufficient number of places to be voted for, so that neither could have a majority of all the votes. Some one, of course, must have a plurality, and for the purpose of favoring any one place, it would only be necessary to make the number of places to be voted for, correspond to the necessities of the case. Such a state of things would be clearly irregular, and I think the election in Le Sueur county void so far as it relates to this question.

ST. PAUL, December 20th, 1858. C. H. BERRY, Atty. Gen.

To the Chairman of the Board of County Supervisors of Winona County:

SIR: An application has been made by the body over which you preside, for an official opinion and exposition of the laws relating to the poor of the several counties of Minnesota. I have already had the honor of communicating to you verbally on this subject, and have thus given expression to my views thereon in part. It was stated to you as my construction of the law on this subject that the poor found within the limits of the several towns, if requiring permanent aid, were to be supported by the county at the expense of the town where such poor shall be found. The statutory provisions prescribing the duties of the overseers of the poor, are somewhat vague, but it is believed they are sufficiently plain to prescribe the general scope of such duties. In every town there is an officer whose duty is to take charge of the poor in such town, and being elected in and for such town, his duties

are, of course, confined thereto, and within the scope of his jurisdiction; his powers on the subject of his duties are exclusive of any other authority not superior to his own. He is in many respects to act conjointly with the board and under their direction. This is necessary from the general supervisory powers of the board over all subjects pertaining to the raising and expenditures of the county funds and their obligation to take care of such as come within the designation of county poor. The board will act on proper information received, and the peculiar duties of the overseers of the poor make it incumbent on them to apprise the board by timely information of such necessities as call for their intervention and aid. For all services so rendered the county, they will receive their pay from the county treasury as provided by law. But the obligation on the part of the county to pay for services so rendered does not release the town from all contingent liability. It is not necessary to make any distinction between "county and town paupers," to create a liability on the part of the towns. In fact, under our "township organization act" no such distinction does exist. Paupers are to be maintained, and it is the duty of the board of supervisors to do it, but it is also the duty of such board to charge the expense so incurred to the town, and such town must pay the same to the county. An account between the county and each town must be kept for such purpose. In this account current between the individual towns and the county, the towns have a voice in determining what town shall enter into that account, with very few and unimportant exceptions, involving the "compensation of the overseers of the poor," merely. This means which towns possess of governing their liability is their board of town auditors. It is by no means clear that even the "compensation of the overseers" should not be subject to this ordeal in the first instance, but however this may be they have no power to audit miscellaneous charges, such as board bills, grocers accounts and the like, not even if presented by the overseers themselves, as such items of expense are not as compensation to the overseers within the meaning of the law, as that seems to relate entirely to their compensation for official services. Step over this rule and there is no limit to the nature of the charges against the towns which the county board may not audit, if such charges arise from aid given to the poor. This distinction obliterated and the board of town auditors for a very large share of accounts will be entirely useless. This is not the design and spirit of the law. All accounts therefore presented to your board for their action as auditors, and not properly within the words of section 16, pages 32 and 33 of the township organization act, should be referred to the proper board of the several towns, for the purpose of giving the parties entitled by law, an opportunity to investigate the charges which they will be called upon to pay, and to allow the original bills to go on the files of the town clerk for reference by the tax payers of the several towns.

WINONA, January 6th, 1859. C. H. BERRY, Atty. Gen.

To the Chairman of the Board of Supervisors of Winona County:

SIR: The resolution of your board passed January 5th, calling on me for my opinion as to the right of the county treasurer to receive from the county seventy-five cents for each parcel of land sold by him as such treasurer for delinquent taxes, has been brought to my notice, and to which I have the honor to reply.

The statutes of the late Territory of Minnesota were selected from the statutes of the various States of the Union. Whenever a statute in its general features seemed to answer the purpose of the compiler, the same was adopted, and the Legislature of 1851 modified the report presented by the compiler as in the opinion of the members of that Legislature the particular exigencies of Minnesota required. A tendency to extravagance was a prevailing characteristic in the new States at that time, while in the old, a more economical system was observed. The necessities of a new and sparsely settled Territory, would not permit the extravagance of the organized western States, and the small amount of business to be performed by the public officers, required a more liberal compensation for services actually done, than in the older

States, where the amount of business was greater. Hence in statutes taken from the laws of the last named States, the rate of fees was uniformly raised, and in statutes from the laws of the western or new States, the fees of public officers were made less. Perhaps in no instance is this more plain than in the question under consideration. The law in relation to "the sale of land for unpaid taxes and the conveyance and redemption thereof," are taken almost *verbatim* from the laws of Wisconsin. The alterations in the original, on its adoption by the Territorial Legislature, are conclusive as to their intentions on this subject. Under the Wisconsin law, the officer selling the lands was authorized to make out as many certificates as the board of supervisors of the county might direct. The existence of more than one certificate is clearly recognized in terms in such law, and for each of which, he was allowed the sum of twenty-five cents. This in the number of five thousand pieces of land, would give a compensation of one thousand two hundred and fifty dollars, a very fair compensation for one week's work. In the law as adopted by the Territory the plurality of certificates is negatived. By a change in the Wisconsin statute in this particular, one certificate alone is recognized, as within the authority of the board of county commissioners, for all lands bought at one sale by the county; seventy-five cents is allowed for this certificate for the first piece of land, and five cents for each and every piece of land described therein after the first. This for the same labor would amount to two hundred and fifty dollars and seventy-five cents. At this rate an ordinary writer would earn from seventy-five to one hundred dollars per day. That, though higher than any precedent set by eastern law, is not unreasonable in view of the compensation received by this officer from other sources. But to consider that this change made by the Territorial Legislature is not to be followed out in practice, and to still to adhere to the original custom, would give, not only the same which such Legislature deemed extravagant, to wit: $1,250, but the further sum of $2,500, or in the case under consideration the sum of over four thousand dollars, for what should be about three hundred.

The time allotted to me to examine and report to your body, will not permit a more extended discussion, as I learn the board are about to adjourn. I will, therefore, say that it is my opinion that the treasurer is not entitled to seventy-five cents for each parcel of land sold by him, and by him bid in for the county, on account of the certificate; but only to the sum of seventy-five cents for the first piece, and five cents for each additional piece named in the certificate by him made out to the county.

WINONA, January 7th, 1859. C. H. BERRY, Atty. Gen.

J. E. Alling, Esq. Chairman of Supervisors of Town of Brooklyn, Hennepin Co.:

SIR: I have received your letter of the 23d ult. By the act of March 20th, 1858, art. 14, sec. 1, "the supervisors of a town may alter or discontinue any road," &c., when properly applied to for that purpose. By the 25th section of the same article it is declared that "the public roads now existing are declared the highways of the towns in which they shall lie." Sec. 1 of art. 21, of the township organization act is affirmatory of the power. Sec. 1 of art. 23, makes an exception in the powers therein granted of State and "county roads," but there are no negative words. That section merely falls short of including these roads, but does not exclude them. By sec. 25 of the same article, "public roads legally existing are declared the highways of towns." So far there is sufficient authority to warrant the town supervisors in assuming jurisdiction over all roads in their respective towns. But section 27 declares that "this act shall not be construed as conferring any power on the supervisors to alter any State roads now, or hereafter existing by law." It will be observed that nothing is said in this section about discontinuing State roads. The question arises whether this act approved August 13th, 1858, which does not give to the supervisors power over the State roads is "inconsistent" with the preceding act of March 20th, which does confer the power. If such power in the first act is

inconsistent with the last, then that portion of the act of March 20th, is repealed. Sec. 12, art. 24.

The last act is upon the same subject matter of the first, and was evidently designed to supersede the power. Perhaps it would be too much to say, that the first act was in all its provisions repealed, as some parts of it are on different subjects from the last, but so far as the two treat of the same subject matter the latter must be held to supersede the former. On the subject of the power of the board of town supervisors over the roads in their respective towns, I am of opinion that such power extends to the *discontinuance of all roads* in such towns, and to the alteration of all *except State roads.*

WINONA, January 10th, 1859. C. H. BERRY, Atty. Gen.

Hon. W. H. C. Folsom:

SIR: I answer your first question, that the commissioners appointed by the Governor to divide organized counties into towns, are not authorized to divide a county in such manner, that any town shall contain less than one hundred inhabitants. The seeming power conferred by the first part of section 3, of the act for township organization, is restricted and confined subsequently in the same section. The authority there given is not absolute, but conditional merely.

Your second inquiry is answered in the foregoing. The commissioners were not authorized to erect as many towns as there were townships, irrespective of the number of inhabitants. You desire to know whether the city of Taylor's Falls is entitled to representation in the board of county supervisors? You do not state whether your city government was organized under the charter of July, 1858, at the time of the passage of the act to provide for township organization. It probably was not. Neither does it appear which went into operation first, the city charter, or new county organization. But I do not think that either of these questions is material. Other questions than those of precedence in time must determine your rights. If your city government is properly organized, I think your city is entitled to representation by wards, as provided in section 8, page 72, of the township act.

WINONA, January 11th, 1859. C. H. BERRY, Atty. Gen.

E. H. Brown, Esq.:

SIR: Yours of the 5th is received. The facts submitted by you, and on which you desire my opinion, are as follows:

First. Previous to the month of October, 1856, the county of St. Louis was organized and county officers appointed to "hold until their successors should be duly elected at the next general election."

Second. In October, 1856, at the general election, county officers were elected, including register and surveyor. The first qualified, the latter did not, nothing was said about vacancies.

Third. At the general election in 1857, the same parties were voted for, for the same offices. This time both qualified.

Fourth. At the general election in 1858, another man was elected, and received his certificate as register of deeds, demanded possession of the office, and was refused by the previous incumbent.

Fifth. The same fact as to the surveyor, except that the claimant elected at the election in October last does not hold the register's certificate.

Upon these facts I have arrived at the following conclusions: The appointees at the organization of your county, could not hold longer than until the next general election, providing successors should then be elected; without such election they would have held under the appointment. But an election was had; the officers thus elected were for a regular term.

There were no vacancies to fill, as no regular terms had preceded. At the first election after the organization of the county a register was required to be elected by sec. 1, page 62 of the revised statutes, who should hold two years. At the elec-

tion of October 13th, 1857, there was an incumbent of this office who had served one year and who had one year more to serve. By the 5th section of the schedule to the constitution, it is provided that all territorial officers, civil and military, now holding their offices under the authority of the United States or the Territory of Minnesota shall continue to hold and exercise their respective offices until they should be superseded by the authority of the State. You will observe that incumbents at the adoption of the constitution were continued in office till superseded by authority of the State. The constitution in adopting the territorial officers also adopted the territorial laws under which they held. These laws fix the time for which such officers shall hold, and provide for the election of successors. At the adoption of the constitution, there was no authority for electing any county officer, except under those laws.

It follows, then, that unless the statutes authorized the election of register, in the fall of 1857, such election was without authority, and void. There was no vacancy, the regular term was not expired, and the incumbent was continued in office until his successor should be elected under the statutes, which the constitution adopted. That election was in October, 1858. The person so elected is the rightful register, and the former incumbent should vacate in his favor. In the case of the surveyor my conclusion is in favor of the person elected in 1857. He had not qualified previously, and there was a vacancy which he was elected to fill. He would continue in office until his successor is duly elected and qualified. The only difficulty seems to be, that the person voted for last fall has no evidence of election. The only proper evidence of such election is the register's certificate. This he has not got. If, however, the register should grant the proper certificate of election, I do not see why he would not be entitled even now. Without such evidence of his election, however, he has no right to qualify.

ST. PAUL, January 15th, 1859. C. H. BERRY, Atty. Gen.

L. F. Stark, Esq.:

SIR: To the first question in your letter of the 11th inst., I answer. The law exempting property from sale for taxes is as it was before the passage of the Homestead Exemption Law. See sec. 7 of said Act. Second—*Lands* merely pre-empted but not paid for are not taxable. The improvements may be treated as *personal property* and taxed as *such*.

WINONA, January 18th, 1859. C. H. BERRY, Atty. Gen.

Messrs. D. Doyle, J. Copeland, and Others, Commissioners, &c.:

Yours of the 19th ultimo is at hand. The question of the amount of compensation to be paid by a county for expenses incurred under act of March 19th, 1859, seems in a measure left to the discretion of the county commissioners or supervisors. By section 95 of such act, the county officers are required to "audit such bills and accounts, and to allow all fair and proper charges and expenses for laying out such roads." What are fair and proper charges? This is a question rather of fact than of law. The acceptance of a portion of your claim which they may see fit to allow, does not preclude you from suing for and recovering the residue to which you may show yourselves entitled.

February 9th, 1859. C. H. BERRY, Atty. Gen.

J. H. Reaney, Esq., Collector, &c.:

In answer to yours of the 31st ult., I have to say that lands sold for taxes continue taxable as though they were the property of individuals. Revised Statutes, page 106, sec. 57. Taxes so assessed are to be paid out of the county treasury, and

remain a lien on said land until the same shall be redeemed. It cannot of course at the same time be chargeable to an individual.

February 10th, 1859. C. H. BERRY, Atty. Gen.

J. M. Doyle, Esq.:

SIR: I have referred your letter of the 4th to the district attorney of this judicial district, as the proper officer to investigate and answer your questions. I will say, however, that personal property is liable to sale for taxes, unless especially exempted by statute. The exemptions, under the *Revised Statutes*, are those to be regarded; and not the exemptions made by the laws of 1858. Whatever might be sold for taxes previous to the last session of the Legislature, may still be sold. If you can show that property levied on by the collector for tax, was sold after such levy, for the purpose of defeating the same, you may proceed and sell, notwithstanding, as all such sales, made with such intent, are void.

February 10th, 1859. C. H. BERRY, Atty. Gen.

Patrick Fox, Esq., Treasurer of Chisago County:

SIR: The school fund is made by law inviolate. But this provision does not authorize the treasurer to first set aside a sum sufficient to pay the entire school tax for the county unless the whole tax for such county shall have been collected. Where there is a deficiency in the aggregate amount of tax collected the school fund cannot be allowed to absorb the money which with this is levied for other purposes. The apportionment for schools should be *pro rata* merely. When the proportion of the money collected to be appropriated to the support of schools shall be ascertained and set aside, your next duty will be to pay the amount due the State. The same rule of apportionment does not hold with funds raised for expenses of the county generally.

WINONA, February 11th, 1859. C. H. BERRY, Atty. Gen.

Wm. Richards, Esq., District Attorney, Meeker Co.:

SIR: Yours of February 21st, is received. In reply to your inquiry I have to state that the construction given to the township organization law, in the form of the collector's warrant, is in my view the true one. It is not intended by the legislature to pay a collector, except for services actually performed. The law offers no bounty for neglect. This matter rests upon the same principle which fixes the compensation of a sheriff. If he collects nothing, he gets nothing.

WINONA, February 28th, 1859. C. H. BERRY, Atty. Gen.

R. H. Bingham, Esq., Treasurer of Winona County:

SIR: I was called upon to-day by Mr. Windom of Winona in reference to the proportion of money collected in your county, to be paid to the State treasurer, and to be retained for school purposes. To such inquiry I reply that the rule adopted is to preserve the school fund inviolate, but not to allow such fund to absorb moneys collected for other purposes. If there is a deficit, the loss must fall equally on the the school and county fund. After the school fund is apportioned and set aside, the dues of the State are to be next satisfied. The school fund is the only one which the claim of the State will not take precedence of.

ST. PAUL, March 9th, 1859. C. H. BERRY, Atty. Gen.

To His Excellency, H. H. Sibley:

SIR: To your communication of this date I respectfully answer: By a special act of the legislature approved March 20th, 1858, certain territory therein described was "created into the county of Monroe" and taken from the previously existing counties of Mille Lac, Isanti and Benton. As described in the act, the county of Monroe was to consist of four hundred and eight square miles, three hundred and sixty from the counties of Mille Lac and Benton, and the remaining forty-eight square miles from the county of Isanti. The action of the legislature in the formation of this county seems to be in all respects correct.

By the constitution of the State of Minnesota, the powers previously vested in the legislative assembly, relative to the formation of new counties, and the change of county lines, was very materially restricted.

By article 11, section 1, it is provided that "the legislature may from time to time establish and organize new counties, but no new county shall contain less than four hundred miles; nor shall any county be reduced below that amount, and all laws changing county lines in counties already organized, and for removing county seats, shall before taking effect be submitted to the action of the county or counties to be affected thereby, at the next general election after the passage thereof, and be adopted by a majority of such electors. Counties now established may be enlarged, but not reduced below four hundred square miles." The negative provisions of this section, are imperative. They are not merely directory, leaving the legislature an option to comply or not at pleasure, but if they are not fully complied with, they are prohibitory. It is indispensable, that the county must contain four hundred square miles. It is true the word "square" is omitted in the body of the section making this requirement, but the meaning is obvious. It can have no other construction. Again, in counties already organized, a majority of the electors of such counties must ratify a proposed change of county lines, before the action of the legislature can be operative. It is not necessary to determine whether the reference in the constitution, to "counties already organized," refers to counties organized at the adoption of the constitution, or that shall be organized at the time of any proposed legislative action affecting them, as all of the counties interested in the matter under consideration, existed at the adoption of the constitution, in their present form. A question does arise, however, whether the provision requiring a majority vote of the electors of the county, or counties, to be affected by the formation of the county of Monroe, to render the action of the legislature effective, means a majority of such votes collectively, or a majority of the votes of each individual county to be so affected? Can a majority in one organized county, in favor of a change, override a smaller majority in another organized county, against it? I have examined the debates of the constitutional convention, in relation to the right of counties in maintaining their boundaries, and the location of their county seats, and am satisfied the intention in the provisions referred to, was to furnish protection to such as saw fit to avail themselves of it, against dismemberment of the legislature, as well as aggressive and interested schemes of counties, which, with more population, may covet the territory of the more sparsely settled. If such is not the case, it is difficult to see what beneficial purpose, in our constitution, such a provision may subserve. It is practically the vote of the people of each county from which a new county is to be formed, and not the act of the legislature, which is operative. The first general election after the passage, was held in October, 1858. The vote was taken in the counties of Benton and Isanti, the former pronouncing in favor of the new county by a majority of 201, and the latter against, by a majority of three votes. This result is in my view conclusive as to that portion of the territory to be taken from the county last named. In the composition of the new county, forty-eight square miles were to be taken from the county of Isanti, which being thus refused, rendered the act with reference to so much entirely inoperative. The county of Mille Lac was formed by act of the territorial legislature, approved May 22d, 1857. But this county does not appear to have been, either at the adoption of the constitution, or the passage of the act, so far organized, as to come within the provisions of the constitution. Hence, no vote was taken in such county. It does

not appear that any was authorized, or if taken, could have affected the question. So far therefore as the act covers territory in Benton and Mille Lac counties, there appears to be no objection. But the whole amount of such lands, is only 360 square miles, forty miles less than the minimum quantity necessary to form a new county. It will be apparent, therefore, that no such county as the county of Monroe exists in our State, and hence that the Governor is not authorized to take measures for its organization. As to the county of Jackson, it appears to have been created by the act of the territorial legislature, approved May 23d, 1857, but has not been fully organized. The same act, section 11, provides that "The Governor shall appoint three persons for such county, being residents and legal voters thereof, commissioners for said county, with full power, &c., to complete the organization of such county." By the "Act to provide for township organization," the Governor is authorized and required to "appoint three persons to act as commissioners in each of the *organized counties in this state*, who shall be residents thereof, to divide such county into towns under the provisions of this act." I am not clear as to the meaning of this expression "organized counties in this State." I am inclined to the opinion, that it means *fully* organized. If such be the case, commissioners must be appointed for a double purpose, or, perhaps, two sets of commissioners, one to organize and put the government into operation, and the other set to divide the county into towns. The same men may be charged with both duties. The first, to organize a provisional government, and the second, to perfect a more permanent one under the township law.

ST. PAUL, March 9th, 1859. C. H. BERRY, Atty. Gen.

To the Board of Supervisors of Carver County:

Mr. Jacob B. Ebing, treasurer of your county, has requested on behalf of your body an answer to the question: "Is a town collector entitled to percentage on the *whole* amount of the tax named in his warrant, or only to a percentage on so much as he collects?"

The words of the act are, (township law, page 40, sec. 5,) "which compensation shall be three per cent. on the hundred dollars of tax." What tax? The tax named in his roll, or tax collected? There is nothing in the act to settle the question either way. It is to be governed entirely by analogy, and by public policy. All analogy, so far as I am able to discover, is against the construction allowing to the collector for labor *required* of him, rather than for labor *performed*. I do not find a single case where such construction has been allowed to obtain. But it ought not to obtain. The public welfare demands that it should not. This allowance is intended as a reward for labor done and performed, not a mere gift to a collector, whether he does anything or not. Were it otherwise, but few collectors would take any pains in the performance of their duties. They would take such moneys as would be tendered and not trouble themselves any further. To carry the consequences of such a rule a little farther, (and there is hardly any absurd length to which it will not go,) the collector on receiving his warrant may return it without any collections, and still receive full pay; his services thus becoming a sort of outgo instead of income. It is clear, therefore, that public policy as well as precedent forbids such construction, and demand that the pay of the collector should be for actual services, and moneys collected, and not a bounty for neglect.

ST. PAUL, March 31st, 1859. C. H. BERRY, Atty. Gen.

Hon. W. F. Dunbar, State Auditor:

SIR: I have received your letter of the 5th inst., in which you ask answers to the following questions:

First. "What, under the laws of the State, is to be regarded as the 'capital stock' of a bank?"

Second. "Is there any distinction between the 'capital stock' of a bank, and the securities deposited with the Auditor, in exchange for circulating notes?"

Third. "Should the Auditor countersign and deliver to a bank, circulating notes, to an amount greater than the amount of capital stock specified in the certificate of organization of such bank?" I shall answer your questions in the foregoing order.

It is to be observed that a bank is an organization differing widely from a company, or association of individuals for purposes of trade, in this, that whereas the individual or association is the sole embodiment of the concern, and alone responsible for its transactions, the bank is a *quasi* public institution, invoking the aid of the state for its very existence, and in whose transactions the state is a party. The state is alone the trustee of the bill holder, the party to whose aid he looks for pay, in case the bank fails to meet its obligations; a third person in the relations between a bank and the people. The credit of a currency is not, under our laws, dependent upon the ready means in bank for its redemption. For obvious reasons this is now seldom considered. Paying in capital, is equivalent to making such funds legally available in the bank. The law prescribes how that shall be done, and when presented does not even inquire whether such securities are even paid for by the broker. The question is, what security is held by the State for these promises to pay? If that is sufficient, inquiry is silenced. Hence, without a dollar of specie, where the securities are ample, the bills of a bank are good for gold to their full amount. Even gold in the bank vaults will not do. The State, in its character of trustee for the bill holder, and supervisor of the bank, received and holds all the property actually necessary to be paid in, to entitle a bank to go into operation. By the general banking law of this State, sec. 10, "the aggregate of the capital stock of any bank shall not be less than twenty-five thousand dollars." Sec. 11, subdivision 3, specifies that the certificate of organization of a bank shall specify "the amount of the capital stock of such bank, and the number of shares into which the same shall be divided," and 4th, "the name and place of residence of the shareholder or shareholders in such bank, and the number of shares held by them respectively." These are preliminary requisites to the existence of corporate powers in a proposed bank. Not only is the minimum of the "capital stock" prescribed, but the amount of such capital must appear of record, and the name and amount owned, by the person to whose credit it is to stand. Still further, this trustee of the bill holder, and supervisor of the bank, must have actual *possession* of the securities, which is a prerequisite for any liability on the part of the bank, as "no such association or banker, shall commence the business of banking under this act, until such association or banker, shall have deposited with the auditor of the State the securities required by this act." We must conclude, therefore, that the securities deposited by a bank or banking association in pursuance of the statute, and these alone, are intended by the terms "capital stock" as used in the statute. From the foregoing considerations it will be apparent that there is no distinction between the capital stock of a bank, and the securities deposited with the auditor in exchange for circulating notes.

Your next inquiry is: "Should the auditor countersign and deliver notes to a greater amount than the amount of capital stock specified in the certificate of organization?" The capital stock being synonymous with the securities deposited, of course, the amount of notes issued must not exceed such capital. But your question involves another of importance, which it would be well to consider, viz.: Must the amount of capital stock entitling the banker or bankers to receive notes appear of record from the certificate of organization? or must such banker or banking association in their transactions with the auditor acknowledge all securities on which they receive notes, as capital stock?

It is provided by the statute, sec. 21, that "the stockholders in each bank shall be individually liable in amount equal to double the amount of stock owned by them, for all the debts of such bank, and such individual liability shall continue for one year after any transfer or sale of stock by any stockholder or stockholders," and for the purpose of a clear, direct and simple way of informing the public who

are such owners of the capital stock, in addition to the certificate before referred to, the bank must "at all times keep a true and correct list of the names of all the shareholders of such bank, with the amount of stock held by each, the time of transfer and to whom transferred, and shall file a copy of such list in the office of the register of deeds of the county wherein such bank may be located, and also in the office of the auditor of State, on the first Monday in January and July of each year." The personal liability of a stockholder is based upon the amount of stock owned by him, or in other words, upon the amount of his interest in the securities deposited with the auditor of State. Whether he would be also liable on account of property not invested in such securities, is foreign to the present inquiry. In determining that question whether a court would confine itself to the technical sense in which the terms "capital stock" are understood, is wholly immaterial. Even if it has a broader sense than the one I have before given it, such latitude of construction would make the foregoing view of it still more obvious. For the purpose of public security the law has placed an easy and expeditious mode of determining the amount of a banker's personal liability, by referring to the exhibits as to the amount and ownership of capital stock, before referred to, and has attempted to make the proof of such liability easy of access to all concerned.

In section 12 of the banking act, it provides that "a copy of the certificate required by the next preceding sections, duly certified by the register of deeds of the county, or by the auditor of the state, may be used as evidence in all courts for or against such bank; or any person or persons for or against whom any such evidence may be necessary whether on civil or criminal trial." Of course, such evidence under any other construction than that here given would fail to meet the intentions of the law. Thus, if securities may be deposited with the auditor in exchange for circulating notes, and those securities not appear of record as capital stock, a banking association may have a circulation of hundreds of thousands of dollars, for which, so far as the records and this evidence would show, there would be no personal liability whatever. In case of an *association*, it would be nearly impossible in any event to supply this defect. Twenty-five thousand dollars is the lowest amount of capital which a bank is authorized to start with. But to enable one to increase its circulation and extend its business, it is provided, section 18, that "it shall be lawful for any person, or association of persons, organized under the provisions of this act, by his or their articles of association to provide for an increase of their capital stock." Why increase the capital stock when it is not necessary to the increase of the banking business? Where is even the convenience of this provision unless it bears upon the means to be made use of by the banks? If it does not confer powers which the banks would not otherwise possess, and which may be necessary to them, it is worse than useless, because its tendency is to mislead. On the other hand, it is contended that respectable precedent, in another state, allows the circulation to exceed the securities deposited. It is said that banks in the state of New York, established under the free banking law similar to ours as regards stocks and capital, had in many cases previous to the panic circulation exceeding their capital three to one. I have not the statistics at hand to verify this statement.

It is well known, however, that a large majority of the banking capital of the State of New York is employed in business under laws existing previous to the so-called free banking law of that State. Until recently, many of those banks were established under the act entitled "An act to create a fund for the benefit of the creditors of certain moneyed corporations and for other purposes," passed in the year 1829, and commonly known as the "safety fund act." They were called "safety fund banks." They were not required to deposit their capital stocks with the state, but only to make a statement of capital stock paid in, and to pay to the Comptroller a small percentage on such capital from time to time, in consideration of which the State agreed to act as insurer of the creditors or bill holders. The restriction on circulation was as follows: "It shall not be lawful for any such monied corporation to issue or have outstanding or in circulation at any time, an amount of notes or bills loaned or put in circulation as money exceeding twice its capital stock then

paid in and actually possessed; nor shall its loans and discounts exceed twice and a half of the amount of its capital stock so paid in and possessed." This was restricted somewhat by statute passed in 1837, and further modified in 1848. Of course, the safety fund banks availed themselves of this privilege, and their circulation exceeded their capital. The evil consequences of such a permission are palpable, and the New York Legislature has labored almost incessantly, for thirty years, to ensure a basis for circulating notes, not subject to the acts of banking associations, whether such acts are from design or misfortune.

Our Legislature had the same object in view and did follow in many things the free banking law of New York; thus taking the best results of experience, they removed in this, as in other things, the causes which have so long governed legislation and the banking system at the East. I do not find in the later acts of New York or in the banking laws of this State any authority for the practices claimed, and do not believe there is any such right.

The securities deposited with you should be acknowledged as capital stock, and until such acknowledgment appears of record, so as to be capable of documentary proof as prescribed by the statute, I do not think you are authorized to deliver countersigned notes upon such deposit.

WINONA, April 8th, 1859. C. H. BERRY, Atty. Gen.

H. H. Sibley, Governor of Minnesota:

SIR: In answer to the note of your excellency of this date, I respectfully state that by statute laws of 1852, page 35, sec. 6, the Governor was authorized to appoint a judge of probate for the county of Pembina, to hold until his successor should "be elected at the next general election of said county of Pembina, and duly qualified according to law." Whether this power to appoint has been exercised I do not know. If it has it may be fairly doubted whether the Governor has any further authority to act. If not he may lawfully appoint to hold until the next election, when the people will be required to elect. The Governor's authority to appoint auctioneers in the various counties of the State appears to be unquestionable, except perhaps when the same may conflict with certain municipal regulations. It is impossible to say whether the proposed appointments conflict with local statutes, as no particular locality is named by your excellency. Under a statute passed March 1st, A. D. 1852, the Governor may establish election precincts in unorganized counties on the application of resident voters. See laws and reports 1853. Div. Gen. Laws, page 37. The township organization act of 1858 in no way conflicts with this authority, as the latter law applies to *organized* counties, and the former to counties *unorganized*.

As to whether such precincts can be established in Indian reservations, it is submitted that the organic act creating the territory of Minnesota makes no difference in the establishment of the territorial government between Indian and other lands. The law is equally binding upon all. Neither is there any restriction in the powers allowed to the territorial legislature. It has practically never recognized any difference. Witness the formation of the county of Pembina in 1849, and its organization in 1852, both prior to the ratification of the treaty of Mendota. Also the formation of the county of Wabashaw in 1856, and the establishment of the county seat in the Sioux half breed reserve. This reserve, in the tenure by which the mixed bloods held it by the treaty of Prairie du Chien, 1830, differed in nothing from Indian lands, yet the county was composed almost entirely of such reserve before the extinction of the half breed title. It is true the soil of a reservation may not be sold or permanently occupied so as to exclude the rightful occupants, yet personal property thereon is as much subject to taxation as though located in any other place. So a person living thereon, although his occupancy may be a trespass under the laws of Congress, is still within the protection of the local law, and his rights of person and property are sacred. But all occupants of Indian lands are not trespassers. Many are authorized to go there, and even commanded so to do, by the

Federal government; but those thus situated are not thereby disenfranchised. They still have and may enjoy their political rights. For such, the establishment of election precincts and even town organizations becomes necessary and lawful. Such organizations confer no authority to occupy the soil; they are primarily for such as may rightfully go there. It is their right to demand them, and of course within the powers of the executive to comply with such request.

ST. PAUL, July 11th, 1859. C. H. BERRY, Atty. Gen.

Messrs. Joseph Haskell, John Coleby, Robert Rich, Commissioners on Roads and Bridges:

GENTLEMEN: In yours of the 17th ult. you ask substantially the following questions:

1st. In case where roads were located over government lands before the organization of the Territorial government, but not opened, and such lands have since become private property, can such roads be forced open under such location?

In this case there appears to me to be an abandonment of right to these roads, if any was ever acquired by the public. It is well settled as a rule of law, that a non-user of a public right may work a forfeiture of the same, qualified of course by the circumstances of the case. Where, through the apparent abandonment of a public way for an unreasonable time, private rights have accrued, the public is estopped.

I do not think the action of the commissioners under the laws of Wisconsin in laying out roads which have not been opened and in actual use, can or should be enforced against individual interests subsequently acquired. What length of time is requisite to raise the presumption of abandonment by the State is not certain. Four years, six and eight years are mentioned as sufficient to raise the presumption. It is probable that a period even shorter than four years, if accompanied with proof of undisturbed use inconsistent with the public claim, would be sufficient to establish a waiver. Each case will, to some extent, have to stand on its own merits; but it is probably safe to assume that a failure to open a road for six years after it is laid out, especially if private rights intervene, would be a waiver on the part of the State. This applies equally to your second inquiry.

3d. As to roads located under provision of Territorial law which have been opened and used by the public "without let or hindrance" on the part of individuals, whether damages have been assessed or not, I think they involve a public right. It does not matter whether such roads were opened under special order to do so, or not, if the preliminaries had been complied with, and such roads had been properly laid out. In such case it is enough that they are open and the public in possession. They are then public roads of the towns in which they lie, (Township Organization, sec. 25, page 71,) and as such fully under the power of the supervisors "to regulate" and keep in order, (same, page 46, sec. 1.) It makes no difference whether such roads are State or county roads, they are fully under the control of the towns for all purposes except alteration or discontinuance. This right and duty of the town supervisors does not necessarily exclude a concurrent right in the board of county supervisors; nor does any right of the county board interfere with the right or duties of the town supervisors.

Where the rights of the State have not been lost, and a road has been legally located through any town, whether by State or any other authority, the supervisors of such town have a right, and it is their duty, to force open such road, and in doing so, settle the question of damages or have it settled, (same, 61, sec. 6,) compel the performance of road labor on such roads, and do any and all acts respecting the same, which shall be for the public good, short of alteration or discontinuance.

As to the details of the supervisors' duties in their respective towns, I must refer you to the instructions given in the pamphlet printed by order of the Legislature, entitled an "Act for township organizations."

ST. PAUL, July 12th, 1859. C. H. BERRY, Atty. Gen.

H. D. Bristol, Esq., County Auditor of Fillmore Co.:

SIR: A citizen of this state can be taxed at the place of his residence for all personal property owned by him, including demands for money loaned, whether to parties in or out of the state.

ST. PAUL, July 13th, 1859. C. H. BERRY, Atty. Gen.

J. N. Bill, Esq., Chairman Board Supervisors, Waterford, Dakota Co.:

SIR: The supervisors of a town have a right to divide their respective towns into road districts at *any time during the year*, if not less than ten days before the annual town meeting. Whenever a vacancy shall occur in the office of overseer of highways, either from the creation of a road district or otherwise, a justice of the peace, chairman of the board of supervisors, and town clerk may appoint such officer.

ST. PAUL, July 13th, 1859. C. H. BERRY, Atty. Gen.

Hon. W. F. Dunbar.

SIR: I have examined the law in relation to your compensation for services performed under sections 24, 26, and 28 of the general banking law of this State, and conclude as follows: 1st. There is no provision by statute granting pay for such services. The compensation provided in Sec. 41 appears to be exclusively for services performed at and before the delivery of countersigned notes by the auditor. Sec. 42 is for "services in selling stocks and redeeming notes" of closed banks. 2d. The Legislature seems to have omitted this and left it entirely between the auditor and parties for whom the duties are performed. There is no prohibition, and therefore your pay is the subject of special agreement.

ST. PAUL, July 19th, 1859. C. H. BERRY, Atty. Gen.

His Excellency, H. H. Sibley:

SIR: I have examined the memorial of Messrs. Abbott, Ketchum, Hankins and others, citizens of the county of Isanti, praying for an organization of said county, which said memorial and accompanying papers were transmitted by your Excellency to me. I have also deemed it expedient to notify the acting register of deeds of said county, Mr. D. A. Young, to show cause if any exists why such reorganization should not be had. In pursuance of such notice a hearing has been had. Gen. Wagner of Cambridge for the memorialists, and Mr. Young *contra*. From the papers submitted, and from the facts admitted on the argument, it appears that the commissioners appointed by the Governor in February, 1857, to organize said county, did not accept such appointment, nor enter upon the discharge of said duties. It seems the register of deeds did accept such appointment, but did not go to reside in said county, but resided in the city of St. Paul, where his office was kept, until some time in the month of June following such appointment, when the register resigned. A man named Griswold next claimed to act as register of deeds, but by what authority, does not appear. He kept no records and died in 1858. There is no record of an election in 1857. On the 6th day of April, 1858, as appears from a letter or certificate filed with Hon. W. F. Dunbar, and signed by Hugh Wilery, chairman of board of commissioners, said county was divided into towns, seven in number, and named by numbers from one to seven inclusive. There is no evidence of the authority of any member of such board to act, nor even that such board existed. There is no record, as required by sec. 3, of the act of March 20th, 1858, that any such action was ever had, except the letter to the auditor aforesaid. Such report is only authorized after a record shall be made of such division by the clerk of the board of commissioners. Some of these towns, embracing about one-half of the taxable property of said county, have no inhabitants whatever, and consequently no town organization. At a meeting held January 10th, 1859, there is a record that

the board of supervisors met, but who such supervisors are, or what they did, does not appear from any record. It is said, however, and admitted on the argument, that such board assumed to abolish town No. 4, containing two townships, but to what town, if any, the same were annexed is not stated. If the county had been divided according to law, this act was unauthorized, except by the special interposition of the legislature. The attempted elections in these towns in April last, were informal, and for that reason I think invalid. There were elections held in not more than three towns, as the others are wholly without inhabitants, or did not contain enough for a town organization. On the whole I do not see how the organization, as at present existing, can be sustained.

Much of the property in the county cannot be assessed on account of its lying in towns which are not, and cannot be, organized, until partitioned anew. The township organization law was not designed (section 7, page 72) to affirm proceedings of this nature, and, indeed, the act approved August 13, 1858, provides that "no town shall contain less than one hundred inhabitants." The spirit and intent of the law is, undoubtedly, that to be valid, a county organization must be efficient for local government. The county of Isanti is not in such condition, and I respectfully recommend the appointment of commissioners to divide the county of Isanti into towns, under section 1, of the act to provide for township organization, approved August 13th, 1858.

ST. PAUL, July 22d, 1859. C. H. BERRY, Atty. Gen.

His Excellency, H. H. Sibley, Governor of Minnesota:

SIR: I have considered the question of the duty of the executive on the application of the railroad companies for State bonds where title to the lands, over which the roads pass, has not been obtained. The matter is attended with difficulties, and, I may say, doubts, for the reason that the amendment to the constitution is silent on that subject. It is like many questions which have risen heretofore on that amendment, to be determined rather from the equities, and the supposed intention of the Legislature, and of the people, in making such amendment, than from precedent, analogies, or the rules of law. There are certain principles of law, however, which bear upon this subject, and may assist in its determination.

In the first place, it is a familiar rule that where it is incumbent upon a party to make conveyance of property, such obligation is not complied with by the mere execution and delivery of an instrument of conveyance, when it is apparent the grantor has not the title, and has not, therefore, the property to convey. Such an act will not meet the requirements of the law, for nothing passes thereby.

Again it may be doubted whether an act which is a trespass, or a wrongful act, can be urged as the basis of an alleged right, and especially when the interests of the public are involved as they are in the present case. If it were true that the Railroad Companies have nothing to convey, the deed of trust would of course be a nullity, and if that were so even with reference to the road bed, I do not think they should receive the bonds until such defect in their title is made good, and if they are wrong doers and trespassers, I am, by no means, sure they could found a claim to receive the State aid upon such acts. But have they no right in the road beds, and are they in this case trespassers? I think they have an interest in the roadway, an inchoate right, which is assignable, an incomplete right, which may, or may not, ripen into a perfect title, as they follow out, or fail to follow out, the provisions of law made to enable them to obtain, by compulsory process, the right of way. So may their assigns. This privilege is guaranteed to them by statute. For this reason I do not think the trust deeds of the companies are open to the first objection, but if, at any time, they shall change their intention, and cease their efforts to obtain title, they would forfeit all further right to aid under these instruments. This presents the question of what shall be regarded as an evidence of their intention, and who shall be the judge of it. Of this hereafter. I do not

think the Minnesota and Pacific Railroad Company can be regarded as trespassers, in the cases presented in the affidavits submitted, because such company has taken the preliminary steps to secure the title, in the manner prescribed by statute. Although our constitution prohibits the taking of private property for public use, without compensation first paid or secured, I do not think this provision extends further than to prohibit the permanent appropriation and a divesting of the proprietor of his right of property, before such payment or security.

It could not prevent the company from such a possession as would enable them to proceed with the construction of their works. The law is a sort of license to them. It offers conditions for their acceptance. Those conditions are prescribed by the legislature—they are binding on every member of the community, and if they are extreme, or seemingly so, they are yet rendered absolutely necessary for the interests of the public, in the prosecution of these enterprises. Under any other rule it would be practically impossible to construct a railroad. It would put it in the power of any captious person to arrest their progress, wherever such roads must cross his lands, or at least to retard their progress as long as he could devise means to prevent a final settlement. The law, however, requires good faith in the prompt and fair recognition of the rights of those who may be injured in their property. I have no doubt that within these limits, the railroad companies may proceed under this implied license, and are not to be regarded as trespassers, at least in the case in hand. If this were not so, it is not clear to my mind that the Governor would be the proper tribunal to try the question of the rights of the companies, with third persons. It would seem rather to appeal to the courts as a matter for judicial action, and perhaps all the Governor could take notice of, would be the judgment of a competent court. There is none such here, and I cannot see that your Excellency is authorized to consider the companies in the light of trespassers, asking a benefit from the public, founded upon their own wrong. But I have said before, it is the duty of the railroad companies to perfect their title to this roadway, for the benefit of their grantees, which in this case is, among others, the State of Minnesota; due diligence in this respect seems to be the criterion of their good faith, and of course of their rights to receive the aid of the State. The Governor is the conservator of the rights of the public. There is no other tribunal or power which has aught to say in reference to it. It appeals to a sound discretion in him. I think it is reasonable and safe to say, your Excellency may exercise a supervision over the acts of the companies in the procurement of title to their lands, and within certain limits issue or withhold the state bonds, without being amenable to the charge of doing an arbitrary act.

What these limits are is not so easy to see, as I do not know of any precedent in point, and the constitution is silent upon it. I am induced to regard it, as before intimated, as referring to the intentions of the Legislature, which proposed, and of the people, who adopted, this constitutional amendment.

If we could determine for what specific purpose any portion of these bonds were to be issued, then, of course, the issuance of such bonds and the accomplishment of the purpose are dependent upon each other. But, unfortunately, we can not determine that question from the constitution itself. It is to be gathered, if at all, from all the circumstances of the case. It is a matter of common knowledge that ten thousand dollars per mile, the amount of State bonds authorized to be issued for grading alone, far exceeds the cost of that part of the expense of building a railroad. However, numerous expenses precede the work of grading. Surveying is one source of expense; preparations, such as tools, and houses for the use and accommodation of hands, is another. These were intended, doubtless, to be provided for out of the ten thousand dollars per mile. The right of way is another source of expense, and was properly included in the estimate. In this point of view the appropriation was reasonable. Liberal, it is true, but not extravagant: necessary to enable the companies to secure their lands; and prudential because the rights of the State depended on the title being secured.

If such was the intention then each company should show title to the first sixty-two and a half miles of road on the reception of one-half the proposed loan. But I

venture this as a suggestion, rather than of incontrovertible law. It is a question, I repeat, of discretion, but to which I think considerations like these appeal.

I am told this road has secured nearly its entire right of way for the first sixty-two and a half miles. If so, perhaps none should be retained, and it may be the entire amount of bonds yet undrawn on the grading now done are too many to withhold, should the Governor determine to hold any for the right of way not yet perfected. The importance of this subject would have led me to a more thorough examination of it, had time permitted. I will, however, with the permission of your excellency, examine it further and report at an early day.

ST. PAUL, September 29th, 1859. C. H. BERRY, Atty. Gen.

Hon. G. W. Armstrong:

DEAR SIR: In answer to your note of inquiry of this morning, I respectfully state, that I can see no valid objection to retiring the currency now in the Treasury of the State, and receiving therefor the bonds of the State of Minnesota held by the Auditor in trust to secure such currency. The "act to authorize a loan of $250,000," etc., passed March 13, 1859, requires the Treasurer to invest a certain amount of money each year for purposes therein expressed, and the exchange of currency in your hands in the manner proposed is undoubtedly, under the circumstances, for the best interest of the State.

ST. PAUL, October 21st, 1859. C. H. BERRY, Atty. Gen.

Thos. B. Chealey, Esq.:

SIR: Hon. W. F. Dunbar has this day put in my hands a letter from you to him on the subject of your county and State taxes, which he desires me to answer. I have already written you, which letter it seems you have not received. I advised you that where lands had been sold for delinquent taxes and bid in by the county, the same may be redeemed by payment in county orders, irrespective of the purpose for which such taxes were levied. This, of course, presupposes that the county is still the holder of the certificate. When the county has assigned, as in the case put by you, it is quite another thing. The tax then becomes a debt or demand due and owing to an *individual*, and not to the county. In such case the register becomes the trustee of the holder of the certificate, and I do not know of any authority to receive evidences of county indebtedness in full satisfaction of such claim.

You say the delinquent taxes for which the lands were sold, accrued in 1858. Are you sure you had a right to sell these lands? Were the returns showing the taxes delinquent made before the *first day* of February last? If not so made, it is doubtful whether the sale was valid, or that the holder of the county certificate has any rights thereunder against these lands. Should such be the case, the taxes are still to be treated as though no sale had been made, and are payable in money or county orders, according to the purposes for which such taxes were imposed.

I cannot advise you specifically as to your duty, as I am not in possession of all the facts, but the foregoing answers your main question, and doubtless as to the details of your duty, you will have no difficulty.

ST. PAUL, October 23d, 1859. C. H. BERRY, Atty. Gen.

His Excellency, H. H. Sibley:

SIR: In answer to your inquiry as to the power of the Governor under the constitution and laws of this state to commute the sentence of death to imprisonment, I have respectfully to state that I think such power is reposed in the Governor. By the constitution he is empowered to grant "reprieves and pardons" without any provision restraining the legislature from prescribing the manner in which such power shall be exercised. By sec. 1, chap. 117, laws of Minnesota, he is authorized on petition of the person convicted "to grant a pardon upon *such conditions* and with *such restrictions* and under *such limitations* as he may think proper." A com-

mutation is but a *conditional* restricted or limited pardon. Operative as a pardon, only on condition that its terms are accepted by the defendant and its conditions complied with.

ST. PAUL, October 28th, 1859. C. H. BERRY, Atty. Gen.

C. N. Earle, Esq.:

SIR: Yours of the 24th inst. is received. My opinion is that the legislature by the words "clerk of the district" in sec. 8, chap. 6, of the township organization act, intended "clerk of the district court," and that the official bonds of justice of the peace should be filed with that officer.

ST. PAUL, October 28th, 1859. C. H. BERRY, Atty. Gen.

E. A. Rice, Esq., Register of Deeds, Waseca County:

SIR: The township organization law recognizes the existence of the office of county auditor when such officer shall be *elected*, but I do not see the authority for the election of such officer. Without doubt the legislature designed to provide for such election, but failing to do so, I do not think there is any authority to supply the deficiency. At present the register of deeds or such other person as shall by the board of supervisors be duly elected to perform the duties of clerk, is the only person, in my view, authorized to perform the duties of such office.

ST. PAUL, November 1st, 1859. C. H. BERRY, Atty. Gen.

GORDON E. COLE, ATTY. GEN.—JAN. 4, 1860, TO JAN. 8, 1866.

L. R. Cornman, Esq., District Attorney, Washington Co.:

DEAR SIR: I have examined the questions submitted by you, and have arrived at the following conclusions:

Chapter 26, of the special laws of 1858, provides for the construction of the Cannon Falls and St. Paul road. Section 3, provides "that each county through which said road shall pass, shall pay the expenses incurred in the location, and construction of the same, as aforesaid, in proportion to the length of said road in each county respectively." Section 4, of the original act, providing for the payment of the orders of the road commissioners out of the treasuries of the respective counties, is repealed by sec. 2, chap. 183.

The objection is raised by the authorities of the county of Washington, that the provision requiring the payment of the expenses of constructing the road, by the respective counties through which it passes, is unconstitutional. In all constitutional governments, the legislature is endowed with all the elements and prerogatives of sovereignty, one of which is the power of taxation, except so far as restrained by the constitution. It matters not, however unjust and oppressive the exercise of such power may be, if confined within constitutional limits, the legislative discretion is beyond control, and may, perhaps, quite as safely be vested in the legislative, as in the judicial department of the government. The responsibility of the representative to his constituents, will usually be found ample protection from the arbitrary exercise of power. All portions of the State and all classes of citizens, are there represented and have an opportunity to be heard. For convenience it is customary to delegate such portions of the taxing power, as are of a local nature and designed to promote local objects and interests, to various sub-divisions, as towns, counties, &c., but certainly the legislature can delegate no power which it does not

itself possess. The power to provide for improvements in which the public at large are interested, as, for instance, a highway passing through several counties, whose local interests may be differently affected thereby, and the authorities of which might entertain diverse views respecting its expediency, would seem to be peculiarly within the province of the legislature, and its decision respecting the propriety of such action is conclusive. It is presumed in all cases, that those districts contiguous to a public work, are more directly benefited thereby, than other and remote portions of the State, hence the justice of requiring that, as a compensation for such additional benefits, those districts directly affected, should be subjected to the burdens attending its construction.

It has become a settled law that the legislature may, in its discretion, provide by a general act for the taxation of the inhabitants of the State at large, or, by special legislation, for assessments upon those districts or individuals, presumed to derive a particular and additional benefit from the prosecution of public improvements. Upon this principle the owners of lots in towns and villages are assessed for their proportionate share of the expense of grading streets by which the value of such property may be enhanced. It was long contended that these assessments were in violation of the constitutional provisions, prohibiting the exercise of the right of "eminent domain," without rendering compensation, but they have at length been decided to be a legitimate exercise of the taxing power, and the universal custom of assessing particular districts for the expense of local improvements, is alluded to by the court as an analogous case, the validity of which is undisputed.

For these reasons I am forced to the opinion, that the law in question is constitutional.

ST. PAUL, January 24th, 1860. G. E. COLE, Atty. Gen.

To His Excellency, Alexander Ramsey:

SIR: I have examined the papers accompanying the application of Joseph Moody for a requisition upon the Governor of Illinois for the delivery to the authorities of this State of one William L. Chase, an alleged fugitive from justice, and am of the opinion that the indictment found by the grand jury of Benton county is the best and only evidence upon which it would be proper for the Executive to act. Whatever may be the facts in the case, the grand jury having found a true bill against the defendant, and the indictment showing upon its face sufficient to warrant the conviction of the defendant of the crime therein charged, it becomes the duty of the Executive to issue the requisition. If the facts warrant the issuing of the requisition I see no reason why the State should not be subjected to the expense of vindicating the law. If the Governor is warranted in issuing the requisition he is certainly warranted in subjecting the State to the expense attending it. The legally constituted authority, to wit: the grand jury, have upon mature investigation (it must be presumed) found the defendant guilty of the crime of larceny, and if so the public which alone has been injured should bear the burdens attendant upon the prosecution rather than the complainant. I have not the evidence at command, of course, neither do I believe it necessary, as it has been passed upon by the grand jury, whose action in the matter I *deem sufficient* authority to authorize the action of the Executive.

ST. PAUL, February 27th, 1860. G. E. COLE, Atty. Gen.

Messrs. Emmett and Smith:

GENTLEMEN: In the inclosed communication received this morning you enquire—

1st. Is any one but the Attorney General authorized or empowered to contest preemptions to school lands within this State? In reply to this interrogatory I have to say that no power or authority in this particular is expressly vested in any officer. The school lands are of course under the control of the State, and her policy respect-

ing them in the absence of legislative action would be determined by the Executive department. The protection of school lands from trespassers, &c., has been by express enactment conferred upon the county commissioners, but no power is conferred in the case referred to by you.

2d. You enquire "whether any authority was given to the commissioners of Hennepin county to contest in the manner before stated or has their action in the premises been approved or recognized by the State?" As I have said, no express enactment confers this authority upon the commissioners, and I find nothing in this office indicating any approval or disapproval of their action. The register of cases commenced or prosecuted by my predecessor has never been delivered to me, and consequently I have no official knowledge respecting his action in the matter.

3d. Was the appeal taken by said county authorized or is it now continued or prosecuted by or on behalf of the State? As I have said, I am unable to say officially whether the appeal was originally authorized. No action has been taken by this administration respecting this particular case, but we have taken the position maintained by the preceding administration, that the joint resolution authorizing the pre-emption of school lands by settlers whose settlements were made prior to the survey, is in violation of the rights of the State under the act of Congress granting sections 16 and 36 to the State for school purposes. Again you inquire, "whether, assuming that Congress had authority by the act or joint resolution of March 3d, 1857, to modify the proposition made to the people of Minnesota as to to school lands by the act authorizing the formation of a constitution before that proposition was accepted, or in other words, assuming that the act of Congress of March 3d, 1857, giving a right of pre-emption to school lands when the settlement was made prior to the survey, is valid, is it the policy of the State government, or the desire, to impose any obstacles to the entry of these lands by pre-emption when the settlement was prior to the survey, or to take advantage of any mere techicalities as against this class of settlers?" To this inquiry I beg leave to state that the policy of the State still remains as it ever has been, to assert her claim under the Congressional grant to all the sections numbered 16 and 36 within her limits, not otherwise disposed of prior to the passage of the act. It is claimed by the State administration that the act of Congress divested Congress of all control over these lands, and that by no subsequent act could the grant be in any way affected; that the acceptance by the State, of the propositions contained in the enabling act, operate to divest the general government of all title to these lands from the date of the grant. The assumption embraced by your inquiry I suppose to be simply this: assuming that this claim on behalf of the State is decided against us, whether it is the policy of the State to interpose any obstacles to the entry of such lands by actual settlers, or to rely upon any mere technicalities as against this class of settlers. To this I have no hesitation in saying that the State has no disposition to rely upon technicalities. It is believed she has rights as against this class of settlers, but if the matter shall be otherwise determined, her policy would undoubtedly be to acquiesce in the decision and select other lands in lieu of those thus taken.

ST. PAUL, March 3d, 1860. G. E. COLE, Atty. Gen.

To His Excellency, Alexander Ramsey:

SIR: In compliance with your request I have examined the question relative to the power of the Legislature to commute the sentence of a convict. The questions to be considered are:

1st. Where is the pardoning power vested?

2d. Does the power to pardon include the power to commute?

3. If conferred upon one department of the government, can it be legitimately exercised by any other?

Under the English law this power is one of the prerogatives of the crown, although parliament, which, untrammelled by constitutional restrictions, is supreme, has, in several instances, exercised it. In this country the question whether it is inherent

in the executive, in the absence of express provision, has never been adjudicated, although it is believed that the question is determined by express constitutional provision in every State of the Union. The language of our own constitution is as follows: "The Governor shall have power to grant reprieves and pardons after conviction for offences against the State except in cases of impeachment." The nicely arranged system of checks and balances, which is the basis of all our American governments, has wisely conferred this power upon the Executive. The Legislature defines the crime and prescribes the penalty; the judiciary applies the law to the particular case, and with its construction neither Legislature nor Executive can interfere. To the Governor is entrusted the power to enforce the enactments of the one and the decisions of the other, and germain to this is the exercise of executive clemency, the power to mitigate the rigor and stay the arm of the law in cases which commend themselves to his mercy. With the enactment and construction of the law the powers of the other departments end, with its execution that of the Executive commences. As the wisdom and justice of particular laws are within the sole discretion of the Legislature, as their construction is the especial prerogative of the judiciary, so the time and manner of their execution is properly confided to executive discretion.

2dly. Does the power to pardon include the power to commute? The Legislature having prescribed the punishment, can it be altered or modified by the Governor? Commutation is defined by all writers on criminal jurisprudence as a conditional pardon, and upon the general principle that the greater includes the less it is difficult to perceive why the power to grant an absolute pardon and absolve the offender from all the consequences of his crime, should not include the power to modify the penalty. Every pardon, whether technically absolute or conditional, is granted upon the condition of its acceptance by the offender.

Numerous cases are cited by criminal authors of pardons granted by the executive upon the condition that the convict should submit to a lesser punishment, as banishment or imprisonment. Any condition, whether precedent or subsequent, not prohibited by law, may be annexed to the pardon; if accepted, the modified sentence is executed, if not the law takes its course, and the original sentence remains unaffected.

3d. If the pardoning power is conferred upon one department can it be legitimately exercised by another? The constitution declares "That the powers of government shall be divided into three distinct departments—legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided by this constitution." I think it has been demonstrated that the power of commutation is vested in the executive, and there is certainly no clause in the constitution providing for its exercise by any other department. It would seem therefore that the question was too plain to require further argument. If the lawmaking power can interfere with the province of the Governor, assume the exercise of Executive clemency, and forbid the execution of the law, why may not the judiciary exercise the same prerogative of mercy, and declare that a law which the legislature has enacted, and which they have declared applicable to the particular case, shall not be executed. If so, a writ of *mandamus* from the supreme court commanding the Governor to issue his pardon under the great seal of the State, would avoid the embarrassing consequences of the veto power, furnish a much more speedy and effectual remedy.

Conceding that legislative action in this particular is legitimate and proper, it may be well to inquire whether there are not other prerogatives incident to the Executive which may not with equal propriety be exercised by the legislature. Among the powers conferred on the Governor are the following: "He shall be commander-in-chief of the military and naval forces and may call out such forces to execute the laws, suppress insurrections and repel invasion, and he shall have power to grant reprieves and pardons, &c. In the same clause and the same language are these powers conferred.

May the legislature assume command of the military; can they under pretence of

executing the laws or of repelling invasion surround the capital with an armed force? If so, absolute and irresponsible power is at their command and sovereignty departs from the people and vests in their representatives. The power and authority of the Executive is not merely impaired, it is destroyed, and with it the constitution. These consequences may not be probable but they are possible, and the argument which supports any encroachment, however slight, furnishes a precedent for greater and more dangerous inroads. Again in the same clause, he shall have power to appoint such officers as may be provided by law, he shall have a negative upon all laws passed by the legislature, he may on extraordinary occasions convene both houses of the legislature, shall take care that the laws be faithfully executed and may fill vacancies in State officers, &c. Are these powers within the province of the legislature? If so, it may declare its sessions permanent, appoint from its own number executive and judicial officers, and render the co-ordinate departments mere sinecures destitute of power or authority. A policy which leads to such results cannot be justified.

If the Executive province can be thus invaded, that of the judiciary is also liable to similar encroachments. The same argument would authorize the legislature to resolve itself into court and jury, examine the evidence, set aside the verdict, reverse the decision of the court, and pass such sentence as in its wisdom might seem just. In a form of government like ours the well defined line that separates the powers of the several departments should be carefully observed, and any attempt at encroachment by the one has ever met with prompt resistance from the other. I am of opinion that the action of the legislature in this instance cannot be justified upon principle or authority and that it is the duty of the Executive to repel the attempted invasion of its constitutional powers.

ST. PAUL, March 5th, 1860. G. E. COLE, Atty. Gen.

I. N. McKilvy, Esq., District Attorney, County of Stearns:

DEAR SIR: I have received your favor inquiring whether the act regulating the traffic in spirituous liquors passed August 12th, 1858, is in force in that portion of the State purchased of the Sioux tribe of Indians in 1851. The act of March 4th, 1854, prohibiting the introduction of liquor into that portion of the State certainly does not affect any subsequent law, and is itself repealed by the act of August 12th, which is extended to all portions of the State and expressly repeals all laws inconsistent with its provisions. The only question is, whether by treaty the introduction of liquor is not absolutely prohibited until the United States Government removes the restriction; if so, the act of 1858 could have no operation whatever within the limits of the purchase. Art. 5th of the treaty is as follows: "The laws of the United States prohibiting the introduction and sale of spirituous liquors in the Indian country shall be in full force and effect throughout the territory hereby ceded and lying in Minnesota until otherwise directed by Congress or the President of the United States." This provision was evidently a temporary one, designed to protect the Indians from the effects of liquor which would otherwise be introduced by traders during the period that would elapse before their final removal, and the settlement of the country by the whites. The state of affairs contemplated by this clause has passed away. Minnesota has been admitted into the Union as a sovereign State, and with sovereign powers, and clothed with the right to regulate under the constitution of the United States her domestic policy in her own way. The act admitting her and conferring these powers, repealed, by implication at least, any restriction of this character. I do not think parties can protect themselves under this plea, but I hold the law operative alike in all parts of the state. With reference to the other question, a justice of the peace can only require security for costs of the complainant in matters in which he has jurisdiction.

ST. PAUL, March 7th, 1860. G. E. COLE, Atty. Gen.

To His Excellency, Alex. Ramsey, Governor of Minnesota:

SIR: I have examined the account of John Tadden, Sheriff of Sibley, for conveying a convict to State prison, referred to me by you, and have to say that the charge for guarding prisoners cannot be allowed under item 12 of an act entitled "an act appropriating money for certain purposes therein named," approved March 10, 1860. This item only provides for expenses in conveying convicts to State prison. All charges for keeping a prisoner must first be audited by the county commissioners of the county in which such prisoner is confined, and when so allowed are to be paid out of the State Treasury. Sec. 3, p. 788, Comp. Stat. The charge for mileage should also, I think, be disallowed. There is no clause in the statutes providing for mileage in such cases. Sec. 45, p. 796, Comp. Stat., provides for the payment of expenses and fees of sheriff out of State Treasury for such services. Whenever mileage is allowed it is as a compensation for and in lieu of travelling expenses, and certainly both should not be allowed. I think, therefore, the actual and necessary travelling expenses only should be allowed. The compensation charged for services, in the absence of any statute fixing the fees, seems to be reasonable, and I see no objection to its allowance.

ST. PAUL, March 12th, 1860. G. E. COLE, Atty. Gen.

Hon. A. Ramsey:

SIR: I am of opinion that the temporary absence of the Governor is not such a vacancy as would authorize the Lieutenant Governor to exercise the duties of Governor *ad interim*. The constitution provides that in case of a vacancy for any cause whatever, the Lieutenant Governor shall perform the duties of Governor during such vacancy. By an act passed August 9th, 1858, the Legislature seems to have given its construction to this clause, by providing that in case of death, impeachment, resignation, or removal from office of the Governor, the Lieutenant Governor shall act. This certainly does not include a temporary absence. With reference to your second inquiry, I have to say, that by an act approved February 24th, 1860, the Governor is required to issue his commission to all county officers.

ST. PAUL, April 19th, 1860. G. E. COLE, Atty. Gen.

Hon. Alexander Ramsey, Governor of Minnesota:

SIR: With reference to the policy of the State respecting the foreclosure of the mortgages upon the several land grant railroads, &c., I have to say, that I have very great doubts of achieving any beneficial results by a foreclosure and sale pursuant to the power conferred upon the Governor by the trust deeds executed by the several companies, to secure the first mortgage bonds issued by them, should other first mortgage bond holders combine with the companies to thwart any attempt thus made on the part of the State. The trust deeds of the Winona Transit Road and of the Minnesota and Pacific contain provisions, authorizing the Governor to foreclose and execute all necessary conveyances. That of the Minneapolis and Cedar Valley contains no such provisions, and the foreclosure must be by the trustees. Should no opposition be made by interested parties, a foreclosure and sale pursuant to the powers conferred, would doubtless furnish the plainest and most expeditious remedy, but in the event of such opposition I have no confidence whatever in any title which the State would acquire. But one thousand dollars were appropriated by the last legislature for the foreclosure of these roads, which will barely pay the necessary expenses of the sale. Whereas in case of a claim on the part of first mortgage bond holders, a *bona fide* bid on behalf of the State would probably be requisite, The objectionable feature in these *ex parte* proceedings is, that they furnish no means of testing the validity and *bona fides* of the claims of other first mortgage bond holders. These claims are *prima facie* equally valid and binding upon the company and the trust fund as those of the State, and must of course be recognized if insisted upon. The State occupies the position that any private bond holder

would, who being desirous that the securities should be foreclosed, finds the interest of his co-bond holders (which must be identical in order to afford sufficient remedy by sale under the power) adverse; the only course in such case would be by resort to a court of equity, making the co-bond holders defendants. In this proceeding the rights and equities of all parties can be determined, the validity of alleged fraudulent claims tested and a final foreclosure of the rights of the companies obtained. The power of sale contained in trust deeds does not, I am satisfied, preclude a resort to the remedy by application to a court of equity, and in the foreclosure of railroad mortgages, the latter is usually resorted to, notwithstanding the more summary remedy by sale. It is believed that in all cases in which the interests of parties are complicated, and the rights of the *cestuys que trust* adverse, this is the only adequate remedy. As, however, it is understood that no opposition will be made to a summary foreclosure by the State, and in view of the expense and delay attendant upon a suit in equity, it may be expedient to resort in this instance to the power of sale conferred by the deeds.

ST. PAUL, April 19th, 1860. G. E. COLE, Atty. Gen.

Hon. Alexander Ramsey, Governor of Minnesota:

SIR: Your favor of the 24th inst., enclosing letter of Edmund Rice, Esq., President of Minnesota and Pacific Railroad Co., is before me. I have to repeat what I said in my opinion of April 19th, that I have very grave doubts of the policy of foreclosing the railroad mortgages by advertisement. The reasons which I then gave are not perhaps the only ones. The positions taken by Mr. Rice as stated in your letter I do not believe tenable, but there are other objections which it seems to me would be stronger. Mr. Rice objects to the action of the Governor in default of action by the trustees, because, as he claims, the supplement to the trust deed of the company of which he is president was obtained by compulsion. He might with equal propriety claim that the original deed was obtained by compulsion, as I presume the Governor would have refused to issue any state bonds to the company until its execution. I hold that it was the duty of the Executive to see that the securities required by the constitution were executed in such a manner as to protect the interest of the State, and not leave her interests at the mercy of the company and its agents, and I cannot see that he has exceeded the limits of his duty. With respect to the second point, "that the Governor refused to issue the remaining twenty-five bonds, and that therefore the foreclosure would be void," I have to say, that this refusal of the Governor to execute the law cannot surely absolve the company from all obligation to pay the 600 bonds already issued. The issue of these twenty-five bonds is in no sense a condition precedent to the foreclosure, and I do not see how it can affect it. But there is a question of serious difficulty. If any first mortgage bonds were issued under the first trust deed, and before the execution of the supplement, the proceedings by the Governor to foreclose would probably be void as to them. If the company and the first mortgage bond holders attempt to obstruct our action they have it in their power to trouble us.

ST. PAUL, April 28th, 1860. G. E. COLE, Atty. Gen.

Hon. Ignatius Donnelly, Governor ad interim:

SIR: Your favor inclosing communication from Rev. E. D. Neill, Superintendent of Public Instruction, making inquiries respecting the great seal of the State, is before me. In reply I have the honor to state that the great seal of the State is in the custody of the Secretary of State, its legally constituted custodian, and a seal similar to that should be procured. I think Mr. Neill is mistaken in supposing that the seal at the head of his circular still remains the great seal of the State, or that the Legislature have taken no action in the matter. Sec. 13, p. 126, Comp. Stat., is as follows: "Whenever the great seal of the State shall be broken or lost, or so worn or defaced as to be unfit for use, the Governor shall procure a new one." It may be

doubtful whether under this clause the Governor has the power to change the seal in any particular, probably not; but I understand that he has provided a seal differing somewhat from that in use under the Territory, and whether such action on his part was authorized by law or not, the seal thus adopted has been since treated as the great seal of the State. Mr. Neill by calling on the Secretary of State can obtain an impression of the great seal to which the one adopted by him should conform.

ST. PAUL, May 17th, 1860. G. E. COLE, Atty. Gen.

Hon. Alex. Ramsey, Governor of Minnesota:

SIR: In reply to your favor of the 26th, inquiring respecting the power to appoint a clerk of the district court, I have to say that I am aware of no law authorizing the Governor to fill a vacancy in that office. The office of clerk of the court is a county and not a district office. The power of appointment in the absence of statute regulations is undoubtedly in the court. Every court has power to fill a vacancy occasioned by the absence, death or resignation of one of its officers.

ST. PAUL, May 28th, 1860. G. E. COLE, Atty. Gen.

Hon. W. F. Dunbar, State Auditor:

SIR: Your favor making inquiries respecting the proper course to be pursued by you with reference to a garnishee process which has been served upon you, by which an attempt has been made to attach in your hands certain funds deposited with you as State Auditor pursuant to the provisions of the general banking law, is before me, and in reply, I have to state, that it has long been the established doctrine of the courts of those States which have adopted this process, that funds in the hands of a public officer are not subject to attachment. In the absence of authority sound principles of public policy would seem to demand such exemption of officers of the government. Were any other rule to prevail they might be called at the suit of any citizen into any and every county of the State to answer interrogatories to the neglect of their public duties, and in the case of the Auditor of the State the object of the banking law would be, I apprehend, entirely frustrated and the bill holders for whose protection chiefly the law was enacted compelled to wait the tardy result of a trial in our courts, instead of receiving the prompt and speedy payment from the fund realized by the sale of the securities in the hands of the Auditor, contemplated by the law. The embarrassment which the adoption of such principles would occasion to the office of State Auditor in particular, the interference with the efficient discharge of his duties, the delay and confusion which would inevitably be introduced into the administration of that department, are satisfactory and conclusive, as it seems to me, against a proceeding of this character.

I am decidedly of the opinion that the process cannot be sustained. As the summons requires you to appear in your private capacity, you will be under the necessity of appearing and alleging the facts stated in your communication to me. In the mean time you are bound to perform the duties required of you by the banking law, and no process in my opinion can excuse you for neglecting or suspending them. If you continue to act strictly in accordance with the provisions of that law, no court will hold you responsible.

ST. PAUL, May 30th, 1860. G. E. COLE, Atty. Gen.

His Excellency, Alex. Ramsey, Governor of Minnesota:

SIR: In reply to your inquiry of yesterday, respecting the proper construction to be given to sec. 9 of art. 4 of the constitution, I have to say that I have examined the question more particularly with reference to the appointment of "Regents of the University of Minnesota." The section of the constitution to which I have alluded, is as follows: "Sec. 9. No senator or representative shall, during the time

for which he is elected, hold any office under the authority of the United States or the State of Minnesota, except that of postmaster, and no senator or representative shall hold an office under the State, which had been created or the emoluments of which had been increased during the session of the Legislature of which he was a member, until one year after the expiration of his term." The term, office, is defined by Blackstone to be "a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging."

The language of our constitution is, I think, more broad than that of most of the States of the Union. The section containing the restriction seems to have been adopted in the convention without discussion. We are therefore without the aid which the journals of deliberative bodies frequently afford. It may be premised, however, that so far as judicial construction has been had upon similar clauses, the strictest possible construction has uniformly been adopted. Nothing has been taken by intendment. Every office not coming within the strict letter of the law has been excluded; and even many apparently embraced by the literal meaning of the words employed have been considered as foreign to its spirit and intent, and therefore not within its provisions.

Sec. 4 of ch. 80, of the session laws of 1860, provides that the University shall be governed by a board of regents, consisting of the Governor, Lieutenant Governor, Chancellor and five electors of the State to be appointed by the Governor by and with the advice and consent of the Senate. The question is whether the appointment of a member of the legislature as regent is in violation of the constitutional prohibition? The board of regents is a body vested with corporate powers, and is to all intents and purposes a corporation entirely separate and distinct from the State. The regents, if in any proper sense officers, are officers of the corporation and not of the state. This position however is rather an appointment than an office within the scope of the restriction. They are perhaps more nearly analogous to visitors of certain corporate bodies than to any other class of public servants. The language of Tod, J., in the case of Commonwealth *ex rel.* Beebe v. Burns, in 17 Serg't & Rawle, p. 226, is as follows: "Visitors of the West. Point Military Academy are appointed by the Secretary of War, yet perhaps it was never once imagined that such appointment was an office under the Government, and therefore incompatible with the station of Member of Congress or Member of Assembly."

Deputy Attorney General and Deputy Surveyor General in those States where they exist, although those offices are fixed by law, have never been deemed within the prohibition, probably because their position was construed as an appointment rather than an office. So officers of the militia have held seats in our legislature without objection, although the argument would seem much stronger against this class of officers than those under consideration. The legislature being the exclusive judge of the qualifications of its members, a construction of a doubtful provision by that body upon this subject, is of high authority.

The clause in question was evidently inserted in the constitution with the view to separate as far as possible the executive and judicial from the legislative department of the government, and to exclude the latter from any undue influence which the presence of office holders might exert upon its deliberations. It is difficult to perceive how the case of the regents is within the spirit or intent of the provision. The office is without emolument. The regents are simply designated by the Governor as the persons to constitute the corporation. The act of appointment performed, they act not as officers of the State, but as members of a separate and independent corporation, whose interests can no more affect their impartiality as legislators than those of the officers or members of any other corporation. I am therefore of opinion that a member of the legislature is eligible to the appointment of regent of the University.

ST. PAUL, January 16th, 1861. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey, Governor of Minnesota:

SIR: With reference to the result of the recent vote upon the question of changing the boundary between the counties of Scott and Dakota, I have to say that I am of opinion that a majority of the votes polled in each county is necessary to effect the change. Section 1 of article 11 of the constitution provides that laws changing county lines in counties already organized, shall, before taking effect, be submitted to the electors of the county or counties to be affected thereby, at the next general election after the passage thereof, and be adopted by a majority of such electors. The act of March 8th, 1860, providing for the submission of such proposition to the electors of Scott and Dakota is only valid so far as it conforms to the section of the constitution referred to. Upon the construction of this, then, the answer to the question depends. The intention of the framers of the constitution seems to have been to leave all changes of this character, by which any county is affected, to the decision of the people of the county, and if two or more counties were to be affected, then to the people of each. Were a majority of the entire number of votes polled in both counties sufficient, it would be in the power of a large and populous county to appropriate the territory of one more sparsely inhabited, giving to the inhabitants of the latter no voice in the matter. If the interests of one county would be promoted at the expense of the other by such change, the county injured ought certainly to decide for itself, otherwise the very object of submitting the question to the people would be defeated. If the people of a county are to have the decision of this matter, every principle of justice supports what I deem the clear intent of the clause, and an effectual vote should be guaranteed to every county affected, uninfluenced by the wishes or votes of the people of any other county.

ST. PAUL, January 16th, 1861. G. E. COLE, Atty. Gen.

Thomas Russell, Esq.:

DEAR SIR: In reply to your favor, I have to say that the Constitution of the United States has conferred upon the several States the power of appointing presidential electors, and our laws make no distinction between this and any other election, but provide that the "qualified electors of the State shall elect." By referring to the section[1] to which you allude, the qualifications of electors will be found to include the foreign born resident, who has declared his intention to become a citizen. I think that such persons are certainly entitled to vote for presidential electors.

FARIBAULT, June 16th, 1860. G. E. COLE, Atty. Gen.

To the Honorable, the Secretary of the Interior, Washington, D. C.:

SIR: On the 13th of February, A. D. 1860, in connection with his Excellency, Governor Ramsey, I had the honor to transmit to Hon. Jacob Thompson, then Secretary, a protest on behalf of the State of Minnesota against the allowance of pre-emptions and the issuance of patents upon sections 16 and 36, in this State, under the provisions of the joint resolutions of Congress, passed March 3d, 1857. To this, as well as to a similar protest addressed to the department by his Excellency Henry H. Sibley, late Governor of Minnesota, no response has been received. A definite decision of the questions at issue is of great importance to the State, and I desire to state briefly for your consideration, the points made by the State, and if, upon examination, you shall entertain any doubt respecting the position heretofore maintained by the land department, I have respectfully to request that the matter be referred to the Attorney General for his opinion, and that until such opinion can be had, the officers of your department be instructed to desist from the allowance of pre-emptions and the issuance of patents under the provisions of the resolution referred to and the act of February 26th, 1857. The act of February 26th, 1857, authorizing the people of Minnesota to form a State government granted sections 16 and 36 to the

[1] Section one, article seven of Constitution of State of Minnesota.

State for school purposes, conditioned only upon the acceptance of certain propositions by the state. These conditions being beneficial in their character their acceptance should be presumed ; at any rate, the right to accept them, became, by virtue of the act, irrevocably vested in the people of the future State.

It has been repeatedly held that words of present grant are not necessary to pass a valid title, and that the right is vested by the act itself, without the issuance of a patent or other formality. The enabling act divested Congress of all title to the sections 16 and 36 within the territorial limits of Minnesota, and constituted a solemn and irrevocable compact between the General Government and the State which no subsequent legislation could impair. The joint resolution of March following is, it is apprehended, void as against the claims of the State. Admitting, however, that the enabling act was merely an executory contract, by which Congress agreed to grant such sections upon the performance of certain conditions by the State, authorities are not wanting to the effect that a legislative contract is irrevocable even in the absence of constitutional provision upon general principles. The public faith is pledged to the performance of its contracts, whether executed or executory, and courts of justice will be slow to admit the power or right of the government to annul them at pleasure. But it may be said that by the act of August 4th, 1854, which extended the pre-emption act to lands in Minnesota, whether surveyed or not, a *quasi* disposition of these sections within the meaning of the provisions of the enabling act was made. In answer to this, it may be observed that the time-honored policy of the government in this particular was applied to Minnesota in the first period of her territorial existence. Before any act authorizing the pre-emption of unsurveyed lands in Minnesota, in and by the organic act of the Territory, sections 16 and 36 were as early as March 3d, 1849, reserved for the support of schools, when the lands should be surveyed. A present but inchoate and undefined right vested in the people of the Territory or future State by this act, which became fixed and definite upon the survey, and of which no subsequent legislation could deprive them. The Supreme Court of the United States has established the doctrine, that whenever a tract of land has once been legally appropriated to any purpose, from that moment it becomes separated from the public mass, and no subsequent law, proclamation or sale, will be construed to embrace or operate on it, although no reservation is made of it. It is a well-settled principle, that a subsequent grant must yield to a prior one, and that he who is prior in point of time is prior in point of right.

If, however, these positions are untenable, and it shall be held that parties who located upon school lands prior to the survey and prior to the acceptance of the provisions of the enabling act by the State, have acquired rights prior to and which take precedence to those of the State, yet it would certainly seem that by such acceptance an irrevocable title was acquired to all such sections not then otherwise disposed of, and that the claims of parties who have located upon sections 16 and 36 prior to the survey, but since the acceptance of those provisions by the State, cannot be valid as against her.

The claim of priority of right in these cases utterly fails. The grant, if such it may be termed, to such persons is in every sense subsequent to that of the State, and its allowance would establish the doctrine that vested rights may be divested by legislative action. In support of my position upon this matter, I beg leave to refer to the argument of Charles E. Sherman, Esq., on file in your office, the opinion of the Attorney General communicated to Hon. J. Thompson, Secretary, &c., under date of November 10, 1858, and the case of Cooper vs. Roberts, 18 How. 173. A communication to me of your opinion, or that of the Attorney General, at as early a moment as practicable will be esteemed a favor.

ST. PAUL, January 23d, 1861. G. E. COLE, Atty. Gen.

To the Honorable the Speaker of the House of Representatives:

SIR: I have the honor to acknowledge the receipt of a resolution adopted by the House of Representatives, requesting the Attorney General to communicate to the

House at an early day, all the facts within his knowledge concerning the foreclosure and sale of the lands, property and franchises of the several land grant companies of the State, together with his opinion concerning the regularity of said foreclosures and sales, and the present legal condition of said lands, properties and franchises. The resolution, in terms, embraces a wide field of investigation, but presuming that only such facts are desired as are necessary for a correct understanding of the conclusions arrived at, a brief notice of a few leading circumstances, and an examination of the objections to the proceedings made by parties in interest, will I apprehend furnish all the information required.

It may be premised that the several land grant companies participating in the loan of State credit granted by the amendment to section 10, article 9 of the constitution, issued and delivered to the Governor an amount of first mortgage bonds equal to the amount of State bonds received by them, with interest payable semi-annually in New York, the interest becoming payable on the bonds of the company sixty days before that upon the bonds issued by the State. That trust deeds were executed to certain parties in trust for the first mortgage bond holders, authorizing in some instances a foreclosure by the trustees on demand of the Governor upon default in the payment of the interest on the first mortgage bonds issued by them, and upon their neglect the Governor was authorized to foreclose. In the fall of 1859, default was made by all the companies except the Southern Minnesota, and demand was made upon the trustees to foreclose, by his Excellency, Henry H. Sibley. No default was made by the Southern Minnesota company until the spring of 1860.

During the summer of 1860 proceedings were instituted by the Governor against all the companies, (except the Minneapolis and Cedar Valley company, whose trustees foreclosed,) and the trust deeds were foreclosed by advertisement; the lands, properties and franchises purchased by the Governor, in the name of the State, and deeds executed and filed in the office of the Secretary of State. The properties and franchises of the Minneapolis and Cedar Valley company were also purchased by the Governor, and the deed has been executed, and is in the hands of the attorney of the trustees ready for delivery.

Prior to the sale, suits were instituted by the Transit, and Minnesota and Pacific companies, and by James M. Winslow, a bond holder of the latter company, and injunctions issued prohibiting the sale. In these suits no appearance was made on behalf of the State, and the sales proceeded. The foregoing is, in brief, a history of the proceedings against the companies.

Before proceeding to notice the objections to the title acquired under the foreclosure, it may be proper to remark, that a foreclosure in equity would in my estimation have furnished a more certain and adequate although less summary remedy. The strictness with which *ex parte* proceedings must be pursued, the complications in which the subject was involved, the conflicting interests of other bond holders, the at least doubtful regularity of some of the early steps upon which the proceedings must necessarily be based, have suggested strong legal objections to a foreclosure under the power. The State occupied the position that a private bond holder would, who, being desirous that a foreclosure should take place, finds the interest of his co-bond holders, which must be identical to afford sufficient remedy by sale, adverse. The safer course in such case would certainly be found in a resort to a court of equity, making all co-bondholders defendants. In this proceeding the legal and equitable rights of all parties in interest may be determined, the validity of alleged fraudulent claims tested, and a final foreclosure of the rights of the companies obtained. It is believed, that in all cases in which the interests of the parties are complicated, and the interests of the *cestuys que trust* adverse, this is the remedy usually resorted to.

I now proceed to the discussion of the objections urged to the validity of the sales.

1st. The Minnesota and Pacific Railroad Company, after the execution of their trust deed and the issue of bonds under it, were required by the Governor prior to the delivery by him of any State bonds to execute a supplement conferring upon that officer the right to foreclose on default of the trustees. It is objected that this

instrument was obtained by compulsion, and is without consideration and void. I apprehend that the only cases in which the plea of compulsion or duress can be successfully urged, are those in which the property of the party is detained upon an illegal demand with which in order to release such property, he, having no day in court, and no opportunity to test the question, complies. The principal cases in which the question arises are upon illegal assessments of taxes, in which the collector has full power summarily to enforce his demand. In this case no property was detained, and a speedy remedy existed which would have tested the legality of the requirement. The plea of want of consideration cannot avail; the seal imports consideration, and no valuable consideration is necessary to support an executed contract by speciality. But again, the constitution no where defines the particular requisite of the deed to be executed by the companies, and it was the duty of the Governor to exercise a sound discretion in the matter and require such instruments as would, in his opinion, effectually secure the State from loss. The plea of compulsion may be urged with equal force against the original deed which was also *extorted* from the company by a refusal to deliver State bonds until its execution.

2d. The same company after having received 500 state bonds, applied for the remaining twenty-five due upon the amount of road graded. To this request the Governor refused to accede, upon the ground, it may be presumed, that the constitution prohibits the further issue of State bonds after any default in the payment of interest or principal accruing upon those already issued. No default, it is true, had at that time been made in the payment of the State bonds issued to this company, but the interest accruing on the first mortgage bonds of the company on the first of August preceding, was due and unpaid. Whether this position was correct, it is not necessary to discuss, as the neglect of the Governor to perform his duty in this particular cannot release the company from the payment of the interest on the bonds already issued by them. Neither was their delivery in any sense a condition precedent to the enforcement of the rights of the State under the power contained in the trust deed, a writ of *mandamus* would have enforced their delivery if authorized by law; and surely a plea of set-off is a novel objection to the execution of a power.

3d. It is insisted that as the state holds a prior lien upon the first 240 sections of land, which the companies may be authorized to sell in addition to her mortgage upon all the properties and franchises, the assets should be marshaled, and the State in the first instance compelled to exhaust her security upon the land, before coming upon the common fund in which she and other bond holders are equally interested. The absurdity of this objection will be obvious when it is reflected, that by the construction of the land department, no title vests in the companies or the State until twenty miles of the road is constructed and in operation. The companies by their own default have prevented the State from acquiring the title to this land; but it is sufficient to say that courts of equity never compel a party to perform the useless ceremony of exhausting a void or worthless security before coming upon the common fund. But another conclusive answer to this objection is, that courts of equity only marshal assets in cases in which no provision of law intervenes to prevent the operation of the rule. The constitution expressly authorizes the Governor in the alternative to sell the lands or to require a foreclosure of the trust deeds. The resort to either or both remedies is entirely within his discretion.

4th. It is claimed by James M. Winslow, one of the bondholders of the Pacific Company, that the proceedings under the supplement are void as against first mortgage bondholders taking under the original deed. If there are any such bond holders, I am of opinion that the objection is tenable. It is urged, however, that the constitution, and laws carrying its provisions into effect, and the trust deeds themselves are to be construed together as parts of one entire system, and that the original deed although dated before was not executed until after the act of August 12th, 1858, was enacted, which contemplates a foreclosure by the Governor, and parties taking under it must be held bound by the provisions of existing laws, and presumed to have taken subject to the implied conditions that the company might conform its trust deed more nearly to the requirements of law. It is true that laws

in pari materia are to be construed together, but I think it will be found that the act of August 12th does not necessarily contemplate a foreclosure by the Governor personally, but taken in connection with the constitution, that he may require a foreclosure by the trustees. The doctrine that the railroad company may, after an issue of bonds to various parties, engraft upon its deed provisions giving peculiar and additional advantages to one set of bond holders, at the expense of another, without the knowledge or consent of the latter, is not sanctioned by either principle or authority. It is by no means certain, however, that any bond holders of this character are in existence. The complaints in the suits of the companies carefully avoid the allegation that any bonds were issued and delivered to any bond holder prior to the execution of the supplement. The charter of the company provides that the trust deeds shall be filed in the office of the Secretary of the State and recorded therein, which shall constitute the notice to parties, &c. Both the original and supplement were filed simultaneously, and the presumption is strong that until that time no bonds were issued by the company, unless perhaps thirteen bonds held by James M. Winslow. If I am correct in this conjecture, parties becoming the purchasers of bonds after the deeds were so filed took them with full notice of the supplement and are bound by its provisions.

5th. It is objected that the demand made by Governor Sibley upon the trustees of the Minnesota and Pacific and Transit companies was insufficient to authorize a foreclosure by the Governor. The trust deeds empower the trustees to proceed upon default in the payment of interest on the first mortgage bonds issued by the companies. The demand of the Governor informs the trustees that default has been made in the payment of the interest upon the State bonds delivered to said companies and that no provision has been made for their payment. It will be recollected that the law of August 12th, 1858, required the companies to make such provision sixty days before the interest on the State bonds should accrue, and the first mortgage bonds were made payable accordingly sixty days or more before the State bonds. A notice therefore of a failure to make such provision, and of a default in the payment of the State bonds, conveyed to the trustees notice, although not in terms, that a default had occurred in the payment of the interest on the first mortgage bonds, because had that interest been met, provision would have been made and the statement in the demand negatived. As I have said, however, in *ex parte* proceedings, a strict compliance with the terms of the power is required, and it may well be doubted whether the notice was sufficient in this particular. It is also objected that the demand was dated on the 1st day of December, 1859, that the State bonds became due upon that day, and that as the company was entitled to the entire day in which to make payment, the notice was premature. In answer to this, it may be observed that the notice was not mailed until the 5th of the same month, and it may be argued that the date was immaterial; that the notice is to be considered as given on the day when served. Again, it may be said, that although it is true that a party has the entire day to make payment, yet that a notice at any time during the last day is valid. It has been held that a notice to an indorser of presentation and demand of a promissory note is sufficient although given on the last day of grace. Again, the notice informs the trustees that the company has failed to *make provision* for the payment of interest; this provision was by law required to be made sixty days before the interest accrued, and before the date of the notice. If, therefore, the notice is sufficient in other particulars, I do not see how this objection can avail.

6th. It is urged that the interest on the bonds was payable at a particular bank in New York, and it does not appear that a demand was made there. The advertisements are entirely sufficient in this particular, as they allege a default in payment of interest when and where due, but even if not, a demand need never be made at the particular bank as a condition precedent to the institution of proceedings. In order to defeat them the party must show not only that no demand was made, but that he had funds there and was prepared to make payment had the same been demanded.

7th. The position has been taken, although not pressed, that as the Governor was

not a party to the instrument, he could not be authorized to act under the power. It is believed that no case can be found which sustains this doctrine. The execution of a power by others than parties to instruments, is of every day occurrence. The Governor is certainly the donee of the power, although not strictly a party to the trust deed.

8th. One of the trust deeds, at least, contains a provision making it a condition to a sale by the Governor, that it shall be made within sixty days after default, and it is insisted, although not with great confidence, that he cannot proceed after the expiration of that period. This objection I think untenable. Section 47, page 395, Comp. Stat.

9th. The Minneapolis and Cedar Valley company's deed contains a provision, "that if the interest upon its bonds shall not be paid when and where due *upon presentation of said interest warrants*, and shall remain unpaid for ninety days after the same shall have been *due* and *demanded*, the trustees may foreclose, &c. It is said that it does not appear that demand was made. The language of the advertisement is not, perhaps, as accurate as it might have been, but is, I think, sufficient. A neglect, however, to make demand, if it could be shown, would involve a question of much greater difficulty, and would, probably, under the peculiar provisions of the instrument, render the sale of at least doubtful validity. The executive journals furnish no information upon this point. Had there been no presentation of interest warrants, and no demand, I cannot see how there could have been a default within the meaning of the deed, unless the fact that a previous installment of interest had been paid at St. Paul can be construed as a waiver by the company of the right to insist upon a demand in New York.

10th. It is contended that the sale in disregard of the injunction, vitiates the proceedings. I am strongly of opinion that the Governor, proceeding in accordance with, and in the execution of a duty enjoined upon him as Governor, by the constitution and the laws, is entirely beyond judicial control, and that the court clearly exceeded its powers and assumed a jurisdiction not properly belonging to it; if so, the sale is unaffected by its action. But again, it has been held that the effect of an injunction is simply to render the party disobeying it amenable to punishment, but that proceedings in violation thereof are in no respect prejudiced. Having alluded to all the formidable objections to the title of the State, I come now to perhaps the most important and difficult question involved, viz.: Whether the franchises of the original companies have been extinguished by the sale, and if so, whether they can be revived by legislation? Upon the first examination of this question, I was strongly inclined to believe that conceding the proceedings to be regular, the franchises were merged and destroyed. The franchise granted to a corporation is a *scintilla* of sovereignty, of which the State divests itself, and transfers it to a citizen or citizens; upon being re-vested in the State in the absence of authority and express legislation, it is difficult to perceive why the particular franchise does not merge in the general sovereignty.

A rule has, however, been adopted by courts of equity, with reference to real estate, which may furnish some analogy to the case in question. With reference to the question of merger, the modern decisions all hold, for instance, that when the titles of mortgagee and mortgagor vest in one and the same person, the question as to whether the transaction shall be treated as a redemption or assignment is to be determined by an inquiry into the intent of the parties, and the equities of the case. An examination of the charter of the Minnesota and Pacific railroad company, the act of August 12th, 1858, and that of March 6th, 1860, sufficiently indicates the intent of the legislature, that the franchises of the several land grant railroad companies should be preserved and perpetuated. The act of August 12th expressly authorizes the purchaser at the sale, or his *assigns*, to organize under the charter of the old companies with all the privileges, rights and immunities claimed and enjoyed by them. The act of 1860, instead of repealing, affirms, at least by implication, that of 1858, and provides for a purchase by the State. The public interests are intimately connected with the preservation of these franchises, and the prosecution of the enterprises in aid of which they were granted. The constitutional provision

prohibiting the formation of corporations by special act, refers exclusively to new creations and is not violated by the perpetuation of charters in existence at the time of its passage. See 1 Gillman, Ill., 672.

Again, a franchise can never be surrendered without the consent of the State, and a forfeiture may be waived by the government. It is difficult to perceive why the State may not in this instance elect to consider the franchises as still in existence. It has even been decided that upon a judgment in a *quo warranto*, and a seizure of the corporate franchises by the State, the franchises are not thereby destroyed, but exist in the hands of the State, and may be afterwards granted to the same or other individuals in the same manner as they were originally granted. See 1 Blackford, (Ind.) 220.

Again, it has been adjudicated with reference to a constitutional provision similar to our own, that the continuance of an old charter is not the creation of a new corporation. The distinction between a new charter and the renewal of an old one is fully recognized by authority. For these reasons I am of opinion that the franchises of the old companies are still in existence, and that the assigns of the State may organize under the original charter.

ST. PAUL, January 30th, 1861. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor.

SIR: Your note of this date, inquiring whether county orders are to be taken in full for the redemption of lands sold under former laws, for taxes, and bid off by counties, is at hand. My predecessor has decided this question affirmatively, and did I not believe that both principle, and public policy, require a different conclusion, I should be loth to interfere with a custom, which by reason of such decision has become general. Counties are *quasi* corporations, *i. e.* for certain purposes only, and in the idea that in purchasing land at tax sales, they act simply in their corporate capacity, lies the mistake. The purchase of such property is not a voluntary act of the county authorities, but is performed by the treasurer in the name of the county, in obedience to a provision of law, as a public agent engaged in the performance of certain duties appertaining to the collection of the revenue.

In the collection of the State tax, the county officers, and the county itself, (so far as it acts at all,) act as agents for the State, and the lands bid off at a tax sale, are held not solely as county property, but in trust for the several funds to be benefited thereby. For convenience in the conduct of the government, certain duties and portions of the taxing power are delegated to legal sub-divisions, as counties, towns, &c. So far as they act with reference to the support of the town or county government, they act as corporations and are responsible as such. So far as the State or school tax is concerned, they act as agents or trustees. The successful and economical management of the State government depends upon the prompt collection and return of the State tax by county officers, to whom she is necessarily compelled to intrust this branch of the public service. If counties are entitled to pay the debts of their citizens at the expense of the State, and to postpone the payment of the State tax until the obligations of the county are exhausted, we may expect in the future, as in the past, a bankrupt State treasury. The custom prevailing heretofore, operates to delay the payment of the State tax until the financial ability of the county shall enable her to refund the money which she has applied to the payment of her own indebtedness.

While the county is not required to pay into the State treasury the State tax, until lands bid off by her are redeemed, when the redemption takes place, it should be in such funds as will enable her at once to account to the State for its proportion of the redemption money.

ST. PAUL, April 1st, 1861. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey, Governor of Minnesota:

SIR: Your communication of the 30th ult., enclosing letter from Edmund Rice, President of the Minnesota and Pacific Railroad, is at hand. I have not access to the charter granted to this company at the last session, but if my remembrance of its provisions is not defective, it contains nothing which would affect the opinion to which I have arrived, from an examination of the constitution and the original charter. Mr. Rice requests the Governor to execute to the new company a deed of 120 sections of land, pursuant to section sixteen of an act passed May 28th, 1857, creating the Minnesota & Pacific Railroad Company, and granting lands to that and other companies, in the execution of the trust imposed upon the State, by the congressional land grant. A brief survey of the several absolute and conditional conveyances which have passed between the company and the State will illustrate the effect which a compliance with the request of the president of this company would have.

In 1857, the State by the act creating the company, but in a separate section, made an absolute grant of these lands to the company, which contained *inter alia* a direction to the Governor to execute a deed upon the location of twenty miles of its road, and it is upon this clause that Mr. Rice relies.

In 1858, by an amendment to the constitution, the State, in consideration of certain important benefits offered to and accepted by the company, imposed a condition upon this grant, upon the failure to comply with which on or before the expiration of 1861 the lands thus granted were to revert to the State. In addition to this, she required a mortgage from the company, which was executed and contained conditions still more rigorous; a failure to comply with the latter, and the proceedings consequent thereon (conceding them to be regular) transferred the title of the company to the State, and deprived it of its rights under the charter.

In 1861 the State granted to certain parties these lands upon certain conditions which as yet are unperformed. If the proceedings by foreclosure were legal, the title passed to the State, and she will regain it upon a failure to perform the last-mentioned conditions. If not, her rights rest upon the amendment of the constitution, and she will acquire the absolute title if the condition therein prescribed be not performed at the expiration of the present year. The State is now asked, after executing a conditional grant to the company, and before the performance by the latter, to execute an absolute deed in fee simple. If the act of 1861, under which the company claims, is valid, and certainly the company is not in a condition to dispute its validity, the execution of a deed is unnecessary. A legislative grant passes a title quite as effectually as a conveyance by deed. The State derives her right to school lands in this manner, and it has been repeatedly held that no patent is necessary to vest the title. So the earlier titles in all the older States were acquired by legislative grant without further action. But I am of the opinion that the amendment to the constitution and its acceptance by the company abrogated the provisions requiring the execution of a deed by the Governor. It made that which was before an absolute grant a conditional one, with which an absolute conveyance in fee simple would have been inconsistent.

The laws of 1861 in conferring upon the company the rights under the original charter did not include section 16. This section contains the grant of the land only, and is *functus officio*, and in its place a conditional grant has been substituted, which is entirely sufficient to vest in the present company all the title which by the contract between it and the State was intended to pass. An absolute conveyance subsequent to the conditional one might well be held a waiver of all conditions by the State, and to vest an unconditional title in the company to the 120 sections claimed.

I am therefore of opinion that a compliance with the request of Mr. Rice would be not only inexpedient, but prejudicial to the public interests.

ST. PAUL, May 6th, 1861. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey:

SIR: In answer to your request of this morning for a further opinion in relation to the request of the president of the M. & P. R. R., that the Governor execute to that company a deed of 120 sections of land, I reply that I do not think I misunderstood Mr. Rice's meaning. His language was plain, and if the mere delivery of an escrow was sought, certainly his language entirely failed to convey his meaning. I cannot advise the execution of such instrument. I doubt whether the Governor has any authority whatever to execute it, since the constitutional amendment and the railroad legislation of last session. If, however, Mr. Rice desires, as I *now* understand, an instrument to be held by your Excellency as an escrow, and to be delivered only upon the performance of all the conditions of the law of 1861, such deed could not probably do any harm to the State, and could certainly do Mr. Rice or the company which he represents no good. It would as it seems to me be a mere farce, and how it could inspire any additional confidence in capitalists, it is difficult to perceive, as the recent legislation contemplates no deed from the Governor. I am inclined to think no title would pass by such a conveyance.

ST. PAUL, June 6th, 1861. G. E. COLE, Atty. Gen.

Rev. B. F. Crary, Superintendent of Public Instruction:

DEAR SIR: In answer to your inquiry of this date, with reference to the power of school district trustees to exclude children of African blood from a participation in the benefits of the common school system, I have to say that I have looked in vain for any clause in the school law conferring any such power either expressly or by implication. The moneys in the treasury of the county are to be apportioned among the respective districts in proportion to the number of *persons* between the ages of five and twenty-one. The superintendent is authorized to expel scholars from the school during the current term for "gross immorality, profanity, infectious disease or habitual uncleanliness." This enumeration of specific cases authorizing expulsion upon familiar principles excludes all others. I am of the opinion that all persons within the ages prescribed by sec. 41 of the school law, without distinction of color or nationality, are legally scholars of the district in which they reside, and entitled to the benefits of the system. That no one but the superintendent has any authority to expel a scholar or in any manner prevent his enjoyment of the advantages which the system is intended to secure, and he only in the cases expressly enumerated in section fifty-six. The association of scholars of different colors, nationalities, &c., in the common schools, is perhaps more a matter of taste than anything else, and certainly is not prohibited by any fundamental principles of law, or by any peculiarities of our institutions.

If the universal dissemination of intelligence is desirable and is the great end sought to be attained, it would seem that the recognition of the distinction contended for would rather defeat than promote the object of the framers of the law. If prejudices against this class of our population exist to any serious extent, it will be necessary for the legislature to enact an express provision upon the subject. The common law knows no distinctions of the character referred to.

The error into which the complaining parties in the case have fallen, probably, originated in the idea that by the celebrated decision in the case of Dred Scott, persons of African descent are not to be regarded as citizens. This idea is, perhaps, strengthened by the partial recognition of that doctrine contained in art. 7th of the Constitution. The mistake lies in supposing that our school system is confined in its operation to *citizens* of the state. On the contrary, all *persons* resident in the state are, by the liberal terms of the law, brought within its purview and guaranteed the advantages secured by its provisions, although in other respects, prohibited from exercising all the rights appertaining to full and complete citizenship.

ST. PAUL, September 16th, 1861. G. E. COLE, Atty. Gen.

His Excellency Alexander Ramsey, Gov. of Minnesota:

DEAR SIR: In reply to your inquiry as to the authority of the Governor to allow an exchange of securities deposited by the Minnesota and Pacific Railroad Company pursuant to Sec. 4 of chap. 5, of special laws of 1861, I have to say that the Governor acts as agent for the State in receiving the securities and delivering them upon fulfillment of the condition prescribed by the act, and has no express authority to deal with them after they are so deposited. Perhaps the general supervision which the Governor exercises over the deposit, might be construed as embracing an implied authority to substitute other securities in place of those first deposited, if required by the interests of the State.

The establishment of a precedent of this character, would, I apprehend, however, be extremely dangerous, and should be carefully avoided. If the power were wisely and judiciously exercised, it might in some instances promote the convenience of the State and those dealing with her, but if improvidently exercised, great detriment to the public interest would result. The exchange of securities in the Auditor's department at a former period and the attendant consequences, should cause great hesitation before the experiment is repeated. In this instance the application is for the convenience of the company, and I cannot see how that convenience can be promoted, unless the securities now on deposit are more available in the market than those with which the company seek to replace them. If so, this furnishes the strongest reason why the application should be denied.

I am of opinion that such change should not be permitted.

September 24th, 1861. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Your favor is at hand, enclosing communication from the auditor of Ramsey county, inquiring whether the residence of the Catholic bishop, and the property denominated the Mission Grounds, in the city of St. Paul, are exempt from taxation. The constitutional provision is as follows: "All churches, church property, used for religious purposes and houses of worship shall, by general laws, be exempt from taxation." It will be noticed that the constitution does not profess to exempt any property directly, but that the clause is merely directory upon the legislature. The enquiry then, is, has the legislature obeyed the constitutional injunction? I think an examination of the statute shows a substantial compliance. The language is "houses used exclusively for public worship, the books and furniture therein and the grounds attached to such buildings, necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit." This language is explicit, and is, I think, open to no constitutional objection.

First, then, is the Bishop's residence embraced in the description of exempt property? It is the policy of the law that all property shall contribute equally towards defraying the expenses of the government; as all share equally in the benefit derived from its protection, so its burdens should rest upon all alike. To this general principle, property devoted exclusively to public, charitable and religious purposes, has, for obvious reasons, usually constituted an exception; but the fact that it is an exception, requires that the strictest possible construction should be given to laws of this character, and that all property not clearly within both the letter and spirit of the law, should be excluded from its operation. To apply these principles. It will be readily conceded that the residence of a clergyman, although the property of the church, is not a house used exclusively for public worship, neither is it church property used for religious purposes; as a residence, it is and must necessarily be devoted to purposes entirely secular. Were it the residence of any person other than the Bishop, although the property of the church, the question would hardly be mooted; but can this affect the question? Would the furniture, plate, or carriage used by the Bishop, although the property of the church, fall within the exemption? The mere fact of occupany, by a clergyman, can hardly be regarded

as sufficient to dedicate the property to religious purposes, without regard to the nature of the use and occupation. Under a statute similar to our own, a portion of the church edifice, held under lease, and the rents devoted exclusively to the discharge of an indebtedness incurred in its erection, was held taxable. The direct and immediate use, and not the incidental benefits resulting from such use, is to be consulted in arriving at a correct conclusion. For these reasons, I think the property is not exempt from taxation.

Second. "The grounds attached to such buildings, necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit," are exempt. This question turns upon a question of fact. Are these grounds necessary for the proper occupancy and enjoyment of the church property? A distinction is to be noted between church property and that of institutions of learning, in this particular, that *all lands* connected with the latter, and not used with a view to profit, without regard to occupancy, are exempt. If the lands in this case are in a separate enclosure, unconnected with the church, there would be little doubt of their taxable character. If not, the amount necessary for the proper occupancy, use and enjoyment would perhaps present an embarrassing question, depending upon a variety of circumstances, and the officer would act at his peril. A valuable block, however, held for purposes of speculation, would certainly be entirely without the scope of the examination.

ST. PAUL, October 14th, 1861. G. E. COLE, Atty. Gen.

Hon. Ignatius Donnelly, Governor ad interim:

DEAR SIR: Your favor calling my attention to the fact that the electors of Olmsted county have at the late general election chosen a Senator to supply the vacancy occasioned by the death of Hon. Stiles P. Jones, and desiring my opinion of the legality of such election, is before me. I am aware of no clause of the statute requiring a proclamation of the Governor, unless a special election becomes necessary. The following proviso of sec. 37 of the election law, page 112, laws of 1861, seems explicit: "If there be no session of the Legislature or of Congress between the time of the happening of such vacancy or vacancies in the office of members of Congress or of the State Senate or House of Representatives, and the then next annual election, then it shall not be necessary to order a special election to fill such vacancy or vacancies, but the same *shall be filled at the next annual election.*" It is to be noticed that the body of the section only requires a proclamation for the purpose of calling a special election. The election to fill a vacancy is fixed in as positive terms as that of an officer for the regular term. The electors may, I presume, always act upon their own knowledge of the occurrence of a vacancy, and if that knowledge prove correct, the validity of the election cannot be impeached. There is certainly no law on the statute book requiring a proclamation merely for the purpose of informing the voters of a vacancy, and in cases of this character I see no occasion for one.

ST. PAUL, October 18th, 1861. G. E. COLE, Atty. Gen.

Hon. Ignatius Donnelly, Governor ad interim:

DEAR SIR: Your communication is at hand inquiring whether, after the adjournment of the canvassing board and a return of the abstract of votes to the Secretary of State, and (in case of a tie or vacancy) after the abstract has been acted upon by the issuance of a proclamation for a new election, the abstract can be amended, or a supplemental return filed correcting a mistake in the proceedings of the canvassing board. I am of the opinion that no amendment is allowable. Section 20 of chapter 15, Laws of 1861, varies somewhat from section 33, page 50, Revised Statutes, in expressly constituting the *justices of the peace, together with the county auditor,* the canvassing board. Whatever might have been the con-

struction of the latter, there can be no doubt that under the present law the justices are members of the canvassing board, and possess equal powers with the auditor. Upon the adjournment of the board it is *functus officio*, and is by the act of adjournment dissolved. It cannot be again called together, and no amendments can be made. Such was the holding of the supreme court under a statute substantially similar. See Clark v. Buchanan, 2 Minn. 346.

ST. PAUL, October 21st, 1861. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey, Governor of Minnesota:

SIR: I have examined the requisition and accompanying papers in the matter of John G. Sherburn, an alleged fugitive from justice, together with the warrant issued by your Excellency for the apprehension of said Sherburn, and have to say:

1st. That upon compliance with the act of Congress of February 12, 1793, by the executive making the demand for the arrest and delivery of an alleged fugitive, no discretion exists in the Governor upon whom the demand is made, but it becomes his duty to issue his warrant. The comity existing between the States, under the constitution, the constitution itself, and the act of Congress carrying its provisions into effect, seem to withdraw all discretion in the matter from the Governor. If, however, the executive sees fit to refuse his compliance with the demand I know of no method by which his action can be coerced. See 2 Kent, Com. p. 82, note.

There are three prerequisites to the jurisdiction of the Governor which it is his duty to require, and which should be recited in his warrant: 1st. The fugitive must be demanded by the executive of the state from which he has fled. 2nd. A copy of an indictment found or an affidavit made before a magistrate, charging the fugitive with having committed the crime, must accompany the requisition. 3d. Such copy of the indictment or affidavit must be certified as authentic by the executive demanding the rendition of the alleged criminal.

It is no part of the duty of the Governor to enquire whether the crime charged is an offence by the laws of this State. It is sufficient that it is charged by the indictment as an offence under the laws of the state where such indictment is found. A distinction is to be noticed between cases arising under the act of Congress and those in which by treaty or the comity of nations a foreign nation demands the rendition of a fugitive by the state or national authorities. In the latter the character of the crime may be examined, and unless a crime by the laws of the state in which the fugitive has taken refuge, and involving great moral turpitude, the request will be refused. In the former, however, no such rule prevails; full faith and credit are by the constitution guaranteed to the records of the courts of sister States, and the language of the act embraces every act which is made criminal by the laws of the State where perpetrated. The requisition of the Governor of Illinois is in compliance with the act of Congress, and it therefore becomes the Governor's duty to issue his warrant. The question now recurs upon the sufficiency of the warrant upon which the arrest was made.

As this matter has already been decided by the chief justice upon *habeas corpus*, I do not of course propose to review his decision, but simply to suggest certain additions to the form now in use by the Executive as a guide hereafter. The warrant should recite the prerequisites made necessary by the act of Congress, viz.: 1st. That a demand has been made (pursuant to the constitution and laws of the United States.) This sufficiently appears by the warrant, but I think the clause included in the parenthesis will improve it. 2nd. That a copy of the indictment or affidavit was produced to the Governor. The warrant used recites that a copy of the "*charge*" was duly produced and annexed, &c. I think this language somewhat loose, and that it should appear how such person was charged—bringing the case within one of the provisions of the act of Congress. I do not mean to say that the language used may not be sufficient, but it is certainly open to objection. But 3d. That such copy of the indictment or affidavit was certified as authentic by the Executive.

In this I think the warrant clearly defective. The language is "duly attested according to the laws of the State of Illinois." This would not be a compliance with the law. It must be proved, not according to the laws of Illinois, but the act of Congress, viz.: by the certificate of its authenticity, signed by the Governor. I have amended the warrant in a few particulars and recommend the annexed copy as preferable to the form now in use. A due deference to the opinion of the supreme court would require this modification, even if my own views or those of your Excellency should be different. For authority in support of the above views I refer to the case of John L. Clark, 9 Wend. Rep. 212.

The next question to be considered is the propriety of granting another warrant. The statute of the State providing for the writ of *habeas corpus* was evidently intended to apply to cases arising under our own laws, and does not in all cases meet the present emergency. Sections 53 and 54, page 639, prohibit the re-arrest of a party discharged upon *habeas corpus* for the same cause under a heavy penalty. It shall not be deemed the same cause, however, if after a discharge for defect of proof, or for any material defect in the commitment in a criminal case, the prisoner be again arrested on sufficient proof, and committed by legal process for the same offence. The term "commitment," would not embrace the warrant in this case, but the intent of the law evidently was, to prevent the escape of offenders upon technicalities, and the entire spirit of our criminal code, would seem to authorize the issuing of a new warrant, in cases of this character. If the requisition had been defective in any of the particulars which I have mentioned, the discharge would have been an end to all the proceedings under it. It is urged by the counsel for the agent of Illinois, that the State courts have no jurisdiction of cases of this character. I have no doubt that this is a mistake. No State court ever has, or I believe ever will refuse jurisdiction in such cases. The cases arising under that branch of the law respecting fugitives from labor, are not analogous.

I think the *habeas corpus* acts of all the States, deny to the State courts jurisdiction where a party is held by virtue of process of any United States court or Judge, having exclusive jurisdiction. Section 41, page 637, Comp. Stat. By the act of September 18, 1850, such jurisdiction is conferred, in cases of fugitives from labor, upon United States courts and commissioners. The Governor is asked, however, prior to the issuance of a second warrant, to allow a hearing before himself. I have looked in vain for a precedent for such a proceeding in a case similar to the present. The discretion of the Governor is so limited and restricted that a hearing could be of little avail to the prisoner, while in many instances it might be highly prejudicial to the public weal. Such hearings have been allowed upon applications made under the comity of nations.

In the case of George Holmes, upon a requisition from the Governor General of Canada, upon the Governor of Vermont, a hearing was allowed; but in this case it was doubtful whether, in the absence of treaty stipulations, the State was bound, or, indeed, could rightfully deliver the fugitive to the Canadian authorities.

Again, in these cases, the authorities of the State may exercise a discretion in determining as to the nature of the crime, &c. All cases in which such hearings have been allowed, it is believed, are cases of great public interest and importance arising under the law of nations, and in which a large discretion was vested in the executive. Certainly in the ordinary intercourse between the States with respect to the rendition of criminals, the allowance of a hearing before the Governor would be a departure from the recognized practice in similar cases and of doubtful public policy.

ST. PAUL, November 11th, 1861. G. E. COLE, Atty. Gen.

(*Form of Warrant.*)

To ——— of the State of ——— and all civil officers of the State of Minnesota:

Whereas a demand has been made in pursuance of the constitution and laws of the United States by ——— Governor of the State of ——— upon the Governor of the State of Minnesota for the delivery of ——— as a fugitive from justice of the State of ——— and supposed to be within the limits of the State of Minnesota. And

whereas the said ——— stands charged by indictment (or by an affidavit made before a magistrate of ———) in the county of ——— in the State of ——— with the crime of ——— alleged to have been committed on the ——— day of ——— A. D. 18—, a copy of which indictment (or affidavit) was duly produced and annexed to the demand, duly certified to as authentic by the said ——— Governor of the State of ———; which said charge as set forth in said indictment (or affidavit) is made criminal by the laws of such State.

Now, therefore, you ——— are hereby commanded and required to arrest the said ——— if he shall be found within the State of Minnesota, and transport him to the line of said State and deliver him to the proper authorities of the State of ——— at the expense of such agent. And all civil officers of the State of Minnesota are hereby required to afford all needful assistance in the execution hereof, and that you and each of you, do and perform all acts required of you, and each of you, by the laws of the United States and of the State of Minnesota, in such case made and provided.

Given under my hand and the great seal of the State of Minnesota, this ——— day of ——— A. D. 186—.

By the Governor:

———————

Secretary of State.

C. J. Short, Esq., County Attorney, Mower County:

SIR: Your favor is at hand, desiring my opinion as to the authority of towns to levy a tax for the erection of a town house, and in reply, I have to say that by sec. 5 of art. 3 of chapter 15, of laws of 1860, the electors have power to vote to raise such sums of money for the repair and construction of roads and bridges, for the support of the poor and for *other necessary town charges, as they shall deem expedient.* By section 73 of chap. 1, of the same session, this tax is limited to three mills on a dollar. If, therefore, the town you refer to has exceeded this limit, it has transcended its authority, and the tax cannot be legally collected; but if not, the question recurs as to what are necessary town charges within the meaning of sec. five. In this State, as we have no decisions or long-established usage to govern us, we resort indifferently to the decisions of other States, for judicial constructions of similar statutes.

The statute of Massachusetts is substantially similar to our own upon this subject. In the case of Kempton vs. Stetson, 13 Mass. Rep. 271, the court says: "The proper construction of the terms, necessary charges, must be that in addition to the money to be raised for the poor, schools, &c., towns might raise such sums as should be necessary for the ordinary expenses of the year, such as the payment of such municipal officers as they should be obliged to employ, the support and defence of such actions as they might be parties to, *and the expenses they would incur in performing such duties as the law imposed.*" And again, "the erection of *public buildings for the accommodation of the inhabitants, as town houses, to assemble in, &c.*, may also be a proper town charge, and may come within the fair meaning of the term 'necessary,' for these may be essential to the comfort and convenience of the citizens."

I know of no duty more incumbent on a town than to provide a place for its annual meetings; this is a duty imposed upon it by law, and if the electors deem it expedient to erect a building for that purpose, I do not see why they may not do that instead of hiring such building temporarily or procuring it in any other manner. It is their duty, certainly, to provide such building; the manner of doing it is entirely within their discretion.

ST. PAUL, November 20th, 1861. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey, Governor of Minnesota:

SIR: In answer to your inquiries I have to say: 1st. With reference to the county of Lincoln, the constitution only requires the legislature to submit the question of a change of county lines to the voters of organized counties. If no organized county is affected by the change, the Legislature had the power to organize the county without any submission. They have, however, provided that the act shall take effect upon the proclamation of the Governor of its adoption by a majority of the voters. The county being unorganized and no votes being polled, a proclamation by the governor would be unwarranted both by the law and the facts. The act is defective, and the only remedy of the petitioners is to have it amended. A proclamation, even if proper, would confer no additional validity upon any action that the inhabitants of the county might take.

2d. Does the law require a vote of a majority of each county affected by it, or if the majority of the voters in each county affected by one of the proposed lines, the other county affected by the change in another line of the county not voting, vote in favor of the change, is the county line thus far changed? I think not. The people of the county vote upon the change as prescribed by law, and such vote cannot be regarded as the expression of their opinion in favor of a partial change. But again, the language of the law is, that it shall take effect upon the proclamation of the Governor of the adoption of the same, by a majority of the voters of the counties affected thereby—meaning clearly a majority in each county. In a matter so important as the change of county lines, no organization should be attempted unless founded upon proceedings entirely free from doubt.

3d. With reference to the form of the proclamation. The proclamation should recite the act, and that it appears by the returns that a majority of the voters of each county present and voting adopted it at the general election, and should proceed to declare the adoption of the same by the majority of the voters of each county.

ST. PAUL, December 12th, 1861. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey:

SIR: I have examined the enclosed letter of Mr. Probsfield, referred to me by you, and have to say:

1st. That I think lands upon which half-breed scrip is located are taxable by the authorities of the State from the date of such location. The question has before been submitted to me, accompanied by an argument against the power of the state to tax such lands prior to the issuance of the patent, upon the ground that the case differs from the location of land warrants by pre-emption or private entry, in that, in the latter cases, a certificate issues from the local land office as evidence of title, but not in the former. I can see no ground for any distinction; the reasoning of the court in Carroll vs. Safford, 3 Howard's U. S. Rep., 441, seems to cover the case. The locator acquires an equitable title (and a legal one also, as against every one but the United States) from the date of the location, subject to be defeated by the action of the general land office; the duplicate and patent do not constitute the title, but are simply evidence of it. Our own courts have held the same doctrine. See Camp vs. Smith, 2 Minn. 155.

2d. If one of the commissioners appointed by you has failed to qualify, or has left the State or accepted an office incompatible with that of commissioner, this creates a vacancy which the Governor is authorized to supply.

ST. PAUL, January 11, 1862. G. E. COLE, Atty. Gen.

T. R. Huddleston, Esq., County Attorney, Dakota County:

SIR: I received some days since, a communication from the register of deeds of your county desiring my opinion upon the question, whether the register should re-

quire the entry of "taxes paid," before recording the assignment of a mortgage. As it is a rule of this office to refer all applications of this character to the county attorney, I decline to give an opinion in the matter unless requested by you. At the request of Senator Nash, who informs me that you desire my views on the subject, I have to say, that I do not think the provisions of the tax law apply either to mortgages or the assignment of mortgages.

Section 17, of the auditor's act, requires the auditor to make the transfer (*for the purpose of taxation*), and to endorse "taxes paid," or "taxes not paid," upon all deeds purporting to be conditional or unconditional conveyances of real estate, and the register shall require such endorsement before recording. This clause, of course, must be considered as a whole, and when we have ascertained the meaning of the language requiring the auditor to make the transfer, that directing the register to require the endorsement, as it depends upon the former, must be subject to the same limitations.

The first and only object of the transfer is to avoid confusion, by causing all property to be listed for taxation in the name of the real owner. The mortgagor is for all purposes, and against all persons, except the mortgagee, regarded as the *owner*, and it is in his name that property is to be listed. Therefore a transfer for the purpose of taxation in cases of mortgages would be neither necessary nor proper. The proper time to make the entry is when both the legal and equitable title pass out of the mortgagor to the mortgagee, viz.: upon the execution of a sheriff's deed upon foreclosure; until then the property for the purposes of taxation remains in the mortgagor. If no transfer is made, no entry of taxes paid need be made, and the register is only required to refuse record to *such* deeds, viz.: deeds which it is necessary to present to the auditor for transfer.

The terms "conditional conveyances" may have full operation, without including mortgages. The common case of deeds upon condition that the grantee shall make improvements, and many others in which the absolute title passes to the grantee, subject to revert in the grantor upon the happening of a contingency, are cases of this character.

ST. PAUL, January 16th, 1862. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey, Governor of Minnesota:

SIR: I have examined, and herewith return, an act entitled, "An act to vacate a portion of the town site of the town of Richmond, in Stearns county." Possibly it is not open to the objection that it is an exercise of judicial powers by the legislature: The most that the law professes to do, and the most that it would be competent for the legislature to effect, would be to vacate a town site upon the application of all the parties in interest, in cases in which no vested rights can be injuriously affected. An attempt to adjudicate upon conflicting interests, would clearly be ineffectual. There are grave objections to laws of this character, other than those arising from the constitution. The statute has provided a prompt and speedy remedy, by application to the courts, in which all controversies can be finally heard and determined. An attempt to reach the same result by legislation, can only create confusion and litigation, as it leaves the rights of all parties, not concurring in the application, precisely as they existed prior to its passage. If the law upon its face is not unconstitutional, upon a judicial investigation, it would clearly be held so, if it should appear that purchasers under the original proprietor had acquired rights which, without their concurrence, were divested by the act.

ST. PAUL, January 20th, 1862. G. E. COLE, Atty. Gen.

John H. Brown, Esq., County Attorney, Scott County:

SIR: You favor is at hand inquiring whether it is competent for the board of county commissioners to reduce the salary of a county auditor after it has been

once fixed by them pursuant to section 55, of chap. 2 of laws of 1861. My impression is that the matter is entirely under their control.

I do not think the statute will warrant the strict construction placed upon it by you, viz.: that where the duty is performed and the salary once fixed it is *functus officio* and no further action can be taken. The object of the legislature evidently was to insure a just compensation in proportion to the labor to be performed; as this would widely differ in different counties and at different periods in the same county, the power to fix the salary was very properly vested in the commissioners of each county, but as the duties of the office may increase or diminish materially during the currency of a single term, unless the power exists to change the salary accordingly, the object of the law would be defeated. The argument, however, goes too far. If the power ends when the salary is fixed so that the successors of the board so fixing it are unable to modify it during the term of office of the present incumbent, they would be equally powerless to change that of his successor, this construction depending solely upon the idea that the *salary of the office* being once fixed the power is exhausted, of course a subsequent incumbent of the same office would be protected from reduction.

2dly. You urge that it is contrary to the public policy to allow such change during the term for which the present incumbent was elected. The constitution has declared that the salaries of certain officers shall neither be increased or diminished during their term of office. This clause would, by implication, exclude all officers not enumerated. The fees and salary of an officer unless protected by the constitution are not held by him by virtue of contract, but are held subject to the right of the legislature or such other body in whom the power of fixing the salary is vested to modify or reduce the same, as their ideas of the public interests may dictate. See Commonwealth vs. Bacon, 6 Sergt. & Rawle, 322.

ST. PAUL, January 28th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I have examined the communication of the County Auditor of Blue Earth county, and the accompanying statement of Marsh & Co., asking your consent to an abatement of certain taxes added to the assessment of the personal property of the applicants by the board of equalization of Blue Earth county, without notice, as is alleged, to the applicants, and which they are prepared to prove is erroneous. The applicants rely upon section 32 of the tax law. An examination of this section will show, however, that it can have no application to cases of this character. Upon the return of the assessor, his action may be revised in two modes: 1st, by the county auditor, upon notice to the party, and upon evidence showing the list furnished the assessor to be false, and in cases of this character, the assessment may be reduced with the written consent of the State Auditor, upon substantial error being shown, but not for excessive valuation. The second method which appears to have been adopted in this instance, is by the county board of equalization, pursuant to section 41 of the same act. The State Auditor has no authority whatever to revise the action of the board for several reasons: 1st. The law, no where, either expressly or by implication, vests any such power in him. 2dly. The assumption of this power would allow an appeal upon a question of fact from the decision of five men having full opportunities for arriving at a correct conclusion, to that of one having nothing before him except an *ex parte* statement. While adverting to this subject, I may also observe, with reference to section 33, that the State Auditor's powers are extremely limited, and I think he does not possess the power to abate any tax upon real property, at least after the matter has been passed upon by the county board of equalization. The language of the section only contemplates the correction of *errors in valuation*. The county auditor may do this, but if the error goes to the reduction of the valuation, he must submit the matter to the State Auditor. But in cases of excessive valuation, the State Auditor has no power whatever; he is the executive officer, merely; the judicial power of determining as to the justice and equality of assess-

ments, and the power to reduce them, if excessive, is vested exclusively in the county boards of equalization. At the January meeting of the county board, the applicants applied for a reduction or abatement of the assessment. The commissioners passed a resolution declaring that they had no jurisdiction in the matter. In this I think they were clearly right. They were assembled at that time as a board of county commissioners, but not as a board of equalization, and had no authority whatever to act as such. The county board of equalization is a creature of statute, and can exercise no powers except at the time and in the manner prescribed by law. If the board has exceeded its powers, the courts are open to the applicants, but the State Auditor has no power to afford them redress.

ST. PAUL, January 31st, 1862. G. E. COLE, Atty. Gen.

H. A. Gale, Esq., County Auditor, Hennepin County:

SIR: Your favor is at hand, objecting to the answer contained in my opinion of January 21st, to the sixth question put by you. I regret that I am so unfortunate as to differ from your county attorney, but can see no reason for modifying my construction of the law. As I have said, all proceedings, from the assessment of a tax to the final execution of a deed, must be strictly in accordance with the letter of the law. Any want of observance of even apparently unimportant forms will (except in very few instances, in which requirements are purely directory) invalidate any title derived from a tax sale.

The power of taxation is unrestrained by the constitution, is liable to great abuse and is exercised in a harsh and summary manner. The security of the citizen, therefore, consists in holding the officers, intrusted with its execution, to an exact and literal compliance with the law.

Section 84, page 241, Compiled Statutes is as follows: "The register of deeds *shall, at least six months before the expiration of the time limited for redeeming, &c.*, cause to be published once a week for *twelve successive weeks.*" He is not *to commence publishing* six months before the time for redemption expires, but is to *publish* before that time for *twelve weeks.* The language seems incapable of mistake. Section 92, of the tax law, declares "that when land shall remain unredeemed, through a failure to give the *requisite* notice, they may be conveyed by the treasurer, giving the *same notice*, with the same effect." If my construction of section 84 is correct, the same rule must govern under section 92, unless you claim that six months' notice is the same as nine. See Doughty vs. Hope, 3 Denio, 594.

The legislature, in enacting the series of tax laws of 1860, did not profess or intend to affect any proceedings relative to the taxes of prior years, which had been closed by sale, and it would have been incompetent for them to have done so. Parties have acquired rights under previous laws which cannot be affected by subsequent legislation. They have by section 92 simply attempted to cure a defect, occasioned by the negligence of county officers, by allowing the same notice to be published at a different time from that before prescribed.

ST. PAUL, February 8th, 1862. G. E. COLE, Atty. Gen.

Norman B. Hyatt, Esq., County Attorney, Faribault County.

SIR: Your favor is received inquiring whether there is any existing provision of any law or treaty rendering the license law of 1858, as amended by chapter 57, of session laws of 1860, invalid. I have to say that the law has never received a judicial construction. Prior to the amendment of 1860, it was doubtless defective, but I think now, that there will be no difficulty in sustaining prosecutions under it. With reference to the objection arising from the absolute prohibition contained in the treaty with the Sioux, I have to say, that the matter was submitted in 1860, and an opinion given, that the laws of Congress, admitting Minnesota into the Union, as a sovereign State, had abrogated the treaty prohibition. The question

has since been so decided by Judge Nelson, of the United States District Court for the district of Minnesota.

Second. You state that your county treasurer filed his bond with the commissioners in due season, and the sureties were approved by them; the bond was then passed over to you and pronounced insufficient; the board then made an order, that upon the execution of the bond prepared by you with the same sureties and filing the same with the county auditor, it should be considered as approved, and you inquire whether a failure to file the amended bond on or before the 15th of January, will occasion a vacancy in his office. I think not; the essential steps were taken, and the bond approved, prior to that time. It was clearly the intent of the commissioners not in the first instance to reject the bond offered, but to order an amended bond to be filed subsequently, its approval to take effect from the time of the filing the first.

ST. PAUL, February 8th, 1862. G. E. COLE, Atty. Gen.

James Hall, Esq., County Auditor, Morrison County:

DEAR SIR: Your communication is at hand, desiring my opinion as to the power of the authorities of Morrison county, to levy and collect a tax in Todd county, which is attached to the former for judicial purposes. Section 41, p. 80, sec. 21, p. 77, clearly confer this power upon the authorities of Morrison.

It is contended, however, that the legislature by sec. 1 of art. 2 of the "Act to provide for county organization and government," have declared every county in the State to be an organized county within the meaning of that act, and that this clause repeals by implication the clauses above referred to. The legislature might as well declare black to be white, as undertake to say that a county is organized, which, as a matter of fact, is entirely unorganized. The terms "organized and unorganized," have been used with great looseness in the various statutes relating to counties, and it is often difficult to perceive the intent of the legislature in their use. I think, however, that there can be little difficulty in arriving at a correct construction of chapter 15, of session laws of 1860. It was the intent of the legislature to remedy the existing confusion and uncertainty by organizing every county in the state, for the purposes of county government. To meet the wants of all sections of the state, two classes of organization were provided for, viz.: Counties possessing a township organization and those without this, but organized by the appointment of commissioners by the Governor, a division into road, assessment, and collection districts, and election of county officers. All counties not having one of these organizations in operation still remain unorganized. In many counties the population is too sparse for even the latter organization, and such counties remain unaffected by the act until they have taken measures to organize under it. It cannot be supposed that the legislature intended to exempt absolutely from taxation, all counties which, either from inability or neglect, have failed to perfect an organization. When any county has perfected its organization by the appointment of assessors, &c., then, and not till then, do sections 21 and 41 become inoperative. Repeals by implication are never presumed, and a prior law must be utterly inconsistent with a subsequent one, to be repealed by it.

The conclusions to which I have arrived, are greatly strengthened by section 34 of article 2, which expressly and in terms, repeals all of chapter 1, compiled statutes, from sections 251 to 263 inclusive. The fact that the legislature have selected these sections and deemed it necessary to repeal them, is a strong, if not conclusive argument in favor of the position that the other sections of the chapter, including sections 21 and 41, are still in existence.

The great difficulty which I have experienced in arriving at this conclusion, is the language of section 1, article 2, declaring that in every county there shall be a board of county commissioners. It may be said that this provision is imperative, and that no legal tax can be assessed if such organization is neglected, but I think the section as amended by chapter 6 of laws of 1861, must be construed with refer-

ence to the state of the country, and instead of intending an immediate organization without regard to the ability of the county to sustain it, was designed to obviate the necessity of a special enactment, in every case of an organization, and to provide an expeditious method by which, as fast as new counties were formed or old ones became able to support such organization, they might avail themselves of its provisions.

ST. PAUL, February 10th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: The county auditor of Dakota county inquires whether a tax levied under the provisions of section 76, of chapter 1, of session laws of 1860, and specifically appropriated to the payment of certain debts of the county, can be properly applied to the payment of general orders under section 21, of chapter 3, of the same session. It is claimed by the holders of general orders that under section 21 county orders are entitled to preference, according to the time when they were presented. This general provision is to be construed in connection with the special provisions of section 76, and must yield to the latter in all cases within the purview of that section. The commissioners, in levying the tax in question, were perfectly right in appropriating it exclusively to the payment of the indebtedness for which it was levied. Section 76 expressly declares that it *shall* be so appropriated.

Section 42, page 160, Compiled Statutes, to which I am referred, has been repealed. See section 48, chapter 3, Laws of 1860.

ST. PAUL, February 22d, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Your favor of this morning inquiring whether, under section 87 of the tax law of 1860, as amended by section 21, of chapter 1, of Laws of 1861, in case of a purchase at a tax sale by private individuals and a redemption by the owner, the penalty of thirty per cent. is to go to the school and county funds or to the purchaser, is before me. This section and section 89 were perfectly plain as originally framed, and the penalty was to be paid to the purchaser, but the amendment has introduced a painful obscurity. The legislature in amending section 87 did not intend to affect section 89, and a construction should prevail which will give force to the provisions of the latter, unless the language of the act amending section 87 is utterly irreconcilable with them. Section 87, as amended, declares that thirty per cent. penalty shall attach the day after the close of the sale, and that one-half of said penalty shall go to the school fund and the other half to the county fund. The auditor shall give to the purchaser a certificate of the amount of taxes with costs and "*penalties* then due, and upon payment of such tax, costs, and penalties into the county treasury, the certificates shall be evidence of redemption, &c. Section 89 provides that upon the demand of the purchaser and payment of auditor's fees, the auditor shall draw his warrant for the *amount of money so deposited as hereinbefore mentioned with said treasurer*, [referring to the payment provided for by section 87,] after deducting the treasurer's fees for said services." By this provision, in case of purchase by a private party, *all* the money deposited with the treasurer, upon redemption, is to be paid to the purchaser, deducting only the treasurer's fees. The penalty is not to be deducted. The language of section 87 is, therefore, limited and restrained to this extent and must be held to refer only to redemptions of lands bid in for the county or forfeited to the State.

ST. PAUL, February 22d, 1862. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey:

SIR: I have examined the following bills, viz.: Bill relating to grand and petit jurors; bill to facilitate construction of Transit Railroad; and bill to facilitate construction of Southern Minnesota Railroad. The latter is open to no objection. The forfeiture clause in the Transit Bill, being the last subdivision of section eight, will, I think, give the company four years to build eighty miles of road before any forfeiture will accrue; the forfeiture is to take place not upon failure to complete ten miles of the road within the time mentioned in the bill, but *upon failure to do that and to complete the road to Rochester and to complete each year thereafter thirty miles as hereinbefore provided.* Forfeitures are regarded with great disfavor by the courts and never enforced unless required in plain and explicit language.

I will merely say, while expressing no opinion upon the merits of the bill, that I do not think a failure to build ten miles of road within one year will result in a forfeiture which the State can enforce; a failure to build thirty miles west of Rochester will occasion the first forfeiture; this will occur, if at all, in 1866; the Legislature must be presumed to have intended to give the company four years. The bill reducing the number of grand jurors, I think, conflicts with the constitution. I am aware that the large number of grand jurors in our sparsely settled counties is a source of much expense, and that they frequently are summoned to meet when there is no business to occupy them. Our constitution and laws were framed for the government of the State, both in the present and future however, and the question of expense should not force upon us an innovation upon one of the greatest safeguards of the citizen. The grand jury is one of the earliest institutions of the common law, and is approved by the experience of generations. The constitution (sec. 7, art. 1,) declares that no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, &c. The grand jury as it existed at common law and by statute in this State at the adoption of the constitution, consisted of twenty-three persons; or (by statute) at least sixteen; it was to such a grand jury that the constitution referred. If the legislature may diminish that number, they may reduce it to one or two as well as to fifteen, and thus destroy those features which have in every age rendered it the protection of the citizen against tyranny, malice and oppression. The theory of a grand jury is this: that the frequent attempts to prostitute criminal proceedings to the base purposes of malice and revenge will be effectually defeated by the selection of a number of citizens from the vicinage of the transaction too large to be influenced by bribery, fear or other appliances, and yet sufficiently limited for the purposes of efficient action. Upon principle, therefore, it would seem that the destruction of the principle upon which it is based, and the annihilation of the features which distinguish it, could not be tolerated under a constitutional provision like ours. The point has been adjudicated, or at least a point similar in principle. The constitution of New York guarantees to the citizen the right of trial by jury. The legislature in a case within the constitutional guarantee, limited the number of the jury to six. The court says the constitution referred to a jury as it existed at common law, and at the adoption of the constitution, and a less number does not satisfy the requirement. See Wynchammer vs. People, 3 Ker. Rep. 427; and Crugen vs. Hudson R. R. Co., 2 Ker. Rep. 198. I am of opinion that should the bill in question become a law, it would be impossible to procure a valid conviction under it.

St. PAUL, March 10th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Your favor inclosing communication of county auditor of Blue Earth county, is at hand. The auditor inquires whether the State has a lien upon personal property for the tax assessed upon it, which will enable the treasurer to follow it into the hands of a purchaser. I think no such lien exists; the tax upon personal property is a personal claim against the owner at the time of the assessment. Sections 73 to 84, inclusive, which provide for the collection of delinquent personal

taxes, do not contemplate any lien upon the property. From the readiness with which personal property passes from hand to hand, in commercial and business transactions, arose the common law principle, that no lien upon personal property could exist unaccompanied with possession, and it would require explicit language to override this principle and introduce an exception so inconvenient and dangerous.

Section 47 of the tax law is relied on in support of the position of the auditor. The first paragraph of the section does not attempt to define the lien of the State, but merely prescribes the time when it shall attach and the period of its continuance. It speaks of the lien, leaving us to other parts of the statute for information of its character. Upon referring to the numerous sections which speak of the lien of the State, it will be found uniformly to be confined to real estate. The second paragraph declares that all personal property shall be liable to be seized and sold for taxes levied thereon. This clause was evidently inserted to exclude the idea of any exemption from sale for taxes, and when read in connection with the doubtful language of the exemption law, seems a necessary provision for that purpose. The third and last clause, however, seems to remove all doubt. It provides that the personal property of any deceased person shall be liable in the hands of any executor or administrator for any tax due on the same by any testator or intestate. Upon familiar principles, the selection of this particular case would exclude other transfers. If the theory of a lien upon personal property is correct, this clause is entirely unnecessary, as the lien would inevitably attach in cases of this character.

Second. The auditor inquires whether a sub-district school tax extended upon the assessment roll, after the purchase, can be legally collected from the property. I think not. If this tax also was assessed against and in the name of the original owner, it became a personal charge against him, and the mere fact that he had disposed of it before the levy of the tax, although good ground, perhaps, for an application for an abatement on his part, will not charge the purchaser with its payment.

ST. PAUL, March 17th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Auditor of State:

SIR: Your favor inquiring whether expenses incurred by the Inspectors of the State Prison in December, 1861, can be paid by you out of the appropriation for 1862, is at hand. The clauses referred to by you authorizing the Auditor to draw his warrants upon the treasury for such sums as the inspectors may from time to time direct, and fixing the salary of the warden, &c., cannot be regarded as amounting to appropriations. I have already decided this question in an opinion given to the warden, and also to your predecessor in office, in the summer of 1860. But the warden now urges that inasmuch as chap. 40 of laws of 1861 declares that for the purpose of making executive reports, the fiscal year shall commence on the first day of December, and end on the last day of November, expenses incurred in December, 1861, are properly a charge upon the appropriation for the expenses of the current year. It is to be observed that the legislature carefully confines the term "fiscal" in that law to the purposes contemplated by it, viz.: reports of State officers; and the sole object was to enable the State printer to print them and lay them upon the desks of the members at the opening of the ensuing session. The language of the appropriation bill, however, repels the inference sought to be drawn from the before mentioned act, by declaring that the "following sums are appropriated for the expenditures of the State government for the year 1862." Had the legislature intended the fiscal year as fixed (for *certain purposes* only) by chap. 40, laws of 1861, they would have said, "for the year commencing on December 1, 1861, and ending November 30th, 1862," or "for the years 1861 and 1862," or would have used other appropriate language conveying the same idea; but the words "for the year 1862," cannot by any rules of construction be made to embrace a part of the year 1861. I am fully aware of the embarrassment occasioned by the repeated neglects of the legislature to make the necessary appropriations, and admit that the necessities of

the case would perhaps justify a *liberal construction* of these laws, but I by no means feel justified in endeavoring to escape from this embarrassment by a forced and unnatural construction of language. The law must be administered as we find it. Executive officers have nothing to do with consequences.

ST. Paul, March 27th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Commissioner of the State Land Office:

SIR: Your communication of this date is at hand. You enquire:

1st. Whether sections 3 and 22 of the State land act affect in any manner your right to sell grass on swamp lands, and if you possess that power, by what law is it conferred. The sections referred to do not affect the question. I think you have the power under the general supervision over the lands of the State. It is nowhere, however, explicitly conferred.

2d. You enquire as to the meaning of the proviso contained in section 7, and whether it is intended to allow settlers to sell or assign their claims, otherwise than as provided by section 30. The meaning of the proviso is not very apparent. It seems entirely foreign to the remainder of the section. If the rights of any settlers upon such school lands have heretofore been divested by special enactment, and the rights of other parties attached, the competency of the legislature to afford settlers relief by this mode of legislation, may well be questioned. It will, however, be time enough to decide upon the construction of the proviso when a question arises under it. I am satisfied that it does not embrace the subject alluded to in your question. The word assignee as there used only applies to purchasers of original occupants prior to the passage of this act. The legislature has not expressly provided for an assignment before a purchase from the State. They have, however, recognized the equitable rights of settlers, and a liberal construction of the law would probably give a *bona fide* purchaser of the improvements of a settler the same rights under sections 22 and 50, that the original settler would have been entitled to. Section 49, requiring the commissioner to remove all persons who have settled on school lands since January 1st, 1861, does not apply to this class of cases, provided the original settler settled upon the lands and made his improvements in good faith prior to that time.

3d. You enquire whether the lands are to be sold at the capital or at the county seat of the county where situated. The law fixes no place definitely; the matter is probably within the discretion of the commissioner.

4th. You ask how the clause in section 46, requiring that from 50,000 to 100,000 acres shall be appraised and offered for sale before November 1st, can be reconciled with the constitution, which requires that lands of the greatest valuation shall be sold first. The term valuation seems to contemplate an appraisal of the whole, before any should be sold, but the law restrains the appraisal to the amount actually sold or offered for sale. I know of no other course than for the commissioner to select the most valuable lands from the best *data* accessible to him; the location, quality of soil, proximity to large towns and navigable rivers, &c., will enable him to form an opinion with reference to the matter.

5th. You ask whether you can subdivide a tract into smaller parcels, pursuant to section 15, without a survey. The law does not require a survey in any case. This is left to the discretion of the commissioner. I hardly see, however, how a subdivision could be made with safety, and an accurate map made and recorded, without survey. I certainly would not recommend such a course.

ST. PAUL, April 5th, 1862. G. E. COLE, Atty. Gen.

Henry Elliot, Esq., County Attorney, McLeod County:

DEAR SIR: Your favor of the 21st ultimo, is at hand. You state that your county treasurer filed his bond on the day prescribed by law, and that it has been

duly approved, but that when filed, it was without date, the blanks for the names of the sureties were not filled, and the seal of the clerk of the court before whom the acknowledgment was taken, was not appended. That the clerk afterwards affixed his seal, and the omissions were supplied by the clerk of the board, and you inquire whether upon this state of facts, there is a vacancy in the office, and intimate that the commissioners are satisfied, if the sureties are holden upon the bond. I do not think upon this state of facts, that the office is vacant. A failure to file any bond, occasions a vacancy; the filing of the bond defective in some particulars is a sufficient compliance with the statute, if upon the defects being made known to the treasurer, he corrects them. The clerk of the court is not, I think, required to affix the seal of the court to his certificate of acknowledgment. He *has* no official seal. The seal in his custody, is the seal of the court, and is to be affixed to all process and to all acts performed by him, strictly as an officer of the court, but the acknowledgment of deeds is not such act. It is a power conferred upon him, distinct and independent of his duties as an officer of the court. The appending of the seal therefore could have no effect upon the instrument, and being an immaterial alteration will not vitiate it. The other alterations are, however, more serious. The rule of law is strict, that all material alterations of an instrument made after its execution, without the assent of the signers, render it absolutely void. You do not state whether the alterations were made in the presence and with the assent of the sureties. If so, there can be no doubt that they will be holden. If not, their assent to the insertion of their names in the blank, may perhaps be implied. The addition of the date is a material alteration, and I think it far safer for the commissioners to procure the execution of a new bond or the assent of the sureties to the alterations in the old one. This will prevent litigation, and save all question. Should they refuse to do so, the treasurer is liable to removal, pursuant to section 32, of chapter 3 of Laws of 1860.

ST. PAUL, April 17th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor.

DEAR SIR: Your favor enclosing letter of chairman of board of supervisors of the town of New Auburn, Sibley county, is at hand. It is stated that the county treasurer has failed to pay the amount of tax collected and due to that town, in cash, but has paid over the amount to his successor in county orders. This is a gross violation of the law. The taxes due the State, county, town, school district, &c., constitute separate and distinct funds, and are to be kept separate and distinct, and collected in gold and silver or current funds, except that any outstanding obligations against any political sub-divisions, as State, county, town, or district, may be received in payment of the taxes which make up that particular fund; thus, county orders are receivable for county taxes; State orders for State taxes; and town orders for town taxes. Any treasurer going beyond this and receiving orders of one particular sub-division in payment for the taxes of another, and refusing to account for such taxes otherwise than in such orders, is a defaulter, and both himself and his bondsmen are liable for such malfeasance. If the commissioners have settled with the treasurer and accepted such orders, they also have been guilty of gross malfeasance. The bond required by sec. 2 of the act prescribing the duties of county treasurer is a security for the payment of all taxes coming into his hands, as well those due to towns as to the county. Sec. 14 prescribes the remedy. Upon receiving instructions from you it is the duty of the county auditor to cause suit to be instituted against the treasurer and his securities. So also the practice of receiving county orders in full for the redemption of lands sold at tax sales and bid off for the county cannot be too strongly reprobated. The law regards lands so sold as security for the payment of taxes accruing to separate and distinct funds, and the public interests imperatively demand that this distinction should be carefully observed, and that county officers should be required to comply with the directions of the State Auditor in this particular.

The numerous instances of this character, and the still worse practice of speculating in State and county orders by county officers, are becoming intolerable, and I conceive it to be the duty of the officers intrusted with this branch of the public service to make an attempt at least to enforce the injunctions of the law more rigorously. I have, therefore, to request that whenever you shall obtain proof of any of the delinquencies mentioned, that you will report the case to this office, with the evidence in your possession.

ST. PAUL, April 17th, 1862. G. E. COLE, Atty. Gen.

Jos. N. E., County Attorney, Carver County:

SIR: Your favor stating that a certain person in your county has fenced up a State road, and desiring information as to the manner in which the offence should be prosecuted, is before me. The obstruction of public highways was a public nuisance at common law, and was indictable as such. Our statute having made no change in the common law, the offence should be prosecuted by indictment. The judgment rendered, in case the defendant is convicted, will be that the party abate the nuisance, and for costs of prosecution, and stand committed until the sentence is performed. In case the defendant should persistently refuse obedience to the order of the court, power undoubtedly exists in the court to order its abatement by the sheriff. 2 Am. Cr. Law, secs. 2368 and 9, note 4. Forms for the indictment will be found in all the books of precedents. An approved form will be found in Davis' Cr. Justice, page 613.

ST. PAUL, April 23d, 1862. G. E. COLE, Atty. Gen.

E. C. Severance, Esq., County Auditor, Dodge County:

SIR: Your favor is at hand enquiring:

1st. Can the trustees, under the law of 1861, levy a tax upon the district to provide for schools for a longer period than three months; no tax having been voted by the district, and no time designated for the continuance of schools. I think not. The school law very properly has vested in the districts full control over their schools and finances, with one exception. To prevent the defeat of the objects of the law by the caprice of the inhabitants of a district, it has made the support of schools for three months imperative upon them, and in case of refusal of the district to vote the requisite supplies, it requires the trustees to levy a tax, but while this power was necessary to prevent the failure of the law, the legislature could not have intended to vest absolute and unlimited power over the tax-payers of the district in three trustees. Sec. 27 is plain, and vests the entire power in the tax-payers, except the well defined powers vested in the trustees by the proviso. This also answers your second inquiry.

3d. You inquire, whether moneys in the district treasury accruing from taxes, thus illegally levied and collected, are subject to draft for the payment of teachers who have been employed in teaching an extra term of three months in two sub-districts, the other sub-districts of the town having only enjoyed the benefit of the regular term of three months. I think not. The trustees have exceeded their authority in all these proceedings. Sec. 15, of the Law of 1861, requires the trustees to employ teachers for the *same length of time* in each sub-district, whereas, disregarding this injunction, they have employed teachers for six months in some districts and for three in others. This would seem to be grossly unjust. Every inhabitant pays alike in proportion to his ability, for the support of schools, and each ought to receive an equal share of the benefits derived from the expenditures of the fund thus realized. Justice and equity not only commend this principle, but the letter of the law expressly sanctions and requires it. The trustees having exceeded their powers, have failed to bind the district by their contract.

ST. PAUL, April 23d, 1862. G. E. COLE, Atty. Gen.

J. F. Pingrey, Esq., County Attorney, Goodhue Co.:

DEAR SIR: Your favor enclosing letter of judge of probate is at hand desiring answers to the following questions:

1st. The statute having limited the time for the continuance of the term of an administrator *de bonis non*, and it with the extensions allowed by law having expired, can he rightfully and legally continue to act for the purpose of settling the estate? I am not referred to the sections of the statute upon which the difficulty arises, and sections bearing upon the question may possibly have escaped my notice. I do not now recollect nor have been able to find any clause in the statute definitely fixing the term of an administrator. The court may and does fix a time for the payment of the debts due from the estate, but this does not limit his term of office. I think he can rightfully and legally continue to act until the estate is fully administered.

2d. Can the judge of probate, by virtue of his office, order the administrator to make a final account, and if so, what shall be done with the assets of the estate? He is required to account whenever required by the court. Sec. 9, ch. 45, Comp. Stat. It seems that that portion of the estate remaining unsettled, consists of notes taken by the administrator upon a sale of real estate for the payment of debts pursuant to the order of court, and secured by mortgage on the premises sold, and which notes have not yet matured. The authority for this procedure is contained in sec. 19 of ch. 85, Comp. Stat. These are to remain in the hands of the administrator until due, and are to be collected by him. But the judge asks if he can require the delivery to the probate court of the securities, and if not how the estate can be closed up? Unless the administrator removes or resigns, I know of no authority to withdraw the management and control of the estate from his hands. The estate evidently cannot be closed up immediately; until these notes become due and are collected, they remain assets in the hands of the administrator. When collected a decree of distribution will close up the matter. If not collected, through the fault or neglect of the administrator, the creditors have their remedy on his bond.

You also ask if a widow can claim and hold the homestead of her deceased husband under the act of March 10th, 1860, she residing out of the State, and not occupying it otherwise than by tenant. My own impression is that she cannot. Homestead laws are to receive a strict construction. The amendment merely provides for certain acts and their consequences to be performed during the lifetime of the owner, and leaves its condition after his death precisely as it existed under the original law. That part of the law of 1858, providing for the occupancy of the wife, is not repealed in terms, and that and the law of 1860 may well stand together—repeals by implication are disfavored and never presumed unless the two acts are utterly irreconcilable. "His removal or sale shall not render the homestead liable to forced sale;" this is the only change made in the law; at his death, without having removed or sold, he leaves it subject to the operation of the former law. Such, I think, is the true construction, but I am strongly of opinion that our supreme court will decide, should the question arise, in favor of the widow.

ST. PAUL, April 29th, 1862. G. E. COLE, Atty. Gen.

His Excellency, Alex. Ramsey:

DEAR SIR: Your favor of the 29th ult. is at hand, inquiring as to your power to remove a commissioner of deeds, appointed under authority of this State, and the proper method of authenticating such removal, and communicating such information to the public. The power is unquestionable. Section 46, page 403, Compiled Statutes, provides for the appointment of such commissioner, and fixes the term of office, viz.: *during the pleasure of the Governor.* The means should be of the same character, as far as possible, as those by which he was appointed. Those suggested by you are doubtless sufficient, viz.: a written notification to him, (and I think accompanied by a request to return his commission,) a copy of this instrument preserved in the executive journal and filed in the secretary's office, and an entry of the

date of removal made in the records of that office. The publication of such instrument suggested by you, of course, can do no harm, and may perhaps save parties from loss. Although I do not conceive that you would be bound to go as far as that.

ST. PAUL, May 3d, 1862. G. E. COLE, Atty. Gen.

A. G. Foster, Esq., County Auditor, Wabashaw Co.:

SIR: Your favor of the 10th inst., stating that prior to the passage of the act of March 6th, 1862, preliminary steps had been taken for the division of a sub-school district, and that a day was appointed for a hearing and decision, which day was subsequent to the passage of the new school law, and you inquire whether the acts of the trustees in making such division on that day can be sustained. I think not. The act of March 6th repeals, in terms, the act under which the trustees professed to act, and is itself to take effect from and after its passage. A grave question may arise upon some questions of the law; for instance, it repeals all prior laws, but does not provide for the election of officers, until the first of May following. It might admit of great doubt whether the legislature did not contemplate the action of the old officers, until the election of their successors, otherwise a hiatus of two months, during which our common school system would be in abeyance, would result; but the point made by you does not raise this question. The commissioners derived their power over these districts from the law immediately upon its passage, and succeeded to all the powers of the trustees in this particular.

ST. PAUL, May 15th, 1862. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey:

SIR: Enclosed I return the communication from the town clerk of Beaver in Fillmore county, and in reply have to say, that the petition shows that one of the supervisors and the town clerk were absent at the annual town meeting, and others were chosen in their places, but that neither the latter nor moderator were sworn, and the clerk thinks the proceedings void, and that you can, in some manner, make them valid. He is mistaken in both particulars. So far as appears from the petition the meeting was entirely regular. No oath, I suppose, is necessary, and if it were required by law such law would be directory merely, and its omission would not affect the proceedings. If the meeting was a nullity, of course no action on your part could help the matter.

ST. PAUL, May 15th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Commissioner Land Office:

SIR: Your favor is received. You cite me to no section affecting your power to divide land into smaller subdivisions than the United States surveys, whenever you deem fit. If there is no other clause affecting it, section 15 of the school law confers full authority upon you to do this in all cases. You inquire whether after making such subdivision you may deduct the damage done by a settler occupying the whole quarter from the value of the improvements on a ten-acre lot. I think you may. The law did not contemplate reimbursing a settler for improvements who had damnified the land to a greater amount than their value, and the fact that you have divided it into smaller tracts does not affect the question.

ST. PAUL, May 22d, 1862. G. E. COLE, Atty. Gen.

H. A. Gale, Esq., County Auditor, Hennepin County:

SIR: In you communication of the 24th inst., you state that one of the districts in your county, met on the first Tuesday of May, for organization, and the elec-

tion of officers, pursuant to section 7 of the act of March 10th, 1862, but that no notices of such meeting were published, as required by section 19 of the same law, and you inquire whether under such circumstances the district is legally organized. There can be no doubt of it, I think. The provisions of that section are merely directory with the exception of the clause in italics. Unless such notices were posted, and the intent to raise money for building, or purchasing a school-house, or fixing a site thereof, were particularly set forth, no tax could be legally levied for such purposes, and if levied could not be collected. But for other purposes, as the organization of the district, and the election of officers, the omission does not invalidate the proceedings. See Marchant v. Langworthy and others, 6 Hill, 646.

ST. PAUL, May 29th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Auditor of State:

SIR: I recommend the accompanying form for a tax deed under the present system of revenue laws. You will perceive that it does not contain the voluminous recitals of the deed submitted by me under the old system. Upon a further examination of the subject, I am of opinion that the preliminary and essential steps necessary to the validity of a tax title, although, if assailed, they must be proved, need not, and perhaps ought not to be, incorporated in the conveyance. Sec. 30 of chap. 2, Laws of 1860, declares that the Auditor's deed shall be *prima facie* evidence of a good and valid title in the purchaser. This will throw the burden of proof upon the party assailing the deed, and dispense with the necessity of accompanying the introduction of the deed in evidence with plenary evidence of the regularity of the proceedings. In the preparation of the form of a tax deed, heretofore submitted to you, I was governed by the analogous cases of sheriff's, administrator's, referee's, and in short all deeds executed by virtue of a special power conferred by law. In these cases the general rule undoubtedly is, that the deed should contain full recitals, showing the compliance with all statute formalities, and commencing at the point which forms the basis of the proceedings. The very few forms of tax deeds to which I have access, are forms expressly prescribed by statute, and of course are of little or no authority in the absence of express statute provisions; these generally, merely contain the recital that "all the requisitions of the statute have been complied with," without reciting them more particularly. In the absence of statute provision, the authorities seem to hold that any deed which would be operative at common law is sufficient, provided it recites the power under which it is made, and is accompanied by proof that the law was strictly complied with. The latter, as we have seen, is not required in the first instance under our statute, and as to the former, the accompanying form does contain a recital of the power. It does not follow, however, that because this deed may be sufficient that the former is bad; on the contrary, the recitals in the latter, if they do no good, will do no harm. The advantage of this form of deed consists in the fact, that with few if any modifications, it can be used indifferently under any of the numerous revenue laws, while any attempt at definite recitals, would necessitate a change in the deed every year, if we may judge of the future by the past. It has been customary, in other States, for the legislature to incorporate a form for a tax deed into the statute. This saves all question, and I suggest that, in your next report, you recommend the adoption of the accompanying form, or such other as they in their wisdom may elect.

ST. PAUL, June 3d, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: In answer to your favor, stating that the citizens of the town of Danby, Jackson county, have neglected to hold a town election, and enquiring whether the assessor elected at the last town election can legally act, I have to say that section 15 of art. 6, of chap. 14 of Session Laws of 1860, declares that town officers shall hold their offices until others are chosen or appointed in their places, and qualified.

I see no occasion for doubt, therefore, that the acts of the assessor would be binding. Section 1 of art. 6 of same chapter, would authorize the appointment of an assessor, in the case you mention; until such appointment, the present incumbent may act. Section 15 was enacted expressly to provide for omissions of this character.

ST. PAUL, June 4th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Commissioner of Land Office:

SIR: Your favor of the 4th inst. is at hand, enquiring whether the rent assessed upon school lands and improvements, under the act of March 9th, 1861, can be collected, unless the occupants pay the reduced amount prior to June 1st, 1862, pursuant to the act of February 22d, 1862. I do not think such rent can be legally collected. By the act establishing the State land office, approved March 10th, 1862, the act of March 9th, 1861, providing for the sale of school lands for rent and taxes, is absolutely repealed, and the repealing statute contains no saving clause. It is a principle of law that upon the repeal of a statute, all inchoate rights fall with it. 5 Minn. 288. Whenever a statute is repealed, it is considered, except as to transactions which are closed, and under which private rights have become vested, as though it had never existed. There is no law now in force authorizing any sale, or any proceedings whatever, to enforce the collection of the rent. It seems plain, therefore, that any attempt to realize the tax by proceedings against property, would be unauthorized and void. See McQuillan vs. Doe, 8 Blackford, (Indiana reports,) 681.

ST. PAUL, June 9th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Your favor is at hand, enclosing communication of A. Clendening, stating that the offices of the county of Jackson are vacant, and enquiring how the vacancies may be filled. If the county has a township organization the vacancy in the office of county commissioner can only be filled in the manner prescribed by sec. 13, art. 2, ch. 15, Session Laws of 1860, viz.: the probate judge, auditor and register of deeds may appoint. If there is no probate judge, that office may be filled, I presume, by appointment by the Governor. See sec. 10, art. 6, Const. If the county is not divided into towns I think the Governor may appoint the commissioners. Sec. 1, art. 2, Session Laws 1860.

ST. PAUL, June 12th, 1862. G. E. COLE, Atty. Gen.

E. R. Smith, Esq., County Auditor, Le Sueur County:

SIR: In reply to your favor of the 9th inst., enquiring whether the town supervisors can draw an order upon the town treasurer, in favor of a district treasurer, for moneys collected under a levy of a sub-district tax for building a school house under former laws, the present district having succeeded to the rights of the sub-district. I have to say that the second proviso of section 25 of the school law of 1862 is intended to cover cases of this character; such moneys are to be held by the town treasurer in trust for the district and are to be paid out upon the order of the supervisors, attested by the town clerk, to be by them applied to the indebtedness of the district or "to such other purposes to which it may be legitimately applied." The intention of this clause was to authorize the supervisors upon the presentation of district orders or evidences of indebtedness, properly authenticated, to draw their orders directly in favor of the creditors of the district without the intervention of the district treasurer. In a case, however, where there are no outstanding obligations payable from such funds, I think the law contemplates their payment to the district treasurer, to be disposed of under the direction of the district; such would,

undoubtedly, be a legitimate application of the fund within the meaning of the last clause of the proviso.

ST. PAUL, June 14th, 1862. G. E. COLE, Atty. Gen.

Rudolph Lehmicke, Esq., County Auditor, Washington County:

SIR: Your favor of the 17th inst. is at hand, desiring my opinion as to the legality of a school district meeting held on the day prescribed by law for the annual meeting, but without any previous notice. Sec. 15 of the school law makes it the duty of the clerk to give ten days' notice of such meeting by posting three notices in conspicuous places in the district and provides that at any annual meeting the legal voters present may act upon any matter properly before them *except the raising of money for building or purchasing a school house or fixing the site thereof* without its being particularly set forth in the call. So far as the matters embraced by the clause in italics are concerned the notice is of the essence of the thing and no money can be legally raised, or any tax levied for the purposes mentioned without the notices have been duly posted, setting forth the intention to take action thereon, but for all other purposes this requirement is merely directory, and the meeting, so far as the election of officers is concerned, or any other business not required to be particularly set forth in the call, is legal and valid.

ST. PAUL, June 21st, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Commissioner of Land Office:

SIR: In reply to your favor of the 20th instant, I have to say, that by section 22, chapter 57, Laws of 1862, the leasing of school lands is left very much to the discretion of the commissioner, except that unimproved lands are not to be leased till they have been appraised. Lands offered for sale and purchased by a settler or third person, should not be leased; the purchaser acquires in these cases a right to possession, by virtue of his certificate of purchase, (section 18,) and may enforce his rights against a trespasser or a settler continuing in possession. I think it would be useless to attempt to compel settlers to take a lease or to pay rent for the time during which they have already occupied the land. If they have gone on to the land since January 1st, 1861, it is your duty to proceed against them as trespassers, (section 49;) and you cannot and ought not to legalize their acts by a contract ratifying their possession, which was in violation of the law. Those who settled upon such lands prior to that time cannot be compelled to pay *rent* until they enter into a contract to do so. The law does not contemplate such payment until the land is leased. Section 22. All improved land offered for sale, and not sold for want of bidders, should be leased for one year from the date of the execution of the lease.

I do not think settlers who purchase lands at the sale should or can be compelled to pay rent for past occupancy. I am also requested by Mr. Power to transmit my opinion as to the validity of a sale made subsequently to November 1st, 1862. He informs me that you fear you will not be able to obtain the reports from all the counties so as to enable you to complete the sales until after that time. I think there can be no doubt that a delay of this character will not in any manner affect the validity of the sales. Sec. 49 authorizes the commissioner, whenever, *in his opinion*, the public interests require it, to appraise and sell *any school lands*, provided that not less than 50,000 acres nor more than 100,000 shall be so appraised and offered for sale on or before the first day of November, 1862. This clause is merely directory, and while it makes it your duty to sell on or before that day it does not prohibit the sale of that or a larger quantity afterwards. The rule is that when the precise day upon which an act is to be done is not material and is not of the essence of the thing to be done, a failure to perform the act at the precise time does not vitiate. This must be determined by the circumstances surrounding the case. Here it is obvious that the day is in no respect important, and that no pub-

lic interest will be affected by a delay of a few days in the sale. Enclosed, I transmit form for a license to enter upon and cut grass on school lands.

ST. PAUL, June 24th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Your favor of the 24th instant asking my views as to the propriety of selecting lands in lieu of those pre-empted under the act of Congress of March 3d, 1857. I have to say that there are grave objections to selecting any lands in lieu of those thus pre-empted, until the question at issue between the United States Government and the State can be judicially determined. I send you by this night's mail the argument and exceptions in the State against Batchelder, from which you will learn the points taken by the State.

The first and second propositions go to all lands pre-empted under those resolutions, the State contending that Congress had no power to divert these lands from the purposes to which they were originally dedicated; and 2nd, that if such power existed, Congress has not exercised it so far as to affect school lands within the present territorial limits of the State. You will perceive that the force of these positions depends entirely upon the want of assent to such action on the part of the State, and although it might well be doubted whether the Auditor or even the legislature could by any official action prejudice the rights of the State, yet an official recognition by the head of the department to whom the custody and management of the school lands has been confided, *might* be held by the courts as a ratification of the acts of Congress in this regard. Nothing but want of authority in the officer would prevent the selection of other lands in place of those pre-empted from operating as an assent and recognition of their validity. I have a good deal of confidence in the soundness of the first position, and should be loth to see it prejudiced by any action on behalf of the State authorities until it can be tested.

So far as lands which were not, in fact, settled upon prior to the survey, and when this is susceptible of proof, I have no hesitation in saying, that unless all authorities and legal analogies are utterly disregarded, the State cannot fail to establish her claim; as to these, then, no act whatever should be taken which will tend directly or indirectly to ratify such pre-emptions, and the grounds upon which all pre-emptions of valuable lands rest should be carefully scrutinized before making selections.

It may require two years, and perhaps longer, to obtain a decision upon these questions in the supreme court of the United States, but unless the public interests will be seriously prejudiced by the delay, I should advise against the selections in *all cases* where the state will be compelled to select lands of considerably less value in place of that pre-empted.

ST. PAUL, June 24th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Your favor of the 23d instant is at hand, inquiring:

1st. "When a man resides in one ward and does business in another, where should his personal property be listed for taxation?" Section 85 of chapter 1, of Session Laws of 1860, provides that property in any incorporated city, town or ward, shall be assessed, equalized and taxed in the same manner as property in townships. Section 3 of the same act as amended by section 3 of chapter 1, of laws of 1861, requires him to list certain articles specified in the town (ward) where situated, and all other personal property in the town (ward) where he *resides* at the time the list was taken. Your question therefore furnishes its own answer. If he does not reside where he does business, such property cannot legally be taxed there.

2d. Is a person buying grain in this State, and forwarding it to other States for sale, a merchant within the meaning of section 11, chapter 1, laws of 1860. If a

resident of the State and dealing upon his own account, I think he comes within the statute definition. Any person whose business is buying and selling merchandise, is a merchant within the common law definition of the term, and the place where the goods are to be disposed of cannot affect the question, if he has his residence and place of business within the State. A shipping merchant is none the less a a merchant because he exports the commodities in which he deals to foreign markets. The statute declares that "any person who shall own personal property within this State, which shall have been purchased with a view to being sold at an advanced price or profit, is a merchant, and in estimating the value shall take as a criterion the average value of such articles which he shall have had from time to time in his possession during the previous year." It seems that the fact that a portion of the grain may have been exported prior to the assessment, cannot affect the question, as the criterion is not what he may have on hand at the day of the assessment, but what he has at *any time within* the previous year owned within the State.

3d. Can a steamboat company be taxed directly or only the stock owned in the State? I have had some doubt with reference to this question. Section 16 of chapter 1, of laws of 1860, provides that the property of every canal, slackwater navigation company, railroad company, turnpike company, plank-road company, bridge company, insurance company, telegraph company *or other joint stock company*, except banking or other corporations whose taxation is specifically provided for by this act, shall be listed by the President, &c. Section 53 and the ninth subdivision of section 3 of the same act, declare that no person shall be taxed for stocks owned by him in a company whose property is listed in the name of the company. The taxation of banking corporations, and corporations formed for the purpose of trade and manufactures, is especially provided for by the act. The question is, whether a steamboat company is embraced in the phrase *other company*, as used in section 16, and if so, whether the taxation of its property is not specifically provided for by the act. I doubt whether the phrase "other company," as here used, does not mean another company of the same description as those enumerated. The succeeding language of the section proceeds to specify the mode of taxation of insurance companies, and of the other companies named, but would be entirely inappropriate to a steamboat company. See Titcomb v. Union Marine and Fire Insurance Company, 8 Mass. 333. If it would be applicable, however, I am inclined to the opinion that the taxation of such property has been specifically provided for by the second subdivision of section 2, which declares that the capital stocks, undivided profits and every share thereof, including every share in every ship, vessel or boat, navigating the waters of the state, shall be deemed personal property. If the shares in the capital stocks are taxable, the boat cannot be, as this would be double taxation and is prohibited by section 53 and subdivision 9 of section 3.

I think, therefore, that the stock owned in the State is alone taxable.

ST. PAUL, June 24th, 1862. G. E. COLE, Atty. Gen.

J. W. Reed, Esq., County Auditor, Stearns County:

SIR: Your favor of the 30th ult. is at hand, enquiring whether the trustees are required by the school law to cause schools to be taught in the English language. The law does not contain any explicit clause on the subject, because no such question could have been anticipated. The objects of the law furnish an answer quite as conclusive as any language could have afforded. The stability and permanence of a government like ours depend mainly upon the wide-spread dissemination of education and intelligence among the people, and the system of common schools is the instrument by which this desirable end is attained; but the formation of citizens who shall become identified with the prosperity of the State, familiar with its laws and institutions, and interested in their preservation, can only be obtained by a system of instruction in the language in which those laws are framed and the government administered. It is the policy of the government to eradicate as far as possible all national differences and to merge all classes of citizens in one, having

similar habits of thought, the same interest in the welfare of the state, and using the same language. If each class of foreigners, upon settling in the country, were to be taught at the public expense in their native language, and allowed to remain in ignorance of the English, the knowledge thus imparted, however useful to the student, would be useless to the State, and they would necessarily remain in ignorance of those matters chiefly in which alone the public interests require that they shall be instructed.

Section 29 of the school law prescribes those branches of study which are to be taught in our common schools; the languages are not included. That those branches are to be taught in the English language, it requires no argument to prove, and the books prescribed for the use of schools are English books. The government has yet to exist which will expend the contents of its treasury to the neglect of its own language, in educating its citizens in the language of a foreign country whose institutions and laws are at variance with its own.

ST. PAUL, July 1st, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am of the opinion that the State Bank of Minnesota at Minneapolis is entitled to receive bills to the amount of $1,000 upon the deposit of an equivalent in the securities required by the act. Sec. 2 of ch. 56 of Special Laws of 1861 admits of no other construction. I am also of opinion that the bank is not authorized to continue business without a capital of $25,000. My predecessor has held that capital stock and securities deposited with the Auditor were convertible terms, and such securities are the only capital stock. This is a mistake. A bank is authorized by the law to hold much property not included in these securities, and all the property of a corporation represents its capital stock. It is quite immaterial how much or how little currency the bank has in circulation, providing it be amply secured by a deposit of securities, but the experience of other States has demonstrated the evils of the swarms of petty banking institutions which have infested the West at every stage of its history. The banking law not only provides for a deposit, but furnishes an additional guaranty to the creditors of a bank by rendering the stockholders liable individually for double the amount of the stock, and to insure the respectability of such institutions, has fixed a limit below which its capital is not to be reduced. The general banking law forbids, by implication at least, the issuance of less than $25,000 to a bank organizing under it. (Sec. 5, as amended; secs. 23 and 25.) This requirement and this only is changed by the special act in relation to the State Bank of Minnesota. It does not follow that because the amount of securities required by sec. 23 corresponds with that of the capital stock prescribed by sec. 10, that they are identical. On the other hand, the fact that banks *may* hold other property, the certificate required by sec. 11, and the language of sec. 30, all indicate an obvious distinction. So also the language of sec. 24, prohibiting banks from continuing business after their *capital stock*, *securities* or circulation is reduced below $25,000, recognizes a distinction between the two former, and the fact that the prohibition is removed so far as the two latter are concerned cannot justify us in applying it by implication to the former.

The amount of capital is intended to be fixed, permanent and definite, and the certificate required by sec. 11 is necessary to the safety of those dealing with the bank; but a construction which should regard the securities as the stock would introduce into the history of corporations the anomaly of a bank whose capital instead of being permanent and definite, to vacillate between $1,000 and $25,000 at the caprice of the banker. The certificate, therefore, would be of no value, as it would furnish no information to the public of the pecuniary responsibility of the institution. On the other hand, it may be convenient to allow the banker (he keeping his capital good) to withdraw any portion of the bonds deposited by him upon returning an equal amount of circulation, as the exigencies of his business or the state of the stock market may render beneficial to him. To this there

can be no objection urged; the bank, instead of being weakened, would receive additional strength, and the public an additional guaranty of its solvency. It cannot be presumed that the legislature, in the absence of express language, could have intended by remote implication to confer extended and peculiar privileges upon a favored corporation, and thus remove one of the most important restrictions upon these institutions, in the retention of which the public is deeply interested.

The certificate prescribed by sec. 11 must still be required. All charters are to be construed in favor of the public, and in derogation of the grant.

The same plates may be used at Minneapolis as heretofore at Austin, and the Auditor cannot refuse to issue bills printed from those plates. The law is explicit. Sec. 4, ch. 56, Special Laws 1861.

ST. PAUL, July 5th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Your favor inquiring whether United States stocks or treasury notes are taxable by the State authorities, is at hand. They are not. The question was determined by the Supreme Court of the United States, in Weston v. City Council of Charleston, 2 Peters, 449.

ST. PAUL, July 7th, 1862. G. E. COLE, Atty. Gen.

Hon. J. W. Edmonds, Commissioner General Land Office:

SIR: Your communication of April 11th, declining to recognize the rights of the State in school lands upon the Lake Pepin Reservation has been referred to me by the commissioner of the State land office. I desire to appeal, on behalf of the State, from that decision to the Secretary of the Interior. It is not denied that had the rights of persons of mixed blood remained as originally fixed by the treaty of 1830, the school sections within the reservation at the time of the passage of the act of February 26th, 1857, granting school lands to the State, would have been regarded as disposed of within the meaning of that act It appears, however, that by the act of July 17th, 1854, these lands were purchased by the Government, and the half-breed owners thereof were required to execute a complete and full relinquishment of all their right, title, and interest in such lands to the United States, they receiving in lieu thereof certain floating warrants or scrip, which conferred a *right to acquire* the title to certain lands, both within and without the limits of the reservation. The language of that act, and of the subsequent one of May 19th, 1858, repels the inference that the holders of scrip retained any vested rights in these lands; had they done so, it would not have been competent for Congress to have deprived them of these rights by allowing pre-emptions on such lands. On the other hand, the scrip owner simply acquired the right to locate it upon any lands to which other parties had not acquired rights prior to such location. Sec. 3 of the act of July 17th, authorizes the President "to cause such lands to be surveyed and exposed to public sale," and that of May 19th, 1858, declares that "they shall be subject to the operation of the laws regulating the sale and disposition of the public lands," among which is that reserving for school purposes, and prohibiting the sale of sections 16 and 36. The act of March 3d, 1849, and that of February 26th, 1857, reserved and granted to the State, sections 16 and 36, the latter with the proviso excluding lands otherwise disposed of. It is submitted that those lands upon which half-breed settlements had been made, or scrip located prior to that time, were alone disposed of. All lands not so situated were at the absolute disposal of the Government, and if so passed by the grant of February 26th. That this position is correct, is shown by the fact that Congress did, during the subsequent year, by the act of May 18th, 1858, exercise this right of disposal. If they could grant lands not settled upon by half-breeds to pre-emptors in 1858, they could convey the same class of lands to the State in 1857. If disposed of as against the State they were equally so as against pre-emptors. But it is said that the act of February 26th, and its ac-

ceptance by the State, did not operate as a present grant, and I am referred to the opinion of Attorney General Butler. This doctrine is at variance with that held by the Department and the Supreme Court. See opinion of Secretary of the Interior, Sept. 10th, 1851, p. 494, Lester's Land Laws; Rutherford vs. Green's Heirs, 2 Wheaton, 196; Cooper vs. Roberts, 18 Howard, 173; Ham vs. State of Missouri, 18 How. 126. As no patent ever issues for school sections, (19 How. 174,) it is difficult to see when the title vests in the State, if not upon the acceptance of the grant. The distinction between this case and that cited by you, as it seems to me, is that there the question arose under the treaty itself, while here the act of July 17th, 1857, is substituted for it, and the half-breed owners have relinquished their rights in the specific land, and accepted scrip. Had their rights remained as fixed by the treaty, the lands might well have been regarded as disposed of, but if that had been so, Congress would also have been guilty of a violation of its provisions by allowing preemptions thereon.

ST. PAUL, July 8th, 1862. G. E. COLE, Atty. Gen.

John E. Putnam, Esq., County Auditor, Sherburne Co.:

SIR: Your favor of the 7th inst. is at hand, inquiring whether moneys collected and in the hands of the town treasurer, moneys collected and in the hands of the county treasurer upon a delinquent tax levied by a district prior to the passage of the act of 1862, and moneys in the county treasury apportioned to existing school districts at the date of that act, should be paid to the town or district treasurer.

To the town treasurer. Sec. 25, chap. 1, Laws of 1862. Such moneys, however, are to be applied under the direction of the supervisors to the indebtedness of the district or "*to such other purposes to which it may be legitimately applied.*" After the debts of the district are fully paid, if a surplus remains, I think under the last clause an order drawn by the supervisors on the town treasurer in favor of the district treasurer would be a legitimate application of such funds.

ST. PAUL, July 10th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath:

SIR: Your favor of this morning, inquiring whether you are authorized to pay the salary of the Lieutenant Governor as "Governor *ad interim*" from the Executive contingent fund, upon the certificate of that officer, is at hand. I had occasion to decide at an early period of my official connection with the State government that the mere temporary absence of the Governor did not occasion such a vacancy as would authorize the Lieutenant Governor to act as Governor. I have seen no reason since that time to modify my opinion in that regard. The difficulty which now exists arises from a disregard of that opinion. It has been the constant practice to recognize his official signature to all accounts except those for his salary. This involves a glaring absurdity or inconsistency of which the Lieutenant Governor may complain. Either he has the right to act or he has not. If the right exists his signature should be recognized in all cases; if it does not it should be recognized in none. He has been called to this duty by the Governor, has acted and been recognized by the Auditor as a competent officer. So far as his services are concerned his acts are treated as valid, and it is only when he draws his salary that the objection is raised. While, therefore, I am far from affirming the *right* of the Lieutenant Governor to act as Governor in the future any more than in the past, I think every principle of honor and good faith require that he should be recompensed for the services which he has performed already. The executive contingent fund is placed at the disposal of the Governor, and he alone is responsible for its proper expenditure; if, therefore, he deems it necessary to employ an additional clerk in the executive office, or to employ any person, whether he be the Lieut. Governor or another, to perform any duties therein, he alone is accountable for the propriety of his action; if, therefore, the account was properly certified, I do not think the Auditor is to inquire as to the propriety of that particular expenditure. This would be to

array the judgment of the Auditor against that of the Governor in a matter which the legislature has confided to the latter. The question then recurs as to the right of the Auditor to recognize the certificate of the Lieutenant Governor. As I have said, consistency would require that he should do so in this case, or cease doing it in others. The general appropriation bill of 1862 does not, in terms, require a certificate, and I presume an oral declaration of the executive will would be a sufficient authority. The Governor has repeatedly recognized and ratified the action of the Auditor in the payment of such bills. He causes the Lieutenant Governor to come to St. Paul in his absence, he recognizes him as Governor and holds him out as such to the other departments. He could not with any semblance of consistency deny the validity of his official signature. But again, the Lieutenant Governor cannot be regarded as a mere usurper; he is acting under color of right, by the especial request and authority of the Executive, by whom his acts have been repeatedly recognized. In this state of facts I think the other departments are justified in regarding him as an officer *de facto*. Whether all of his acts as to third persons would be valid as such I express no opinion; neither do I wish to be understood as laying down a general rule, but simply to confine my opinion to the facts of the particular case under consideration.

ST. PAUL, July 12th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Your favors of the 14th and 15th are at hand. You inquire:

1st. Is a cattle dealer a merchant within the meaning of sec. 11 of the tax law of 1860? I think he is. My opinion of June 24th is in point.

2d. Is a merchant doing business here and acting as agent for Eastern manufacturers of agricultural implements, who simply receives and forwards orders, and receives and transmits the machines to their destination, a merchant as to them? I think he is not. When delivered they become the property of the purchaser, and are taxable as such; until then they are only in transit, and are in the custody of the agent only for the purpose of being delivered or forwarded to their destination pursuant to a prior contract; they are not in his possession for the purpose of being sold, as the contract of sale has already been consummated, but simply to be stored and forwarded.

3d. Is a person located in this State as an agent for an Eastern merchant purchasing furs for shipment to a foreign market, he having no interest in and no authority to sell the same, a merchant within the meaning of that act? I think not. Sec. 11 expressly declares that no consignee shall be required to list for taxation the value of any property, the product of this State, nor the value of any property consigned to him from any other place for the sole purpose of being stored or forwarded, provided he has no interest in such property. This language alone excludes the idea that such property is taxable by the authorities of the State. The consignee has no interest in the furs, and they are as much the product of the State as wheat, or any other article of commerce, grown or produced within its borders. But upon general principles such construction could not prevail. The agent in this case makes his purchases of merchants doing business here, who both buy and sell furs within the State; they, and they only, are taxable as merchants upon the commodities sold by them, by the authorities of this State; the capital of the foreign merchant and his stock in trade is taxable by the authorities of the State in which he is located and ought not to be again taxed here.

ST. PAUL, July 15th, 1862. G. E. COLE, Atty. Gen.

Hon. Ignatius Donnelly, Acting Governor:

DEAR SIR: I herewith return requisition of Governor of Wisconsin and accompanying papers submitted to me, pursuant to the provisions of section 2, chapter

100, Compiled Statutes. I have to say that the papers are in due form, and in compliance with the requirements of the act of Congress of February 12, 1793. The statute of our State authorizes an inquiry into the situation and circumstances of the person charged as a fugitive from justice, especially as to whether he is held to answer for an offence against the laws of this State or the United States. As I am not informed of the whereabouts of the alleged fugitive I have no means of ascertaining this. The requisition and accompanying papers being regular, it has been customary to issue the warrant.

ST. PAUL, July 21st, 1862. G. E. COLE, Atty. Gen.

Louis Harrington, Esq., County Auditor, McLeod County:

SIR: I am in receipt of your favor enclosing certain inquiries of the supervisors of the town of Penn, respecting the construction of the law providing for a general system of common schools.

It is asked—*First*, "shall the surplus moneys in the town treasury be divided equally among the districts, or in proportion to the number of scholars between the ages of five and twenty-one?"

The last subdivision of sec. 24 of the school law of 1862 declares that any surplus of money belonging to the district as originally organized (*i. e.*, the town) shall be equitably divided among the districts of the town." An equal division among the districts without regard to the number of scholars, would not, necessarily, be an equitable one. Should this construction prevail, a scholar in a sparsely settled district would derive a much greater benefit from the school fund than one resident in a more populous district. The moneys now in the town treasury were derived from the county, and were raised and distributed to the towns in proportion to the number of scholars. In this manner, only, will every scholar derive an equal benefit, and such, only, can be considered an *equitable* distribution within the meaning of the law.

It is said that certain lands were sold and struck off to the county for delinquent taxes, and upon redemption the entire amount was received in county orders, and the proportion belonging to the town was tendered to and received by the town in county orders, and it is asked, "could these orders be paid in by the county, and if not, who is responsible for the fraud?" In 1858, it was held by the then Attorney General that the county became the owner of the lands so struck off to her, and being responsible for the proceeds, might allow a redemption in full in county orders. In 1860, this ruling was reversed by the State authorities, and it was held that lands so struck off did not become the absolute property of the county, but that she held them as a trustee for the State and school funds as well as for the county fund; the purchase was not the voluntary act of the county, but the lands were struck off to her, pursuant to a provision of law, and that redemption could only take place in county orders, so far as county taxes were concerned. By sec. 49, chapter 1, of Session Laws of 1860, the decision of the State Auditor is final, until reversed by the courts, and any county treasurer disregarding his directions in this particular may be treated as a defaulter, and all orders taken in violation of such instructions should be refused by the county commissioners in their settlement with the treasurer. The county, in this case, however, had the undoubted right to pay the towns in county orders, if they chose to accept them, and if they have done so, they have ratified such action, and cannot complain. If not, the town may in its settlement with the treasurer refuse to allow them in his account. The orders, however, are valid; the fact that the town might have demanded cash instead of orders, does affect their legality. This, also, answers the third question.

4th. Are districts that have not had three months' school, entitled to their portion of the money remaining in the town treasury? I think they are. The old restriction contained in section 41 of Laws of 1861, has been removed, (sec. 24, Laws 1862,) and had it been intended to have continued it in force with reference to the money mentioned in the last proviso of section 24, I think a clause to that effect would

have been inserted. The language is "among the districts of the town," not among those merely in which the school has been taught.

ST. PAUL, July 21st, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Your favor desiring my opinion as to the form of advertising forfeited lands under the act of March 11th, 1862, is before me. The published description should follow the original list, which is the basis of all subsequent proceedings. The name of the owner should be stated in all cases, if known, or if it can be ascertained by enquiry, and if not, the fact that he is unknown must be stated. The land should be described in legal sub-divisions, and the amount of tax and penalty should be definitely set forth as upon the assessment roll. The sale must be according to the parcels and description contained in the list, or original assessment roll, or it will probably be void. Every particular required by the statute to be stated in the notice must be literally inserted therein, and when the statute is silent as to its form and contents it must be sufficient to enable the delinquent owner to ascertain whether his land is advertised, the amount of the tax charged upon it, and the time and place when and where the sale will take place. Proof of the strict observance of all statute requisitions in the advertisement, is of vital importance. The statute under which these proceedings are had does not prescribe the means of preserving this evidence, as it requires the Auditor to act as clerk, and keep a record of the sale. I have thought it prudent to have the Auditor make a certificate of the fact of publication, and file it with a copy of the notice and list in his office, in analogy to the course prescribed by section 48 of chapter 2, of 1860. As the law does not in terms require this, it is doubtful whether such proof, alone, would be sufficient. On the other hand, the statute being silent, we must be governed by the general laws. Secs. 61, 62 and 63 of chapter 84, Compiled Statutes, provide that the affidavit of the printer, or foreman, or principal clerk, of any newspaper, annexed to a printed copy of the notice, may be filed with the register of deeds, and shall be received in all courts as presumptive evidence of the facts therein contained. An affidavit, therefore, in the language of the form for the Auditor's certificate herewith enclosed, except the various changes of form from that of a certificate to an affidavit, should, in all cases, be preserved and filed. I enclose forms drawn in accordance with the above views.

ST. PAUL, July 21st, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Your favor of July 25th, suggesting the impracticability of stating in the notice of tax sale prepared by me, under the act of March 11th, 1862, the different funds as specifically as therein set forth, is before me. I do not regard it as essential that the different funds should be separately stated, and upon looking over the old statutes, I perceive that it will probably be impossible to do so, as the sum total only, was required by those statutes to be embraced in the assessment roll. This argument is therefore sound; that based on the expense, however, is of no weight. Legal proceedings upon which titles are to be founded, should not be regulated by any question of this character. I presume, also, that the funds of the different years need not be separately stated; as I said in my previous opinion, any notice which will enable the delinquent to ascertain whether the land is advertised, the amount of the tax chargeable upon it, and the time and place when and where the sale will take place, is probably sufficient. See Roukendorf vs. Taylor, 4 Peters, 349.

My object in stating the amounts of the several years and funds so minutely, was to avoid all question, and prevent litigation if possible; and also that as by section 3, the lands were to be sold to the highest bidder in money or *orders corresponding with the several funds making up the taxes charged on such premises*, it might be

desirable for the purchaser to know the exact amount payable in the different orders.

ST. PAUL, July 26th, 1862. G. E. COLE, Atty. Gen.

J. W. Mulvey, Esq., County Auditor, Wright County:

SIR: I am in receipt of your favor of the first instant, enclosing an elaborate argument from Mr. Francis H. Widstrand, by which he attempts to prove the Bible the most immoral of books, only to be tolerated in an age of superstition and barbarism, and that it is a violation of the constitution of the State and against the peace and dignity of the State of Minnesota, to allow it to be used in our common schools. In this age and country, Mr. Widstrand will hardly be able to find a public officer, whether priest or layman, who will yield an unqualified assent to his doctrines. Although it is undoubtedly true that under our constitution and laws, every citizen enjoys the right to the fullest and most perfect liberty in matters of opinion, it is also true that by the same laws no man has a right to utter and publish a libel upon the Christian religion, (3 Greenleaf on Evidence, sec. 164) and an officer who should sanction it officially, would be guilty not only of a moral but a legal crime.

I do not propose to enter into any discussion upon the propriety of allowing the Bible to be used in our schools, or in defence of its doctrines, although I may be permitted to doubt whether "*the principles of science and the practice of virtue,*" which Mr. Widstrand proposes to substitute in its place, would be found as sure a basis for a popular government as the doctrines which he condemns. I believe the French Revolutionists found their "*Goddess of reason,*" a somewhat inadequate substitute for the Deity worshiped by their fathers. But this is not the question. Whether the book be good or bad, the legislature have vested the general control of schools in three trustees, and until a list of books to be used in our common schools is prescribed by a higher authority, the matter is entirely with them or a majority of them, and I know of no authority competent to revise their action. It is perfectly competent for them to exclude it if they desire, but it is equally within their power to prescribe it as one of the books to be used in their schools.

ST. Paul, August 6th, 1862. G. E. COLE, Atty. Gen.

Hon. Ignatius Donnelly, Acting Governor:

DEAR SIR: I am in receipt of your favor enquiring, "Who of the citizens of this State above the age of eighteen and under the age of forty-five are exempted from militia duty, under the laws of the United States or of this State?" In reply I have to say.

1st. Under the laws of the United States, all officers, judicial and executive, of the government, the members and officers of both houses of Congress, custom house officers and clerks, port officers, assistants and clerks regularly employed and engaged in post offices, stage drivers employed in carrying the mails, ferrymen on post routes, inspectors of exports, pilots, marines, and all persons exempt by State laws.

2d. Under State laws, acting members of fire companies in active operation, under the control of the corporate authorities of any town, city or village; persons disabled while serving as firemen; all persons who have heretofore been members of fire companies for the term of five years in time of peace only, and the officers of the State prison. All other able bodied white male *citizens*, between the ages of eighteen and forty-five, are liable to military duty, and constitute the State militia. The word citizen as here used, includes all persons of foreign birth who have declared their intention to become citizens of the United States. All such persons are invested with the privileges of citizenship by sections 1 and 7 of article 7 of the constitution of the State, and must share equally with native born citizens, in the burdens consequent upon that condition. The act of Congress of February 28th,

1795, to which the act of July 17th, 1862, is but an amendment, authorizes the President in certain emergencies to call out the militia of the State. The case of Dred Scott against Sanford, recognizes the right of a State to prescribe the qualifications of her citizens *within her own limits*, and of such her militia must consist.

ST. PAUL, August 9th, 1862. G. E. COLE, Atty. Gen.

F. B. Dean, Esq., Dept. County Auditor, McLeod Co.:

SIR: I am in receipt of your favor of the 13th inst. inquiring—

1st. When a new school district is organized is it authorized to exercise corporate powers as soon as it has elected its officers and they have complied with the statute and not before? It is authorized to act immediately upon such election; the provisions requiring the officers to qualify is merely directory, and a school district may do many things before the qualification of its officers. The neglect to take an oath or file a bond will not, unless expressly so declared, vitiate an election or render the acts of the officers void.

ST. PAUL, August 17th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Your favor informing me that there is a certain town in Dakota county whose assessor has resigned, and that no one will accept the appointment, and inquiring how the assessment is to be made, is at hand. This is a singular state of affairs. Each assessor so appointed is liable to a fine of five dollars for a refusal to serve, which should be collected; but if the town will not make the assessment, I know not how it can be made until provision for such cases shall be made by the legislature. Certainly no authority exists for the appointment of an assessor not a resident of the town.

ST. PAUL, August 23d, 1862. G. E. COLE, Atty. Gen.

Hon. Charles Scheffer, State Treasurer.

SIR: Your favor of this date is at hand, stating that by the act of 1861 establishing the bureau of public lands you were made receiver of said board with a salary of two hundred and fifty dollars; that the law required you to file a bond before entering upon the duties of your office, and provided for its approval by the board; that you filed your bond in due form, but from an oversight the board neglected to approve it; that by the act establishing the State Land Office passed in 1862, the bureau of public lands was abolished, and that now the Auditor refuses to draw his warrants for your salary, alleging as a reason that your bond was never approved. I think upon this state of facts that the Auditor is fully justified in drawing his orders. As the bureau of public lands has now no legal existence no power exists in them to act in the matter. The fact that you had filed your bond pursuant to law and that the same was accepted and retained by them without objection, might be regarded as evidence of approval, were approval necessary. But a conclusive answer to the objection of the Auditor is, that the provision in question is purely directory, and a neglect to observe it would not occasion a vacancy in your office or prevent you from drawing your salary.

ST. PAUL, August 23d, 1862. G. E. COLE, Atty. Gen.

Hon. J. H. Baker, Superintendent of Public Instruction:

SIR: Your favor of this morning, inquiring whether the moneys in the county treasury are to be apportioned among all the districts of the town, or only those in

which a school has been taught for three months, is at hand, and in reply I have to say that such apportionment is to be made among all the districts. Sec. 41 of chapter 11 of Laws of 1861, provided for such distribution among those districts only in which a school had been taught for three months; sec. 24 of chapter 1 of Laws of 1862 entirely omits the latter clause and provides for an apportionment among the several school districts of the county. It cannot be presumed that this omission was unintentional. The only object of the legislature must have been an entire change in the policy of the law in this particular. The law of 1861, being entirely repealed, and that of 1862 containing no such language, an interpolation of an important exception cannot be justified by any of the recognized rules of construction.

2. You inquire whether under the last clause of sec. 25 of chap. 1 of the laws of 1862 moneys in the town treasury are to be distributed among the several districts in proportion to the number of scholars, or upon the assessed valuation of property. In proportion to the number of scholars undoubtedly. The entire policy of the law recognizes this as the only equitable method of distribution. Much, if not all of this money was originally distributed by the county auditor to the towns upon this principle, and the theory of the law is that each district shares in the common fund in proportion to the number of its scholars.

ST. PAUL, August 25th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: In reply to your favor of this morning, enquiring whether county treasurers are entitled to fees for moneys collected by town Treasurers and paid over to them pursuant to section 22 of treasurers' law, as amended, is at hand. I think not. By the law as it originally stood, the county treasurer was entitled to three per cent. on all moneys by him *received*, and no fees were prescribed for collections by town treasurers. Secs. 22 and 28, chapter 3, Laws of 1860. By the amendatory act of 1862, section 22 was amended, and the town treasurers were allowed a commission of 3 per cent. for collecting; and section 28 was amended by striking out the word *received*, and inserting the word *collected*, so that it now reads, "the county treasurer shall *be* allowed 3 per cent. on the amount by him *collected*." The moneys collected by the town treasurer and delivered to the county treasurer, are received but not collected by the latter. It cannot be presumed that the legislature intended to provide compensation to two officers for the performance of the same services. The legislature must be presumed to have intended to effect some object by a change in the language employed, and the omission of the word received and substitution of the word collected, taken in connection with the change in section 22, clearly indicates their intention.

ST. PAUL, September 1st, 1862. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey:

SIR: In reply to your inquiry of this morning, at the instance of certain clergymen of this State, as to whether clergymen are exempt from the coming draft by any existing law of this State, I have to say, that they are not. I have already had the honor to submit an opinion to the acting Governor upon this subject, which further examination has not induced me to change or modify in any particular. That opinion was based upon the existing militia law, approved August 12, 1858, being chapter 120 of the Compiled Statutes. The applicants for exemption, however, claim that by an act published in the appendix to the Revised Statutes of 1851, on page 581, ministers and preachers of the gospel are exempted, and that inasmuch as the law of 1858 exempts all persons *exempted by law*, this reference must be construed to continue in force the law of 1857. There are several conclusive answers to this argument.

1st. That the act of 1858 expressly repeals "An act to organize and discipline the

militia and volunteer militia," and all acts and parts of acts amendatory thereto and inconsistent with this act. If the act is repealed, then the words of the exemption contained in the militia law of 1858, "*exempt by law*," cannot apply to it.

2d. In the absence of any express language repealing a pre-existing law, a law professing to legislate fully upon any subject will be construed as repealing the common law or any previous law upon the same subject.

3d. The compilers of the present statutes, in their introductory note, state that they have included every law, the repeal of which was in any respect doubtful, and excluded only those which were clearly and absolutely repealed. This, although far from being conclusive, is evidence of the repeal of those acts or parts of acts which do not appear in the present edition. The language of section 1 of the existing militia law can have full application by applying it to the law exempting firemen and the officers of the State prison, without seeking for an obsolete enactment to which to apply it. It certainly cannot be presumed that the legislature, while providing for a general enrollment of the militia, would have omitted an important ingredient in such law, under the impression that an obsolete clause repealed by its express provisions would cover the case. There need be no uneasiness, however, on the part of the applicants. There is good reason for the belief that the defects in our State militia law will be supplied after the draft, by the action of the Secretary of war, by the discharge of such persons as ought not to serve, and are usually and ordinarily exempt by the laws of sister States.

ST. PAUL, September 8th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of a communication from the county auditor of Ramsey county, to you, desiring the construction of your department on sec. 37, of the tax law.

Upon a cursory examination of the first, second, and third subdivisions of the section, an irreconcilable conflict would seem to exist; the first and second requiring each tract of real property to be assessed at its true value, while the third declares that the aggregate value of the real property of the county shall not be reduced. A more careful consideration, however, of the several parts of the section, will, it is believed, reconcile any apparent discrepancy. The aggregate value of the county, is to be taken as the standard of comparison. This is assumed to be correct, and in ascertaining the true value of any tract or lot, the board are to be governed by this test. The comparative value is the true value, within the meaning of the section. For the purpose of a fair and equal assessment, an average is to be made; for instance, if one piece of property is returned at its fair value, and another greatly above its real value, the board is to equalize these values, with reference to the test before mentioned, by reducing the one and proportionately raising the other. The auditor seems to be of opinion that this would be making the values of some pieces of property wrong, in order that others may be made right. This would be the result, were there no standard provided to govern the judgment of the board, but the aggregate value of the county being assumed to be correct, in the instance I have supposed, neither valuation would represent the true abstract value, but merely the true comparative value.

The general rule above stated will, it is believed, afford a solution to all of the enquiries made by the auditor. The board may raise the aggregate value of the property of the county as returned by the assessors, but cannot reduce it; they may adjust the scale of values, between different lots or between entire towns, at their pleasure, having reference to the above rule, and if a town or ward is assessed greatly below its true value as compared with the entire assessment, they may add such per centage to the entire property of that town or ward, as will equalize it with other towns of the county.

ST. PAUL, September 9th, 1862. G. E. COLE, Atty. Gen.

C. G. Mullen, Esq., County Auditor, Watonwan County:

DEAR SIR: I am in receipt of your favor of the 11th inst., stating that a teacher was hired by a district in your county, to teach a school for the term of three months—that she taught two weeks and ceased teaching for some reason not stated, but has twice offered to complete the contract, which the trustees have declined, and she now demands payment for the entire period of three months. In reply, I have to say, that at the expiration of the term for which she was employed, she may maintain an action against the district for the entire amount, if it appears that the cessation of the school was occasioned by no fault on her part, and that she has always been ready and willing to fulfill her contract, unless the district can show that during the whole or a portion of the time, she was engaged in a similar employment, or was offered such employment and refused it. If so, this may be shown in reduction of damages. Costigan vs. Mohawk and Hudson R. R. Co., 2 Denio, 609.

ST. PAUL, September 16th, 1862. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey:

SIR: I have received the communication of C. S. Bryant, complaining of the proceedings of the Provost Marshal at St. Peter, referred to me. It may be extremely doubtful whether any power exists in the commander at St. Peter, to appoint such officer, and invest him with the powers which he assumes to exercise; and indeed all resort to arbitrary power and to proceedings not recognized by the constitution and laws, should, except in cases of extreme necessity, be carefully avoided, and when such power is attempted, it should be exercised with the greatest caution, lest the officer should subject the citizen to unnecessary inconvenience, and himself to liability. I presume in this case the officer does not rely upon the strict legality of his proceedings, but upon the general acquiescence of the people in measures considered to be of public utility.

I am informed by gentlemen of standing in St. Peter, that the person exercising the powers of Provost Marshal, has conducted himself with much discretion, and situated as St. Peter is, upon the frontier, exposed to the incursions of Indians, and thronged by crowds of panic stricken fugitives, it is difficult to say that some measures of the character named, might not have been demanded. The emergency, I trust, is past, or if not, soon will be, and with the necessity which induced them, it is hoped and believed that all acts of arbitrary power will cease.

ST. PAUL, September 18th, 1862. G. E. COLE, Atty. Gen.

N. Hilger, Esq., County Auditor, Sibley County:

SIR: Your favor is at hand inquiring——

1st. Whether a county auditor can legally levy a tax for school and town purposes, unless he is notified of the amount of the tax at the time prescribed by law, which for the town tax on or before September 1st, sec. 46, chap. 1, Laws 1860; for the school tax on or before September 15th, section 21, chapter 1, Laws of 1862. And if so, for how long after that time can he receive and levy such tax. I think these sections are directory and intended for the convenience of the auditor, and that if the amount is received by him at any time before the 15th of December, when he is required to deliver the duplicate to the treasurer, (section 1, chapter 10, Laws 1862,) a tax levied by him will not on that account be held invalid. 3 Mass. R. 230; 2 Denio, 160.

2d. You inquire how the auditor is to ascertain the amount of personal property in a school district, and the owner of the same. The law is defective in this particular. The assessment rolls returned to the auditor, furnish no information of the particular school district in which personal property is located. The auditor can

probably ascertain for this year, by consulting the officers of the school district. This will be attended with much inconvenience, and to obviate the difficulty in future, I have prepared a bill amending section 20 of chapter 1, Laws 1860, requiring the assessor to state upon his roll the particular school district in which the owner of personal property is taxable. This bill has at the present session passed both houses, and will hereafter remove the difficulty.

ST. PAUL, September 19th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Commissioner State Land Office:

SIR: Your favor is at hand inquiring what fees you are authorized to pay county surveyors for surveying school lands under the act establishing the State Land Office. Chap. 8, Rev. Stat., published on page 167 of Comp. Stat., requires the county surveyor to execute any survey which may be required of him by any individual or corporation, and fixes the fees for such services. I do not think you are justified in departing from the statute rule as fixed by that chapter.

ST. PAUL, October 1st, 1862. G. E. COLE, Atty. Gen.

J. W. Reed, County Auditor, Stearns County:

SIR: Your favor inquiring whether a school district formed after the March apportionment is entitled to any part of the public moneys apportioned at that time is at hand. Of course, so far as the action of the county officers is concerned, the moneys in the county treasury should be paid over to the districts only having a legal existence at the time of the apportionment. Secs. 24 and 25 of the school law recognize no other mode of action. The question, however, arises, as I suppose, between the two districts, the new district claiming to recover of the one in existence at the time of the apportionment, its share of the public money. You do not state whether the new district is formed from territory originally constituting a part of the old district, but such is the fact, I presume. Assuming this, I have to say that if a part of the territory and inhabitants of a school district are separated from it by annexation to another, or by the erection of a new corporation, the former district retains all its property, powers, rights, and privileges, and remains subject to all its obligations and duties. It continues seized of all its lands, possessed of all its personal property, including the public moneys apportioned to it —entitled to all its rights of action, bound by all its contracts and subject to all its duties; and the new district is entitled to none of its property and subject to none of its obligations. See Windham vs. Portland, 4 Mass. 384.

ST. PAUL, October 8th, 1862. G. E. COLE, Atty. Gen.

William Tubbs, Esq., County Auditor, Isanti County:

SIR: In reply to your inquiry whether under sec. 34 of the school law of 1862 teachers employed since the passage of that law should be paid in preference to those employed before, I have to say that the section refers only to teachers employed since the passage of the law. The old districts, viz.: the entire town, are liable upon all contracts made prior to the passage of the present law. Sections 25 and 37 were intended to provide for cases of this character.

ST. PAUL, October 8th, 1862. G. E. COLE, Atty. Gen.

E. R. Smith, Esq., County Auditor, Le Seuer County:

DEAR SIR: I am in receipt of your favor of the 20th inst., inquiring whether the moneys collected on the tax for 1859 and '60, are to be distributed among the

districts as then existing, or those under the present law. Without doubt to the districts as now organized. Section 24 requires the auditor on the last Wednesday of March, and the last Wednesday of October, to make apportionment of the money in the county treasury, among the several school districts of the county. This clause can only refer to the districts as created by that law. No distinction is made between money collected upon taxes levied during the present and former years. Section 25 requires the treasurer to pay over the money, upon the order of the auditor, to the district treasurer, provided, that any money in the treasury and *already apportioned* at the date of the passage of the law, may be paid to the town treasurer. This proviso excludes the idea that moneys *not* then apportioned are to be paid in this manner.

Owing to the impossibility of making the spring apportionment upon the basis contemplated by the present law, arising from the fact, that the auditor had no means of ascertaining the number of scholars in the district between five and twenty-one, I held that the legislature could not have intended that that apportionment should be so made; that the existing districts at the date of the passage of the present law, had acquired vested rights to the moneys then in the treasury, whether apportioned or not, which were protected by section 37 of the law, and that the legislature could not have intended to require of the auditor, an apportionment which no *data* in his possession would enable him to make. This position, however, justified by the necessity of the case, is only applicable to the apportionment made in March last. The returns of the several districts are now in the hands of the auditor, and the apportionment must be made among the existing districts.

ST. PAUL, October 30th, 1862. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey:

SIR: I am in receipt of your favor enquiring what effect an act entitled "An Act to provide for the organization, equipment and discipline of the military forces of this State, approved September 29th, 1862," has upon the power of the Governor to officer the volunteer regiments of this State, in the actual service of the United States. This question seems to me so entirely clear, both upon principle, authority and the uniform practice of the National Government, and that of the several States, that I should hardly deem it important to discuss the subject at any length, had not doubts, which I must presume to be sincere, arisen in the minds of some of our citizens.

Among the powers conferred on Congress by the constitution, are those of organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. It will be seen that the unlimited control of the militia is vested in Congress, with the exception of the appointment of officers, and the mere training of the militia forces of the State subject to rules prescribed by Congress. The construction of this clause of the constitution received a very elaborate consideration in the case of Houston vs. Moon, 5 Wheaton's Rep., by the Supreme Court of the United States, the court holding that the power of organizing and disciplining the militia in times of peace, is concurrent in the State and National Legislatures, but that when Congress has once exercised the right of legislation, all power in the State government ceases, except so far as they act in accordance with and subordinate to the acts of Congress. That when any portion of the militia has entered the actual service of the United States by reporting at the usual place of rendezvous, this concurrent power of legislation ceases, and the right of Congress becomes exclusive. It follows from this that the militia laws of a State are only so far valid as they do not conflict with acts of Congress, while as regards the militia in the actual service of the United States all State laws providing for their organization, equipment and discipline are absolutely inoperative. Of course it is not pretended that anything in the decision cited or in the act

of Congress, can operate to divest the power of appointment by the States, of officers of the militia, as distinguished from volunteers, (a distinction which will be hereafter considered;) but the question to be determined now is, whether, read in the light of the constitution and decided cases, the militia law of this State can be construed to apply to volunteer regiments in the actual service of the United States. The general scope of the law as indicated by its title no less than by the context, is "the organization, equipment and discipline of the militia," and all laws of this character, as we have seen from the authority just cited, are inapplicable to militia in actual service. There can be no doubt, then, that all that portion of the law embracing these matters, which includes the entire law with the exception of the election of officers, must be regarded as affecting solely the general militia system of the State, and the militia not called into action by the authority of the United States. Can then one single provision of the law be separated from the context and applied to an entirely different subject? *Noscitur a sociis*, is a maxim which governs in the construction of statutes; and in interpreting the intent of the legislature, the meaning and application of a particular clause is to be ascertained by reference to the general provisions of the law, and an examination of the sections by which it is accompanied. Applying this rule, it would seem to be plain that the legislature intended to confine the law to a general State militia system, having no reference to emergencies like the present.

Without relying, however, too much upon general rules of construction, an examination of the sections providing for the election of officers will demonstrate the utter impracticability of the law as applied to volunteer regiments in actual service, and will furnish abundant reason for the presumption that such could not have been the intent of the legislature.

Section 11 of title 4 requires the Governor to divide the State into division, brigade, regimental, and battalion districts. Sec. 12 provides for an election of officers in *each of said districts*. Sec. 22 requires the county commissioners to divide their several counties into company districts, and provides for an election of company officers in *each district so formed*.

Section 16 of title 2 authorizes the Governor to declare any office vacant in case of a change of residence of the incumbent, if in his opinion such change has removed the officer so far from his command as to be detrimental to the service. These clauses all indicate a geographical division of the militia, and elections confined to geographical limits. By the law each division is made an election district, and every able bodied citizen liable to military duty in such district is made an elector. The law in this respect is evidently framed with direct reference to sec. 1 of art. 7 of the constitution, which in effect prohibits the exercise of the elective franchise outside of the election district in which the voter is a resident.

It requires no argument to prove that to regiments of volunteers composed of men from all the various militia districts of the State stationed at Fort Snelling or elsewhere within or without the State, these provisions cannot apply. But again the law provides that regimental officers shall hold their office for five years unless sooner removed for incompetency or misconduct—all commissioned company officers for four years—all non-commissioned company officers for two years—and all until their successors are elected and qualified. The volunteer forces are enlisted into the service of the United States for various terms from nine months to three years or during the war; at the expiration of their term of service they are mustered out of the service of the United States. They cannot return and take their places and rank in the regular militia establishment of the state, for that is to be at once fully organized. We should then have a swarm of officers holding commissions without a command, until their successors are elected and qualified, but as the peace establishment is full and the regiments of volunteers disbanded, there is no provision for the election of their successors, and I am unable to see why they may not hold their useless honors by a life tenure. This result, perhaps, is nothing more than an absurdity, but we can hardly presume such consequences within the intent of the legislature. But suppose the war is not concluded at the expiration of the terms of these officers, are the experienced officers who have commanded our regiments through a series of

campaigns to give place to others elevated from the ranks by the suffrages of the soldiers?

Sections 6 to 11 provide for the election of officers to fill vacancies. If this applies to regiments in actual service instead of the salutary rules of promotion prescribed by the war department, the acts and intrigues of a political canvass are to be introduced into our regiments in the field, and we shall have the novel spectacle of a regiment halting in the face of an enemy to elect in due form the officers who are to lead them to battle, and every engagement will be followed by an election to fill vacancies. To say nothing of the utter subversion of all discipline to which this system would lead, it is sufficient to say that these provisions go somewhat further than the mere appointment of officers and extend to the government of the militia in active service a power entrusted exclusively to Congress.

The constitution while guaranteeing to the States the right of appointing officers of the militia, by no means conferred upon them the right to prescribe the manner of their election while in actual service, to the extent here claimed. Indeed so long as the essential right of the States is preserved, there seems no good reason why the manner of the appointment may not be prescribed by Congress, so as but to promote the discipline and utility of this branch of the service, and this power Congress has exercised by declaring that the regimental officers of volunteers shall be commissioned by the Governors of the respective States, who shall also fill all vacancies occurring in regiments in the field. It may be objected, however, that the power to commission, conferred by the act of July 12, 1861, does not include the power to appoint. This depends upon the connection in which the term is used. It can hardly have a different meaning here. By that act, all Governors responding to the call of the President for troops, shall commission all necessary officers, provided, that if volunteers are accepted directly by the President and not through the agency of the States, the President may commission. The power to commission simply, would be a barren one—a right to perform a mere ministerial act. There can be no doubt that the power here intended to be conferred upon the Governor, is the same as that conferred upon the President in the alternative, but in the latter case, the evident intention is, that the President shall appoint, as no provision for any other appointment is made. The war department, by several orders, has placed its construction upon the power of Congress in this particular. By these orders the Governors are expressly authorized to appoint adjutants, quartermasters and second lieutenants. Rules are prescribed for filling vacancies by appointment of Governors, and elections prohibited.

By the articles of war to which militia in actual service are subject, the President may at his pleasure discharge any commissioned officer from the service; rules of promotion and the method of filling vacancies are prescribed with reference to the reward and encouragement of bravery, and the good of the service. It can hardly be claimed that any provision of a State law can under the constitution override acts of Congress and the orders of the war department, which have the force of law in these particulars, and yet such would be the necessary effect of the law under consideration.

Hitherto I have proceeded upon the assumption that the constitutional guarantee of the right of the State to appoint militia officers, applies to volunteers. This certainly has not been the construction of the government. The constitution referred evidently to compulsory drafts, by which the militia, or a designated portion of them, were called out as such, and was intended to guard against the anticipated evil which might result from the power of the government to enforce the service of the militia without regard to the assent of the soldier or the State. It is difficult to perceive how this can apply to the case of citizens voluntarily tendering their services and enlisting in the army of the Union. The distinction is recognized in the case of Houston vs. Moon, and it is said that this power of calling out militia as such has never been exercised by Congress, as a matter of fact, except the regimental officers; the officers of volunteers are not appointed by the State, but are appointed by the President, a practice which in any other view of the case would be a palpable violation of the constitution.

If this position be correct, the Governor acts by virtue of an act of Congress, and his action cannot be governed by State legislation. If I am wrong in this, however, I think I have shown that the State militia law has no application to the militia in actual service. There is then no provision of any State law regulating the manner of appointment, and the clause of the constitution conferring the power of appointment upon the States would vest it in the executive branch of the government. The term appointment, as distinguished from choice or election, denotes an executive act.

These conclusions are further strengthened by the fact that the militia laws of most of the States contain similar provisions to our own. In Massachusetts, indeed, the constitution provides for the election of all regimental officers by the militia, and division officers by the legislature, yet, so far as I am aware, the claim here made has never been asserted, but appointments of officers of volunteer regiments have uniformly been made by the Governor. It is the Governor's duty to place his executive construction upon laws whose execution is intrusted to him, and although he may err in the exercise of his discretion, the law is settled by repeated decisions, that the officer does not become such by virtue of an election until he receives his commission, and the commission of the executive is conclusive evidence of the right of the officer to exercise the duties of the office. No mustering officer can therefore rightfully refuse to recognize the validity of an executive commission.

ST. PAUL, November 6th, 1862. G. E. COLE, Atty. Gen.

His Excellency, the Governor:

SIR: I herewith return the papers relative to the application for the pardon of Patrick Maroney, Daniel O'Neal, Martin Fox and John Murphy, referred to me. It appears that only two of the parties have been sentenced, and the only question seems to be, whether under the provisions of section 4, article 5 of the constitution, authorizing the Governor to grant reprieves and pardons after conviction, he can exercise this power before sentence has actually been pronounced. The question was somewhat considered by at least one member of the Supreme Court, on application for a *habeas corpus* in this very case. The question arose under section 7, of article 1 of the constitution, declaring all persons before conviction bailable, except for capital offences. The judge of the district court had, pursuant to section 222 of chapter 115 of the Compiled Statutes, refused an application to be admitted to bail, and it was conceded that that section left the matter to his discretion. An application was made to the chief justice upon *habeas corpus*, and granted upon the ground, as I understand, that the party was by the constitution entitled to be admitted to bail before conviction, and that until sentence, the party could not be regarded as convicted. An application to vacate this order, and for a recommitment of the prisoner, was afterwards denied by the full court. The question may therefore be regarded as *res adjudicata* so far as the supreme court is concerned. In the absence of any decision of the question by our own courts, I have no hesitation in saying that I do not regard this construction as correct. Taking this clause of the constitution in connection with the criminal code and treating them as statutes "*in pari materia*," there can be little doubt that the term conviction refers simply to the verdict of the jury. Section 219, chapter 115, Compiled Statutes, declares that any person who shall be convicted of an offence, may allege exceptions, in which case all further proceedings shall be stayed, except that if it shall appear to the judge that the exceptions are frivolous, *judgment may be entered and sentence awarded*. A broad distinction is here made between the terms "*conviction and sentence*." Blackstone says: "If the jury find the defendant guilty, he is then said to be convicted of the crime whereof he stands indicted." 4 Com. 362 and (page 365.) After trial and conviction the judgment of the court regularly follows. "Conviction" is defined by Burrill as "the finding of a person guilty of an offence with which he has been charged, either by the *verdict of a jury*, or the decision of any other competent tribunal." Burrill's Law Dict., title, "Conviction." In the construc-

tion of statutes the ordinary and usual meaning of a word or clause is to be accepted, unless an obvious intent to use it in a more technical sense appears—and in this view of the case the definition of the term by Mr. Webster, does not differ from the authorities already cited. Were it not therefore for the intimations of our own court, I should be clearly of the opinion that the right of your Excellency to pardon after verdict, but before sentence, was unquestionable.

ST. PAUL, November 15th, 1862. G. E. COLE, Atty. Gen.

Hon. J. W. Edmunds, Commissioner of the General Land Office:

SIR: You are doubtless aware the state of Minnesota is at issue with the United States upon the right and power of congress to pass the joint resolution of March 3, 1857, authorizing settlers who had settled upon sections 16 and 36, granted to the state for the support of the schools, prior to the survey, to pre-empt under the provisions of the pre-emption act of September 4, 1841. An action has been instituted in behalf of the state, to test the question which has been taken by writ of error to the supreme court of the United States, and is now pending in that court. Applications to pre-empt school lands are being continually made, and as I do not desire to commit the state by a recognition in any manner of the right of the land officers under any circumstances to grant pre-emptions on lands claimed by the state, I have to request that until the decision of the court shall be had, and the question definitely settled, all entries or pre-emptions of school lands within the territorial limits of the state shall be suspended, and no patents delivered therefor.

The general land office has, I believe, always exercised a discretion in suspending the execution of patents in case of serious doubt or conflicting claims, until the discretion of congress or the decision of a competent tribunal can be had. Such is the language of Attorney General Legare in an opinion given at the instance of the secretary of the treasury, November 1, 1841. Will you be kind enough to inform me of your action in the premises, at your earliest convenience.

ST. PAUL, December 1st, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Auditor of State:

SIR: A question has arisen in the county of Dodge, and possibly in other counties, as to the validity of taxes levied on lands in 1857, which were not pre-empted until after the assessment was made. This and numerous other questions important to the State and tax payers, ought to be speedily settled, and I desire again to call your attention to the confusion existing in the several counties in the State, for the want of uniform instructions. With reference to the present question, although not called upon by you for an opinion, yet an erroneous practice being in existence in the county referred to, I deem it my duty to forward my opinion upon the question, and instructions should be given the auditor of Dodge county accordingly.

By the statutes governing the assessment of taxes in 1857, the assessment was to be made during the month of June. The lien of the State for taxes, undoubtedly attached at that time, and land not then pre-empted could not of course be subject to taxation. The auditor, however, seems to have an idea that under our present law, requiring the auditor to add to the assessment roll, taxes of any previous year that may have been omitted, he may add real estate not liable to taxation at the time of the assessment. This is clearly a mistake. Should you permit the sale of lands forfeited under the act of March 7, 1862, to proceed without explicit instructions upon this and other points of doubt and difference which unquestionably exist, the sale will be of little avail to the State.

ST. PAUL, December 5th, 1862. G. E. COLE, Atty. Gen.

His Excellency, the Governor:

SIR: I am in receipt of your communication of the 6th inst., enclosing notice of the completion of ten consecutive miles of the Winona and St. Peter railroad, and inquiring what action you are to take in the premises, and whether the company have thus far complied with the requirements of law.

In reply I have to state that if it be true that such portion of the road is completed, with the cars running thereon, of which fact you will require such evidence as may be satisfactory to you, the company has complied with and performed the condition of the charter thus far, and it will become your duty under section 5 of the act of incorporation, to certify that fact to the secretary of the interior, and execute to the company a deed of one hundred and twenty sections of land if the officers of the company demand it.

Whether under the land grant the company is entitled to any land before the completion of 20 miles of its road is, as you are aware, a mooted question. The legislature has, however, placed its construction upon that act, and committed the State to the position maintained by the company.

ST. PAUL, December 8th, 1862. G. E. COLE, Atty. Gen.

Howard M. Atkins, Co. Atty., Mille Lac Co.:

SIR: I have received your favor, stating that at the general election of 1861, your county elected three county commissioners; that the county, containing but two towns, was not districted, but the commissioners were elected at large; that at the last general election another board was elected, and you inquire whether two of the old commissioners hold over, and if so, how they are to decide as to the length of their respective terms, &c. The act of February 28, 1860, being chapter 15 of Laws of 1860, as amended by chapter 6 of Laws of 1861, declares that the term of office of county commissioners shall be three years. It then proceeds to divide counties into four classes, and when the general term of three years is in any respect modified, it is done in express language.

1st. Counties having five commissioners, whose terms shall expire in alternate years.

2d. Counties having three or more election districts, and having three commissioners, whose terms shall also expire in alternate years.

3d. Counties having no township organization, whose commissioners are appointed by the Governor, and their terms of office governed by the general clause in section 1 of the amendatory act, viz.: three years.

4th. The class affected by the proviso at the end of section 1, "that in counties containing less than three election districts, the commissioners may be elected at large." Each organized township constitutes an election district; your county therefore is embraced by the proviso. The commissioners elected in 1861, were rightly elected, and under the general clause which governs all cases not otherwise expressly provided for, will hold for the term of three years.

ST. PAUL, December 8th, 1862. G. E. COLE, Atty. Gen.

To Hon. Charles McIlrath, Auditor of State:

SIR: I am in receipt of your favor of the 10th inst., inquiring whether you have authority to draw your warrants on the State Treasury for claims audited by the board of auditors pursuant to the provisions of chapter 3, of Laws of Extra Session of 1862. And if so, what rule you shall adopt with reference to the payment of these claims, the board having audited and allowed a much larger amount than the appropriation. I understand the doubt upon the first point to arise from the absence of any express direction requiring you to draw your orders for the payment of these claims, such direction being usual in cases where accounts are audited by

officers other than the State Auditor. You also state that an examination of the journals shows that such provision was contained in the law as it passed both houses, but not in the bill as signed by the Governor. This fact, however, is of no significance. We must be governed in our construction of the law by the published act, and the original on file in the office of the Secretary of State, although we may resort to the journals to explain ambiguities and ascertain the legislative intent. We cannot interpolate new clauses into a bill in this manner, for although passed by both houses, the clause never having been approved by the Governor, cannot have the force of law. But is there not enough in the law as approved to confer this authority upon you? Sec. 4, p. 127, Comp. Stat., provides that all accounts and claims against the State, *which shall be by law directed to be paid out of the Treasury of the State*, shall be presented to the Auditor, who shall examine and adjust the same, and shall issue bills or warrants payable at the State Treasury. I do not see that the act in question changes the section in any respect except in providing another tribunal for auditing the claims—the duty to pay all claims directed to be paid out of the State Treasury remains.

Chapter 3, Ex. Session Laws 1862, confers upon the board of auditors full power to pass upon the claims therein mentioned. Chapter 9 provides for a loan to meet these expenses. Chapter 18 explicitly appropriates $75,000 for the payment of claims adjusted and allowed by the State Board of Auditors, and directed that the same *shall be paid out of the proceeds of the State loan.* I cannot see that reading the three acts together, as we must, the legislature have left their intention in any doubt. Everything necessary for the consummation of the settlement and payment of these claims has been done. 1st. A tribunal vested with full powers to adjust the amount to be paid. 2nd. A State loan to provide the means of payment. 3rd. An express appropriation of a sum of money to pay the claims so adjusted, and a direction that the same shall be paid out of the proceeds of the loan. A direction to the State auditor in terms could not be necessary. When it is declared that they shall be paid, the auditor's law fixes the officers by whom such payment is to be made. There is a provision, it is true, that the board shall make a report of their doings to the legislature, but this is no more than all State officers are required to do, and does not, I think, contemplate further legislation. As to the second question, as to the order in which the claims are to be paid, I have to say that I know of no authority in the auditor to make any discrimination. The sum of $75,000 is appropriated, and until that is exhausted he should pay in the order of presentment. 4th. As the accounts are, for some not very obvious reason, required by law to be deposited with the Secretary of State, I presume you are authorized to pay upon the certificate or order of the board. Lest this last remark should be misapprehended, it may be well to say by way of caution, that the jurisdiction of the board of auditors is confined to the several classes of claims enumerated in section 1 of the act providing for their appointment. And although the State Auditor has no power to enquire whether there was sufficient evidence to support the claim, or whether it was not audited at too large an amount, yet if it should appear from the certificate of the board, that any claim is not embraced in the description of claims upon which they are authorized to decide, it will be the duty of the auditor to withhold payment. See People v. Lawrence, 6 Hill, 244.

ST. PAUL, December 18th, 1862. G. E. COLE, Atty. Gen.

H. A. Gale, Esq., County Auditor, Hennepin County:

SIR: I am in receipt of your favor, enquiring whether a teacher employed by the district [town] under the law of 1861, is to be paid by the present district out of the last October apportionment, or by the town or district as it existed under the law of 1861. By the town undoubtedly.

Section 25 provides that if any district or sub-district, has contracted any obligations which remain unpaid, it may levy a tax for its payment, and that the money

in the county treasury at the time of the passage of the act of 1862, shall be paid to the town treasurer, and shall be applied to the liquidation of existing indebtedness, and section 37 declares that nothing in this act shall prejudice any right to enforce any contract against the district. All these sections clearly contemplate the liquidation of all existing indebtedness by the district, as it existed when such indebtedness was contracted.

ST. PAUL, December 19th, 1862. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor of this date, enclosing communication from the auditor of Ramsey county, inquiring how he shall proceed in the matter of an application for an abatement of the taxes on the Winslow house property consumed by fire. There are two very sufficient reasons why the auditor should refuse the application:

1st. The burning of the building cannot, in the least, affect the right of the county to the taxes. The county is not the insurer of property upon which it has a lien for taxes. It is presumed that a prudent owner will see that his buildings are sufficiently insured, and such I presume was the case here, and the owner receives an equivalent from the company for his loss, which, if this application was granted, would escape taxation altogether; but a more conclusive reason is that not only is no such power vested in the auditor, but he is expressly prohibited from making any deduction in the valuation of real property. Section 33, chap. 1, Laws 1860. The auditor's power is confined to the ministerial power of correcting errors. The only power of abatement vested in any one is in the board of equalization, or the county commissioners.

2d. The auditor states that certain taxes have been voted by the county commissioners after their regular meeting in September, and after the duplicate was placed in the hands of the Treasurer, who has returned it to the auditor, that he may extend these taxes upon it, and he inquires how he shall proceed with reference to applications for certificates, that taxes are paid upon conveyances, and generally with reference to his duty in the premises.

A distinction is to be noticed between such directions of the law as are intended for the protection of the tax-payer, and therefore imperative, as the time when the assessors shall file the assessment rolls with the auditor, and those which are merely for the convenience of the officer, and therefore directory merely.

In this case I think the direction as to the time when the duplicate is to be placed in the hands of the treasurer, and the time of notifying the auditor of the amount of taxes to be levied, are directory, and that a delay of a few days, giving sufficient time to enable the officers to comply with other provisions of law, will not invalidate the assessment. 3 Mass. 230; 2 Denio, 160.

As to the auditor's duty in the matter of certifying taxes paid upon conveyances. I have to say that parties are not to be prejudiced by any default of county officers. If the applicant tenders the amount of taxes which the treasurer is prepared to receive, he is entitled to the certificate.

ST. PAUL, December 20th, 1862. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey:

SIR: I have examined and herewith return petition for the appointment of commissioners in Isanti county. The petition does not state the present condition of the county or whether any vacancy exists in the office of county commissioner. It appears by record in the Executive office that on the 12th of October, 1860, the Governor appointed three commissioners for this county. The law (chapter 6, Laws 1861) fixes the term of office at three years. Unless there is a vacancy, therefore,

no power exists in the Governor to remove the commissioners so appointed and appoint others. The petition does not show facts sufficient to justify any action.

ST. PAUL, December 22d, 1862. G. E. COLE, Atty. Gen.

Geo. Bennett, Esq., County Auditor, Carver County:

MY DEAR SIR: I am in receipt of your favor of the 15th inst., desiring my opinion as to whether an enlistment by your county attorney in the service of the United States creates a vacancy in that office. The fact that your attorney is interested takes the case out of the rule of this office referring all questions by county officers to that officer.

Sec. 2 of chap. 10, Comp. St., defines the term vacancy, as follows: 1st. The death of the incumbent. 2d. His resignation. 3d. His removal. 4th. His ceasing to be an inhabitant of the county.

Sec. 3 of art. 7 of the constitution declares "that for the purpose of voting no person shall be deemed to have lost his residence by reason of his absence while engaged in the service of the United States."

Sec. 7 of the same article provides "that every person who by the provisions of this article shall be entitled to vote at any election, shall be eligible to any office which now is or hereafter shall be elective by the people." The domicile or place of inhabitancy cannot be lost without an actual removal, accompanied by an intention of abandoning the old and acquiring a new residence. These ingredients do not enter into the act of enlisting in the military service of the United States. On the contrary, by the terms of the constitution the volunteer may at any time return to the county, and exercise the elective franchise; and by article 7, any person who can do this is eligible to any office elective by the people.

I have heretofore had occasion to decide this question, and have since learned that in one district, at least, the courts of the State have held a similar doctrine. I can easily see, however, that some embarrassment may result from this construction of the law, for while many of the county officers may perform the duties of their office by deputy, and even the absence of the county attorney may be remedied by the temporary appointment by the court, or the procurement by the county commissioners, of such legal advice as they may from time to time require; yet a case may be supposed in which the county commissioners might all enlist, thus leaving the county without an effective organization. The law and the constitution did not contemplate an emergency like the present, and should difficulties arise from this cause it will be a matter probably calling for the interposition of the legislature.

ST. PAUL, December 26th, 1862. G. E. COLE, Atty. Gen.

H. A. Gale, Esq., County Auditor, Hennepin County:

DEAR SIR: I am in receipt of your favor of Dec. 26th, 1862, stating that pursuant to section 38 of the school law of 1861, the trustees of a school district in your county levied a tax; that the warrant was placed in the hands of the treasurer, commanding him to make his return to you on or before March 20th, 1862. By section 39 of the school law of 1861, you were authorized to extend the same upon your tax roll and enforce collection in the same manner as delinquent county taxes. Prior to the time fixed for the return of the warrant, the entire law of 1861 was unqualifiedly repealed, and you inquire if you can now extend this tax upon the assessment roll without imperiling the entire tax. I have anxiously sought for some principle of law, which will enable you to do this safely, but have been unable to find any. Assuming that the tax was void, it would not render other taxes upon the list void, probably, until a sale were made, but any sale made for several funds, any one of which was void, would doubtless be of no validity. 10 Vermont, 506. It is a general principle of law governing the assessment of taxes, that after the proceedings

are entirely closed by sale, no subsequent law can affect vested rights thus acquired, but it is equally well settled, "that where a statute confers a power, or gives a right in its nature not vested, but remaining executory, if it does not become executed before a repeal of the law, it falls with it and cannot thereafter be enforced." See Bailey et al. vs. Mason et al., 4 Minn. Reps. 546.

Not only the law empowering the treasurer to collect and report to you, but that empowering you to extend upon the roll and enforce payment, was repealed before these acts had been done. The clause of section 25 of the present law, referring to moneys hereafter to be collected upon a school district tax heretofore levied, must be held to apply to cases where the proceedings had been closed by sale, prior to the passage of the repealing statute and lands redeemed afterwards.

ST. PAUL, December 27th, 1862. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey:

SIR: I have read the letter of the county auditor of Watonwan county referred to this office, stating that, at the last general election, a board of county commissioners was elected in that county; that the former commissioners are absent from the county; that no board of equalization has been held, and inquiring whether the new board may go on and make the equalization. They cannot. 1st. Because their terms of office do not commence until January 1st, 1863, and the duplicate should be placed in the hands of the treasurer on or before December 15th, 1862. The last provision might not be absolutely imperative, although so great delay would be likely to introduce confusion. But a further and insurmountable reason is, that the day on which the board of equalization shall meet is fixed by law, and unlike many other provisions this direction is imperative. Parties wishing to appear and object to the assessment before the board, are entitled to notice of the time and place of meeting. This notice the law gives them, and the time cannot be changed. A board of county commissioners assembled at their January meeting have, as I have heretofore had occasion to decide, no jurisdiction as a board of equalization.

ST. PAUL, December 29th, 1862. G. E. COLE, Atty. Gen.

John C. Meloy, Esq., County Auditor, Dakota County:

SIR: I am in receipt of your favor, inquiring how the Auditor is to extend upon his roll a school district tax, as from the returns of the assessors, he has no means of knowing in what particular school district the owners of personal property are taxable; and you inquire whether he may levy the tax upon real estate alone. By section 22, he is directed to levy the tax upon real and personal property (sec. 22, chap. 1, Laws 1862,) and the exemption of all personal property would render the tax unequal, illegal and void. For the present, you can only ascertain by inquiry from the officers of the district, the residence of such tax payers as you may not know. The difficulty has occurred in many counties, and this course is pursued by most of the county auditors. Upon my attention being called to this omission in the law, I prepared a bill which was passed by the legislature at its extra session, which will prevent the recurrence of the embarrassment. See chapter 5, laws of extra session, 1862.

ST. PAUL, January 1st, 1863. G. E. COLE, Atty. Gen.

Geo. W. Tower, Esq., County Treasurer, Rice County:

SIR: In answer to your inquiry as to whether the amount of United States war tax is to be included in the amount of $20,000, upon the collection of which your fees are fixed by law, I have to say that the question is one which should be de-

cided by your county attorney. I may say, however, that the question appears to me entirely plain. Chapter 10, Session Laws of 1862, contemplated only the *annual* tax levied for State and county purposes, and even with regard to those expressly excepted, collections upon which some other rate was fixed by law. The United States war tax is not levied annually, but is a special tax levied in one single year for a temporary purpose, and in its collection the State acts as the agent of the National Government. The general laws regulating the collection of taxes do not apply to, or in any manner control it, except as expressly made to do so by chap. 7, of Laws of 1862. By this act the fees of the treasurer for its collection are prescribed, and the amount collected can in no respect affect the fees for the collection of the ordinary State and county revenue.

ST. PAUL, January 18th, 1863. G. E. COLE, Atty. Gen.

F. Joss, Esq., County Auditor, Goodhue County:

SIR: I am in receipt of your favor enclosing certain inquiries by school district officers in the town of Kenyon. The statements upon which I am asked to decide, are so vague, confused and uncertain that it is extremely difficult if not impossible to form a satisfactory opinion. It is said that "at the first meeting under the present school law, the management of the district was taken out of the hands of the old trustees and assumed by new ones; that the old trustees got themselves and the larger part of the territory of the town set off into a new district and got the district badly in debt," and I am asked, 1st. Whether district No. 87, being the remainder of the district after the creation of the new district, ought to pay any part of the debt of the old district, by which I understand the indebtedness contracted by the town under the old law, and if so, what proportion; and, 2d. When the new district will be entitled to draw public money, (meaning the district created as aforesaid, I presume.)

I answer: *First.* That all indebtedness contracted by the district under the law of 1861, is to be paid by the district as then constituted, and by section 24 of the present law, such districts are authorized to levy a special tax for that purpose.

2d. That when a new district is created out of a part of the territory of an old one, the remainder bearing the old name, constitutes the old corporation, retains all its property, powers, rights and privileges, and remains subject to all its obligations. It continues seized of all its lands, possessed of all its property, including the public moneys apportioned to it, entitled to all its rights of action and bound by all its contracts, and the new district is entitled to none of its property and bound by none of its obligations. See 4 Mass. 384.

Under section 24 of the present school law it is not necessary that a school should have been taught in a district to enable it to draw public money. At the next apportionment after the creation of a new district, it will be the duty of the auditor to treat it as any other district, and to apportion the public moneys to it in proportion to the number of scholars between 5 and 21, as shown by the report of its clerk.

ST. PAUL, January 21st, 1863. G. E. COLE, Atty. Gen.

John B. Davis, Esq.:

SIR: Your favor of the 14th inst. is at hand, desiring me to commence an action upon the complaint of Michael Quiggley against C. W. Hackett, to vindicate the right of the former to exercise the duties of the office of register of deeds in the county of Wabashaw. The facts upon which the application is based, seem to be, that Hackett has enlisted in the service of the United States, and is performing the duties of the office by deputy. I have held in several instances that under the peculiar provisions of our statutes with reference to vacancies, taken in connection with the constitutional provision with regard to enlistments, (see secs. 3 and 7, art. 7, Const.,) the mere fact of enlistment did not occasion a vacancy. This doctrine has

also been announced by the courts in one judicial district at least as I am informed, and is pretty generally acquiesced in throughout the state. The statute requires the Attorney General to commence an action whenever he has reason to believe that any of the acts constituting a usurpation of an office can be proved. Such being my views of the law, I have no reason to believe that any usurpation exists, and must therefore decline to comply with your request.

ST. PAUL, January 22d, 1863. G. E. COLE. Atty. Gen,

Henry Hill, Esq., County Attorney, McLeod County:

SIR: I am in receipt of your favor of the 12th inst., desiring my opinion upon the right of county commissioners to reduce the salary of a county attorney below the limit fixed by the commissioners pursuant to section 7, chapter 5, Laws of 1861, during his term of office, by virtue of the power vested in them by chapter 32, Laws of 1862. The legislature has ample power to reduce the salary of any officer not protected by the constitution during his term of office. An officer has no such vested right in his salary as will protect it from reduction by the legislature whenever the public interests require it. Commonwealth vs. Bacon, 6 Sergt. and Rawle 322; Taft vs. Adams, 3 Gray, 126. The question, however, is whether the commissioners had any such power by virtue of the authority vested in them to affect the salary of an officer elected and whose salary has been fixed prior to the passage of the act of 1862. In the absence of express legislative authority, the cases are conflicting—the first case above cited holding that any officers empowered to fix salaries may reduce them in the same manner as the legislature might do, while the case of Chase vs. Lowell, 7 Gray, 33, would seem to indicate a distinction between the powers of city and county boards and the legislature in this particular.

I am of opinion, however, that sufficient authority is by the statute vested in the board of commissioners to fix at any time the salary of the attorney. Whatever powers the legislature possessed have been vested in the board, and as the legislature might by direct legislation have reduced or taken away the salary, I cannot see why the board may not do the same.

ST. PAUL, January 26th, 1863. G. E. COLE, Atty. Gen.

H. A. Gale, Esq., County Auditor, Hennepin County:

SIR: I am in receipt of your favor of the 23d inst., in which you inquire: "The trustees of a school district, not having qualified by filing notice of acceptance with the clerk, pursuant to sec. 8, chap. 1, Laws 1862, could they legally appoint a clerk, and will a tax voted at meetings called by a clerk thus appointed, but who was himself duly qualified, be legal and collectible?" The provisions of sec. 8 are directory, and a tax levied in the manner stated by you, if open to no other objection, is collectible. 9 N. H. 491; Id. 524; 12 Id. 284; 12 Vt. 569.

ST. PAUL, January 26th, 1863. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey:

SIR: I am in receipt of your favor enclosing communication of Jonathan Sweet, enquiring as follows, to wit: "Are persons *bona fide* residents on the military reservation of Fort Ridgely, and owning property there, which property out of the limits of said reserve would be taxable under the laws of Minnesota, liable to be taxed according to said laws for any such property, which they may own and possess within the limits of said reservation?" There can be no doubt that they are not. The constitution of the United States (sec. 8, art. 1,) vests exclusive jurisdiction over such reservations in Congress, and the power here asserted has never been claimed or exercised by the States. Even the power to tax property of persons re-

siding on Indian reservations, although expressly vested in the State Legislature by our own constitution, has been denied by the Supreme Court of the State, in a very recent case, (Foster against Commissioners of Blue Earth County, decided at July term, 1862, and not yet reported;) the court resting their decision on the exclusive jurisdiction in Congress over all similar reservations.

ST. PAUL, January 27th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Auditor of State:

SIR: I am in receipt of your favor inclosing communication from the county auditor of Meeker county, inquiring—

1st. Whether a county attorney can delegate his official duties to another, and claim pay for the whole year, during which himself and the person delegated by him have acted. No officer has any power to delegate his official duties to another, unless expressly authorized by law to do so. It is a principle of law that delegated power cannot be delegated. The personal talents, acquirements and qualifications of an officer enter into the consideration of electors, and it is these which he is to bring to the discharge of his duties, not those of another. In this case, however, the county attorney had enlisted, and it is asked, "Did the county have an attorney until one was elected?" As I have repeatedly held, heretofore, the enlistment of an officer does not, under the peculiar provisions of our law, create a vacancy. If, by reason of his absence, the county was compelled to employ and pay another attorney the commissioners might, probably, deduct the amount so paid from the salary of the officer. But if not he would be entitled to his salary, which should be paid upon his order, whether he had employed another attorney to act for him or not.

2d. It is asked whether a county treasurer is required to pay over the identical funds received by him of a former treasurer, or is only required to pay in such funds as are a legal tender at the time of payment. Strictly, the treasurer should pay over the identical moneys received by him, except that he may take, it would seem, by implication from sec. 33, treasurer's law, orders on the different funds in his hands at their par value. Theoretically, the money is the property of the county, and by sec. 34 heavy penalties are imposed for loaning or using the county funds; as a matter of practice, however, the county funds are frequently deposited in bank, to the credit of the treasurer, who thus becomes responsible for the solvency of the bank, and makes payment in any funds which are a legal tender. In practice, the question, in ordinary times, would be one of small importance, but in the present state of the nation, the question, by reason of the high rates of gold, has risen to one of considerable moment. My own impression is, that when gold becomes an article of commerce, the treasurer has no right to speculate in it for his own benefit, but that the profits of all such speculations may be recovered to the use of the county.

ST. PAUL, January 29th, 1863. G. E. COLE, Atty. Gen.

A. G. Foster, Esq., County Auditor, Wabashaw County:

SIR: I am in receipt of your favor of the 26th inst., stating that upon a petition signed by a majority of voters in that portion of a school district desiring to be set off from an existing district, the commissioners of your county have created a new district, and enquiring whether they have power to do so. I cannot express my opinion in language plainer than that of sec. 5 of the school law: "The county commissioners shall have power to create new school districts, change the boundaries of districts or unite two or more districts, whenever a petition signed by a majority of the legal voters of the *territory to be affected thereby*, shall be presented to them, requesting such organization or change." I am unable to perceive how any one can seriously contend that the portion of the territory sought to be set off, is any

more seriously affected by the change than the portion remaining. The question does not admit of any doubt. The action of the commissioners was clearly in excess of jurisdiction, and the attempted division is a nullity.

ST. PAUL, January 29th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, enclosing letters from treasurer of Hennepin county, and auditor of Sibley county, inquiring: 1st. Under sec. 3, of chapter 4, Laws 1862, what evidence of ownership shall the treasurer require, to authorize him to pay over any surplus, resulting from a sale under that act. He should pay to the party in whose name the title appears of record. The mortgagor is the owner previous to foreclosure. The party redeeming cannot be required to pay more than the law specifies, viz.: "the amount for which the property sold, with interest at two per cent. per month." See sec. 9. The auditor of Sibley county inquires whether the holder of a tax deed, under the sale provided for by the act of 1862, can claim immediate possession of the land? This is not a question for the executive officers of the government to determine. The duty of the county auditor ends with the execution of the deed. The rights of the party under it are proper questions for the judicial tribunals, but matters with which neither the State nor county auditor have any thing to do. The county auditor is required to deliver a deed, duly executed and acknowledged, to the purchaser upon the presentation of the certificate, without charge. A county officer is never authorized to charge fees for official services, unless *specially* authorized by law to do so.

ST. PAUL, February 17th, 1863. G. E. COLE, Atty. Gen.

Hon. D. Blakely, Superintendent of Public Instruction:

SIR: I am in receipt of your favor enclosing letter from the clerk of a school district in Mendota. The application should have been made through the county auditor. I am willing in this instance to consider the application as coming from you, and to answer it accordingly, but it will tend greatly to simplify matters and avoid much useless labor to insist in future upon a strict compliance with the provisions of sec. 37 on the part of persons applying for information. It is said that sec. 18 of the school law was and is popularly understood to authorize the acting trustees to employ a teacher for a time which might extend four months beyond their term of office, and I am asked:

1st. Are the trustees so impowered still? The entire law was repealed by that of 1862, and of course no powers now exist by virtue of *that* act. The act of 1862 contains no such provision. The trustees are in general terms empowered to employ teachers, but by the sixth subdivision of sec. 26, the trustees may, without a vote of the district, levy a tax for the support of a school for three months during the year; provided further, that the legal voters may vote to have a school any length of time more than three months. This language implies a restriction upon the powers of trustees, and, doubtless, if they should contract for a school for a longer period than three months, the district would not be liable without the legal voters saw fit to levy a tax for the purpose. This is the only restriction upon their powers, now existing. It matters not whether the term of office of the trustees expires during the continuance of the school or not, they may, without express authority from the district, provide for a three months' school, and for such further time as the district may vote to have a school.

2d. If not, and they have employed a teacher as provided in section 18, what is the result to teachers and trustees? If, since the repeal of section 18, the trustees have contracted for a school for more than three months, without special authority from the district, the legal voters may, at any special or general meeting, ratify such action, and levy a tax for the payment of teachers so employed. If they refuse to

do this, the teacher would very likely be without remedy. Trustees of a school district are public agents, and when they in *good faith* contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves, they do not become individually liable, unless the intent to incur a personal liability is clearly expressed, although it should be found that through ignorance of the law they may have exceeded their authority. See Sanborn vs. Neal et al. 4 Minn. 126. Any knowledge of a defect in their authority, accessible to them but not to the teacher, would probably fix a liability on them, however. At a special meeting called as prescribed by section 18 of Laws of 1862, the legal voters may vote to continue the school, and may vote a tax for that purpose.

ST. PAUL, February 17th, 1863. G. E. COLE, Atty. Gen.

To His Excellency, the Governor:

SIR: In answer to your inquiry as to whether there exists any incompatibility between the offices of Senator of the United States and Governor of Minnesota which would render it improper or impossible for you to continue the exercise of the duties of Governor after the 4th of March next, I have to say, that I think there is not. At common law the only offices incompatible with each other were such as were subordinate and interfering, as when one was judicial and the other ministerial, and the ministerial was directly subordinate to the judicial. Bouvier's Law Dict. 673; 4 Sergt. & Rawle, 277. In the absence of any provisions in the constitution of the State or United States, I see no objection to your continuing to act as Governor. There is certainly nothing in the constitution of either, which creates any such incompatibility.

Many of the States have incorporated into their constitutions, provisions prohibiting the holding of offices under the State by United States officers, but even in those States the practical construction of the law has rendered the prohibition of little avail. Thus the constitution of Pennsylvania prohibits in the most express language, officers of the United States, from holding office under the State, and yet notwithstanding this, the speaker of the senate of Pennsylvania, upon being elected a Senator of the United States, continued to exercise the duties of his office in the State Senate, even after the 4th of March. In no less than four instances the question has been raised in the legislature of that State, and has uniformly been decided in favor of United States Senators holding seats in the State senate. A case more analogous to your Excellency's, however, is that of General Banvard, who, while holding the office of Secretary of State of Pennsylvania, was elected to the United States Senate, and continued to hold the office of Secretary until the November following the 4th of March, on which his senatorial term commenced, and in so doing his action has been sanctioned by the Supreme Court of that State. These precedents, it must be remembered, are drawn from a State, the constitution of which contains the most explicit constitutional restrictions, whereas, that of this State contains none, and we are bound only by those which the common law imposes. Should an incompatibility be admitted, the acceptance of the office of Senator would vacate that of Governor, but your continuing to act as Governor would not in the least prejudice your right to a seat in the Senate. Angell & Ames on Corp. 255; People vs. Carrique, 2 Hill, 93. The case of Commonwealth vs. Bimms, 17 Sergt. & Rawle, 219, is an instructive case, and shows very strikingly the construction and practice of the courts and legislatures of Pennsylvania upon this question of incompatibility.

ST. PAUL, February 18th, 1863. G. E. COLE, Atty. Gen.

To the State Auditor:

SIR: I am in receipt of your favor, inquiring whether the taxes of 1862 must be paid before the deed executed by the Auditor, pursuant to sec. 5, chap. 4, can be recorded. The act of March 11th, 1862, does not require this, but probably any conveyances executed under this or any other statute, will be held to be governed by

secs. 16 and 17 of chapter 2 of Laws of 1860, as amended by chapter 9 of Laws of 1862, so far as they may be found to be within the reason of that provision.

Section 16, chapter 2, Laws 1860, requires the auditor, when he shall be satisfied that the transfer of any land has become necessary by reason of a sale for taxes, to make such transfer.

Section 17 requires the auditor, whenever a transfer shall become necessary by reason of any sale or conveyance by deed, to make such transfer, and no such deed shall be admitted to record until the taxes are paid. All lands in this State, are taxable to the absolute owner as distinguished from the mortgagee, or holder of a lien. I have therefore held, that the payment of taxes, is not an indispensable requisite to the record of a mortgage, as until foreclosure, the land could not be properly transferred for taxation, and the proper time for such transfer, was upon the execution of the sheriff's deed upon foreclosure.

Section 5 of chapter 4, of Laws of 1862, declares that the effect of a tax deed, shall be to vest an absolute title, both at law and equity. The purchaser in the contemplation of the law becomes upon the receipt of the deed, the absolute owner, and the land should thereafter be taxed in his name. If this be true, it should be transferred for taxation, when he receives his deed, but all conveyances which require such transfer, are refused record, until the taxes are paid. The provision in section 9, that upon the performance of certain conditions, the mortgagor may redeem, does not in the face of the express declaration of the law, that the legal and equitable title passes by the deed, make the case analogous to a mortgage, but the certificate granted by the auditor, operates to re-convey the legal and equitable title to the original owner; until the execution of this certificate, the legal title, notwithstanding the payment, remains in the purchaser. The purchaser may, I presume, recover of the party redeeming, the taxes so paid, with interest at 12 per cent. See sections 106 and 107, of chapter 1, of Laws of 1860, as amended by section 4 of chapter 6, Laws of 1862.

ST. PAUL, February 20th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor referring me to the decision of the Hon. George S. Boutwell, Commissioner of Internal Revenue, "that county auditors are liable to a duty of one-tenth of one per cent. on the gross amount of sales of lands for delinquent State taxes, and that certificates of sale and deeds of conveyance based upon such sales require stamps." While I shall most cheerfully submit to the decision of competent Federal authority upon this, as upon all other questions in which the line which separates State and national authority may be drawn into controversy, yet I cannot believe that the commissioner could have fully understood the facts in the case when he made the decision in question. This, indeed, is the more apparent, from the fact that Mr. Boutwell is a citizen of a State in which the system of State and county auditors, as it exists in Minnesota, is wholly unknown, and from the further fact that while deciding that the acts of county auditors, in the collection of the State and county revenue, are liable to duty, he reserves the question as to the liability of the acts of the State Auditor. Under the system prevailing in this State there can be no distinction between the two cases; the county auditor, in the collection of the revenue, acts as the agent and officer of the State, and all State taxes are collected directly by county officers, the duties of the State Auditor being confined to a supervisory power over them.

The authorities of this State have gone farther than those of many loyal States in recognizing and enforcing the rights of the national government, and will, I trust, continue to do so. We have repeatedly held, that property located upon the numerous reservations in this State, was not taxable by the State. We have recognized the authority of the case of Weston v. City Council of Charleston, 2 Peters, 449, and held that United States stocks were exempt from taxation by the State

authorities, notwithstanding the court of appeals in New York has, in a recent decision, repudiated its authority, and insisted upon the right of the State to tax such stocks; but while acknowledging the full authority of that case, so far as it supports the claim of the Federal government, I deem it my duty to urge, on behalf of the State, the analogies legitimately deducible from it, so far as they support her right to the uncontrolled exercise of her own sovereignty within constitutional limits.

It will doubtless be admitted, that except the restriction upon its power to levy duties upon imports and exports, the power of taxation in a State is unlimited, and may be exercised upon all property, which is a legitimate subject of State taxation, concurrently with the exercise of the same powers by the National Government.

The decision of the Supreme Court of the United States in the cases of McCulloch vs. State of Maryland, 4 Wheaton, 316, and Weston vs. City Council of Charleston, against the right of a State to tax the United States Bank and United States stocks, proceeded upon the ground that it was an attempt to impose burdens upon the machinery by which the government of the United States exercised its constitutional powers; that as the taxing power was necessarily unlimited and capable of no restraint, save the discretion of the authorities which imposed it—the power of taxation once admitted implied the power to destroy.

If, then, a tax imposed upon the property of a private citizen, by reason of the nature of that property, is void, because, in the language of the court, it tends to prostrate the National Government at the feet of the States, it would seem that a tax levied not upon the property of a citizen, but upon the very machinery by which a State collects her current revenue, would have the effect to prostrate the States at the feet of the nation. When this right is once admitted, it seems to me that the power of the nation to strike down all State sovereignty by a blow at the vital power of taxation, must also be conceded. I am happy to be able to add, to the close, and as it seems to me, conclusive analogies drawn from the decided cases, the weight of a high authority upon all questions of constitutional construction.

In number 32 of the Federalist, the writer says: "Although I am of opinion that there would be no real danger of the consequences to the State governments, which seems to be apprehended from a power in the Union to control them in the levies of money, yet I am willing to allow in its full extent, the justness of the reasoning, which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants, and making this concession I affirm that (with the sole exception of duties upon imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense, and that an attempt, on the part of the National Government, to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its constitution." This reasoning is adopted and its force recognized in the cases which I have cited. If, then, the power of taxation implies the power to destroy, is not a direct tax upon the State revenue *eo nomine*, an essential abridgment of this power in the States?

It has been said that the amount involved is of small importance, and is simply a tax on speculators in tax-titles; neither of these statements is correct. The cost of the stamps, it is true, might be charged to the purchaser, but not without a change in our law. As it now stands, the State officers are required to execute a perfect conveyance, without charge to the purchaser, but if paid by him, the amount for which the State might sell, would be decreased by an amount equal to the increased expense. It was urged in favor of the power of the States to tax United States stocks, that it was a tax on the citizen, but it was answered "by so much as you burden these securities by taxation, by so much you depreciate their value." But the tax of one-tenth of one per cent. upon all sales by county auditors, is a direct tax upon the State revenue. She cannot charge this to the purchaser. The lands are sold for the amount of the delinquent taxes of former years, and from the proceeds, one mill on every dollar is diverted from the State Treasury into that of the United States. This is no light tax in itself, but the principle it inaugurates would tolerate the diversion of the entire State revenue in the same direction.

The requirement of stamps upon certificates and patents issued by the State in the sale of school lands, is more doubtful, and is perhaps open to no objection. But while I entertain little doubt of the soundness of the doctrine, which I have endeavored to establish as an abstract proposition, I should feel a great disinclination to urge it in the present crisis of our nation, had Congress in direct terms assumed the exercise of this power. The act of Congress, however, contains no allusion to the States, and asserts no right to tax State revenue. I am of opinion, that by no known rules of construction can the act be held to extend to the States as States, and believing as I do that such was not the intention of Congress, and that the commissioner has been misled by a partial view of the facts, I suggest that you transmit a copy of this communication to him, and if upon further reflection, and a submission of the question to the attorney general of the United States, should it be deemed of sufficient importance, the decision shall still be adverse to views here maintained, I shall cheerfully acquiesce in the final determination, whatever it may be.

ST. PAUL, February 20th, 1863. G. E. COLE, Atty. Gen.

To the State Auditor:

SIR: I am in receipt of your favor, enclosing a letter from the auditor of Morrison county, stating that certain lands in that county were sold for the taxes of 1858, and previous years, and bid in by the county, and the certificates assigned to an individual. That the assignee not paying the taxes of 1859, the land was forfeited to the State, and sold under the provisions of the act of March 11th, 1862; and that the assignee demands of the purchaser the taxes of 1858, and previous years, with interest at 25 per cent. And the auditor enquires whether he is entitled to this, or whether he has forfeited his right to these taxes by not paying subsequent taxes. I am also in receipt of a letter from the county attorney of that county upon the same subject, which states the additional fact, that at the sale in January last, the lands were sold not only for the taxes of 1859, which were due to the county, but for the taxes of 1858 and previous years, the certificates for which had been assigned by the county. If this is true, it renders the sale as to the lands, void. 11 Shepley, (Maine R.) 386. Sec. 1 of chap. 4 of Laws of 1862, only authorizes a sale for taxes which are due to the county, and when lands have been purchased and are still held by the county. The lands should have been sold for the taxes of 1859 only. If this had been done, the assignee, by reason of his purchase from the county, would have stood in relation to the public, in the place of the owner, and by neglecting to pay the subsequent taxes, would have forfeited his lien; upon the sale he would have been entitled, like any other owner or holder of a lien, to have redeemed from the purchaser within one year, and if he had not perfected his lien, by obtaining a tax deed, the absolute and original owner, in redeeming from him, would have been compelled to pay interest, at twenty-five per cent. As against the purchaser, the assignee could make no such claim.

ST. PAUL, February 21st, 1863. G. E. COLE, Atty. Gen.

H. A. Gale, Esq., County Auditor, Hennepin County:

SIR Your favor is at hand, containing the following inquiry: "Can a resident property holder and tax payer of a school district, receive into his family a person of suitable age to attend school, and for a single term or longer, have the right to send such person to the school in his district without paying tuition." Section 33 of chapter 1, Laws of 1862, vests a discretion in the trustees in regard to the admission of scholars from an adjoining district, and declares that no person shall have a right to attend school out of his district, without the consent of the trustees of the district to whose school he desires admission. The question submitted by you, doubtless, depends somewhat upon the intention of the scholar; while a parent could not

for the colorable purpose of evading the law, send his children to board in another district for the mere object of attending school, I entertain no doubt that a scholar actually and in good faith domiciled in a family in the district, would be entitled to the benefits of the school without regard to the residence of his parents.

ST. PAUL, February 22d, 1863. G. E. COLE, Atty. Gen.

Chas. A. Chapman, Deputy Auditor, Blue Earth County:

SIR: I am in receipt of your favor, stating as follows: "That the person elected to fill the office of school district treasurer did not offer his bond until about the 1st of February, 1863, although there was money in the treasury of the county belonging to the district at the October apportionment, which money was needed to pay the debts of the district, but which they could not get, on account of said failure of the treasurer, and the district clerk refuses now to file the treasurer's bond when presented, on the ground that the office is vacant;" and I am asked:

1st. Does the fact that a district clerk was notified of his election in annual meeting, and accepted the office verbally, in said meeting, constitute him clerk of the district? The election and qualification constitute him clerk of the district, but although it is his duty to qualify as required by law, the provisions of sec. 8 of the school law are directory, and a non-compliance with them does not, of itself, occasion a vacancy. The only effect which a neglect in this particular could have, would be to authorize his predecessor to perform the duties of the office until these acts were performed. Sec. 7, school laws; 21 Pick. R. 75.

2d. Who should the director and treasurer elect, file their acceptance with; the former clerk or the one newly elected? By section 8, the acceptance is to be filed in the office of the district clerk. The office is permanent, although the incumbent may change, and it is here the bond should be filed. At the election in March last, the clerk elect would doubtless be the officer entitled to act, as by the repeal of the act of 1861, the town clerk had ceased to act as district clerk. In future the clerk of the preceding year will continue to be clerk until his successor is not only elected, but qualified. Sec. 7; 21 Pick. R. 75.

3d. How long a time can the treasurer have, by law, to file his bond? No time is specified by law in which it should be filed. I presume, at the same time with the filing of the acceptance. Should he neglect to do this within this time, the director and clerk would, probably, under the provisions of section 15, be authorized to declare the office vacant, and to fill it by appointment; but, should they neglect to do so, and before any action on their part the treasurer should tender his bond, I think it would be the duty of the clerk to receive it, and in the meantime, the former treasurer under section 7, would be authorized to act. I do not think that the mere neglect to file the bond, without any action on the part of the director and clerk, can be regarded as creating a vacancy; and I am confirmed in this belief, by the consideration that when such neglect is of itself sufficient to create a vacancy, the legislature declares such to be the effect in express terms. See sec. 5, chap. 2, and sec. 3, chap. 3, Laws 1860.

ST. PAUL, February 24th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of the enclosed letter from L. Smith, Esq., county auditor elect, of Dakota county, inquiring whether purchasers of lands at tax sales, under the act of March 11th, 1862, are entitled to a deed before the expiration of the year allowed for redemption. I think they are. Section 5 requires the execution of the deed, upon the production and return of the certificate of purchase, and there is no limitation as to time. Section 7 allows an action to be commenced for the purpose of testing the validity of any such sale within one year from the recording of the

tax deed. Section 9 declares, that a certificate of redemption issued upon redemption within one year, shall operate to defeat the tax deed, and the *title* acquired by the purchaser shall revert to such redemptioner. This section evidently contemplates the execution of a deed at some time prior to the expiration of the period of redemption.

ST. PAUL, February 29th, 1863. G. E. COLE, Atty. Gen.

A. G. Foster, Esq., County Auditor, Wabashaw County:

SIR: I am in receipt of your favor, stating—1st. That district No. 1 embraces the city of Wabashaw. 2d. That the charter of that city contains no reference to schools. 3d. That the district neglected to organize in May last.

You inquire whether they may legally organize in March next. They may. There is no clerk authorized to give the notice prescribed by section 19, but for an annual meeting, this is not absolutely necessary for the mere purpose of electing officers. You state further, that the city council appointed trustees of the district, who are now acting; that the clerk so appointed, left the State, and the remaining trustees appointed another who is now acting.

That the commissioners of the county have set off that portion of district No. 1, in which this clerk resides, upon petition of a majority of the voters in that portion of the district so set off, and you inquire whether such person can legally continue to act as clerk of district No. 1. I do not understand why this question is raised, as I have already informed you that this action of the commissioners was a nullity. The clerk would therefore still have the right to act, were this the only objection, but I am unable to perceive how and from whence the city council acquired any authority to act in the matter. By section 38 of the school law, those cities and towns alone are excepted from the act which have their school systems provided for by special enactment. Such you state is not the case with the city of Wabashaw. The act of 1862, therefore, embraces all the districts within the city limits. The officers appointed by the city council are not even officers *de facto*. They assume to act by no color of right. An election irregular as to the time, place or notice of it, may constitute an officer *de facto*, whose acts, as to third persons, will be valid, but an appointment to an office by a board, having no color of right to act, and when the power to designate the incumbent is vested in a distinct authority, cannot have such an effect. Baird vs. Bank of Washington, 11 Sergt. & Rawle, 414.

ST. PAUL, March 3d, 1863. G. E. COLE, Atty. Gen.

Hon. D. Blakely, Secretary of State:

MY DEAR SIR: I am in receipt of your favor of the 13th inst., calling my attention to sec. 11, page 126, Comp. Stat., which declares "That no person who is a member of Congress or who holds any office under the State or United States shall exercise the office of Governor," and inquiring whether my attention had been called to that section when preparing my opinion upon the compatibility of the office of Governor with that of United States Senator. In reply I have to say that the office of Governor is created by the constitution and his qualifications defined, (sec. 3, art 5.) He shall have attained the age of 25 years, he shall have been a *bona fide* resident of the State for one year, he shall be a citizen of the United States, he shall hold his office for two years and until his successor is elected and qualified. The legislature certainly cannot dispense with any one of the qualifications required by the constitution and I am at a loss to perceive how it is competent for them to prescribe new and different ones. When the framers of that instrument intended a restriction of the nature which the statute in question seeks to impose, they did not neglect to declare such intention in express language. Sec. 9, art. 4.

ST. PAUL, March 14th, 1863. G. E. COLE, Atty. Gen.

J. C. Simmons, Esq., County Attorney, Morrison Co.:

SIR: I am in receipt of your favor, stating that an injunction has been served upon your county treasurer, prohibiting him from receiving and paying certain county orders, and enquiring whether parties offering such orders can harm him for his refusal to receive them, and you state further, that the treasurer is perhaps doubtful whether the injunction served upon him is in conformity with law. Of this I have no means of judging, as you do not furnish me with copies, and I can only say that if the officer by whom the injunction was allowed acted within his power and jurisdiction, and under the rules of the court, the treasurer would be guilty of contempt should he disobey it, (2 Barbour's Ch. Pr. 274,) and it will furnish a justification to the officer for refusing to receive such orders.

2d. You enquire whether the county commissioners can remove the treasurer for refusing to receive such orders, under the circumstances stated. Certainly not. Even were there no injunction, I do not see what power they would possess to remove him. Section 14, treasurer's law, 1860, prescribes the only cases in which they may remove, and contains no reference to a case of this character.

ST. PAUL, March 25th, 1863. G. E. COLE, Atty. Gen.

John L. Macdonald, Esq., Co. Atty., Scott Co.:

SIR: I have examined the bonds given in the case of State against Hinds, as recognizance to appear for examination before the justice, referred to me by your communication of the 23d inst., and am of opinion that they are fatally defective. The point made by the defendants, that a bond taken where the statute authorizes a recognizance is void, is not perhaps tenable, provided the bond contained the essential recitals required in a recognizance, and only differed in a matter of form. The cases relied on by the defendants of Johnson vs. Randall, 7 Mass. 340, and Merrill vs. Prince, Id. 396, proceed upon the ground that as the statute required a bond, and the court might relieve against the penalty in cases of hardship, whereas upon the forfeiture of a recognizance the court possessed no such power, the taking of the latter would seriously prejudice the rights of a defendant, the cases I think have little or no application to the one before me. But whatever its form there are certain essential recitals the omission of which will invalidate it. No proceeding of a court of special or limited jurisdiction will be valid unless competent authority for the purpose appears affirmatively upon its face. The recognizance should state the ground upon which it is taken, so that it may appear that the magistrate taking it had competent authority to demand and receive it.

The instruments submitted to me are defective in the following particulars: 1st. They run to the county of Scott instead of the State of Minnesota. 2d. It does not appear from them that any proceedings whatever were instituted before any court or justice, or that any complaint was ever made charging the party with any crime, or that the recognizance was entered into by order of any court; it requires him to appear before no court for examination. The condition merely recites that I. R. Hinds has been arrested on a charge of forgery, and has called for an adjournment, and the adjournment has been granted to the 14th day of October, 1858, at 10 o'clock. Now, if the said Hinds appears on that day, and abides the order of the court, &c. This is the first allusion to any court in the whole instrument. When and before what court he is to appear is not stated. A recognizance is matter of record, and the facts sufficient to support it must be stated and cannot be proved by matter *in pais*.

If any authorities are necessary I refer you to People vs. Koeber, and People vs. Young, 7 Hill, 39 and 44; Commonwealth vs. Downey, 9 Mass. 520; Commonwealth vs. Daggett, 16 Mass. 447; Bridge vs. Ford, 4 Mass. 641. The remaining question put by you, I have had more difficulty about. You state that the chairman of the board signed in blank a number of county orders, and that the register attested, filled up and issued duplicate copies, and that in certain cases where jurors' certificates had been received for taxes he issued and attested orders upon

these, and inquire whether this was not an official act for which his sureties will be liable. Sec. 2, page 156, Comp. Stat., requires the register to give a bond with good and sufficient sureties in the penal sum of one thousand dollars conditioned that he will faithfully and impartially discharge the duties of his office.

Sec. 7, page 157, declares that the register shall attend the meetings of the board, and do and perform all duties imposed by law, and the clerk of the board shall keep minutes of the proceedings and all accounts of the county, shall attest all orders issued by the county and enter them in numerical order in a book to be kept for the purpose. At the time when the acts were committed these sections were in force. The practice of the county commissioners seems to have been extremely loose, and it may be doubtful whether a fraud in filling up orders signed in blank, or in misappropriating orders entrusted to him, would be regarded as done while acting officially, but in attesting orders and entering them numerically, and in keeping the accounts of the county he was acting strictly in the line of his duty, and by attesting orders known to him to be fraudulent, and entering them, or by neglecting to enter any orders issued by him, he was guilty of official malfeasance, for which I think his bondsmen would be liable.

ST. PAUL, March 27th, 1863. G. E. COLE, Atty. Gen.

E. P. Dorival, Esq., County Auditor, Houston County:

I am in receipt of your favor inquiring "whether school district trustees have power to hire money to build a school house." I think not. Corporations, and especially *quasi* corporations, have only those powers specifically granted to them by statute, and such others as are necessary for carrying into execution those specifically conferred. By sec. 10 of the school law the trustees are authorized "to build, hire, or purchase a school house *out of funds provided for that purpose.*" By the 5th sub-division of sec. 26 the manner of providing such funds is specifically indicated. The case of school district No. 7, in Wright County, v. Thompson, 5 Minn. Rep. 280, fully sustains this position.

ST. PAUL, March 28th, 1863. G. E. COLE, Atty. Gen.

E. C. Severance, Esq., County Auditor, Dodge County:

SIR: I am in receipt of your favor of the 27th ult., stating that in 1858 and 1859 the county commissioners apportioned the school money from the total amount levied instead of the amount collected, and allowed the treasurer to pay accordingly. Under this method many districts were largely overpaid and others were not paid.

In 1860 the county board requested the auditor to retain the money from districts that had been overpaid, and apply the same to districts that had not been paid.

You enquire whether you have any right to retain money from any of the present school districts when the territory is the same as 1858 and 1859.

Sec. 69, page 359, which was in force in 1858 and 1859, directs the commissioners to make an apportionment of *the money in the county treasury* for the support of schools, &c., among the districts as therein directed. The law is the same in both cases.

The commissioners have disregarded the law in the first instance, and in order to meet the consequences of this mistake they ask the auditor to disregard it again. It is an old and homely adage "*that two wrongs cannot make a right.*" The commissioners have no authority over the school fund under the present law; the duties of the auditor are prescribed by law; he is simply an executive officer, and neither at his own instance nor upon the request of any other officer or board has he a right to depart from them.

ST. PAUL, April 1st, 1863. G. E. COLE, Atty. Gen.

F. Joss, Esq., County Auditor, Goodhue County:

DEAR SIR: In answer to the first inquiry contained in your favor of the 15th ult., I refer you to page 20 of published decisions of this office. If any oath is required by the present school law, the provision is directory merely, and the acts of a district officer without it will be valid; no express provision of this character exists however.

2d. You inquire "if the teacher's contract is not made, signed and filed with the district clerk until after the term of his or her service has expired, will the contract be binding on the district, and can the clerk draw an order on the treasurer for the money without making himself personally liable." The provisions of section 12 specifying the manner of making a contract with the teacher, and directing that it shall be filed with the clerk, are doubtless for the information of that officer in drawing his orders, and the time of filing and signing cannot be material. If the teacher has, pursuant to a verbal contract, performed the stipulated services and produces and files the contract reduced to writing, as prescribed by statute, with the clerk, he or she is entitled to the order and the clerk will not on that account incur any personal responsibility.

3d. You inquire, "has either two of the trustees power to make a contract and do other business and make it binding on the district?" Sub-division 3, page 114, Comp. Stat., declares "that all words purporting to give a joint authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority." See also 7 Gray. Mass. Rep. 131.

ST. PAUL, April 3d, 1863. G. E. COLE, Atty. Gen.

J. L. McDonald, Esq., County Attorney, Scott County:

SIR: I am in receipt of your favor desiring my construction of an act entitled "An act to amend sections 30 and 31 of chapter 104 of the Public Statutes, relating to indictments and presentments by the grand jury," approved March 5, 1863. In reply I have to say that I understand that there are three distinct classes of cases embraced in the law.

1st. No indictment shall be found in any case unless the defendant has been first examined and held to bail by a magistrate.

2d. In all other cases which were offences at common law, and the gist of which is not a private injury, they shall proceed by presentment.

3d. In all cases which were not criminal at common law, and the gist of which is a private injury, they shall proceed neither by presentment or indictment until the matter has been investigated by a magistrate. That is, the grand jury shall initiate no proceedings in cases of this character.

ST. PAUL, April 10th, 1863. G. E. COLE, Atty. Gen.

N. E. Nelson, Esq., County Auditor, Sibley County:

SIR: Your favor is at hand. In answer to the first question, I have to say that my opinion of October 8th, 1862, page 14, and the decisions as published, were given upon reflection and the examination of authorities, and as at present advised, I am not disposed to change or modify them. They are to be regarded by school officers as the rules of this office. The directions of the State Superintendent published on the first page of the decisions, seems to cover the case stated in your second question. The county auditor is required to apportion the public moneys in October and March; he is also required to make his report to the State Superintendent in November. The basis upon which only the apportionment of both county and State funds can be made, is the reports of district clerks. If these are delayed the apportionment cannot be made, and the entire school system and finances of the State are thrown into confusion. If but one district of the county makes a report to the auditor, he can only report the number of scholars in that district as the quota of

the county, and the State Superintendent can only apportion to such county the school money properly belonging to that district. Shall the district thus complying with the law be required to share a fund of which it has already but its just proportion among other districts who have occasioned the deficiency of the sum apportioned to the county by their own delinquency, or that of their officers, for which they are responsible? This certainly is not justice, nor is it within the spirit of the act. Any delay which does not affect the apportionment may be disregarded. So far the law is directory, but the absence of reports will justify the officer making apportionment in disregarding the delinquent districts, and school moneys should be distributed by the county auditor to those districts who have entitled themselves to them by a report made in season to govern the action of the superintendent.

In some States the consequences of a neglect to report are fixed by law; in the absence of this I can see no alternative between a failure of the law from want of power to enforce it and holding school district officers to a strict compliance. The provisions of the law are reasonable, easily understood, and nothing but wilful misconduct or culpable negligence can ever deprive a district of its share of the fund under this ruling. I hold, therefore, that with the limitations which I have stated the law is in this particular imperative.

As all decisions are intended to govern future cases, I have stated above, in general terms, what I regard as the correct construction of the general school law. At the last apportionment of the State Superintendent he did what was perhaps not strictly regular, viz.: took the reports of the previous year as a basis in cases in which no report was made this year, and the legislature, with a view to protect districts from the consequences of *past* neglect, passed a special act authorizing districts so in default to make their reports by the first of March, and declaring that districts so making returns should share in the March apportionment of the present year. The above decision, therefore, does not extend to the apportionment of March last.

ST. PAUL, April 10th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

I am in receipt of a communication from the auditor of Anoka county, making the following inquiries. As the communication should have been addressed to you, I answer through you: The auditor says that "A's house, occupied by a tenant, was sold February 28th, 1863, to B, for taxes of 1859 and previous years. C holds a mortgage on the house."

1st. Can B take possession of the house upon the receipt of the tax deed? For answer I refer you to the second opinion, page 27, published decisions of this office.

2d. Can C redeem? I have no doubt that a mortgagee is entitled to redeem from a tax sale. In the opinion above referred to, I have said that under section 3 of chapter 4, Laws of 1862, the mortgagor is the owner before foreclosure. That section declares that the surplus money realized from any sale under that act, is to be paid to the party owning the same at the time of forfeiture. No words are used intimating that the assignee of the owner or the holder of a lien is entitled to the surplus as against the owner. Section 9 of the same act, however, allows a redemption by the person who owned the same at the time of forfeiture, *or his representatives or assigns*. In conveyancing, the word assigns, embraces all those to whom rights have been transmitted by particular title, such as sale, gift, legacy, transfer or cession, (Bouvier's Law Dict. title "Assigns,") and applies as well to mortgagees, as to holders of unconditional conveyances. Section 106, chap. 6, Laws of 1862, recognizes the right of mortgagees to pay the taxes on the property embraced in the mortgage, and make the sum so paid a lien upon the land. Independent of statute, the right would doubtless exist at common law. There is no distinction, in principle, between a right to pay taxes before sale, and the right to redeem afterwards, and I am clearly of opinion that the Legislature have made none.

ST. PAUL, April 10th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, referring to me a communication from the county auditor of Fillmore county. The question upon which my opinion is desired, seems to be, whether, in making settlements with town or school district treasurers, the county auditor should draw his order for the gross amount collected, or for an amount less the fees allowed by law to the county treasurer for making the collection.

I cannot see that there is any room for doubt upon this point. Section 4 of chapter 2, of Laws of 1861, declares that after deducting delinquent taxes *and the collection fees allowed the treasurer from the several taxes charged on the duplicate in a just and ratable proportion*, he shall be held liable for the balance, and section 5 of the same chapter declares that the auditor shall credit each township, city, incorporated village or school district with the net amount so collected. It is the *net* amount, after deducting expenses of collection, that is to be paid. The treasurer is right, and may retain his fees.

ST. PAUL, April 13th, 1863. G. E. COLE, Atty. Gen.

H. A. Gale, Esq., County Auditor, Hennepin County:

DEAR SIR: I am in receipt of your favor of the 7th inst., stating that "certain scholars resided in a school district when the October report was made, moved into another and attended school in still another," and enquiring where they shall draw their school money under the March apportionment.

Undoubtedly in the district in which they resided when the report was made. The October reports are the *data*, and the only *data*, upon which all apportionments are or can be properly made. Section 24 declares that the auditor shall make the apportionment in proportion to the number of scholars in the district, between the ages of 5 and 21, *as shown by the reports of the several districts.*

ST. PAUL, April 13th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor stating that a certain party has organized under the general banking law, by making and filing with the register of deeds, and in your office, the certificate required by section 11, page 856, Compiled Statutes. That having done no business as a bank, he addresses a letter to you saying the bearer desires to file a certificate and organize under the same name, and that he has disposed of the plate of the bank to the party applying, and consents to the granting of the application. A person or company filing the certificate prescribed by that section becomes an incorporation, and is clothed with all the franchises, rights and privileges, and assumes all the obligations of a corporation as fully as if incorporated by a special enactment. As a corporation the franchises can only be surrendered by some formal, solemn act of the corporation, and not then until accepted by the State. 24 Pick. 53.

Upon filing the certificate the corporation became invested with the power to contract debts and transact business, and a letter from the corporators (although probably stating the facts in this present case) would as a general rule furnish very inadequate proof that debts had not been contracted. You should refuse to allow the filing of a second certificate. A transfer of the stock by the present stockholders to the person now applying, is the proper method of obtaining the object sought. But it is said that the present stockholders fear that under the provisions of section 20 they will incur a responsibility for all the transactions of the bank for one year after the transfer of their stock. The language is, "the stockholders in each bank shall be individually liable in amount equal to double the amount of stock owned by them, for all the debts of such bank, and such individual liability shall continue for one year after any sale or transfer of stock by any stockholder."

The statute *creating* personal liability in stockholders being a wide departure from the rules of the common law, must be construed strictly, and not extended beyond the limits to which it is confined by the statute. 4 Cush. 199.

The various statutes creating such liability have been variously construed in different States. In New York the liability is confined to those who were stockholders at the time the debt was contracted. 5 Denio, 573. In Massachusetts it is extended both to these and to those who are stockholders at the time the suit is brought; 11 Cush. 188; but in no State has it been held to extend to those who were stockholders at neither of these periods. While stockholders who are such when the debt is contracted have a voice in the management of the corporate affairs, and a control of its concerns, and while those who purchase subject to existing debts do so generally at a reduced price, or at least have full means of ascertaining the liabilities which they are about to incur, there may be some show of reason in subjecting them to this responsibility, but to hold all retiring stockholders as guarantors of the solvency of an institution over whose affairs they have ceased to exert an influence, seems neither consonant with reason nor justice. I think the last clause limiting the liability to one year (and which I may add is not contained in the statutes of either of the States to which I have alluded) was intended to limit rather than to enlarge the liability of stockholders, and instead of making them liable for debts contracted after the transfer, operates to prevent any liability for those incurred before, unless suit is brought within one year from the date of the transfer.

ST. PAUL, April 14th, 1863. G. E. COLE, Atty. Gen.

Robert F. Fisk, Esq., Private Secretary, Executive Department:

DEAR SIR: I am in receipt of your favor enclosing a communication from the Consul General of Bavaria, at Philadelphia, desiring information of the extent of the rights of married women to hold and convey property in this State. In reply I have to say that married women in this state may, without any marriage settlement or other contract or agreement with the husband, hold in their own name and without the intervention of trustees, all the real and personal estate acquired before marriage, either by labor or by inheritance, gift, grant or devise, and also such as they may acquire after marriage in any of the above modes except the first, and the rents, profits and increase of all real estate so acquired. This property is not liable for the husband's debts and for those of the wife only contracted before marriage, and such other as may have been contracted for the improvement of her estate, or with reference to and upon the credit of such estate. She cannot, however, during coverture convey or dispose of any such property without the consent of her husband, except by order of the district court of the judicial district in which she is a resident, or her property, if real estate, is situated. In cases where the husband, from want of mental capacity, sobriety, disposition or ability fails to make adequate provision for the support of his family, the wife, in her own name and for her sole benefit, is authorized to prosecute any business or pursuit which she is capable of conducting in all respects as a *femme sole*. In such cases her stock in trade is not subject to his control or liable for his debts, and she may in these cases dispose of goods in the ordinary course of business without his consent.

This, I believe, embraces all the inquiries of the Consul, and the substance of our statute laws upon this subject. It is not necessary to observe that, save as modified by the statute law of the State of which the foregoing is a general statement, the common law prevails.

ST. PAUL, April 20th, 1863. G. E. COLE, Atty. Gen.

H. Kins, Esq., County Auditor, Wright County:

SIR: I am in receipt of your favor enquiring how a school district which has neglected to organize under the new law may do so, and whether a district which has neglected to organize until this time still remains a legal school district. It

does. Sec. 7 of the school law authorizes three freeholders to call a meeting when new districts are formed under this act. This section refers to the creation of new districts as provided by section 5, rather than to the case stated by you. I think, however, that at a meeting called in that manner the district may elect officers who will at least be officers *de facto*, and will have power to bind the district by contracts. I would not advise, however, the levy of a tax at a meeting so called. I think it would be better for the district to wait until the time prescribed by law for the next annual meeting before attempting this. The report of the clerk *de facto* elected at a meeting called as I have suggested, will entitle the district to its share of the public moneys.

ST. PAUL, May 7th, 1863. G. E. COLE, Atty. Gen.

T. R. Huddleston, Esq., County Attorney, Dakota Co.:

SIR: I am in receipt of your favor enquiring whether taxes must be paid before the record of a sheriff's certificate under chapter 19, Laws 1862. The principle which must govern the case is somewhat analogous (although not precisely so) to that embraced in my decision of February 20th, page 26, published decisions of this office. The character of the title held under the mortgage materially changes upon a foreclosure sale, under ch. 19, and thereafter the title is so far vested in the mortgagee as to be liable to be seized and sold upon an execution against him. See page 74, Laws 1862. If the property is not redeemed it becomes, without further act or paper title absolute in the purchaser. If the proceedings cannot be stopped at this point until the taxes are paid and the land transferred for the taxation, the auditor loses control of such transfers, and the object of the law, viz.: the settlement of all tax accounts between the public and the original owner, prior to a transfer of title, is evaded. I think the taxes must be paid.

ST. PAUL, May 10th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, enclosing communication of county auditor of Carver county, stating that the town of Liberty has been organized from territory originally constituting a part of the fractional towns of Chaska and Carver, without submitting the question to the voters of those towns, and the auditor thinks there is a conflict between section 23, page 139, of the Session Laws of 1860, and section 1, page 113, same session, (as amended by chapter 67, Laws 1862.) There is no conflict between them. Both sections are to be construed together and can be readily harmonized. Sec. 1 as amended, authorizes an organization upon the petition of a majority of the legal voters of any congressional township containing twenty-five legal voters. This section standing alone will apply to all cases in which the territory sought to be organized has not already been created into a town or annexed to the territory of an existing organization, and in the organization of towns in new and sparsely-settled counties will be of very general application. But section 23 incorporates a proviso upon the former section which applies only in cases in which the disintegration of an existing town will be the result of a new organization, and in such cases operates as a limitation upon section 1. If therefore the towns of Chaska and Carver contain less than 36 sections, the section applies, and the attempted organization is a nullity.

ST. PAUL, May 12th, 1863. G. E. COLE, Atty. Gen.

Hon. Wm. P. Dole, Commissioner of Indian Affairs:

SIR: My attention has been called by the Commissioner of the State land-office to a notice bearing your signature, published in the daily papers of St. Paul, in which you offer for sale certain lands located within the limits of the Winnebago

reservation in this State, and denominated "Winnebago Trust Lands." The list published by you embraces several sections numbered 16 and 36, which are claimed by the State of Minnesota under certain acts of congress, passed March 3d, 1849, and February 26th, 1857. I desire to enter a protest on behalf of the State of Minnesota, against the sale or disposition of the sections above mentioned, pursuant to said notice, for the following reasons.

1st. By the provisions of section 18, of an act entitled "An act to establish the territorial government of Minnesota," approved March 3d, 1849, it was declared "that when the lands in said territory should be surveyed, &c., sections numbered 36 and 16 in each township in said territory shall be and the same are hereby reserved for the purpose of being applied to schools in said territory, and in the State and territories hereafter to be created out of the same." At the time of the passage of this act, the lands embraced in the Winnebago reservation, in common with all lands within the present territorial limits of the State of Minnesota, west of the Mississippi river, were held by the Sioux tribe of Indians, by the right or title of occupancy. Any argument drawn from this fact, however, would apply as well to all other lands in the State west of the Mississippi, and if a construction should prevail which would deprive the school fund of the sections in question, the entire Congressional grant would be rendered nugatory and void. The nature of this Indian title, however, has been settled by judicial determination. It is merely a precarious right of occupancy, the fee simple being in the United States. Fletcher vs. Peck, 6 Cranch, 87.

The United States, then, the owners of these lands in fee simple, by the act of March 3d, 1849, made a solemn dedication and reservation of all sections numbered 16 and 36, within the territory, to a public charity, subject only to the temporary incumbrance of a right of occupancy by the original possessors of the soil. This reservation for a public charity was valid, without any grantee *in esse* capable of taking, and by it the title passed out of the United States and remained in abeyance until vested in the State, upon her creation as executor of the trust. It was irrevocable and deprived Congress of all further power of disposition. Town of Paertes vs. Clark, 9 Cranch, 292; New Orleans vs. United States, 10 Peters, 662.

By the treaty of July 23d, 1852, as amended June 23d, 1857, the lands comprising the Winnebago reservation, together with all lands west of the Mississippi, were ceded to the United States. This cession constituted, as I have endeavored to show, simply a relinquishment of the Indian right of occupancy. By it no new title in fee simple was acquired; it operated simply to remove the incumbrance upon the grant or reservation of school lands, from all such lands west of the Mississippi. Upon the ratification of this treaty, the territory of Minnesota became entitled to all sections numbered 16 and 36 west of that river, or she became entitled to none; there is up to this point no distinguishing feature between those subsequently erected into a reservation for the Winnebagoes and others. The surveys of the townships included in the present reservation were made before the treaty with the Winnebagoes.

On the 27th of February, 1855, the tract of land known as the Winnebago reservation, was set apart for the occupancy of that tribe. The conveyance of any title to the sections dedicated to schools would have been a disregard of such dedication, which no tribunal would sanction, but it can hardly be construed that any such conveyance was contemplated. A mere temporary residence and location, unaccompanied by any right in or to the soil, was all that could have been intended by the framers of that treaty.

Such then was the state of the title to sections 16 and 36 upon the reservation, upon the passage of the act of February 26, 1857, authorizing the people of Minnesota to form a State government. By this act, upon its acceptance by the State, sections 16 and 36 in every township of public lands in said State, and when either of said sections or any part thereof had been sold or otherwise disposed of, other lands equivalent thereto, were granted to the State for the use of schools.

Whatever might be the true construction of the language, had the title of the State had its inception in this act, it should be remembered that the act of February, 1857,

was but a continuance of the policy inaugurated by Congress in 1849, and operated to vest that title which had before remained in abeyance for want of a grantee *in esse* in the State as a trustee, to execute the public trust and charity erected in 1849. But even admitting that the sole title of the State is derived from the act of February, 1857, there is no language which excepts any school sections within the territorial limits of the State from its operation. The lands on the reservation were public lands, for a transitory purpose, only reserved from sale; they had not been otherwise disposed of, certainly not to the Winnebagoes; they were only occupants, the title being in the United States, under the decision in Fletcher vs. Peck, cited *ante*. The fact, however, that the act of 1849 had reserved these lands for a specific purpose, that at the time they were held by the United States by a like tenure with all other lands west of the Mississippi, that during all the period from 1852 to 1855, they were, together with the lands of the State, generally disencumbered from any Indian claim or title, and left entirely free for the operation of the reservation of 1849, is confidently relied upon as a conclusive answer to any claim made by Congress of a right to divert them from the purpose to which they were originally dedicated. It is insisted, however, that Congress has made no such attempt.

The notice published by you, and the sale of these sections, must proceed, if at all, upon the theory that prior to the act of 1857, Congress had made no binding disposition of them, and that all sections so numbered, were still subject to national legislation and disposal. In addition to the cases already cited, I refer you to the case of City of Cincinnati vs. White's Lessees, 6 Peters, 431, as a conclusive authority against this position.

Should your decision be adverse to the views here maintained, I desire to have the matter referred to the Secretary of the Interior for his opinion.

ST. PAUL, May 18th, 1863. G. E. COLE, Atty. Gen.

H. A. Gale, Esq., County Auditor, Hennepin County:

DEAR SIR: I am in receipt of your favor, stating that prior to the receipt of my opinion of Jan. 26, published on page 22 of decisions, a district which had already held a meeting and elected its officers, who were acting, but had neglected to file their acceptance, as prescribed by statute, held another meeting called by three freeholders, and elected a new set of officers, and that both organizations still exist, each claiming legality for itself, and alleging error and irregularity in the other. The first organization was not irregular on account of the neglect of the officers to file their acceptance. That requirement, as I have repeatedly held, was simply directory. If the first was regular, it follows, as a matter of course, that the second was not. I am aware of no provision of law which authorizes the calling of a meeting of the voters of a district already organized and having a board of school officers, by three freeholders. You should recognize the first organization.

ST. PAUL, May 18th, 1863. G. E. COLE, Atty. Gen.

His Excellency, Alexander Ramsey:

SIR: I have received your favor, stating that the warden of the Penitentiary desires a requisition from you upon the Governor of Michigan, for a convict who has escaped from the prison, and in reply have to say, that without the requisition, I do not know of any authority that the warden would have to arrest the convict in another jurisdiction. I think the case is within the act of February 12, 1793. The blank form of requisition enclosed in your letter, is, I think sufficient. I believe it is in the usual form.

ST. PAUL, May 21st, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I wrote you hurriedly in response to your inquiry of the 16th inst., with reference to the application of my opinion of May 21st, 1862, published on page 56 of the decisions of this office, to tax sales under the act of March 11th, 1862. Since then I have examined the question with some care, and have to say, that that opinion, the reasons which controlled it, and the limits within which it must be confined, may not be perfectly apparent without a brief review of the history of legislation upon tax matters since 1860.

Section 87, chapter 1, Laws 1860, provided for redemption from tax sales upon payment of taxes with 20 per cent. penalty and interest. Section 89 of the same act, authorizes the auditor to draw his warrant for the amount so deposited, deducting the *treasurer's fees for such services.* For what services? Evidently for receiving and paying out such moneys. By section 28 of chapter 3, the treasurer was allowed three per cent. on all moneys by him received, upon his settlement with the board. This section standing alone, would not authorize fees in the case in question; but the language of section 89 must be held to adopt that of section 28, so far as the percentage for receiving is concerned, but providing another means of payment, viz., the percentage upon moneys collected for the county, was to be deducted from county moneys; so that collected for a purchaser was to be deducted from the amount due him. It proceeded upon the theory everywhere perceptible in the law, that each fund should pay for its own collection. The language must bear this construction, or it must be disregarded entirely, and held to mean nothing. But are we at liberty to disregard the plain language of a statute? It is a rule of construction, that such construction shall be adopted as will, if possible, give effect to every word and clause. It is not to be presumed that the legislature intended that the result of its deliberate act should prove a nullity. Smith's Commentaries, sec. 488.

But it may be said that we ought not to adopt such a construction as would produce an absurd consequence. No consequence can be more absurd than that of a presumption that the legislature have used language without meaning, and with an intention directly the opposite to that which they have expressed. But as the law then stood, (and in arriving at the legislative intention we are to examine the law as framed by them, and not by the light of subsequent developments,) there was no such absurdity. The purchaser received twenty per cent. penalty upon redemption, the day after the sale, and could well afford to pay three per cent. for its collection. The legislature have repeatedly changed the provisions of section 87, and now by section 2 of chapter 6 of Laws of 1862, the purchaser receives 24 per cent. interest only, and if the land is redeemed the day after the sale, he is a loser by the deduction of the treasurer's fees. The ill effects of the provision are now apparent in the discouragement of bidders; but if the legislature in their wisdom had so regarded it, we must presume that while changing the language of section 87 they would have modified that of section 89. During the changes of three years, this section has retained its place upon the statute book. It may be urged, however, that by the same construction, the auditor would also be entitled to fees. The answer is, that the auditor is in the receipt of a fixed salary, and no fees are prescribed for him except in one solitary instance, viz., ten cents for transfer for taxation upon a sale for taxes, and which constitutes a part of the expenses of the sale. Section 89 requires the payment of all money deposited under section 87 to the purchaser, he paying the auditor's fees. The language must refer to the fee of ten cents for transfer, prescribed by section 3, chapter 9, Laws 1862.

While I am forced to this conclusion as to the general tax law, I admit that, in view of the consequences, the law should not receive a construction which will extend its operation beyond the express letter of the statute. Sec. 89 requires the deduction only in cases of money deposited under sec. 87.

The act of March, 1862, is designed as a curative act, and applies to a special class of taxes. In all its provisions it essentially differs from the general tax law. Sec. 9 provides the manner and time of redemption. The section is complete in itself: the redemptioner is to pay to the treasurer, for the use of the purchaser, the amount

for which the property sold, with interest at the rate of two per cent. per month. I cannot think that the legislature, while providing thus particularly for a single class of sales, and with the evident intention to take them out of the operation of the general law, would have omitted to prescribe fees for the treasurer, had it been intended that he should receive them; but believe that so far as it professes to legislate upon any of the subjects embraced by its provisions, it was intended to contain complete directions for closing up, and if possible rendering unassailable, the earlier tax proceedings of the State and Territory. The act is complete in itself, and in this particular, at least, is unaffected by the provisions of the general tax law. In saying this, I must not be understood to hold that there are no matters connected with sales under the act of 1862, to which the provisions of the general law will not apply. There are doubtless many incidents arising out of such sales in which the act of 1862 is silent, leaving them to be governed by general provisions; but in all cases in which the law professes fully to regulate the subject, as the time and manner of the sale, the form and effect and time of execution of the tax deed, the mode and time of redemption, &c., it is complete in itself.

ST. PAUL, May 26th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, enclosing letter from the auditor of Carver county, stating that the town of Liberty having been organized by taking portions of the territory from the towns of Chaska and Carver, and which organization I have already decided was a nullity, that the assessors of the latter towns were elected by the legal voters of the territory remaining after the organization of Liberty, and I am asked if they can legally assess their respective towns in the same manner as if all the citizens of their respective towns had participated in their election. Without doubt they can. The organization of Liberty being a nullity, the towns of Chaska and Carver remained unchanged, and all voters in the territory embraced in the attempted organization of Liberty were entitled to cast their votes in the town to which they belonged before such attempt. But the fact that they neglected to do so, cannot affect the election; the majority even of all the voters in a town may stay away from the polls; still an officer receiving the votes of the majority of those present and voting, will be none the less legally elected.

ST. PAUL, June 8th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

I am in receipt of your favor enquiring as follows: "Are lands taken for homesteads subject to taxation as real estate?" I suppose the question has reference to rights acquired under the provisions of an act entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20th, 1862. The act provides that certain classes of persons upon making the affidavit prescribed by the act, and the payment of ten dollars, shall be *permitted to enter* the quantity of land specified. But it declares that no patent shall issue until the expiration of five years, and upon proof of continuous occupation. It is, however, treated by the act as the property of the settler, and although not transferable by deed, passes by descent or will to his heirs or devisee, and may be sold by the administrators for the benefit of infant children.

If it shall be proved, however, that the settler has ceased to occupy it for six months, it reverts to the United States. Here are all the elements of a legal title, fully vested in the settler, but subject to revert to the grantor, the Government, upon a breach of the condition under which it is held. The delay in the issuance of the patent does not prevent the vesting of the title. It has repeatedly been held that the patent does not constitute the title, but is simply the evidence of it, and when issued takes effect and derives its vitality from the original entry. In the

case of Carrol vs. Safford, 3 Howard's U. S. Rep. 441, the court says: "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not at equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors and administrators. In every legal and equitable aspect it is considered as belonging to the realty. Now why cannot such property be taxed, by its proper denomination, as real estate?" It is difficult to see why this reasoning does not fully apply to the case before us.

Two objections occur to me. It may be urged that the possibility of reversion to the United States is a sufficient reason why they should not be taxed, as it would thus be an interference with the primary disposition of the land. The same objection was urged in the case which I have cited; but it was answered: "The State does not warrant the title of land sold for taxes. The purchaser acts on the presumption that the settler has and will act honestly, and in good faith carry out his contract with the Government; and if not, the purchaser acquires no title, and the Government is of course at liberty to dispose of it." But a further and more serious difficulty arises from the consideration that a sale for taxes could vest no title in a purchaser, as no sales would be recognized by the Government, and if the settler should be dispossessed under State laws, he would lose all right under the act. Perhaps the readiest solution of this difficulty may be found in the decision of the court in Lessee of Wallace vs. Leman *et al.* 7 Ohio, 156, "That where lands have been entered and sold for taxes before patenting, when patented the patentee should hold the land subject to any claim which the purchaser at a tax sale may have in consequence of such sale." It is certain that in Ohio lands were held taxable after entry, and not only before patenting, but before payment. I think, therefore, your question must be answered affirmatively.

ST. PAUL, June 9th, 1863. G. E. COLE, Atty. Gen.

Col. Oscar Malmros, Adjutant General:

DEAR SIR: I am in receipt of your favor, inquiring whether persons exempt from military duty by the act of Congress of 1792, providing for the organization of the militia, but not exempt by the act of March 3d, 1863, providing for the enrolling and calling out of the national forces, are liable to military duty in the State militia. The 17th clause of section 8 of article 1 of the constitution of the United States confers upon Congress the power to organize, arm and discipline the militia, reserving to the States the appointment of officers and the authority of training them according to the discipline prescribed by Congress; under this section the power to organize the militia and to govern them until called into the service of the United States, is concurrent in the State and national governments, but when the power was exercised by Congress by the enactment of the act of 1792, all State laws upon the subject became subordinate to the paramount law of the United States, and no State militia laws are valid except so far as they concur with and are not repugnant to the act of Congress. Houston vs. Moore, 5 Wheaton, 1. Hence the omission of the word "white" in the militia law of Massachusetts was held of no effect, that word being inserted in the act of Congress. If, therefore, the act of 1792 remains unrepealed, its provisions must control those of the State law, and persons exempt by its terms are not liable to service in the State militia.

I think the acts of 1792 and that of 1863 are upon entirely different subjects, or at least that the provisions of the former from sections 1 to 16 inclusive embrace a subject not within the purview of the latter. The one contemplates a general and permanent organization and discipline without reference to actual service. The latter clearly contemplates an efficient mode for calling the militia into the service of the United States. The exemptions are not from all military duty, but from the provisions of the act. There is nothing incompatible in the two acts; both may well stand together, and there is no repealing clause in the latter—repeals by impli-

cation are never presumed. I hold, therefore, that the act of 1792 is in force, and that its provisions must control the matter.

ST. PAUL, June 13th, 1863. G. E. COLE, Atty. Gen.

Col. Oscar Malmros, Adjutant General:

DEAR SIR: I am in receipt of your communication, enclosing enquiry whether under section 9 of title 8 of the militia law, chapter 4, Laws Extra Session 1862, a justice of the peace has the power to grant a citizen arrested for failure to perform military duty, a trial by jury. I think a party so arrested is entitled to a trial by jury. Sec. 6, art. 1, of the constitution declares "that in all criminal prosecutions the accused shall enjoy the right to a speedy and impartial trial by an impartial jury of the county," &c. Sec. 1, page 507, Compiled Statutes, is explicit. In all trials for criminal offences before a justice of the peace, when the accused shall demand a trial by a jury of twelve men, such jury shall be empaneled by the justice as therein prescribed. This section is general and will apply to all offences created by future legislation, and applies, I have no doubt, to the case in question.

ST. PAUL, June 20th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Auditor of State:

SIR: I am in receipt of your favor, enclosing letters of I. W. Sencerbox, county auditor of Scott county, enquiring:

1st. Whether town lots are within the meaning of an act entitled "An act in relation to the redemption of lands sold for taxes, and relating to taxes and tax sales," approved March 11th, 1862. There can be no doubt that they are both within the letter and the spirit of it.

2nd. Are certificates of purchase at a tax sale taxable? The certificates are not, but the land should be transferred for taxation by the auditor to the name of the purchaser. Sec. 3, ch. 9, Laws 1863.

ST. PAUL, July 10th, 1863. G. E. COLE, Atty. Gen.

F. Belfoy, Esq., County Attorney, Sibley County:

DEAR SIR: I am in receipt of your favor submitting to me certain objections to ch. 3 of the Session Laws of 1863, providing for the assessment and collection of a poll tax:

1st. It is urged that it is unconstitutional. Judicial tribunals are extremely reluctant to hold a deliberate act of the legislature unconstitutional. Inferior courts, perhaps, ought never to do so, and courts of last resort will seldom declare a law unconstitutional, except in the absence of all reasonable doubt. *A fortiori*, an executive officer entrusted with the execution of the laws framed by the legislature, ought never to do so except in extreme cases, and where the unconstitutionalty of the act is entirely clear.

2d. It is urged that the law does not apply to persons not legal voters. The language of sec. 1, ch. 3, Laws 1863, is, "every white male inhabitant or legal voter." The use of the alternative implies that all persons embraced by either of these terms shall be subject to the tax. The insertion of the term "legal voter" was induced doubtless by a desire to include a somewhat large class of our population, viz.: persons of Indian and mixed blood, who by the constitution are entitled to all the privileges of citizens. A different conclusion can only be reached by construing the word "or" to mean "and" as is sometimes done. This construction, however, is, I think, never resorted to except when clearly necessary to give effect to the clause in which it occurs, and I see no such necessity for it here. Neither do I perceive any just cause of complaint on the part of foreigners or others who are not legal voters. I cannot express what seems to me the correct view of the subject in language better

than that used by the Supreme Court of Massachusetts in a somewhat similar case, (see 7 Mass. 523:) "As aliens residing among us receive the protection of the commonwealth, and are secured in the fruits of their labor, and in the acquisition of goods and chattels, this contribution may be exacted as a reasonable price of this protection and security, and when an alien is obliged to pay no other tax on his poll and estate than is required from a citizen having equal personal ability and estate, he cannot complain that the assessment is inequitable."

I agree with you therefore in your construction of the law.

ST. PAUL, July 12th, 1863. G. E. COLE, Atty. Gen.

Col. Oscar Malmros:

SIR: I am in receipt of your favor desiring my opinion as to the right of line officers under the militia law of this State, to cast their votes for field officers, by proxy. If there is any provision in the militia law which has changed the common law upon the subject of elections, it has escaped my notice.

Messrs. Angell & Ames, in their work on Corporations, say, "that the only case in which a vote by proxy was allowable at common law is by the peers of England, and that is said to be in virtue of a special permission of the king."

The Supreme Court of Connecticut says, "that by the common law every vote given in a corporation, instituted for the public good, either the good of the whole State or of a particular town or county, must be personally given—so also every vote given by a freeman for his representative, must be given by himself in person." State vs. Tudore, 5 Day's Reports, 329.

I think, therefore, votes by proxy are not admissible, but if they were, it seems the persons authorized to cast their votes transferred the proxies to others upon the principle well established in the law, "that delegated power cannot be delegated." I do not see how this course can be sanctioned.

ST. PAUL, July 22d, 1863. G. E. COLE, Atty. Gen.

J. L. McDonald, County Attorney, Shakopee, Scott County:

SIR: I am in receipt of your favor of the 20th inst., inquiring whether a criminal prosecution can be maintained under our statutes for gambling, or must the remedy be confined to a civil action in the name of the county. Section 6 of chapter 95, Compiled Statutes, provides "that all fines and forfeitures mentioned in this chapter may be recovered before a justice of the peace, in, and in the name of, and for the use of, the county where such offence may have been committed;" and by section 7, "the district attorney shall, upon notice, prosecute such suit in the name of and for the use of the county." At common law the keeping of a common gaming house is indictable as a nuisance, and punishable by fine and imprisonment. People vs. Jackson, 3 Denio, 101. When an act is already made penal and punishable by indictment, and a further mode of prosecution is given by statute, it is held to be cumulative and does not by implication take away the existing remedy. Commonwealth vs. Howes, 15 Pick. 231. I think, therefore, that a person may be indicted for keeping a common gaming house. But at common law, mere gaming was not indictable unless excessive. 1 Russell on Crimes, 453. Where a new offence is created by statute, or, in other words, when an act not before subject to punishment is declared penal, or subject to any specific penalty or forfeiture, and a mode pointed out by which it shall be prosecuted, that mode alone can be pursued. Commonwealth vs. Howes, cited *ante*. Our statutes give a remedy by action at the suit of the county in the nature of a *qui tam* action, and I think it is the only remedy which can be successfully pursued.

2d. You inquire what should be done if the officers of the county or town refuse to enforce the law prohibiting the sale of spirituous liquors without license. Section 7 of an act, passed August 12th, 1858, as amended by section 2 of chapter 57,

of Laws of 1860, makes it the duty of county attorneys, sheriffs and constables having knowledge of a violation of the law, to make complaint, and if other officers refuse, you, as the law officer of the county, have it in your power, I presume, to enforce it. If officers can be proved, however, wilfully to have refused to perform their duties in this particular, section 8 points out the remedy. The office may, I presume, be treated as vacant, or at least upon the election of another to the office, the court upon a *quo warranto* would probably hold so; they are also liable it seems upon their official bond.

You enquire lastly, whether a license from the general government would be any defence to a prosecution under State laws. It would not. Section 67 of the act of Congress expressly denies such effect to licenses granted under it, and I have an impression that I have recently seen in an eastern paper, a decision of the Supreme Court of Massachusetts holding the objection untenable.

ST. PAUL, July 23d, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor enclosing letter from the county auditor of Fillmore county, stating that the facts therein mentioned prevail very generally throughout the State, viz.: That through a neglect to distribute the laws of the last session of the legislature in season, nothing has been done in many towns with reference to the collection of the poll tax provided for by chap. 3 of Laws of 1863, and enquiring whether the tax can now be legally collected, the time limited therefor having expired. It is a general principle that laws for the collection of taxes must be strictly pursued or the proceedings will be void, and the county and town officers should carefully observe the most apparently unimportant formalities.

There are, however, a few exceptions to this rule, one of which is, that when a statute directs a person to do a thing in a certain time without any negative words restraining him from doing it afterwards, it will be directory merely, unless the nature of the act to be performed shows that the designation of the time was intended as a limitation of the power of the officer.

The rule is with difficulty defined, but this distinction may perhaps be regarded as the most accurate of any which can be given. All those measures which are intended for the security of the citizen, for insuring an equality of taxation, and to enable every one to know for what polls and for what real and personal estate he is taxed,—are conditions precedent and must be literally followed; but those regulations which are designed for the convenience of officers merely, and intended to promote method, system and uniformity, and the compliance or non-compliance with which do not affect tax-paying citizens, are usually treated as directory, and a non-observance will not render the proceedings void. Torrey vs. Milbury, 21 Pick. 64.

The following instances illustrate the rule: In Pond vs. Negus, 3 Mass. 232, assessors were directed by statute to assess a tax within thirty days after it was certified to them by the clerk. They neglected their duty and made their assessment after the expiration of the period named. The tax was held valid. In the People vs. Allen, 6 Wend. 486, a commanding officer of a brigade was required to call a brigade court martial on or before the 1st day of June in each year; the court martial was called more than a month after the day named, and fines assessed by it were held valid and collectible. In Colt vs. Eves, 12 Conn. 242, where jurors were required to be drawn on the first Monday of July, a drawing on the 8th of August following was held valid. Chap. 3 of Laws of 1863, requires the clerk to make a list of persons liable to poll tax eighteen days after the first Tuesday in April.

The Treasurer is required to return the list to the auditor on the 20th day of June. Owing to the accidental delay of the laws, those acts have not been performed. Can town officers now proceed with their duties under the law? The analogies drawn from the decided cases above cited convince me that they can. No private right can be interfered with; it matters not to the tax payer whether he pays his poll tax in June or July. I cannot think that if town officers had neglected their

duty in this particular intentionally, that upon a *mandamus* to compel them to discharge it, an answer that the time had elapsed would be good.

ST. PAUL, July 25th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Commissioner of State Land Office:

SIR: I am in receipt of your favor enquiring—

1st. Should suit for trespasses on school lands be brought under chapter 12 of Laws of 1861, or chapter 62 of Laws of 1862, sections 32 to 37. This may depend somewhat upon the circumstances of each case as it arises. I see no reason why in a proper case a prosecution cannot be sustained under either. Of course if a civil action for treble damages is resorted to it must be brought under the latter.

2d. You enquire whether appraisers appointed last year will hold their office and are authorized to act as appraisers of other lands as they may be brought into market by the commissioner. I think not. The language of section 46 of the act establishing the State land office, treats appraisers as merely temporary appointments. "Whenever in the opinion of the commissioner it will be for the interest of the people that an appraisal should be made, he shall appoint two," &c. After the particular appraisal to which the appraiser is appointed to make, I think he is "*functus officio.*"

3d. You enquire whether you may sell school lands at public sale at the *minimum* price without the *forms* of an appraisal. *You certainly cannot.* The appraisal is very far from being a mere form; it is one of the most vital safeguards of the law. The legislature of course could fix no value upon particular tracts; the most they could do was to provide generally against a waste of the funds by declaring that none should be sold for less than five dollars; but some lands may be worth one hundred dollars per acre even; they have therefore provided that not only shall no lands be sold for less than five dollars, but none for less than the appraisal. Without this clause the commissioner might sell any lands at five dollars per acre, although worth vastly more. The appraisers are intended as a check upon the commissioner, and are the guardians of the school fund against fraud and peculation. I regard the appraisal as the most essential feature in the law, and it can in no case be dispensed with.

4th. You also state that certain lands were appraised last year at 3 and 4 dollars per acre, that the occupants are now desirous of purchasing at $5.00 per acre, and that you do not want to go to the expense of another appraisal if you can avoid it. When an appraisal has been made the value so fixed continues to be the value until established by another appraisal, (sec. 46,) which the commissioner may in his discretion cause to be made, (sec. 17.) I do not think you are required to cause land appraised but not sold at that sale to be again appraised when offered at a subsequent sale, but it is in your discretion to do so. I may be permitted to suggest, however, that real estate has advanced considerably since the last appraisal, and the fact that the occupants are desirous of purchasing this land now at a price in advance of the appraisal, shows that it has done so. Would not the State derive more benefit from this advance than the expenses of another appraisal?

ST. PAUL, July 25th, 1863. G. E. COLE, Atty. Gen.

James D. Jaquith, Esq., County Attorney, Wabashaw County:

DEAR SIR: I am in receipt of your favor calling my attention to section 11, chapter 15, Laws of 1863, being an act to license dogs, and for the protection of sheep, and stating that no householder of a certain town in your county will make complaint, and inquiring if prosecutions can be instituted by other parties than those named. Section 11 of the act declares "that all fines, penalties and judgments provided for in the act, may be recovered on complaint of any householder of the city or town." Section 5 provides that "whoever keeps a dog contrary to the

provisions of this chapter, shall forfeit ten dollars, to be recovered on complaint, for the use of the person making the complaint." The neglect to comply with the statute is not in terms declared a misdemeanor, and the only remedy provided, seems to be in the nature of a *qui tam* action, by which the penalty is recoverable to the use of the informer. Two very simple rules of the common law seem to settle the question:

1st. When an action not before subject to punishment, is declared penal or is subjected to any specific penalty or forfeiture by statute, and a mode is pointed out in which it shall be prosecuted, that mode alone can be pursued." Commonwealth vs. Howes, 15 Pick. 231.

2d. "No action for a penalty can by maintained by a common informer, unless power is given him for that purpose by statute." Colburn vs. Sweet, 1 Metcalf, 232.

To apply these principles, an act is by this statute made criminal which before was innocent, and a mode of proceeding, to wit: on complaint of a householder of the town, is prescribed, and no person other than the householder of the town is authorized to prosecute. If the public sentiment will not sustain the law, it is useless to attempt to enforce it.

ST. PAUL, July 30th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath:

DEAR SIR: I am in receipt of your favor enclosing communication from the auditor of Fillmore county inquiring whether the following description which conforms to the original list and advertisement is sufficient in a tax deed containing several descriptions:

	Subdivision.	Section.	Township.	Range.
	S. W. ¼ of N. W. ¼	2	104	8

It is undoubtedly true that the rules governing the construction of the tax deeds are much more stringent than those applicable to conveyances by individuals. The description must be perfect in itself without reference to other instruments, and the maxim, *falsa demonstratio non nocet* which governs in the latter has no application to the former. The following rule may generally be regarded as correct. The deed must contain a certain description of the land conveyed and conform in every respect to the mode of designation pointed out by the local laws of the State, and must conform to the description adopted in the anterior proceedings.

I think the description referred to me is sufficient. No one can mistake it.

ST. PAUL, August 10th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor enquiring whether a deputy auditor can execute a tax deed; and, generally, as to the duties of Deputy Auditors. I cannot better answer you than by a quotation from a work of acknowledged authority on the subject: "The power of a deputy to sell and convey lands, depends upon the power of his principal to make a deputy. The general rule is that every *ministerial office* may be performed by deputy. The power of appointing a deputy is, therefore, implied in all such cases. Whatever power may be exercised by the principal, may be performed by the deputy, and is equally valid in the one case as the other. But the deputy must act in the name of his principal. An acknowledgment of the deed in his own name is invalid, nor has he power to execute, acknowledge, and deliver a deed in pursuance of a sale made by the principal officer. It would be altogether irregular to permit the deputy to convey what had been sold by the principal, or the principal to convey what had been sold by the deputy. Permitting the sale of one to be completed by the conveyance of the other, leads to confusion. He who com-

mences the execution of a power must go on and complete it, except when a term of office has expired, in which case either the late or the present incumbent may exercise the power. No one can lawfully convey what has been sold by another, except in the case referred to, without the express power of the law or the consent of the party in interest." Blackwell on Tax Titles, 443.

ST. PAUL, August 10th, 1863. G. E. COLE, Atty. Gen.

J. A. Sargent, Esq., County Attorney, Carver County:

SIR: I am in receipt of your favor enquiring whether a person elected to a county office having died and the vacancy having been first filled by appointment, and at the next general election the person elected will hold his office for the unexpired term or for the full term. I think for the unexpired term only; the election in such case is to fill a vacancy. Sec. 46, of chap. 15, Laws of 1861, declares that officers elected or appointed to fill vacancies may qualify, and when elected they may hold for the unexpired term, and when appointed until the next general term. The power of appointment is only a temporary expedient to avoid the expense and inconvenience of a special election; as very few if any of the vacancies constantly occurring will occur on the eve of a general election, the language of the statute must apply to an election after an appointment, or it would seldom if ever have any application.

ST. PAUL, August 17th, 1863. G. E. COLE, Atty. Gen.

Chas. A. Chapman, Esq., County Auditor, Blue Earth County:

SIR: I am in receipt of your favor stating that a teacher in one of the school districts in your county closed her school *one day* before the expiration of the term for which she was employed, and that the trustees require her to teach an extra day, and in case of her refusal, claim that they may refuse to pay her any portion of her wages for the term, and you enquire if they are correct. It is, as a matter of strict law, undoubtedly true that a contract for services for a fixed period is an entirety, and that if the party contracting for the performance of such service leaves the service of his employer before the expiration of the stipulated period, without sufficient cause, he can recover no compensation for his services either on the contract or on a *quantum meruit*. But although the courts have labored to uphold this severe doctrine, jurors have always essayed to mitigate the rigor of the law, and have seized upon the slightest circumstances as pretences for evading principles so inequitable. The case of Britton vs. Town, 6 New Hampshire, although at variance with the weight of authority, approaches much nearer to the principles of equity, and the analogies of the law, than those which hold the opposite doctrine.

This case holds that if the contract be of such a character that the party actually receives useful labor, and thereby derives a benefit and advantage over and above the damages which have resulted from a breach of the contract by the other party, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of the excess. The course proposed by the trustees named by you is particularly unjust, the damages sustained by the trivial breach are of small importance, and I shall be surprised if a jury does not find some means to avoid a decision which, whatever may be the law, I cannot but regard as unjust and inequitable.

ST. PAUL, August 22d, 1863. G. E. COLE, Atty. Gen.

His Excellency, Henry A. Swift, Governor of Minnesota:

DEAR SIR: I am in receipt of your favor, enclosing opinion of Commissioner of the General Land Office, holding—

1st. That the State is not entitled under the provisions of the swamp land grant of March 12th, 1860, to lands within the six mile limit fixed by the railroad grant.

2d. That the odd sections not taken as indemnity between the 6 and 15 mile limit may upon proper proof be secured to the State; and you request me to prepare an argument in opposition to the first of these views, if in my opinion it is erroneous. The grounds upon which the opinion of the commissioner is based, are, I presume, that the even sections within the six mile limit are duplicated in price with a view to indemnify the Government for the loss it would otherwise sustain by the grant to the State of the odd sections, and that in this view they must be regarded as reserved for this purpose, and that when land has been reserved for any purpose, no subsequent general law, proclamation or sale will be construed to embrace it. Assuming the fact of a reservation established, the general principle was announced in Wilcox vs. Jackson, 14 Peters U. S. Rep. 498. The matter, however, is by no means without doubt, and were the question an open one I should not hesitate to advocate the opposite doctrine before the department. I think, however, the point must be regarded as definitely settled so far as the department of the interior is concerned. The question was elaborately argued by Judge Seates on behalf of the State of Illinois in 1855, in a case in which the claim of the State to swamp lands within the six mile limits of a grant for the Mobile and Chicago Railroad was involved, and after full consideration, was decided by Hon. R. McClelland, then Secretary of the Interior, adversely to the claim of the State.

As to the other point, the decision of the commissioner simply amounts to this, that odd sections without the six and within the fifteen mile limit not required for railroad purposes to make up any deficiency, stand upon the same ground as other swamp lands, and if so, no special action seems to be necessary on my part. The Commissioner of the State Land Office should take such action with reference to these lands as controversies arise as he would in other cases. I may remark, however, with reference to these lands, that as the State has elected to abide by the United States field notes and surveys, these by a uniform course of decision at the department have been held conclusive upon the Government, and unless the State saw fit to produce further proof, I presume she will without proof be entitled to all such lands appearing to be overflowed by the Government plats. As the opinion of the Commissioner does not necessarily militate against this view of the subject no special argument at present seems necessary.

ST. PAUL, August 27th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, inquiring whether the treasurer who makes a sale of land for taxes may legally become the purchaser. It is a general rule that trustees, agents and others employed to sell land for the principal, cannot become its purchaser, as no one can be both vendor and vendee. The reason upon which this rule is founded is the encouragement and opportunity which such practice would give for the perpetration of frauds. Although the analogies of the law might bring the case you state within the operation of this rule, I do not think the authorities sustain it in its application to public officers in cases of this character. In support of what might seem a departure from established principles it has been remarked "that a bid by the officer making the sale might be absolutely necessary to counteract combinations to defeat the collection of the revenue, whether arising from the sympathy of the by-standers or other causes." I think upon the authorities, the action of the treasurer must be sustained, and the auditor should execute deeds to him or his assignee for lands so purchased. See Blackwell on Tax Titles, 473, *et seq.*

ST. PAUL, August 28th, 1863. G. E. COLE, Atty. Gen.

His Excellency, Henry A. Swift, Governor:

MY DEAR SIR: I am in receipt of your favor, stating that by an act to enable citizens of this State who are employed in the military and naval service of the United States to vote in the election districts in which they reside, the Governor was required to appoint commissioners; that commissioners were appointed accordingly at an extra session of 1862, who took the votes for the ensuing election; that in March last, at the regular session of 1863, another set of commissioners was appointed and confirmed by the senate to take the votes at the election of November next; and that the commissioners first appointed now claim the right to act, and insist that their offices are not terminated; and you desire my opinion as to which are the legal commissioners under the act.

In reply, I have to say, that the claims of the commissioners first appointed are entirely unfounded. The law does not prescribe the tenure of the office, but from its general object and purview it would seem to contemplate a temporary appointment merely, for each election. I do not, however, deem it important to examine or decide this question, as the rule seems to be well settled that when the term of office is not fixed by law, the office is held during the pleasure of the appointing power. The power of appointment implies the power of removal, and the appointment of another to the office operates as a removal of the incumbent.

Such has been the uniform construction of the powers of the President and departments of the general government; *Ex Parte* Hennan, 13 Peters, 230; and most if not all of the States recognize the soundness of the rule, and have adopted it. See People vs. Mayor, &c., 5 Barb. 43.

ST. PAUL, September 11th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your communication of the 10th inst., submitting to me certain inquiries with reference to the taxation of banks, and expressing a desire, as the banking interest of the State is becoming important, that I would review the whole subject so that there may be no misunderstanding hereafter. It is difficult to decide upon questions before they arise. There are, however, some few general principles not embraced within the literal scope of your inquiries, which I shall briefly advert to before proceeding to answer the questions proposed. Sec. 4 of art. 9 of the constitution declares that "laws shall be passed for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects or dues of every description, of all banks and bankers, so that all property employed in banking shall always be subject to taxation equal to that imposed on the property of individuals." Sec. 9 of the general banking law enacts in terms this provision of the constitution. Sections 54, 55 and 57 of the tax law of 1860, as amended by sections 14 and 15 of chapter 1 of Laws of 1861, prescribe in detail the means of carrying into effect the general provisions before cited. A fundamental principle which lies at the foundation of all taxation and is incorporated into the constitution, sec. 1, art. 9, is that of equality, and in construing the law under consideration it should be borne in mind that double taxation is in no case allowable, and that any law requiring it would be unconstitutional, oppressive and void. This principle is fully recognized by the tax law, and no person is required to list shares of the corporate stock of any corporation whose taxation is specifically provided by the act. 1st, then, I remark that the stockholders of banks incorporated under the general banking law, are not taxable for their shares. 2d, that all property of banks is to be taxed as prescribed by sections 54, 55 and 57, except real estate, which is to be taxed where it is situated. I do not know that any doubt has arisen as to the right to tax the real estate of banks, but thinking a question may arise from the peculiar language of sec. 57, it is to be observed that the term moneys, effects or dues in the second clause of section 54, do not include real estate; that by section 20 of the general banking law a large proportion of the capital of a bank

may in the usual course of business be converted into real estate, which would escape taxation altogether, unless held taxable as such; this result would be a plain violation of the constitutional provision, requiring all bank property to be taxed equally with that of individuals, and would also conflict with another clause of the tax law, declaring that all real real estate is to be taxed where situated. There are many other important questions growing out of the tax law, but as you have not raised them I prefer to express no opinion until they come regularly before me. I come now to the questions raised by you.

1st. If the president and cashier of a bank return an incorrect statement, shall you proceed at once, as though no statement had been made? Section 57 declares that in case the president and cashier refuse or omit to make such a statement, (as is prescribed by sections 54 and 55,) the auditor shall ascertain the amount, &c. An incorrect statement is certainly not such a statement as is required by the act. If by an incorrect statement you mean a statement legally defective; but if on the other hand you refer to a statement false in fact, but *prima facie* in strict compliance with the law, and containing no legal defects, I think it will be binding upon you, as I find in the law no authority for you to decide a question of fact in such cases. You may therefore properly disregard a statement not in compliance with the law, and act as though none had been made.

2d. "Are Minnesota State railroad bonds taxable by the State?" The claim of the holders of these obligations is, as I understand, that as the State pays no interest, they are not within the scope of the second clause of section 54, which provides "that all moneys, effects or dues of every description upon which such bank or banking company receives *or is entitled to receive interest* shall be included in the statement. This enquiry presents a somewhat embarrassing question. It matters not whether the State pays interest or refuses to do so, the sole point upon which the question turns, is, whether the holders are entitled to interest and this raises the old and vexed question as to the legality of these bonds. If they are valid as against the State, the holders are entitled to interest, and they are taxable within the literal meaning of the law. If the holders are willing to accept this dilemma, consider the bonds void, and withdraw them as a basis for banking, I presume the State will not insist upon the right of taxation. But on the other hand, so long as they are treated as valid, and deposited by the holders as a basis for banking, they cannot be regarded as void.

Some of these bonds are on deposit at the rate of 50 or 60 cents on the dollar, while their market value is but 17. Notwithstanding this the legislature has repeatedly refused to place adequate power in the hands of the State officers to enforce a compliance with the provisions of law requiring this deficiency to be made good. Without, therefore, deciding upon the general question as to the validity of these State obligations, I place my decision upon the ground that the action of the State has not been such as to authorize her executive officers to declare a class of obligations issued in pursuance to an express provision of her constitution void, and that unless void, although the payment of interest may be delayed, the holder is entitled to receive it, and is not therefore exempt from taxation within the section before cited. I am fully aware of the hardships which result from this view of the law, but this consideration, although entitled to great weight with the legislature, to which holders should apply for relief, cannot affect or control the duties of an executive officer. I may say here, lest my answer to your first question should be misunderstood, that in case a banker having Minnesota railroad bonds or others on deposit in your office should refuse to include them in his statement, claiming that they are not taxable, this would present a question of law, and although his statement might be *prima facie* in compliance with law, yet being fully contradicted by the records of your office, I think you would have a right to disregard it.

3d. "Are the circulating notes of a bank to be regarded as moneys or effects employed with a view to profit?"

They are not. These bills as fast as issued are taxable under the head of notes, bills discounted or some one of the numerous heads under which the capital is taxable; any other construction would involve double taxation, against which I have

already cautioned you. I refer of course to these notes while in the hands of the banker. See opinion of October 10th.

4th. You enquire if these notes are not taxable in the hands of a banker, are they not in the hands of a broker. They certainly would be, if the banker and broker were different persons, but if in the case you instance "the Bank of Minnesota and Thompson Bro's" are the same persons acting under different names, and are really the owners of the circulating notes of the bank, I can hardly see how by adopting a different name you can obtain the right to tax them for their own paper before they have put it in circulation. If I understand the mode of proceeding proposed, you would tax the Bank of Minnesota for the bonds deposited to secure the circulation; you would then tax Thompson Bro's, the owners of the Bank of Minnesota, for the circulation, and then tax the bank for the notes discounted and bills purchased with such circulation. This would also be double taxation of the most oppressive character.

5th. "Are the legal tender notes to be considered as specie funds for the redemption of circulating notes?" It may be doubtful whether legal tender notes would, in any event, under the decision of the Supreme Court of the United States, in Peters vs. City Council of Charleston, be taxable by State authority, but as the decision of this question becomes unnecessary from the view which I have taken of the statute, I have not examined it. The term "specie" in its ordinary acceptation does not, it is clear, include legal tender notes or paper money of any description. The rule of construction applicable to the case is "That when the words of a statute are plain and clear they are to be understood according to their general and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the statute by reason of some subsequent clause from whence it might be inferred that the intent of the legislature was otherwise. But if from a view of the whole law the evident intention is different from the terms employed to express it in a particular part of the law, that intention should prevail, for that in fact is the will of the legislature." Smith, Com. sec. 650. There can be little difficulty in arriving at the meaning of this clause, which was to exempt funds retained (and not used for profit) solely for the purpose of protecting outstanding circulation. At the time of the passage of the act there were but two classes of funds which could be used for this purpose,—specie funds, viz., gold and silver on hand in the vaults of the bank, and bills of other banks included under the head of balances due from other banks upon which gold and silver was payable if demanded; but since that time, owing to the state of the country, gold and silver have become articles of commerce, have disappeared from circulation, and are unavailable for the purposes contemplated by the law, and legal tender notes have taken their place. They are used for precisely the same purpose, and the object of the law being to exempt funds not invested, but kept on hand for the purpose named, there can be no doubt that they are exempt within its clear intent and meaning.

ST. PAUL, September 12th, 1863. G. E. COLE, Atty. Gen.

E C. Severance. Esq., County Auditor, Dodge County:

DEAR SIR: I am in receipt of your favor, stating that at a meeting of the county commissioners, a petition from a portion of the inhabitants of a school district asking for a division of the district, and also to attach a strip one-half mile wide in an adjoining township and district to one of the parts thus divided, and thus form two districts, was granted. It is further stated that a majority of the voters in the original district are opposed to the change, and that those who signed the petition from the district in the adjoining town did not propose to interfere with the division of the other district, but simply to indicate their assent to detaching a strip of one-half mile in width from their district, and I am asked whether under these circumstances the decision can be sustained. The language of section 5 of the school law is as follows: "The county commissioners shall have power to create new

school districts, change the boundary of districts, or unite two or more districts whenever a petition signed by a majority of the legal voters of *the territory to be affected thereby*, shall be presented to them, requesting such organization or change." It is a matter of no importance with what object any of the signers of the petition affixed their names; the sole question is, "*Have a majority of the legal voters of the territory to be affected thereby requested the change?*" If they have, the action of the commissioners is valid; if not, they acquired no jurisdiction, and the decision is a nullity.

What then is the territory to be affected? Obviously, the two districts, from each of which a portion is to be taken. Not an acre of land can be taken from any district and attached to another without diminishing the amount of taxable property of the one, and proportionately increasing that of another. No scholar can be taken from one district and transferred to another without diminishing the revenue of the one and enhancing that of the other. A majority of the legal voters of the territory comprising both districts as they exist before the division, is therefore a majority of the legal voters of the territory to be affected thereby.

ST. PAUL, September 14th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of a letter from the county auditor of Washington county, stating that a school district in that county has voted to raise a sum of money for building a school house, exceeding the amount which school districts are authorized by law to raise in "any one year," and enquiring whether pursuant to this vote the auditor is authorized to levy eight mills on the dollar on the property of the district, being the amount to which districts are limited by law, and disregard the excess. The authority of the auditor to extend the tax upon the list is derived solely from the vote of the district. If therefore the vote is void, all subsequent proceedings would fall with it. If the foundation fails, the superstructure cannot stand. In the levy and collection of taxes the injunctions of law should be strictly followed; if not, no part of a tax levied can be sustained. 19 Ohio, 324. The power of the majority of the legal voters of a school district over the property of the minority is limited to such cases as are clearly defined and provided for by the statute which confers the power of taxation. The auditor is required to levy the tax as reported to him, and if that is in excess of the statutory limit, no power is conferred upon him to make that which is void in its inception, valid by a subsequent correction.

ST. PAUL, September 23d, 1863. G. E. COLE, Atty. Gen.

F. E. Baldwin, Esq., County Attorney, Sherburne County:

MY DEAR SIR: I am in receipt of your favor of the 26th ult., referring me to chapter 26 of Special Laws of 1863, providing for the removal of the county seat of Sherburne county. The law provides, first, for a change of the county seat. Secondly, it directs the question to be submitted to the electors of the county at the next general election, and prescribes the manner in which the votes shall be canvassed and returned. Sec. 7 declares "that this act shall take effect and be in force after its submission to and adoption by the electors of the county, and not before." You state that inasmuch as the language of section 7 is general and applies to the entire act, you are of the opinion that no part of the act can be in force, and that no vote can be taken at the next general election. In this I think you are mistaken. Statutes are to be construed by the light afforded by other laws upon the same subject, and by the intention of the legislature as gathered from the context.

Cases are by no means rare in which a literal reading of a word would, as in this case, not only defeat the object sought to be attained, but directly conflict with the intention of the framers of the law as expressed in other portions of the same law. In such cases the intent only is to be consulted. The law in question is framed with

a careful reference to the constitution and the decisions of our courts. Sec. 1 of art. 11 of the constitution declares "that all laws for removing county seats shall *before taking effect* be submitted to the electors of the county to be affected thereby, at the next general election after the passage thereof, and be adopted by a majority of such electors." The supreme court, commenting upon this clause of the constitution, has said: "The legislature must, in every case of a removal of a county seat, pass a special act to take effect upon its adoption by the electors of the county at the next general election after its passage." Ross vs. Swensen, 6 Minn. 428. The gist of the law, its sole aim and object, is the removal of the county seat of Sherburne county, and it is to this, and this only, that the language of section 7 can be held to apply.

ST. PAUL, October 3d, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: Referring to my opinion of September 12th, 1863, upon the taxation of banks, and to further inquiries made by you, explanatory of your previous ones, you now state that certain brokers who are the owners of a bank of issue, refuse to return any statement of notes discounted, claiming that their bills are passed over to them as individual brokers, and are not used by the bank with a view to profit, and also claiming that, as they are the owners of the circulation, they cannot be taxed for that as brokers.

While, as stated in my former opinion, you are not at liberty to go outside of your office and investigate the concerns of the different banks in the State to enable you to decide whether as a matter of fact a statement is true, yet whenever a statement is returned to you which is shown to be utterly false by the records of your office, and is made so by a false legal theory adopted by the bankers, you may, and it is imperatively your duty, to require a proper certificate, and to disregard any other.

In this case the bank and individual brokers who are the stockholders and owners, are, in the eye of the law, distinct persons and capable of contracting with each other as such. You cannot, as I said in my former opinion, tax the bills discounted by the bank and the circulation owned by it, because this would be double taxation, but you can and should tax it once. If the bank passes its currency over to its stockholders a legal indebtedness at once arises in favor of the bank against its stockholders. If, as they claim, the bank does not use its circulation with a view to profit, and that it is entitled to receive no interest from its stockholders, then the brokers who do have the use and benefit of its circulation, who are really the owners of the bank, but legally distinct individuals, should be taxed on such circulation as for moneys, &c. This idea may be better illustrated by the case of a bank owned by many stockholders, each owning and holding a certain number of shares. In all the business between any individual stockholder and the bank, the same relations are preserved as between the bank and an ordinary customer. If the stockholder desires a loan of $5,000 his note is discounted and becomes taxable as bills discounted, the money in his hands is regarded as launched into circulation, and is taxable in his hands as so much cash.

The legal relations of the contracting parties are in no respect affected by the fact that should the bank fail to redeem its bills, the stockholders would be liable, nor by the consideration that he is a part owner of the bank. The bank may, it is true, give or loan without interest even in this case a portion of its currency to a stockholder. If so, it would not be required to return this transaction under the head of bills discounted for taxation, but the currency would still be taxable as money in the hands of the stockholder.

A distinction between the case I have just instanced and one in which the capital of a bank is owned entirely by an individual broker, may seem to exist. In the former case no one will deny that the law is as I have stated it, but in reality it will be apparent to every lawyer that there is no legal distinction between the two cases. The bank has as much a distinct legal existence, and is as certainly a distinct person from one stockholder as from twenty.

My first opinion was upon this point given upon a misunderstanding of the question presented and some of the language may be too broad, but with this explanation will not mislead you.

ST. PAUL, October 10th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor enclosing letter of county attorney of Benton county, stating that judgments have been obtained against the county on certain bonds issued by it, and demand made on the county commissioners, and a certified copy of the docket of the judgment presented to them, pursuant to the provisions of section 17, page 617, Compiled Statutes, and inquiring—

1st. Must the court issue any other order before the commissioners will become liable for contempt of court? The commissioners can commit no contempt unti a formal command is addressed to them by the court. This command is in form of writ of *mandamus*, and most of the points raised by Mr. Sweet's letter depend entirely upon the inquiry, whether *mandamus* lies in cases of this character. It may be stated generally that a writ of *mandamus* lies only in cases where there is no other specific and adequate remedy at law. Have the judgment creditors any other *specific and adequate remedy* in this case? Section 18, page 617, Compiled Statutes, declares that upon filing the certified copy of docket, as prescribed by the preceding section, the commissioners *must* proceed to levy a tax for the payment of the judgment and interest. Section 15, article 1, chapter 15, Laws of 1860, also declares that judgments shall be levied and collected as other county charges are. These provisions must be regarded as modified by those of sections 73 and 76, chapter 1, of Laws of 1860, the first limiting the amount of tax to be levied in any one year to three mills on the dollar, and the latter authorizing, when necessary, the addition of fifty per cent. to the established rates, for the purpose of paying debts already contracted. This money is to be exclusively appropriated to the purpose for which it was raised (sec. 76.) The treasurer is required to receive county orders in payment for county taxes, (sec. 21, chap. 3, Laws 1860.) But although this direction is general, I think it is controlled by the provisions of sec. 76, chap. 1, Laws of 1860. If these moneys are to be appropriated exclusively to the purpose for which they were raised, they cannot be applied to the payment of county orders issued for other purposes; and I think the tax should be collected in cash. It is from these provisions of law entirely clear, that the commissioners should, within the prescribed limit, proceed to levy the tax. In case they refuse to do this, the question still recurs,—has the judgment creditor a remedy by *mandamus*?

Section 20, page 617, Compiled Statutes, declares that no execution can issue except by leave of the court, and leave can only be granted after a demand has been made upon the commissioners and they have wrongfully refused to levy the tax. Section 15, art. 7, chap. 15, Laws 1860, while it does not repeal the sections published on pages 616 and 617 of Compiled Statutes, modifies them so far as they conflict with its provisions, and provides that "such judgments shall be levied and collected as other county charges, and when collected shall be paid by the county treasurer; but if payment is not made after the time the collector of taxes is required by law to make his return of county taxes next after the rendition of said judgment, execution may be issued on said judgment; and a clause of section 20, page 617, Compiled Statutes, still in force, declares, "that when execution is issued the property of the county only is liable.

Is the limited and qualified right to an execution on such judgment, such a plain, specific, and adequate remedy at law, as will deprive the party of his right to a *mandamus*? I am of opinion that it is not, and that a *mandamus* will lie to compel the commissioners to perform their duty. The law leaves no discretion in them; the levying of the tax is a mere ministerial act which they are expressly enjoined to perform. The law certainly contemplates the levying of a tax as the usual and proper if not the only mode of satisfaction. As the execution can only

affect the property of the county, this remedy would be in most cases entirely inadequate.

The common law recognized the inefficiency of this mode of relief against a municipal corporate body, having no corporate fund, and provided for the defect by making each inhabitant of a county liable in his person and private estate to the execution. Our statute having taken away the only provision of law which rendered the execution available in ordinary cases, has destroyed its efficiency. Very few of the counties of this State have as yet county buildings even; many have no corporate property whatever, that an execution could reach. See People vs. Supervisors of Columbia County, 10 Wend. 363.

If, however, the commissioners desire to make this point, and have it adjudicated upon by the courts, their proper course will be to delay action until a writ of alternative *mandamus* is served upon them, which is the form usually adopted. They will then have an opportunity to appear and make their defence or show cause why the writ should *not* issue; and they cannot be harmed until they have been heard and judgment awarded against them, and a refusal on their part to obey the writ of peremptory *mandamus* which will then issue.

Our statute, it is true, provides that in a plain case, a writ of peremptory *mandamus* may issue in the first instance, and if this should be done, the commissioners must obey it; but the supreme court says, "where applications have been made for the writ to this court, it has been a universal custom to make an order that the defendant have notice. This rule will be adhered to, save in instances where the duty sought to be enforced is very clear, and public or private rights would be jeopardized by delay." 2 Minn. 342. And it is said by approved text writers that without due notice of motion, a *mandamus* will never be granted. Angell and Ames on Corp. sec. 715.

I think there is no doubt, therefore, that the commissioners will have an opportunity to be heard before they can be compelled to act; and I would advise them, if they see fit to contest the question, to raise the point that there is another plain and adequate remedy at law, which is the only one upon which there is any doubt.

ST. PAUL, October 12th, 1863. G. E. COLE, Atty. Gen.

Howard M. Atkins, Esq., County Attorney of Mille Lac County:

DEAR SIR: I am in receipt of your favor of the 6th inst., inquiring—

1st. Whether the act of February 24th, 1863, (ch. 18, Laws 1863,) fixing the term of county commissioners in certain counties at one year, applies to commissioners previously elected under the provisions of ch. 6, Laws of 1861, which fixed their term of office at three years. I think that it does. The validity of such a law was conclusively shown by the very able reasoning of the court, in the case of Butler vs. Pennsylvania, 10 How. 402. And the rule of construction, that no retrospective effect shall be given to a law unless it is expressly declared to have that effect, can hardly be said to apply to this case, as, although the commissioners were elected prior to its passage, the subject-matter upon which the law is to operate, is the future tenure of the office. The case might appear plainer, although the principle would remain the same, if the tenure was for life, and by an act of the legislature reduced to years. There can be no doubt that such a law would apply to the tenure of officers elected prior to its passage. See 5 Watts & Serg't, 418.

2d. You state that in 1860, a portion of Benton county was attached to Mille Lac county; that the county commissioners of the two counties have been unable to agree upon the share of county funds, and the *pro rata* of county indebtedness that should be apportioned to each; that the difference principally arises from a contest as to certain school moneys in the county treasury of Benton county at the time of the division, belonging to the town of Princeton, which is located in that portion of the county formerly belonging to Benton. You further state that Mille Lac was originally attached to Morrison county for judicial purposes, and that the commissioners of your county (the county having been first organized in 1860) have come

to no settlement with the authorities of Morrison, having doubts as to the legality of taxes levied by that county, from the fact that the union of the two counties was for judicial purposes only. You also state that the authorities of Benton and Morrison retain the delinquent tax lists for taxes assessed by them, and are selling lands in Mille Lac county, under the provisions of ch. 4, Laws of 1862, and giving deeds, and that this creates great confusion, &c. A series of difficult and embarrassing, but extremely important and interesting questions arises from this state of facts. The rapid rise of Minnesota from a wilderness to a prosperous community, clothed with all the powers, rights and incidents of a sovereign State; the loose and careless legislation which has attended her progress; the rapidity with which vast tracts of uninhabited territory have been erected into counties; the ignorance or indifference to the situation of these frontier counties which has characterized legislation, have resulted in a state of chaotic confusion, which is greatly to be deplored. Many of the questions arising from these circumstances are peculiar to ourselves, and upon which authorities and precedents drawn from the common law or statutes of older States throw but a feeble and uncertain light.

The question suggested by the statement of facts submitted by you and recapitulated above, may be stated as follows: 1st. Is Mille Lac county entitled to any share of the funds of Benton county, or bound for any of its obligations? 2d. Is Princeton entitled to the school moneys in the treasury of Benton county, and apportioned to her at the time of the division? 3d. Was the action of Morrison county in levying taxes in a county attached to it for judicial purposes only, valid? 4th. Can Mille Lac claim any portion of the funds or deliquent taxes due Morrison county; and is she liable to any of its obligation? 5th. Is the action of the authorities of Morrison and Benton in selling lands, giving deeds, and closing up tax proceedings affecting lands in Mille Lac, having their inception prior to any division or organization of the latter as a separate county, valid?

These questions will be considered in their order:

1st. Is Mille Lac county entitled to share in the funds, and contribute to the payment of the obligations of Benton county? There is high authority for saying that if an act separating a portion of a county from it, and attaching it to another, contains no provision for the payment of debts or the division of funds, all the property and credits of the original county, as well as all the obligations and duties which accrued before the division, will remain to it. Hampshire vs. Franklin, 16 Mass. 75. Upon the general law of corporations, therefore, if there is no express provision of any statute, Mille Lac has no claim on Benton for any portion of its funds, and Benton has no claim on Mille Lac for any contribution towards the discharge of its obligations. The legal relations of the two counties are then as stated, save in so far as they are changed by sec. 8, page 92, Comp. Stat., which provides that a *pro rata* of whatever debts may be found to be due by the county of Benton on the first day of April next, after the passage of that act, shall be charged to certain counties by that act set off from Benton and erected into separate counties or reserved to be attached to other counties at some future time. This act, in terms only, applies to the debts of the county and not its property. Upon my first examination of that law, I thought that possibly that portion of Benton county now embraced in Mille Lac, might be included in the territory there mentioned. A more careful examination, however, convinces me that it is not, and I have been able to find no other statute bearing upon this point.

2nd. Is Princeton entitled to the school moneys in the treasury of Benton county, and apportioned at the date of the division? If that town was a regularly organized school district, under chap. 29, Rev. Stat., and if pursuant to sec. 11 of that chapter a certain and definite share of the school moneys in the county treasury of Benton, at the time of the division, had been apportioned to it, and thus become subject to the drafts of its trustees, I think that by the operation of that section, and of the act of February 20, 1856, entitled "An act for the relief of school districts." (Comp. Stat. 361,) this money became vested in the town of Princeton; that no subsequent action of the county or the legislature, could divest her rights in that particular; and that the moneys in the treasury, and apportioned to Princeton, at the time of

the division, are subject to the drafts of its trustees. As to moneys apportioned afterwards, the same rule would apply as to ordinary county funds.

3d. Can the action of the authorities of Morrison in levying taxes in counties attached to it for judicial purposes only, be sustained? Sec. 21, p. 77, and sec. 41, p. 80, Comp. Stat., provide that counties attached to others for judicial purposes, shall, for the purpose of the assessment and collection of taxes, be deemed to be within the limits of the county to which they are attached and as forming a part thereof. These sections, therefore, seem fully sufficient to justify the action of Morrison county. It would, indeed, in the early years of our territorial existence have probably been impossible to collect the revenue in these sparsely settled localities, had not this expedient been resorted to.

4th. Can Mille Lac claim any portion of the funds as delinquent taxes due Morrison county; and is she liable to any of its obligations? I presume that the people of counties so situated have acted generally upon the supposition that an account should be kept between the two counties, and that each should share *pro rata* in the funds and indebtedness. But is this view of the matter correct? were not Mille Lac and Morrison, so long as the former was attached to the latter for all practical and legal purposes, one county, and so within the rule already applied to Benton county? The object of county organizations is the enforcing of private rights and the redress of public and private wrongs, and the organization necessary to effect these objects is supported by taxation. This entire organization was in operation in the county of Morrison, but not in that of Mille Lac, for judicial purposes, and for the purpose of the assessment and collection of taxes they are declared to be one county; and these embrace almost all the functions of county government. To the support of this, the inhabitants of Mille Lac contributed their share, and upon the separation of that county from Morrison, the effect is precisely the same as the separation of an entire county. By the withdrawal of the taxable property of Mille Lac, much larger burdens are imposed upon the county of Morrison; and if it leaves her with the debts of Morrison county upon her hands, equity would seem to require that she should retain the delinquent taxes to enable her to meet them. It has indeed been held in a similar case that a county attached to another for judicial purposes could not, in the absence of any express provision, be compelled to reimburse the latter for any portion of the expenses of courts, &c.; Hampshire vs. Franklin, 16 Mass. 88; and if this be correct it would seem to follow, as a consequence, that she ought not to draw from an organized county any portion of the revenue by which that expense is to be supported.

I am aware that the legislature declared many of these unsettled counties organized, and provided for the appointment of a full board of county officers by the Governor; but as this could not have been necessary when another county had elected a full set of officers competent to act for both counties, and as the legislature must have found that the attempted organization had proved a failure, otherwise they would have had no occasion to provide for the performance of the functions of government by another county,—I may fairly presume that the laws providing for an organization of Mille Lac county remained inoperative, so far as any county action was concerned, until its organization in 1860. I think, therefore, that Mille Lac county must, so far as the present inquiry is concerned, be regarded as composing a part of the county of Morrison for the purposes of county government; and that while she cannot be called upon to pay any debts of Morrison, she is entitled to none of the delinquent taxes raised to support that government, although levied upon lands lying within her boundaries.

5th. Is the action of the authorities of Morrison and Benton in selling lands, giving deeds, and closing up tax proceedings affecting lands in Mille Lac county having their inception prior to any division or organization of the latter as a separate county, valid? I think it is; and I see no other manner in which, in the absence of express enactment, it could be done. A sale of land at a tax sale is a contract under which the purchaser acquires rights which cannot be affected to his prejudice by subsequent legislative action. Among other rights, is that to a tax deed; and in the absence of express statute this can only be executed by the officer who made the

sale or his successor in office, and the legislature cannot deprive him of his right to receive a deed from this officer without empowering some other officer to execute the conveyance.

Again, as we have seen, the taxes on the delinquent lists are due to the counties of Morrison and Benton; the delinquent lists, and all the records, which are indispensable to a valid tax title, are in the offices of the auditors of those counties. It seems, however, to be your impression that the lists can be delivered to the authorities of Mille Lac. There is no authority conferred by law for this. The legislature in separating a portion of Benton and attaching it to Mille Lac, would not certainly have omitted so important provisions had it intended to transfer this power to Mille Lac.

It is true that the condition in which these separations and organizations of new counties place tax titles in those counties is somewhat anomalous; and further legislation is urgently required to unravel the tangled skein which territorial extravagance has bequeathed to us. But the difficulties mentioned by you are not insurmountable.

You say a person can get a tax deed in Benton county without first paying the taxes to date. This is true; but he cannot get it recorded in Mille Lac county without paying the taxes in that county also.

You also state that a person may get a tax title in Mille Lac county without paying taxes due in Benton. I think in these anomalous cases it is the duty of the register of the county where the land lies, to require the certificate of taxes paid from the auditors of both counties having taxes against it, before admitting it to record. You also suggest that different persons may hold tax titles for the same tract. So they might if the taxes were all imposed by the same county. The only effect of these considerations is, as it seems to me, to require of purchasers and those dealing in real estate, an examination of the tax lists in both counties.

I have thus endeavored to examine and decide all the points submitted to me. There are no questions in our law more embarrassing or difficult of solution. It may well be, therefore, that I have erred in some of the conclusions arrived at. I have, however, been influenced by a sincere desire to decide correctly, upon the first opportunity, questions which have long been a source of great annoyance and perplexity.

ST. PAUL, October 12th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

DEAR SIR: I am in receipt of your favor enclosing letter of county attorney of Meeker county enquiring "whether a county is liable for the salary of a county attorney, when he has left a county for a part of his time and has not enlisted." I answer that if the county is obliged to employ and pay another attorney to perform his duties, they may deduct the amount so paid from the salary of the county attorney. Chap. 31, Laws of 1862. If not, and his absence has not required the appointment of another person, the county has no cause of complaint.

ST. PAUL, October 27th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor enclosing communication from county officers of Sibley county, stating that the county buildings, records, &c., have been destroyed by fire, and that no *data* remain by which the county treasurer can collect the taxes of this and former years, and enclosing a resolution of the commissioners to suspend all action in relation to the collection of delinquent taxes and await the action of the legislature on the same, and desiring my views as to the proper and legal course to be pursued in the premises. The board of commissioners were undoubtedly right in delaying action. The auditor, however, writes that they also passed a resolu-

tion instructing him to procure the necessary blanks and proceed immediately with a view to a new assessment, and make out a new duplicate for the present year. This resolution seems to be inconsistent with the one to delay action, and the course indicated would be illegal. The assessors are required by law to make their returns to the auditor on or before the first Monday in August. The county board of equalization is required to meet on the first Tuesday in September; these directions, to say nothing of many others, are imperative, and the acts must be performed on the day. An attempt to collect the taxes, as the law now stands, at this late day, would throw everything into confusion, and would be entirely invalid and useless. Blackwell on Tax Titles, 186. As the taxes had been levied and equalized before the fire, I do not think the county will gain much by attempting to hurry matters by legislative action. These back taxes are a lien upon the land in the county, and I think may be extended upon the assessment roll of next year in the same manner as they could have been if the auditor had omitted to extend them upon the roll. Blackwell, 195. This strikes me as the most simple and certain course. An act cannot be passed by the legislature until some time in the winter, and when passed, if it provides a special tax system for one year for Sibley county, will probably involve the validity of the tax sales in that county in much doubt. If there are no special reasons for a different course, I would advise, if any legislation be procured, an act expressly authorizing the auditor to extend the tax on the roll for next year. I presume that without any legislation he would have authority to do this, but it will do no harm to expressly authorize it.

I am aware that the course recommended by me is more dilatory than special legislative action, and that the delay will doubtless be attended with much embarrassment to the county and its officers. Indeed, a heavy misfortune like that which has befallen the county cannot occur without producing much embarrassment and distress. But I have great doubts of the validity of a special act of the legislature prescribing a shorter period for collecting taxes in Sibley county, than that prevailing in other portions of the State.

Suppose the general tax law has provided that while taxes in other parts of the State should be assessed in July, levied and equalized in September, and collected in January, the taxes in the county of Sibley should be levied in March and collected in April following, would there be any doubt of its illegality?

It is a general principle, "that a law which is partial in its operation, intended to affect particular individuals alone, or to deprive them of the benefit of the general law, is unwarranted by the constitution and void."

ST. PAUL, November 2d, 1863. G. E. COLE, Atty. Gen.

Chas. A. Chapman, Esq., County Auditor, Blue Earth County:

SIR: I am in receipt of your favor of recent date, stating that school district No. 5 in your county, voted in June last a sum of money for building a school house; that in September last a portion of the district was erected into a new district. You enquire—1st. Can the tax be levied upon the entire district as it existed when the vote was passed? 2d. Can it be legally levied upon any portion of the county? In answer to your first inquiry I have to say that by numerous well considered decisions upon a statute similar to our own, it is established that it cannot be levied upon that portion of the district set off from it before the levy or assessment. The levy of the tax constitutes an indebtedness against all who were residents of the district at the date of the assessment, which no subsequent change of circumstances can affect or annul. Waldron vs. Sec. 5 Pick. 523. But the mere voting of the tax creates no obligation and fixes no legal liability upon the individual tax payers. A removal from the district, or a separation of a portion of the tax payers from it by the creation of a new district, therefore, releases such persons from all obligation to contribute to the purposes for which the tax was voted. Jackson vs. 2d School District in Sudbury, 3 Gray 413.

A more difficult question arises, however, upon your second inquiry: Can the tax

after such a division of the district be legally levied at all? Is not the identity of the district destroyed, and two new districts erected in its place? If so, all power to act under the vote ceases. It was early held in Massachusetts that "The true and necessary construction of the statute required that the district voting to raise money should have the same limits when the money is assessed, as when voted, for if it had not it must be considered as a new or different district, and the vote to raise money is annulled." Richard vs. Daggett, 4 Mass. 534. An examination of the law relating to school districts existing in that State, however, at that time, discloses the fact that school districts had no legal name or qualities; they were merely sections of the town privileged to determine for themselves the location of their school houses and to raise money for building and keeping them in repair. They were not corporations, and could not sue or be sued, make contracts or enforce them; everything but the vote to raise money was to be done by the power of the town. By our statute school districts are expressly declared to be bodies corporate and invested with full power of suing and being sued, contracting and being contracted with, and it has frequently been held that a separation of a portion of a *quasi* corporation and the erection of such portion into a new corporation does not annul the old corporation, but that it exists, retaining all its rights, powers and property, and subject to all its obligations. Wyndham vs. Portland, 4 Mass. 384. The law was subsequently changed in Massachusetts. School districts were invested with more enlarged powers, and the case of Richard vs. Daggett is upon the point no longer law in the court in which it was decided. Waldron vs. Sec. cited *ante*.

I am of the opinion, therefore, that the tax must be limited to the district as it exists at the time of the actual levy of the tax upon the assessment roll, but that upon the district so existing it may be legally levied and collected.

ST. PAUL, November 16th, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor enclosing letter of county auditor of Washington county, saying that the county commissioners of that county, at a meeting on the 19th of November, (1863, I presume,) made the following order: "That the taxes on certain lots for the years 1859, 1860 and 1861, be re-assessed and the valuation of 1862 be taken as the basis of such assessment." The commissioners may doubtless, if the tax sale under chap. 4, Laws of 1862 is still open, order a sale without restriction as to price, to the highest bidder, but I know of no power which they possess to order a re-assessment or an abatement of the tax. The only authority given to the county commissioners *as such* to abate taxes is contained in section 3 of chap. 4, Laws of 1862, which authorizes an abatement, such abatement to be made, if any, on or before the 1st of November, 1862.

Without stopping to enquire whether this authorizes an abatement of any taxes except those of 1859, and prior years, it seems at least certain that the power of the commissioners expired on the first of November of that year. By section 1 the time for redemption was extended to the 1st of November, and if not redeemed before that time it became forfeited to the State, and to relieve parties from the exorbitant assessments of the earlier years of the territory, the power of abatement was vested in the county commissioners, but was to be exercised for the benefit of the owner before the time fixed for redemption expired.

There are many requirements which as to time are regarded as directory, and it is sometimes difficult to distinguish between these and those which are peremptory. The object of the present provision, however, stamps it as peremptory.

ST. PAUL, December 5th, 1863. G. E. COLE, Atty. Gen.

His Excellency, Henry A. Swift:

DEAR SIR: I am in receipt of your favor stating that the third Senatorial District is a very large one; that the population is mostly located upon the Mississippi, from which section the Senator and Representative are usually taken; that the mining and lumbering interest of Lake Superior are thus very inadequately represented, and you enquire whether the district cannot be divided so as to constitute the counties of Carlton, St. Louis and Lake a separate district; or if not, if a provision cannot be made requiring one of the representatives of the district to reside in one of those counties. In reply I have to say that it is pretty generally understood that I have entertained great doubts as to the constitutionality of the apportionment of 1860. If that was a constitutional measure, any apportionment which the legislature might choose at any time to make would be, and it would probably justify the course suggested by you. The objections to that measure and the one suggested by you are, that the constitution limits the power of the legislature in this particular. Sec. 23, art. 4. "The legislature shall provide by law for the enumeration of the inhabitants of this State in the year one thousand eight hundred and sixty-five, and every tenth year thereafter. At their first session after each enumeration so made, and also after each enumeration made by authority of the United States, the legislature shall have the power to prescribe the bounds of Congressional, senatorial and representative districts, and to apportion anew the senators and representatives among the several districts, according to the provisions of section 2 of this article."

The express grant of power in a particular case, and under certain restrictions and limitations, is equivalent to a prohibition of its exercise in a different manner and at a different time. The object of these restrictions affords an additional argument in support of this position. Sections 2 and 23 of article 4 should be read together. Section 2 declares that the representation in both houses shall be apportioned equally throughout the different sections of the State in proportion to the population thereof, and section 23 provides the means by which the legislature is to arrive at a knowledge of such population, viz.: by an enumeration of the inhabitants. As in a new and growing State the population is rapidly increasing and the proportion between different sections constantly changing, the census affords a very inadequate information of the population, one, two or three years after it is taken, hence the provision that the apportionment shall be made at the next session after the enumeration of 1865. Neither do I think it would be competent to restrict the inhabitants of the district in their selection to the residents of any particular county. The constitution has prescribed the qualifications of representatives. Sec. 25, art. 4. "They shall be qualified voters of the State, and shall have resided one year in the State, and six months immediately preceding the election in *the district* from which they are elected." A provision of law adding to these qualifications the further one, that they shall reside in a particular part of the district, would be an infringement of the constitutional rights of the electors, which could not be sustained. Barker vs. The People, 3 Cowen, 686.

ST. PAUL, December 29th, 1863. G. E. COLE, Atty. Gen.

A C. Dunn, Esq., County Attorney, Faribault Co.:

DEAR SIR: I am in receipt of your favor inquiring whether county attorneys are obliged to draw complaints and warrants to be used in courts of justice of the peace in criminal matters, and whether they may not charge a fee for such services.

I think it is their duty to attend to such business without extra compensation. Sec. 2, chap. 5, Laws of 1860, makes it their duty to attend all courts of criminal jurisdiction, and all preliminary examinations when requested by the magistrate, and section 3 prohibits them from receiving any fee for services in any prosecution to which it shall be their duty to attend.

ST. PAUL, December 31, 1863. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Commissioner State Land Office:

SIR: I am in receipt of your favor, stating that in several instances the appraisers of school lands have in good faith returned lands as prairie which were really, as has afterwards proved, mostly valuable for timber, and therefore within the provision requiring the payment of 75 per cent. down. These lands, you also state, have been sold pursuant to such return, for 15 per cent. down; that the large emigration of the past year has brought with it a largely increased demand for timber; that it is now evident that the purchasers intend to sell off the timber and allow the land to revert to the state, and you enquire what steps can be taken by you to protect the interests of the State.

The law directs that lands mostly valuable for timber, shall be sold at 75 per cent. down. Some one must, of course, decide what lands are within this description, and while a fraudulent or wilful violation of this provision of law would render the transaction void, a mere error of judgment by the commissioner cannot furnish a ground for the rescission of his contract and the disturbance of rights vested under it. Indeed, the decision of the commissioner, it would seem from your letter, was at the time correct; the land was more valuable as prairie than timber; subsequent occurrences have changed this state of facts, but certainly cannot justify the State in attempting to escape from a contract into which she has deliberately entered. The purchaser has acquired vested rights which cannot be modified or impaired by yourself or the legislature. The title to the lands, however, does not pass until the issue of the patent, the purchaser before that being only entitled to possession as tenant of the State, with the right to acquire the title by payment, according to the terms of his contract. If the security of the State is therefore injured or hazarded by his acts, I think a court of equity may, upon principles well recognized, interfere by injunction, to prevent the destruction of the security by waste committed by the occupant; this power exists in the analogous cases of mortgages and tenancies.

ST. PAUL, January 10th, 1864. G. E. COLE, Atty. Gen.

Hon. D. Blakely, Superintendent of Public Instruction:

SIR: Disputes are arising in many districts between teachers and trustees, as to the meaning of the term "month" in the contract for teaching; the teacher contending that a lunar month is intended, while the trustees insist that a calendar month is contemplated by the statute and the contract. As the question is so generally agitated, I deem it expedient to publish a circular from your office upon the subject. A month at common law, and at present probably in the English law, means a lunar month. In mercantile contracts, however, it has both in England and this country been changed by usage, and the rule now is to calculate months as calendar; and in other contracts the lunar yields to the calendar, if such was the intention of the contract. In this country the rule of English law may be considered as greatly shaken, if not absolutely changed, and months are usually computed as calendar. So far as the construction of statutes is concerned, the rule in this State is fixed by law: "The word month shall be construed to mean a calendar month, *unless otherwise expressed.*" Sub. 9, sec. 1, p. 114, Compiled Statutes.

The present school law declares that the trustees may levy a tax sufficient for the support of a school for three months without a vote of the district, and the legal voters may vote to have a school for any length of time for more than three months; and it is made the duty of the trustees to make a contract with a teacher, specifying the wages per month and the time employed, and they are required to file such contract in the office of the clerk. As the word month in the statute is expressly declared to mean a calendar month, and as the contract is made with direct reference and pursuant to the express directions of the statute, and must be construed with reference to it, there can be no doubt that a calendar month is intended, and the construction of the trustees is correct.

ST. PAUL, January 19th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your letter, inclosing letter from auditor of Benton county, stating that "A" bid off a tract of land in 1860, and in 1863 obtained a tax deed which was not recorded because the taxes of 1861 and 1862 were not paid, but forfeited to the State; that the original owner now desires to redeem from the purchaser, who charges him $10 bonus to quitclaim, and the auditor proposes to allow the person in whom the title appears of record to redeem upon paying all delinquent taxes. This will not do. The purchaser at the sale in 1861, who received a tax deed in 1863, has, assuming the proceedings to be regular, acquired the title to the land as against the original owner, and is himself the only person entitled to redeem. His neglect to record his deed does not confer any additional rights upon the original owner. Sec. 85 of the tax law, allows a redemption within two years from the sale. Sec. 29 of the Auditor's law prescribes the effect of a tax deed, and does not make its validity depend upon record. If the purchaser, who by the execution of the deed has become the owner and redemptioner, fails to redeem from subsequent sales and forfeitures to the State, he in turn loses his title, which becomes vested in the State or its assigns. The original owner, who has lost his rights by the execution of the tax deed, may perhaps avail himself of the provisions of sec. 2, chap. 9, Laws of 1862, and become the assignee of the State of all rights acquired by the State after the passage of that act, and thus compel the purchaser at the sale in 1861 to redeem from him.

The auditor may have been misled by an opinion from this office, that the auditor, in the absence of other proof, should allow the party in whom the title appears of record to redeem. In the absence of all controlling evidence, this rule is, perhaps, the safest which can be adopted, but it is by no means the only proof.

The rules governing the rights of parties to redeem are extremely liberal. The auditor should avail himself of any evidence which satisfies him of the right of the applicant to redeem. Of course, if he errs in the matter, the rights of the true redemptioner will be sustained by the courts, notwithstanding the mistake of the auditor. The utmost liberality should govern the action of the auditor, taking care that while he is not imposed upon by fraudulent pretences, he throws no undue obstacles in the way of redemption. In this case no question can arise. The records of his own office point out the purchaser at the tax sale as the true and only redemptioner. I am also in receipt of a letter from the county auditor of McLeod county, stating that a party has purchased land at a tax sale; that the owner of the land has deeded it, but has not paid to the purchaser at the tax sale the amount of his bid; and the auditor thinks he should certify that the taxes are paid, as the town, county and State have received their pay. He is mistaken; a purchase at a tax sale is not a redemption. The purchaser stands in the place of the county, or in other words, he occupies the same position that the county or State would if bid off or forfeited to them, and his rights are equally entitled to protection.

ST. PAUL, January 20th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, inclosing letter from the county auditor of Ramsey county, inquiring "whether the county auditor can give the usual transfer certificate on conveyances without first requiring the tax of 1863 to be paid, during the time the duplicate is in the hands of the county treasurer." In reply I have to say, that the tax payers are by law entitled to the time intervening between the day when the duplicate is placed in the hands of the treasurer, and the last day of February, within which to pay their taxes. On the last day of February, all delinquencies are reported by the county treasurer to the auditor, and are recorded in the office of the latter. Prior to that time, the auditor has no record in his office of the unpaid taxes of the current year, and can have no more knowledge of the fact to which he is required to certify than any other person in the county. It is true he might require the production of the treasurer's receipt, and in the absence of

that, certify the taxes unpaid; but various casualties may easily be supposed which would put it out of the power of the person who has paid his taxes, to produce it. The theory of the law with reference to the certificates of officers having the custody of public records, is that they shall certify to the contents of these records, and it is the presumed authenticity of a public record, required by law to be kept, which gives these certificates their legal value.

In the absence, therefore, of any peculiar language of the statute, it would be difficult to say that the auditor could be required to go outside of his official records for the contents of his certificates. The history of legislation and the language of the present law, relieves the point from any doubt. The law, as originally framed, and as it continued to stand until the amendments of 1862, declared that the auditor should *ascertain whether or not all taxes were paid.* Sec. 17, chap. 2, Laws 1860; sec. 3, chap. 2, Laws 1861.

In 1862, the legislature seemingly having in view the evident legal propriety of the position taken above, and with the intent as it would seem, by express language, to make the law conform to the legal analogies upon the subject, amended the section as follows: "The county auditor shall ascertain *from the records and books in his office*, whether or not all taxes are paid." Sec. 1, chap. 9, Laws 1862.

There is, I think, no doubt that the auditor may certify to the facts as they appear upon his records.

ST. PAUL, January 21st, 1864. G. E. COLE, Atty. Gen.

Hon. Charles Scheffer, State Treasurer:

SIR: I am in receipt of your favor of this date inquiring whether the legislature may under the 5th sec. of art. 9 of the constitution contract a loan for the purpose of paying the State loan of $250,000 which becomes due in 1867. I think there are several grave objections to this proposition deducible from both the letter and spirit of the constitution. 1st. The means and manner of paying this indebtedness are explicitly prescribed by the constitution. "Every such law shall levy a tax sufficient to pay the principal of such debt within ten years, and shall specifically appropriate the proceeds of such taxes to the payment of such principal, and such appropriation and taxes shall never be repealed, postponed and diminished until the principal and interest of such debt shall have been wholly paid." Pursuant to this constitutional provision sec. 4 of chap. 126, Comp. Stat., provides "that there shall be levied the annual tax of twenty-seven thousand seven hundred and seventy-seven dollars and twenty-seven cents, to be held and retained as a sinking fund with which to cancel the bonds mentioned in this act when the same shall become due." It appears, however, that this tax has never been levied. The constitution contemplates, therefore, the payment of this indebtedness within ten years, and provides the means of payment. If a loan were allowed to be originally made for ten years and continually renewed for the same period it would be allowing that to be done indirectly which cannot be done directly. The clause limiting the period of indebtedness was intended to have some meaning, but under the construction suggested by you might be easily evaded. So, too, the clause requiring the annual levy of a tax, although a directory requirement merely, imposed a duty upon the legislature which, although they may neglect to perform it, will not certainly justify or authorize them to meet and remedy the consequences of such neglect by a mode of raising the money entirely foreign to the purposes and intent of the constitution. Their neglect to comply with a directory requirement of the constitution is a violation of their official oaths, but cannot of course be prevented. No power can compel them to act in the matter, but while the constitution lacks the power to impel them to action, it contains ample restraining power, which becomes operative the instant they proceed to act in violation of its injunctions.

Another objection, perhaps equally serious, is that the State indebtedness is limited to $250,000. It is proposed to contract an indebtedness of equal amount to meet this, and it is said in support of this measure that it is not intended to in-

crease the permanent debt, but the money thus borrowed is to be immediately applied to the payment of the present loan. This may be true, but at the time the debt is contracted the first is in existence, and for a period (short, it is true) the State indebtedness amounts to $500,000. If the State Treasurer should fail to apply the second loan to the repayment of the first, I presume it will be admitted to be void, but can its validity depend in any degree upon the subsequent action of the State Treasurer? A contract is either void or valid at the time it is made, and in this case it cannot at that time be valid because in direct violation of an express provision of the constitution, and if so, I do not see how any retrospective vitality can be given to it by subsequent events.

I think it clearly the duty of the legislature to remedy the neglect of their predecessors by a provision for a sinking-fund, and a compliance so far as in their power with the constitutional injunctions.

ST. PAUL, January 22d, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, saying that under my opinion of June 9th, 1863, lands taken under the act of Congress entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20th, 1862, have been taxed; that the occupants refuse to pay these taxes, and you desire me to forward the necessary instructions for enforcing payment.

I endeavored to show, in the opinion referred to, that these lands were, by force of the provisions of that act, granted to settlers upon condition, and that until the breach of that condition, the equitable, if not the legal title, was in the settler. The language of the act is that the settler, upon making the prescribed affidavit, and the payment of ten dollars, shall be *permitted to enter* the quantity of land specified.

Now the entire history of all new Western States proves that in all of them, lands purchased of the United States have uniformly been held liable to be taxed before they are patented; and in Ohio, where the question has more frequently arisen than elsewhere, they have always been held taxable after entry, and even before they were paid for. The courts, indeed, in that State, went so far as to hold that a sale of land for taxes surveyed, but not patented, passed all of the owner's right to the purchaser; and that if the original owner, in order to defeat the sale for taxes, withdrew the survey, and made a new one, upon which he obtained a patent, such patentee was a trustee in equity for the purchaser at the tax sale, and chancery would compel the conveyance of the legal title to him. Wallace's Lessee vs. Seymour, 7 Ohio, 156; Renvick vs. Wallace, 8 Ohio, 539. But in the case of Gwynne vs. Frisbauger, 20 Ohio, 556, the earlier decisions in that court were modified, and a much more extended doctrine advanced. The court said: "We think that the State of Ohio had the power to determine that the party who had a complete equitable right to the land should be treated as the owner, and that the land should be subjected to taxation; that the State could sell this land for taxes and provide that the purchaser, as against the original owner, or those claiming under him, should take a good and valid title both in law and in equity," and they accordingly held that upon the issuing of the patent, the legal title vested in the purchaser at the tax sale.

This doctrine has been fully confirmed by the Supreme Court of the United States. 3 How. Rep. 441. The court say: "The land should be estimated at its full value, as the owner having paid for it, is subject to no additional charge for the obtainment of the patent; and although the statute may purport to give a higher interest in the land than the owner could convey, yet it does not follow that such title is inoperative. It must at least convey the interest which the owner has in the lands, or it may be that a higher interest is conveyed. The conveyance of real estate, whether by deed or operation of law, is subject to the law of the State, and it is difficult to say that any restraint can be imposed upon the local power on

this subject." Our own statute upon this subject declares that the tax deed shall vest in the purchaser a good and valid title, both at law and equity. Sec. 30, chap. 2, Laws 1860.

In the case of Douglass vs. Dangerfield, 10 Ohio, 156, the court said: "If the right to tax exists, and that it does there has not been any serious question for many years, it would seem to follow that the right to collect must also exist, although, in making collection, it might become necessary to transfer to a new proprietor the thing taxed." Under the system prevailing in this State, by which equity and law are blended, and legal and equitable remedies enforced by the same process, and in the same action, it is not very material to inquire into the precise nature of the title acquired by the purchaser at the tax sale. One thing is at least certain, that all the title of the settler is transferred to the purchaser, subject, of course, to be defeated by any failure on his part to perform the conditions prescribed by the act of Congress; and although the settler cannot, perhaps, be dispossessed until the expiration of the period required by law; yet, when the patent finally issues, it will inure to the benefit of the purchaser. This position is sustained, not only by the uniform practice of the new States, supported and sanctioned by decisions of both State and Federal tribunals, but by every principle of justice. It would be intolerable, if, while these settlers were enjoying the bounty of Congress, and acquiring valuable estates by the munificence of the General Government, and thus already marked as a favorite class, they could, at the same time, transfer the burdens of supporting the government, under whose protection they enjoy all their rights of property, to those who, less fortunate, have been compelled to purchase and pay for adjoining tracts. In the States yet to be formed, the effect would be to withdraw from taxation the entire domain of the State, and to deprive her of the chief source of revenue, upon which all new States must rely for the support of State and municipal governments.

The several county officers should proceed to sell these lands as other lands are sold for taxes, and if not redeemed, to issue tax-deeds to the purchasers in the usual form, who, upon the issuing of the patent, will, I apprehend, find no difficulty in enforcing their rights against the delinquent settlers.

ST. PAUL, February 1st, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor inquiring whether the words of the banking law, (sec. 4, page 855, Comp. Stat.,) "shall duly assign and transfer in trust," require a written assignment on the bonds deposited by the bank as security for its circulation. The words do not "*ex vi termini*" import a written instrument, but are, as other words used in a statute, to be interpreted either as referring to a written or parol transfer, according to the connection in which they are used. The verb "to assign," as used in law, simply means "to make a right over to another." Bouvier's Law Dict., title, "Assign." If used in reference to a mortgage, or any interest in real estate, a written instrument would be understood, because no interest in real estate can be assigned or transferred by parol; but if used with reference to negotiable paper, any assignment which is operative to transfer the legal title is sufficient to meet the requirements of the law. Public stocks, which are by the laws of this State receivable as a basis for banking, are made payable to bearer or to order, and endorsed in blank. They possess most if not all the qualities of negotiable paper, and the title passes by delivery.

When the statute, therefore, declares that the banker shall duly assign and transfer such stocks to the State Auditor, any assignment and transfer which passes the legal title is sufficient. It would undoubtedly have been a wise precaution to have provided that a written or printed assignment or memorandum of the purpose for which they are held by the auditor, should be endorsed on the bonds. This is desirable to guard against robbery, and the possibility of bonds stolen or surreptitiously obtained passing into the hands of a *bona fide* purchaser, and also to render malversa-

tion by the auditor or his subordinates more difficult and perilous. This precaution has been taken by the legislatures of many States, and has been adopted by our own State in the case of bonds belonging to the common school fund. When, however, this is intended it is provided for by express enactment. In the law in question there is a provision that upon the face of the bills and notes issued by the auditor, shall be engraved "secured by the pledge of public stocks." Had the legislature intended to require any endorsement to be made upon the bonds, they should and would have expressly provided for it.

I am of opinion that the practice heretofore prevailing in your office of receiving bonds without a written assignment upon them, is justified by the existing law, but that there is a defect in the law in that particular which merits the consideration of the legislature.

ST. PAUL, February 3d, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller, Governor of Minnesota:

SIR: I am in receipt of your favor, desiring my opinion as to the construction of art. 4, section 9 of the constitution, and particularly, whether it would be proper to commission a member of the legislature, during the term for which he is elected, as an officer in one of the Minnesota regiments, or as a notary public, or regent of the University or commissioner to receive votes under the provisions of the law authorizing soldiers to vote. The language of the section referred to is as follows: "No Senator or Representative shall, during the term for which he is elected, hold any office under the authority of the United States or the State of Minnesota, except that of postmaster." The rule of construction applicable to clauses of this character is stated as follows by Tod, J. in *Commonwealth* v. *Binns*, 17 Sergeant and Rawle, 226: "The established rule is to give the strictest possible construction to every part of the constitution, and to every act of assembly, declaring State offices incompatible with offices or appointments under the federal government, or declaring different State offices incompatible with each other, and never to hold anything to be within the prohibition unless expressly named, and to take in no possible case by construction;" and the reason assigned is, "the apparent harshness of taking, unless when some plain and unequivocal precept requires it, from the people or from the agents of the people, their power of entrusting the public business to those men whom they may think most fit to be trusted." It must be admitted, however, that this rule has been carried so far in that State by legislative and judicial construction as practically to repeal this constitutional provision. The courts in that State have placed great weight upon the construction which the legislature has given to this provision, and as this body is the exclusive judge of the qualifications of its own members, its decisions are justly entitled to great respect. I am satisfied, however, that they should receive the deference paid to them by the courts of that State, or should be allowed to override and utterly ignore a plain constitutional provision. If I were to accept legislative interpretation as absolutely binding, I might perhaps rest content by basing my decision upon the constant practice of our own legislative assemblies. Practically the rule has been disregarded in this State; officers in the militia and those in the United States service having repeatedly been elected to the legislature and appointed and commissioned while holding seats in that body, and have continued to act without objection. The weight due to contemporaneous construction given by the legislature is, however, in a great measure destroyed by the consideration that the point has never been brought to the attention of that body and a decision made upon it. The most that can be said is, that the matter has passed "*sub silentio*," and no objection made. This negative and passive construction can hardly be regarded as furnishing an argument against the plain provisions of the law.

Without entering into the nice distinctions sometimes taken by the courts between an office and an appointment, I am unable to see any possible chance for escaping

the conclusion that notaries public and military officers are officers within the meaning of the constitution, and so ineligible while actually members of either house.

They hold their offices under the authority of the State, and by commission from the Governor, and the principle upon which the provision is based would seem to be, if ever, violated by the admission of federal military officers to participation in the deliberations of the legislature. What, however, will be the effect of an appointment of a member of the legislature to either of these offices? Will the appointment be void or will it create a vacancy in the office of member of the legislature?

The rule undoubtedly is, that the acceptance of an incompatible office creates a vacancy in that previously held. 2 Hill, 93; People vs. Carrique.

Do the peculiar provisions of the constitution that "No Senator or Representative shall, during the time for which he is elected, hold any office," change the rule? It may be urged that this clause renders the appointment of a member impossible during that period, and that resignation or ceasing to be a member in any manner will not render him eligible. I regard this as an extremely narrow and illiberal construction.

In the construction of a doubtful provision, we should inquire what was the evil anticipated by the framers of the instrument, and to which they intended to apply a remedy?

In this instance unquestionably the object was to preserve the purity and freedom of deliberation by protecting the legislature from all corrupting or disturbing influences; and from all undue interference by any department of State or Federal government, and lest it should be thought that the restriction applied to a member of that body, while in session, the language "during the period for which he was elected" was inserted, in anticipation of the possibility of the calling of extra sessions at which the member elected for the regular session would be entitled to a seat. *Cessante ratione lex cessat* is an ancient legal maxim. Now, in case of resignation or of the ceasing to be a member upon appointment to another office, all danger from this source is removed, the reason for the restriction ceases, and the case is without the spirit, if within the letter of the constitution. I cannot believe that it was the intention of the framers of that instrument to deprive a person who had accepted a seat in the legislature of his right to elect between that and a more important office, should such be tendered him, nor that the people should be deprived of their right to select a member for another office, provided he ceases to hold his seat as a member.

Being elected and occupying a seat as member of the legislature does not, therefore, render an appointment by you improper, if the appointee is willing to resign his seat in the legislature, the only effect of the constitution being to prohibit him from holding both offices at the same time.

With reference to the Regents of the University and Commissioners to take the votes of soldiers, I have to say that I think these offices may be holden by members of the legislature retaining their seats. As we have seen, the constitution in this particular is to receive a strict construction; the term office as used in that instrument means, I think, an office in the State or some local division of the government, such as State, county or town officers. The Regents of the University are a corporation, a public corporation it may be, and each Regent, perhaps, in a certain and limited and qualified sense, a public officer, but within the meaning of this clause in the constitution, not an officer of the government; they are officers of a corporation rather than of the State, although appointed by the Governor. Even an officer of a city has been held not to be within the meaning of the term. Commonwealth vs. Dallas, 3 Seates, 300.

For further remarks on the eligibility of a member to the office of the Regent I refer you to my opinion of January 16, 1861, on file in the Executive office.

The Commissioners appointed to take soldiers' votes cannot be regarded as officers within the meaning of the constitution. It is rather a temporary appointment for the execution of a special commission than an office. Shepard vs. Commonwealth, 1st Serg't & Rawle, 1.

ST. PAUL, February 4th, 1864. G. E. COLE, Atty. Gen.

Hon. D. Blakely, Secretary of State:

SIR: I am in receipt of your favor enclosing communication of chairman of county commissioners of Watonwan county. It is stated that at the last election it was supposed that the commissioners elected prior to that time held their offices for one, two and three years respectively, and that there being a vacancy in the offices of two of the commissioners, two persons were elected to fill them, and a third person ran who received seven votes. At that time the law of 1863 was in force, by which the terms of commissioners in counties situated like Watonwan, were reduced to one year. Three commissioners were to be elected instead of two. As the commissioners were elected at large, the three persons receiving the highest number of votes at that election are duly elected commissioners. The person, therefore, who received seven votes is entitled as against the present incumbent, whose term of office has expired by limitation and by the election and qualification of his successor, to the office.

2d. You state that the same person was elected to the offices of county auditor and county treasurer, and you enquire whether he can hold both offices. He cannot. There are strong reasons against this, founded in public policy and the principles of the common law. The auditor is a check upon the treasurer, and the treasurer is in a certain sense subordinate to and under the supervision of that officer; but it is not necessary to discuss the question in this aspect, as section 8 of chapter 2, Laws of 1860, is express. "No Judge of the Supreme Court, or of the district court, or clerk of either of said courts, county commissioners, county surveyor, or *county treasurer*, shall be eligible to the office of county auditor." And by section 4 of chapter 3, Laws of 1860, "No person who holds the office of county attorney, sheriff, register of deeds, *county auditor*, or county commissioner, at the time of said election, shall be eligible to the office of *county treasurer*." The last section does not, perhaps, in terms apply, but indicates the policy of the law; the first, however, is applicable. The party may elect which office he will accept, but cannot accept both.

ST. PAUL, February 5th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller, Governor of Minnesota:

SIR: I am in receipt of your favor, stating that the probable appropriation of $5,000, for the benefit of sick and wounded soldiers, the popular sentiment in favor of some provision for the needy and suffering families of enlisted men, and the disposition of the legislature to encourage educational and charitable institutions, suggest an increase of State revenue, and you propose: 1st. A tax of 50 cents each upon all suits and upon conveyances. 2d. Upon deeds of land commissioner. 3d. Upon all moneys at interest. 4th. Upon all income exceeding $600. 5th. Upon commissions issued to military officers. 6th. The payment by county officers of one-half of all fees in excess of $1,500 into the State treasury. 7th. A license tax upon various branches of business; and you desire my opinion upon the propriety of these suggestions.

I regret that the opinions which I entertain both upon the policy and the legality of these suggestions are adverse to them. I am fully sensible of the necessity of an increase of revenue, if we would provide for the payment of the State loan of $250,000, which will soon become due. A sinking fund should have been provided by an annual tax for the payment of the principal of this loan at maturity. The constitution especially directed this, but it has been thus far entirely neglected, and if we would preserve the credit of our State, some device should be hit upon which will enable us to meet it at maturity.

As to the measures proposed for the benefit of wounded soldiers and their families, while I deeply regret that we are not in a situation to render the proposed assistance, I am convinced that with the bounties, pensions, &c., received from the government, and the assistance of the several towns, cities and counties, they will not be allowed to suffer, and that an attempt on the part of the State for relief

would be attended with an expense which would involve the State in great embarrassments if not result in seriously impairing her credit.

These of course are matters for the consideration of the legislature, but as you desire my opinion upon these matters of State policy, I shall frankly communicate them. With reference to the suggested modes of increasing the revenue, they may be considered in two aspects: 1st. The policy of adopting them. 2d. Their legality.

With reference to the policy, I have to say that our people are accustomed to a different mode of taxation for State purposes, and that new and unusual modes of raising revenue are always attended with great jealousy and dissatisfaction on the part of the tax payer.

Thus, the poll tax law, which seems to me to be fairer and more equal than the modes proposed, has excited great opposition, and will probably be repealed at the present session. All branches of business and all species of property are now taxed to an extent never before experienced by our people, and while they will generally cheerfully pay these or much heavier taxes for national purposes, so long as the exigencies of the present contest render it necessary, they will not, I believe, willingly submit to a species of new and arbitrary taxation, (for all taxation not based upon actual values is arbitrary,) for the support of State government. I speak plainly and frankly, in accordance with your request, when I assure you that I believe the system of taxation suggested by you would break down any administration which should attempt it. The popularity of the last administration in this State has in the main been owing to the light taxation imposed. Thus upon the advent of that administration, the rate was reduced from five mills upon the dollar to four mills, which continued to be the rate until the present year, when it was raised to four and a half mills. It is to be regretted, I think, that the rate was reduced, as the difference would have created a sinking fund which would have, if continued and set apart annually, paid the public debt at maturity, but any great and sudden increase now, especially by new and unusual modes, ought, I think, if possible, to be avoided.

I now proceed to the examination of the legality of the proposed methods of taxation. These objections may not apply to all of the modes suggested, but will apply to most of them, and to the general principle which underlies all of them. Before examining the peculiar provisions of our constitution I may remark that the constitutions of many—perhaps most—of the States, especially the older ones, contain no restrictions upon the power of taxation; this power is indispensable to every government, and is in those States confided to the discretion of the legislature, with which the courts will not interfere.

So unlimited is this power, that it has been said that it implies the right to destroy, and if property is taxed to the extent of its entire value, in the absence of constitutional restrictions, the citizen is without redress. Several of the new States, however, including Ohio, Kentucky, California, Louisiana, Iowa, Wisconsin and Minnesota have incorporated into their constitutions very wise and salutary restraint upon this power.

Art. 9 of the constitution says: "Sec. 1. All taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the State." Sec. 3. "Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property *according to its true value in money.*" This clause is, I think, broader than that of any of the States I have named, except perhaps Ohio.

It will be noticed that the theory of an *ad valorem* tax as distinguished from a tax on specific articles is carefully preserved. By thus carefully requiring all property to be assessed by a uniform rule and a uniform rate per cent. levied upon the ascertained value, it was intended to avoid all arbitrary distinctions between different trades, professions or branches of business, as well as between different individuals of the same trade.

A license to insurance companies, merchants and other trades and professions would

single out a particular class and impose heavier burdens than those borne by the rest of the community, and would violate two constitutional rules: 1st, that taxation shall be equal and uniform; and 2nd, that all property on which taxes are levied shall have a cash valuation.

If I am referred to the cases of licenses to theatres, saloons, &c., as analogous cases, my answer is, that these are are not instances of the exercise of the taxing power, but are matters of public police. The State may restrain by requiring a license or otherwise, those trades, which, if unrestrained, might prove deleterious to the public morals, but cannot, for the purpose of raising revenue, demand a license fee as a consideration for the pursuit of a business having no such tendency. State of Louisiana vs. Merchants' Insurance Co., 12 Louisiana, 802.

It may be said, also, that the constitution of the United States declares that "all duties, imposts and excises shall be uniform throughout the United States," and yet this system of taxation is freely resorted to. The answer to this objection is, that this uniformity is only required as between the States, so that each State shall bear an equal burden, while under our State constitution the uniformity sought to be preserved is between individuals and classes. Attorney Gen'l vs. Winnebago Lake and Fox R. Plank Road Co., 11 Wisconsin, 41.

The provision of the Ohio constitution, which is substantially the same as ours, received the construction of the court in The City of Janesville vs. The Auditor of Muskingum Co., 5 Ohio State R., 593. The court said "The great object of the provision was to secure equality and uniformity in the imposition of the public burdens. The public burdens are made to rest upon the property of the State, and whenever money is to be raised by taxation, the positive injunction is that laws shall be passed, taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money. In establishing this principle of justice and equality they have necessarily made it the fundamental rule upon which all such laws must be based, and its spirit and purpose can only be preserved by holding "*that it requires a uniform rate per cent. to be levied upon all property according to its true value in money.*"

The objection to the suggestions made by you cannot be better stated than in the language of the court in Knowlton vs. Supervisors of Rock Co., 9 Wisconsin, 421: "That it creates different rules of taxation, to the number of which there is no limit, except that fixed by legislative discretion, whilst the constitution establishes but one fixed, unbending, uniform rule upon the subject." The meaning of the constitutional terms is perhaps more fully explained by the court in Exchange Bank of Columbus v. Hines, 3 Ohio State Rep., 15. The Court say: "What is meant by the words, '*taxing by a uniform rule*,' and to what is the rule applied by the constitution? No language in the constitution, perhaps, is more important than this, and to accomplish the beneficial purpose intended it is essential that they should be truly interpreted and correctly applied. *Taxing* is required to be by a *uniform rule;* that is, by one and the same unvarying standard. Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of assessment upon taxable valuation. But the uniformity in the rule required by the constitution does not stop here. It must be extended to all property subject to taxation, so that all property may be taxed alike, equally, which is taxing by a uniform rule."

I am clearly of opinion therefore that the modes of taxation proposed are unwarranted by the constitution, and advise in case an increase in taxation is thought expedient, an increase of the rate per cent. levied upon the property of the state generally.

I notice, however, that your third suggestion is a tax upon all moneys at interest. Moneys at interest are taxed at present, but the present tax law provides that a party may deduct his indebtedness from his credits. This provision I regard as a palpable violation of the constitutional rule of uniformity. A merchant may purchase ten thousand dollars' worth of goods and owe for the whole. A farmer may purchase a farm for $10,000 and remain indebted for the entire sum; yet each is required to pay a tax upon the actual value, the one of his farm, the other of his

goods. The usurer hires $10,000 and loans it upon bond and mortgage, and escapes taxation altogether. Here then is a complete exemption upon one class of property. This point was elaborately discussed by the court in Exchange Bank of Columbus against Hines, 3 Ohio State Rep. 1, and the arguments there urged against the constitutionality of this clause are, I think, unanswerable. By its repeal a considerable amount of property would be brought within the taxing power, which now escapes taxation altogether.

ST. PAUL, February 6th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller, Governor:

DEAR SIR: I am in receipt of your favor desiring me to examine the St. Paul and Pacific R. R. bill, and advise you in reference to it. You inquire—

1st. What I think of the propriety of all the directors residing in London, and whether such an arrangement would not embarrass or prevent suits at law against the company. Sec. 53, chap. 60, Comp. Stat., provides that in a suit against a corporation, the summons may be served on the president or other head of the corporation, secretary, or managing agent thereof. I presume the company would always have a managing agent in this state. But if it should happen that under existing laws circumstances arise which would prevent the service of a summons, the legislature would find no difficulty, I presume, in providing another mode of service. A law of this character, affecting a remedy merely, would be open to no objection. As to the mere propriety of allowing the directors to reside in London, that is a matter, I think, of which the legislature are the best judges, and they having decided in its favor, I am bound to presume that there is no valid objection.

2d. You enquire whether the actual settlers who filed upon the land prior to the location, should not be allowed to pay for it at $1.25 per acre. The present bill is only an amendment. Sec. 8 of ch. 20, Special Laws of 1862, provides that such settlers shall be at liberty to purchase at $2.50 per acre within the six mile limit, and for $1.25 per acre within the fifteen mile limit, and is not affected by the present act.

3d. Do not the privileges, immunities and franchises named in section 8 include a grant of swamp lands equal to the donation to the Winona branch road. The language is, "and for the purpose of extending, locating, constructing and operating the same, the said company shall have and may exercise all the *rights, immunities, privileges and franchises* conferred in and by its charter, and applicable to any other portion of its road or branch road." I do not think a grant of real estate would be understood from this language; the swamp lands referred to were not conferred by the charter of this company and by no possible construction can be included in the rights or franchises mentioned.

4th. You ask, "Should not sec. 8 *require* as well as authorize and empower the construction of the branch road from some point at or above St. Cloud to Lake Superior?" That depends entirely upon the intention of the legislature. If they intended to *compel* the company to build that portion of the road, it certainly cannot be done under the language used, but if they intended simply to leave the matter to the discretion of the company and to vest in them the requisite power, to be used or not, as the directors may determine, they have employed apt words to express their meaning.

Many of the questions embraced in your letter are questions of policy, and I may say here, in explanation of my meaning, that while grossly improvident legislation should be promptly repressed by the executive veto, the rule generally is that the legislature being presumed to be competent judges of the policy of a measure, the veto is to be interposed only in cases of laws to which there is some legal and constitutional objection. This rule is of course subject, as all general rules are, to many exceptions, but will apply to merely incidental questions of State policy, upon which the executive may happen to differ from the legislature.

ST. Paul, February 6th, 1864. G. E. COLE, Atty. Gen.

Miles Carpenter, Esq., County Auditor, Fillmore County:

SIR: I am in receipt of your favor of 11th inst., inquiring whether county commissioners have authority to organize a new school district upon a petition signed by a majority of the legal voters of the entire territory affected, or whether the law requires a petition signed by a majority of the voters of each district so affected. The language is, "A majority of the legal voters of the territory to be affected thereby." This language seems capable of but one construction,—the petition may be signed by a majority of the legal voters of the entire territory. Had the legislature intended a majority of the voters of each district, they would have adopted the language used by the framers of the constitution with reference to counties, viz.: "A majority of the legal voters of the *district or districts* to be affected thereby." I am aware that the construction may seem to work hardship, by enabling a large and populous district to rob a small and sparsely settled one of a portion of its territory and sources of revenue in defiance of the wishes of a majority of the voters of the latter

The discretion vested in the county commissioners will, however, enable them to protect districts from injustice, as they will derive their *jurisdiction* from the petition of the majority of the voters of the territory, and will then judge of the propriety of the proposed change, and of course give its due weight to a remonstrance, signed by a majority of the voters of either district, although it may be a minority of the voters of the territory affected.

ST. PAUL, February 19th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller, Governor of Minnesota:

SIR: I have examined and herewith return requisition of the Governor of Kansas, and accompanying papers, demanding the arrest and rendition by the authorities of this State, of I. G. Scott and Mahala Haglett, charged with the crime of murder, and have to say that I do not think them sufficient to confer jurisdiction upon the Governor. As I stated to your predecessor in an opinion given in the matter of the requisition of the Governor of Illinois for the arrest and delivery of John G. Sherburne, under date of November 11th, 1861, on file in the executive office, in order to give the Governor of this State jurisdiction in cases of this character, three things are requisite: 1st. The fugitive must be demanded by the Executive of the State from which he fled. 2nd. A copy of an *indictment found*, or an affidavit made before a magistrate, charging the fugitive with having committed the crime. 3d. Such copy of the indictment or affidavit must be certified as authentic by the Executive. In the Matter of Clark, 9 Wend. 212.

In the present case no indictment or affidavit accompanies the requisition, but a paper purporting to be the verdict of a coroner's jury is produced, upon which it is said that by the laws of Kansas, a magistrate is authorized to proceed in the same manner as upon complaint duly made before him. Upon an examination of the statutes of that State I find that such is the law there. The jurisdiction of the Governor of this State depends solely, however, upon the act of Congress, and cannot be affected by the laws of the State from whence the demand is made.

The act of Congress of February, 1793, declares "That whenever the Executive authority of any State, &c., shall demand any person as a fugitive from justice of the executive authority of any such State or Territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any State or Territory as aforesaid, charging the person so demanded with having committed treason, felony or other crime, it shall be the duty of the Governor," &c.

It is a well settled principle that criminal laws are to be strictly construed, and while it is the Governor's duty in all cases when the papers are strictly within the letter of the law, promptly to issue the executive warrant, a just regard for the rights of our own citizens, who are liable to be drawn from their homes, forcibly carried to other States, deprived of the assistance of friends and acquaintances, and

compelled to answer to fictitious charges, by means of undue and *ill* considered exercise of this extraordinary power, demands that the papers on which requisitions are based should be carefully scrutinized and compliance refused in cases not clearly within the letter of the law.

Under the strict rules of construction applicable to the case I cannot regard the verdict of the coroner's jury as an affidavit made before a magistrate. There is no certificate of any officer that the jury were sworn, nor is there crime charged in any such specific form as would under the loosest system of criminal practice justify or support a conviction for murder.

These, however, are incidental objections which might not be sufficient in and of themselves. The act of Congress, however, contemplates that the initiatory steps of a prosecution for a crime should have been taken by a formal charge being preferred, either by an indictment by the grand jury, or a sworn complaint before an examining magistrate, and although the statutes of Kansas have made the verdict of a coroner's jury equivalent to the latter, yet it cannot be said that under the act of Congress, the verdict of the jury is within the letter of the law.

The warrant should be refused.

ST. PAUL, February 20th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of a letter from M. Donahue, Esq., county auditor of Sibley county, inquiring whether county orders will draw interest after presentment and demand at the county treasury. The general rule with reference to interest upon ordinary contracts is very simple and well established. No contract bears interest, *as interest*, unless an express stipulation to that effect is inserted; but a sum equivalent to the legal rate of interest is allowed, as *damages*, for the breach of all money contracts. If payment of a definite sum of money on such contract is delayed beyond the time at which it ought to have been paid, damages will be allowed at the legal rate of interest from the time when the indebtedness matured. A liquidated money indebtedness, payable on demand, will therefore draw interest after demand made.

I know of no principle of law which exempts counties from the operation of this well known rule, and if a county were sued upon an indebtedness of the character mentioned, the plaintiff would undoubtedly recover the face of the demand, with interest from the time when it should have been paid, *i. e.*, from the date of any demand of payment. Sec. 77, chap. 1, Laws of 1860, expressly recognizes the application of this rule to county orders. "The commissioners of any county that has a floating debt *in county orders*, (and the amount authorized by present existing laws to be levied for county purposes be insufficient to defray the expenses of such county and *pay the interest on their debt*,) may, if they deem it just and right, levy a sufficient amount to pay the interest *on their debt*, which tax when collected shall be applied to paying the *interest on their county debt*, and no other purpose."

The debt here referred to is expressly declared to be a debt in county orders.

ST. PAUL, February 20th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I have examined and return herewith an act entitled "An act to amend an act to incorporate the Minneapolis and St. Cloud Railroad Company." I think there are grave objections to this act.

Sec. 1 of the act to which this is an amendment (chap. 159, Laws of 1856) incorporates certain persons therein named, "and all such other persons as shall hereafter become stockholders in said company," and vests in them all the corporate powers conferred by the act. No particular ceremony is made requisite for the acceptance of the charter by the corporators, and although the act contains certain

directory words, there are no clauses of forfeiture. Sec. 17 of the original act provides that "this act is hereby declared to be a public act and may be amended by any subsequent legislative assembly in any manner *not destroying or impairing vested rights*. The original charter, upon acceptance by the corporators, therefore, conferred upon them certain rights, powers and privileges, of which they can only be deprived by their consent or by a forfeiture by some neglect or omission on their part.

The amendatory act before me, however, while purporting to amend and continue the original charter, wholly disregards the rights of these corporators and proceeds to vest the franchises in a new and distinct set of corporators. This action can only be justified upon one of two theories, either that the original charter was never accepted, or that the corporators have forfeited their rights under it, for if not, the original act constituted a contract between the territory and the State as its successor, and the corporators, which is recognized and continued in force by sec. 1 of the schedule of the State constitution and protected by the constitution of the United States. It is certain that acceptance was indispensable to the validity of this contract, but in these cases very slight evidence of acceptance is sufficient, and in cases of grants and proceedings beneficial to the corporators acceptance will always be presumed. Bank of U. S. vs. Dandridge, 12 Wheaton, 64.

There is certainly no evidence before me that the charter has not been accepted, and the presumption being to the contrary, the act being a most liberal grant of extensive and important privileges, we must, I think, treat it as a valid contract unless the corporators have lost their rights by forfeiture. As I have said, there are no express clauses declaring a forfeiture, but it is not necessary to inquire whether the original corporators have or could lose their rights by misuser or non-user, as the rule is established that a corporation is not to be deemed dissolved by reason of any misuser or non-user of its franchises until the default has been judicially ascertained and declared. 2 Kent, Com. 312. The first section of the bill is therefore objectionable because it is a palpable violation of vested rights growing out of the contract between the territory and the original corporators.

The last clause of sec. 2 is objectionable, in that it contains a new grant not found in the original charter of power to construct a railroad from St. Cloud to the Minnesota river. Sec. 2 of art. 10 of the constitution declares that no corporation shall be formed by special act except for municipal purposes. This clause by no means prohibits the amendment or modification of a charter having its origin prior to the adoption of the constitution. "The distinction between a new charter and the renewal of an old one is fully recognized by authority. The extension of a charter as to time, the increase of the capital of the corporation, the curing of any informalities or irregularities, the waiving of any supposed forfeitures, in short any amendment or modification within the scope of the original charter, the better to enable the company to fulfill the objects of its creation, and to adopt itself to change of times and circumstances, is the legitimate exercise of legislative power upon the principle that every grant or concession of power carries with it by necessary implication all others essential to the efficient exercise of that granted." People vs. Marshall, 1 Gilman, 672.

But will it be contended that under a colorable pretence of amendment the legislature may so amend an old and obsolete charter for a railroad as to establish a bank or insurance company; or, to confine myself to the case before me, is it a legitimate exercise of this power of amendment to allow a company originally created with power to construct a railroad between certain specified points, to construct railroads at their election any where and every where throughout the State? This, instead of being an amendment to facilitate and afford increased advantages to the company in the prosecution of its enterprise, would be in reality the inauguration of a new and distinct undertaking, having no necessary connection or relation to the original one, seeking shelter from the constitutional inhibition under the provisions of an old and obsolete charter, which in everything but its name has been so altered in its entire scope and object as to destroy its identity. If this liberty of amendment is to pass unquestioned, the constitutional prohibition is of little avail,

as there are obsolete charters enough upon the territorial statute book to furnish franchises for every variety of corporation, and in sufficient quantity to meet the real or fancied wants of the community.

ST. PAUL, February 22d, 1864. G. E. COLE, Atty. Gen.

Hon. D. Blakely, Superintendent Public Instruction:

SIR: I am informed by you that the records of the county of Sibley were destroyed by fire; that the reports of the several school districts in that county were made at the proper time, and were destroyed in common with other records in the offices of the county officers. That no apportionment was made in October last, the auditor claiming that the records being destroyed, there were no *data* upon which the same could be made. That the auditor afterwards suggested to the several districts (or to all but one) the propriety of making reports anew, which was done by all the districts notified, (one district not notified failing to report,) and that upon the basis furnished by these reports, the auditor made his report to the State Superintendent, who apportioned the school money in the State treasury to the county accordingly.

It is evident that the county has not received her full quota of the public money, by reason of the omission of the district failing to report. This district has since made a report, and the question is, can the county auditor make an apportionment of *all* the money in the county treasury, including that which should have been apportioned at the October apportionment, among all the districts in the county at his next apportionment? I think it is his duty to do so. Sec. 24 of the school law requires him, on the last Wednesday of March, to make an apportionment of the money in the county treasury, among the several districts of the county, which apportionment shall be in proportion to the number of persons in the district, between the ages of 5 and 21 years, as shown by the reports of the several districts; the reports are now all before him and he will have no difficulty in doing this.

I have held that a district failing through negligence to make its report prior to the apportionment, or the report of the auditor to the State Superintendent, will not be entitled to any portion of the funds, as the auditor and superintendent have no *data* upon which they can act, and the district guilty of the negligence should alone be the sufferer; but the present is a case of accident and misfortune; there has been no negligence on the part of any district, but all have been unfortunate, and none of the reports upon which the auditor is to act were filed in time. The county has lost a portion of the school money properly belonging to it through accident, but the district not notified of the necessity of filing an additional report, having once fully complied with the law, is no more in default than any other. The language of the law is broad enough to justify the action advised, and I think the auditor should, at the March apportionment, apportion all moneys in the county treasury, belonging to schools, among the different districts, in proportion to the scholars, &c., as shown by the reports before him.

ST. PAUL, February 27th, 1864. G. E. COLE, Atty. Gen.

To the Prussian Consul, Milwaukee:

SIR: I am in receipt of your favor, inquiring whether, by the laws of the State of Minnesota, a married woman under age has the right, with the consent of her husband, to make a power of attorney for the sale of real estate, and the settlement of an inheritance. In reply, I have to say that the statutes of Minnesota make no special provision upon the subject, but that by the common law which prevails in Minnesota, in common with most of the States of the Union, marriage does not create legal majority, and the disability occasioned by infancy is not thereby removed. Bool vs. Mix, 17 Wendell (N. Y.) Reports, 119.

ST. PAUL, February 27th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I have examined and herewith return an act entitled "An act to amend section 1 of chapter 48 of the Complied Statutes, relating to the conveyance of real estate by executors and administrators in certain cases." It has been usual to exercise a more careful supervision over bills relating to practice in the several courts than others. I think the present bill possesses features of a dangerous character, and that it would be improper to change the law as proposed. The bill provides that "when any person who is bound by a contract either in writing or *parol* to convey real estate, shall die before making the conveyance, the probate court may make a decree authorizing and directing the executor or administrator to convey such real estate in all cases where such deceased person, if living, might be compelled to execute the conveyance." The amendment of the old law consists in the insertion of the word *parol*. Strictly, under the statute of frauds, no person is or can be bound to convey real estate by a parol contract. It is true that a parol contract aided by other circumstances, as part performance, &c., will be enforced in equity upon clear and decisive proofs of the facts necessary to take the case out of the statute. This examination, however, is oftentimes extremely complicated and difficult, and the application of the rules of equity to the facts in the case requires a nice discrimination, the exercise of enlightened judgment, and extensive acquaintance with the principles of law and equity. A power requiring such qualifications I do not think ought to be entrusted to the courts of probate.

The entire theory of the statute, one section only of which is sought to be amended, contemplates the summary action of the probate court only in cases entirely free from doubt. The statute provides for the personal service of no notice or process upon any of the parties interested, and provides that if upon the hearing the judge of probate has any doubt of the right of the petitioner to a specific performance, he shall dismiss the petition. While a contract in writing may be clear and definite, a contract by parol, depending upon the uncertainty of oral testimony, cannot be of that clear and certain character which the statute contemplates, and yet a judge of probate, not subject to doubts, has, as it seems to me, power in the absence of, and without actual notice to, the parties, to transfer the title to real estate in cases in which a court of equity would not hesitate to dismiss the bill.

The statute as it now stands provides that a bill may also be filed in chancery to enforce a contract *in writing*, against the representatives of the deceased, and it has been thought by some lawyers, I believe, that in a case of a parol contract, supported by part performance, there was no remedy, because none is expressly provided. This cannot be so. The *law* only recognizes the validity of a written contract for the conveyance of real estate, but by principles of equity having their origin coeval with the statute of frauds, chancery will in such cases enforce performance, and although the statute may not extend its express provisions to such cases, these principles are sufficiently comprehensive to afford the party seeking relief an adequate remedy.

ST. PAUL, March 3d, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor enclosing a paper signed by many gentlemen of the bar of Ramsey county, advising the signing of a bill, prepared, as I learn, by Chief Justice Emmett, amending section 20, chapter 57, Comp. Stat. The proposed amendment is substantially as follows: "But this shall not be construed as authorizing a trial by jury or upon other than written testimony, when either party shall so elect and give notice thereof in writing." I entertain great respect for many of the gentlemen whose names are attached to the petition, but knowing how easily signatures are procured to petitions, I may be permitted to doubt whether, after all, the deliberate opinion of the Ramsey county bar will be found much at variance with my own. The reasons assigned in support of the bill, are—

1st. It does not have the effect of reinstating the old chancery practice. In an-

swer, I have to say, it does reinstate one of the most marked and distinguishing features of that practice.

2d. That it would not interfere with the right of trial by jury as it now exists. It may be admitted that it does not interfere with the right of trial by jury. In chancery, however, a discretion was vested in the court to frame a feigned issue and send it to a common law court for trial by jury, the trial of which was upon parol evidence in accordance with the practice of that court. The same result is now attained under sec. 7 of chap. 61, Comp. Stat., and rule 23 of the district court. Either the bill in question takes away this discretion, or it requires such trial to be upon written evidence, either of which would be an innovation, not only upon the present practice, but that formerly prevailing in chancery.

3d. It is in accordance with the practice of almost every State in the Union. It is in accordance with the practice of every State retaining the distinct systems of law and equity to require the testimony to be taken by examiners in writing, with the exception, that the proofs of handwriting may be made at the hearing. It is *not* in accordance with the practice of any State which has adopted a system like ours, whereby legal and equitable remedies are sought in the same action and by the same forms.

4th. It will be less expensive. One of the chief complaints against the old court of chancery was its innumerable and endless delays and the enormous expense imposed upon suitors by the voluminous depositions required, and this indeed is a grave objection to the present bill.

5th. It will enable a party to present precisely the same case to the appellate court as to the court below. This is true, and is the real and only object of the bill. If it is desirable that an appellate court should in equity possess power to review both the law and the facts, this argument would be entitled to respect, if it were practicable to reach the end desired in this manner. I do not, however, regard the suggestion of the supreme court in Martin vs. Brown, 4 Minn., 289, in favor of the right of review upon questions of fact, that as our courts are constituted, it would be an appeal from the judgment of one man to that of three, as very forcible, as the value of a decision depends more upon the character than the number of the judges. But admitting the review upon questions of fact desirable, is the amendment proposed practicable under our system of practice, and if so, would it not result in endless doubt and confusion? The bill provides no definite method by which its provisions are to be carried out. The form effected by the New York code, upon which our system of practice is modeled, went to the extent of effacing all distinctions in the forms, pleading, trial and modes of proceeding between law and equity, one of the most marked of which was written evidence. The attempt at a perfect blending of these diverse systems has resulted in sufficient confusion, but if we take one step backward and substitute a partial union for a perfect one, if while we say that the pleadings, forms and proceedings shall be the same, the character and mode of introducing evidence shall be utterly dissimilar, it seems to me that "confusion will be worse confounded;" as the law will then stand, legal and equitable remedies may be sought in the same action, or alternate relief, either legal or equitable, as the plaintiff shall show himself entitled to the one or the other, or an equitable defence may be interposed to a legal cause of action; the proof in support of the equitable relief shall be in writing, that of the legal by parol. But suppose the relief sought is in the alternative, and the plaintiff, as well as the court, is in doubt, until the evidence is in, to which species of relief he is entitled, or suppose he sues for both in one action, or that the plaintiff's cause is legal, the defendant's defence equitable, are two distinct rules of evidence to prevail at the trial? And upon appeal, the proofs in support of the legal cause of action being by parol, and of the equitable in writing, is the court to review the case upon the facts in the one and refuse to do so in the other?

The perfect union of the two systems is thus stated by an approved writer: "There is no longer any distinction in this State between legal and equitable remedies; either may be administered under the same forms; both may be sought in the same action. They are all governed by the same rule of pleading and practice. The

question is not whether the plaintiff has a legal or equitable defence, but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right he seeks to establish, or the defendant shows that he ought not to have the relief sought for." Van Santvoord's Eq. Pr. 18, 20.

I believe, therefore, unless we are prepared to retrace our steps and sunder the two systems entirely, the distinction sought to be engrafted upon our code is unwise and will be found in practice impracticable.

ST. PAUL, March 9th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor, enclosing letter of Judge Chatfield in support of the bill to provide for references in certain actions. I entertain the highest respect for Judge Chatfield's legal ability and experience, and most cordially agree with him in all his arguments in favor of the constitutionality of the bill in question. I have never for a moment doubted its constitutionality. While, however, I have never advised the veto of other bills except upon constitutional grounds, the facility with which bills are crowded through the legislature to meet the views of some lawyer, and to fit some particular case, without regard to the symmetry and consistency of our practice, has induced me to be governed in cases of this character somewhat by my views of the policy or expediency of the measure proposed. I have not the bill before me and must rely upon memory in attempting to state my objections to it. The bill provides that in chancery proceedings whenever either party requests a reference the judge *shall* order it. It is the point that the bill leaves no discretion in the court to which my objection goes. Feigned issues being abolished, a trial of any particular issue of fact by jury may now be obtained in the discretion of the court, under sec. 7, ch. 61, Comp. Stat., and rule 23 of the district court. This privilege in the suitor of applying to the discretion of the court, I regard as a valuable one, and I do not think such discretion should be altogether withdrawn from the court. It is a power which has always existed in courts of equity, and no lawyer can doubt that cases will be frequent in which it can be beneficially exercised. But the bill in question, by declaring that upon the application of either party the court *shall* order a reference, places it in the power of a party to compel his adversary to submit to a reference, even in a case in which the court, had it the power, might advantageously submit an issue to the jury.

I agree with Judge Chatfield in thinking that the law with regard to referees might be advantageously amended. A compulsory reference is now by statute confined to cases in which the taking of an account is necessary, and although the law in this particular does not differ from the New York practice, upon which our own is modified, yet I see no reason why the discretion vested in the old court of chancery, to submit a case to a referee, or any issue of fact to a jury, as the circumstances of the particular case might require, could not properly be vested in our district courts; but the bill in question goes, I submit, somewhat further than this, by depriving the court of the power to submit to a jury and compelling a reference. In other words, the discretion is withdrawn from the judge, and vested in the party.

ST. PAUL, March 9th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, enclosing communication from county auditor of Dodge county, stating that after sale and expiration of period of redemption of a tract of land sold under the act of March 11th, 1862, the owner presents a certificate that the taxes have been paid, and he inquires how he shall "*kill*" the tax deed. There is no method prescribed by law whereby the records can be corrected by the auditor or register. The deed is void, and if the purchaser should refuse to quitclaim to the owner, the latter could by resort to the courts remove the cloud thus cast upon his title. With reference to your suggestions in regard to the treas-

urer of Winona county, who neglects to pay over certain moneys in his hands, claiming the same as fees, I have already communicated with you quite fully upon the subject. It is made the duty of the county auditor and county attorney, by laws referred to in a previous communication, to commence proceedings of this nature.

Sections 73 and 74, page 132, Comp. Stat., requires the Attorney General to cause revenue officers to be prosecuted, &c. This, besides being a prior law to those previously referred to, does not contemplate the personal appearance of that officer in the several district courts. I do not think the public interests require or would justify my attendance in cases of small importance like this, and should I do so, I might upon good grounds be charged with seeking opportunities to appear in the district courts for the sake of the mileage and *per diem*.

I must, therefore, respectfully decline to take personal charge of this action. I believe I have already done in the matter all that can be required of me.

ST. PAUL, March 9th, 1864. G. E. COLE, Atty. Gen.

R. C. Mitchell, Esq., County Attorney, Anoka County:

SIR: I am in receipt of your favor inquiring—

1st. Is it obligatory on you to appear before a justice of the peace in criminal cases when not notified to do so by the justice, and when another attorney has been retained by the complainant? In the case you name, the necessity for your actual attendance may not exist, but the statute makes the county attorney the prosecuting officer of the State, and requires his attendance upon all courts having criminal jurisdiction. Of course there may arise many cases of trivial importance before the various justices in the county in which the justice may not regard the matter of sufficient public interest to require the attendance of the county attorney, and which may not come to his knowledge; he would not be forced to appear under such circumstances. Of course the law in practice is to receive a reasonable construction.

2d. If not bound to appear would it be lawful for him to be employed by the defendant? It would be a gross impropriety, besides being a course not sanctioned by law. It is very seldom that the Attorney General is required to appear in the district courts, yet I should never feel authorized to appear in a criminal case for the defendants.

3d. You inquire whether, when a person comes to you for advice as to the propriety of commencing a criminal prosecution, you have a right to charge for that advice. By no means. I note your remarks about the slender salary paid you by the county, and have only to say that if the county pays an inadequate salary it is optional with you to accept or decline the office, but by your acceptance you impliedly agree to perform all the services required by law for the salary fixed by the commissioners. That is therefore no argument in favor of charging fees or accepting retainers from private individuals.

4th. When complaints are made by the county attorney in good faith, should the justice require him to give security for costs. That is a matter within the discretion of the justice. Cases will rarely occur, I presume, in which it will be necessary or desirable for a prosecuting attorney to appear as the complaining witness. Should such cases arise, however, I am not aware of any rule which exempts such officer from the rules governing such trials.

5th. You inquire whether an acquittal upon the grounds that the complaint did not state who was the owner of the property and that the ownership was not proven on the trial is a bar to a second prosecution for the same offence. At common law the proceedings must have been regular to have sustained the plea of *autrefois acquit*. Thus, if the indictment was defective, an acquittal on the merits could not have been pleaded, as it was said a person tried upon a void indictment could not have been in jeopardy. Our statute has, at least as to indictments, modified this rule, and under its provisions a verdict of a jury upon the merits may be pleaded in bar of a second prosecution, although the trial was had upon a void indictment. Secs. 134 and 135, page 767, Comp. Stat.

6th and 7th. You state that you have obtained judgments against certain school districts who refuse to pay; that these judgments are based upon contracts with teachers; that there is money in the county treasury belonging to these districts; and you inquire if you cannot garnish the county treasurer. You cannot; public officers cannot be garnished. Stillman vs. Isham, 11 Conn. 123.

ST. PAUL, March 21st, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Auditor of State:

SIR: I am in receipt of your favor enclosing letter from G. E. Stacey, Esq., county auditor of Freeborn county, enquiring as follows: "Can I legally advertise the delinquent lands of 1863 in regular sub-divisions, that is, in forty acre tracts, when the same was assessed in larger quantities, say 80 and 160 acres?"

Sec. 23 of chapter 2, Laws of 1860, requires each tract contained in the advertisements to be offered for sale separately, and the purchaser is the person offering to pay the taxes and penalty charged on *such land* for the least quantity thereof. The taxes in the case supposed are charged on the larger tract; it is the least quantity of this tract that the purchaser is to receive, upon paying the taxes on *that tract*, and I am unable to perceive where any county officer derives his authority to divide the tract and apportion the taxes anew upon the several portions thus separated.

By what rule is the officer to be governed in making this division? One subdivision of the tract may largely exceed the other in value, but if the auditor is to exercise his discretion in apportioning the taxes to the several portions of the tract, he virtually possesses power to revise the action of the assessors; for the sale, as we have seen, must follow the advertisement.

The lien of the State attaches on the 1st of August upon *each tract* for the taxes charged *thereon*. Is this lien by the subsequent action of the auditor to be disturbed and to attach in unequal proportions to the separate parcels of that tract? "The sale must be according to the parcels and descriptions contained in the list and the other proceedings, or it cannot be sustained. Especially must it conform to the list, as that constitutes the basis of all the subsequent proceedings. The course pursued must be consistent with itself throughout the entire proceeding. Any variance in this respect will be fatal to the validity of the sale. The reason is obvious; the authority of the officer to sell is derived from the existence and regularity of the anterior proceedings. If these proceedings are irregular he possesses no authority at all; if regular, the law confers upon him no authority to change them. He acts at his peril in making a sale if they are irregular, and if regular they constitute his only guide in *advertising, selling and conveying the land* affected by them." Blackwell on Tax Titles, 330.

The auditor's enquiry must be answered in the negative.

ST. PAUL, March 22d, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditer:

SIR: I have read and considered your communication of March 22d, together with communication of Bank of Minnesota, and the statement and amended statement of the bank which were enclosed. The issue between the auditor and the bank seems to be this: On the 15th day of July, 1863, the bank made a statement as follows:

Bills discounted, - - - - - - - - -	none.
United States stocks exclusive of stocks deposited with State Auditor for security for circulation, - - - - - - -	$25,521
At that time the bank had on deposit with the Auditor State stocks upon which it was entitled to receive interest amounting to - -	$44,334

The auditor says, that supposing this statement to be incorrect by reason of a false legal theory adopted by the bank, he partially disregarded it and taxed the State

stocks in his hands; that he also found the average amount of money used in said bank with a view to profit, or upon which the bank received, or was entitled to receive, interest, was $64,098, from which he deducted the United States stocks, $23,521, and taxed the bank for the balance, $40,577, and the bank refuses to honor the Auditor's draft for the amount thus made up.

The law provides that in case the bank refuses or omits to make the statement required, the Auditor shall ascertain the amount from the last quarterly returns, and I have held that the Auditor had no right to reject a statement simply because he suspected it to be false in fact, but that a statement shown to be incorrect by the records of his office. or made so by a false legal theory adopted by the banker, might be thus far disregarded or corrected; thus, in this case, the State stocks on deposit with the Auditor are interest-bearing stocks, and are entirely omitted in the statement furnished. I think the Auditor entirely justified in taxing these, but how it was possible for him to say from any *data* in his possession what was the average amount of moneys used with a view to profit, is a point upon which I am not informed. The bank returned none, and the right of the auditor to pronounce this statement false upon a vague suspicion may well be questioned. The Auditor might know the amount of circulation issued by him, but could hardly be supposed to know whether that circulation still remained idle in the vaults of the bank or has been used for loans and discounts, or invested in taxable property.

The amended statement, assuming it to be true, as made by the bank, illustrates the fallacy of the rule adopted by the Auditor, by showing the falsity of the conclusions to which it led him. It appears by this statement that the currency of the bank has been used in purchasing United States securities, which are not now and which were not previously reported, because not taxable, and that the bank has never transacted any business as a bank of discount. As this property is not taxable, the sole assets of the bank subject to taxation are the State stocks in the hands of the Auditor. The bank, however, claims that only the excess of the amount invested in State stocks, less specie and legal tender notes kept on hand for the redemption of its circulation, should be taxed. Both this claim and that of the Auditor to tax United States securities are utterly without foundation; the law requires the average amount of all moneys, effects or dues of every description belonging to such bank or banking company, loaned, invested or otherwise used or employed, with a view to profit, or upon which such banking company receives or is entitled to receive interest, to be taxed, but provides that the average amount of specie funds kept on hand, with a view to redeeming the circulation, shall be excluded from such statement and estimate. I should be glad to know by what construction of this language it could be held that the amount thus exempt should be deducted from the amount taxable. It is the *amount* of specie and not *twice* the amount which is to be excluded.

ST. PAUL, March 24th, 1864. G. E. COLE, Atty. Gen.

S M. Fearly, Esq., County Attorney, Steele Co.:

DEAR SIR: I am in receipt of your favor making the following inquiries:

"1st. Under sec. 4 of ch. 3 of the Session Laws of 1860, could a county commissioner be elected, qualified and legally hold the office of county treasurer?" The language of the proviso to the section alluded to is as follows: "Provided, that no person who holds the office of county attorney, sheriff, register of deeds, county auditor or county commissioner at the time of said election shall be eligible to said office of county treasurer." The language of a previous law repealed by that of 1860 was as follows: "Provided, that no person who holds the office of district attorney, sheriff, register of deeds, or county commissioner shall be eligible to said office." The intention of the legislature in the enactment of laws of this character would seem to be to throw around the finances of the county all possible guards against frauds and peculation. The county commissioners are entrusted with the supervision of the treasury and the treasurer is to render his accounts to them, and by them is liable

to be removed for peculation in office. The impropriety of allowing the same individual to hold both offices is obvious. Upon the same principle is founded the ancient rule of the common law, that offices subordinate and interfering are incompatible with each other. All laws couched in doubtful or ambiguous terms are to be construed with reference to their spirit and the evil to be avoided or remedied. Upon ceasing to hold the office of county commissioner, the danger which it was the object of the legislature to prevent, ceases, and the legal maxim "*cessante ratione lex cessat*," becomes applicable. Hence it is well settled that the appointment or election to an incompatible office is not absolutely void, but that the acceptance of an incompatible office vacates that previously held. People vs. Carrique, 2 Hill, 93.

There would be no difficulty under the previous law in the application of this principle, but by the insertion of the clause in that of 1860, "at the time of said election," the legislature has attempted the inauguration of a different rule. It might well be held that the terms "no person who holds the office of county treasurer" should be confined to a holding at the same time that the incumbent was exercising the office of treasurer, and that by ceasing to hold the office of commissioner the temporary disability terminated; but the language "no person who holds the office of county commissioner at the time of said election," has fixed a definite point of time at which a disability then existing shall disqualify; and while an equitable construction of statutes is admissible in some instances, it cannot be justified when the letter of the law is plain, for there is then no room for construction.

Were it not therefore for the plain provisions of the constitution I should be forced to the opinion that the legislature has for no very obvious reason established a rule unknown to the common law, and that a person holding the office of county commissioner at the time of the election could not by any subsequent act qualify himself for the office of treasurer, and could not be considered entitled to the office.

Although it is a salutary rule that inferior courts, or indeed those of last resort, ought never to declare a law unconstitutional, unless in a case entirely free from doubt, yet I conceive it to be equally true that in a case of plain conflict between the constitution and the law, the officer called upon to express his opinion should not hesitate to uphold the constitution in preference to a legislative enactment. Article 7 of the constitution prescribes the qualifications of electors, and section 7 of the same article declares that "every person who by the provisions of this article shall be entitled to vote at any election shall be eligible to any office which now is, or hereafter shall be, elective by the people."

Conceding that there is no conflict between the rule of the common law or the statute law, as it existed prior to 1860, and the constitution, as by these a party was not rendered absolutely ineligible to an incompatible office, but might be elected to any office in the gift of the people, subject only to the condition of vacating the first by acceptance of the second, it is difficult to reconcile with the provisions of that instrument, a law which imposes new and additional qualifications foreign to the spirit and intent of the constitution, and prohibits the election of a person not possessed of these statutory qualifications.

By the constitution, the liberty of choice in the selection of their servants, subject to a few necessary limitations, is guarantied to the people of the State. A right in the individual to the office, and a right in his fellow citizens to select him, is here conferred in the most direct and positive terms. Whence derives the legislature its assumed power to ignore or disregard both these privileges by the imposition of arbitrary restrictions unknown to the constitution? This question has been so ably discussed by an eminent jurist in the court of errors of New York, in a decision remarkable for clearness of logic and force of reasoning, that I may be excused for a somewhat lengthy quotation.

In the case of Baker vs. The People, 3 Cowen, 686, Chancellor Sanford said: "Eligibility to public trusts is claimed as a constitutional right which cannot be abridged or impaired. The constitution establishes and defines the right of suffrage, and gives to the electors and to various authorities the power to confer public trusts. It declares that ministers of religion shall be ineligible to any office; it pre-

scribes in respect to certain offices particular circumstances, without which a person is not eligible to the stations; and it provides that persons holding certain offices, shall hold no other public trust. *Except particular exclusions thus established, the electors and the appointing authorities are by the Constitution wholly free to confer public stations upon any person, according to their pleasure.* The constitution giving the right of election and the right of appointment, these rights consisting essentially in the freedom of choice, and the constitution also declaring that certain persons are not eligible to office, it follows from these powers and provisions that all other persons are eligible; eligibility to office is not declared as a right or principle by any express terms of the constitution," (and here it will be observed that the case is stronger under our own constitution than under that of New York, as, by the express terms of the former, eligibility to office is declared as a right;) "but," says the chancellor, "it results as a just deduction from the express powers and provisions of the system. *The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the constitution. I therefore conceive it to be entirely clear that the legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications which the constitution does not require.* If, for example, it should be enacted by law that all physicians or all persons of a particular religious sect should be ineligible to public trust, or that all persons not possessing a certain amount of property should be excluded, or that a member of the assembly must be a freeholder, any such regulation would be an infringement of the constitution, and it would be in effect an alteration of the constitution itself." The case was determined upon another point, but the decision is valuable, as the carefully considered opinion of one of the ablest lawyers that has ever adorned the bench of New York.

If the election should be declared illegal, there would be no vacancy; the present incumbent would hold until his successor is elected and qualified; but I am of opinion, for the reasons given, that in the case submitted to me, the fact that the person elected held the office of county commissioner at the time of the election does not of itself render him ineligible to that of county treasurer.

ST. PAUL, March 24th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor of the 25th inst., inquiring how real property should be described in the assessment rolls and duplicate lists, viz.: whether it must be described in legal subdivisions as 40's, and each subdivision regarded as a separate tract, or whether a large quantity, when owned by the same person and occupied as a farm, may be embraced in a single description. Section 42, page 32, Session Laws 1860, provides that "Each separate tract of real property in each township, other than town property, shall be contained in a line or lines opposite the name of the owner or owners, arranged in numerical or alphabetical order. Each separate lot or tract of real estate in each town shall be set down in a line or lines opposite the name of the owner or owners, arranged in numerical or alphabetical order."

The construction dictated by common sense will, in this as in most cases, be found to harmonize with the rules of law. The fact that the United States government, for convenience of disposition, has seen fit to sub-divide a section into 40's, does not by any means constitute each 40 a separate tract. To the comprehension of an ordinary man, not seeking for technical distinctions, a farm of contiguous territory, owned and occupied by the same person, would seem to be a separate tract of real property, and such is the construction which the law places upon it. Atkins vs. Hinman, 2 Gilman, 443; Spellman vs. Curtenius, 12 Ill. 410; Morley vs. Naylor, 6 Minn. 192.

The word "lot," in the second subdivision of the section, must be taken to mean town or city lots, as laid out, platted, numbered and recorded. 6 Minn. 203. And a sale of a number of such lots in a body, or the assessment of a number as one tract, although lying contiguous, would be void. The reason of the distinction between

the two cases is obvious. The law must be strictly followed in both cases; but in the first, any number of government subdivisions lying together, and owned by the same person, constitute one tract, within the meaning of the law. The law does not declare that each separate government subdivision should be listed separately, but it does require that each separate town subdivision, *i. e.*, lots, should be so listed. Corporation of Washington vs. Pratt, 8 Wheat. 681; Unmin vs. Inman, 26 Maine, 228; Wiley vs. Lorilles' Lessee, 9 Ohio, 43.

This distinction made by the Legislature is not without its reason. The laws regulating the levy and collection of taxes are sufficiently summary in their mildest form, and both justice and public policy require their burdens to be made light as possible. Lands must be sold as listed. If a block of town lots are listed as one block, they must be sold in a body and redeemed in a body; but in a case of a large number of town lots, held for purposes of speculation, the owner may not be able to redeem all, or for special reasons may desire to redeem a part. The principles which govern all summary proceedings, whether by foreclosure, execution or tax sales, preserve this right to the owner, otherwise the salutary measures for enforcing payment by sale of real property might be converted into means of intolerable oppression, and through the inability of the owner to redeem, large amounts of real property sacrificed to the payment of comparatively trivial amounts. This rule, however, must have some limit, and that selected by the legislature, of a tract of contiguous territory outside of any city or town, and of a lot within the town, is perhaps as reasonable and just as any which could be adopted. The language, "or tract of real estate," in the subdivision, refers to such lands within the limits of any town as are not divided into lots.

You also request me to prepare a form for the general tax sale or advertisement, and especially for cases in which lands omitted the previous year are advertised pursuant to section 14, chapter 2, Laws of 1861.

The general principles governing tax sales have been so often stated that I can hardly do more than repeat them. The full directions published on page 62 of the decisions of this office, embrace principles which will apply to all tax sales. The list to be published is simply a transcript of the duplicate list prepared by the auditor, and upon which the treasurer collects. Section 42, chapter 1, Sess. Laws of 1860, prescribes the contents of this list. It is a duplicate of this which is placed in the treasurer's hands. And the delinquent list is simply a transcript of that part of the duplicate upon which the taxes remain unpaid. The description of the property as it appeared on the original list must be retained. Section 4, chapter 2, Laws of 1861.

Keeping in view the fact that the advertisement must conform to this list, there will be little difficulty in determining what it must contain. Any form given by me is therefore on the assumption that the original list was in accordance with law.

The statute prescribes what the notice must contain, and must be strictly followed.

ST. PAUL, March 27th, 1864. G. E. COLE, Atty. Gen.

H. M. Atkins, Esq., County Attorney, Mille Lac County:

SIR: I am in receipt of your favor enquiring whether land which was forfeited to the State in 1860 is subject to sale under the provisions of sec. 28, ch. 2, Session Laws of 1860, as amended. The language of that section as amended by the legislature at its last session is substantially as follows: "At any time before any tract or parcel of land hereafter or heretofore forfeited to the State shall be redeemed, sold or disposed of, any person may become the purchaser thereof by paying into the county treasury all the taxes, costs and interest due thereon at the time of such purchase, and the purchaser shall thereupon become vested with the same rights as he would have acquired had he become the purchaser of such land at the delinquent tax sale, and the time of redemption shall commence running from and after the day on which the same became so forfeited."

On the day of sale in June, 1860, the proceedings to enforce the collection of the tax of 1859 by sale of lands were closed by sale, and the rights of purchaser and owner became fixed; the purchaser took the land subject to the right of the owner to redeem within two years. But if the land was forfeited to the State, the right of the owner attached to redeem at any time before the sale of forfeited lands, to have the land then exposed for sale to the highest bidder, and to redeem from such sale at any time within six months.

At the time of the passage of the section quoted above, the period of two years from the sale of 1860 had elapsed, and by the terms of the law, a party availing himself of its provisions is entitled to a tax deed at once, which is declared by law to vest in him an absolute title both at law and equity, but the original owner was at that time possessed of a vested interest in the land, and the right to redeem at any time within six months from the forfeited sale in January next, or in case the land should not then be sold, he was entitled to a much longer period. This vested interest is, in the case put by you, suddenly and summarily terminated and destroyed by this statute, and I apprehend that it requires no argument to prove the nullity of a law productive of such results.

The Supreme Court in the case of Heyward vs. Judd, in a decision which met with the unanimous disapproval of the bar, I believe, held that it was competent for the legislature to extend the period of redemption on mortgages from one to three years, but while making a distinction between foreclosures by advertisement and in chancery, they say, "the statute directly changes the nature of the estate which the mortgagee may sell from one absolute, after one year, to one qualified by the right to defeat it by redemption at any time within three years,—a very different and much less valuable interest;" and they very properly held that the legislature was not competent to do this, so far as mortgages containing a power of sale and foreclosure by advertisement were concerned. Had they gone further and extended their decision to all mortgages, however foreclosed, their opinion would have met with a more ready assent. They went far enough in some of their *dicta* however to cover the present case. This law, instead of changing a vested interest to one different and less valuable, would in the case you suppose utterly and entirely extinguish it. As it is not the province of ministerial officers to decide upon the constitutionality of a law, with the execution of which they are entrusted, your auditor can execute the proper certificates and conveyances to any party willing to risk such a title, who will then be in a position to test the matter in the courts.

ST. PAUL, April 8th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor. enclosing communication from the county auditor of Rice county and letter from Geo. H. Marsh. Mr. Marsh it seems was a mail contractor and entered as such in 1857 certain lands under the provisions of the act of Congress of March 3d, 1855, the language of which is as follows: "Each contractor engaged or to be engaged in carrying mails through any of the territories west of the Mississippi, shall have the privilege of occupying stations at the rate of not more than one for every 20 miles of the route on which he carries the mail, and shall have a pre-emptive right therein," &c.

It seems Mr. Marsh entered the lands in question, and as I infer paid for them and received the usual duplicate certificate therefor. Had these entries been confirmed in the usual course of business by the Commissioner of the General Land Office, there can be no doubt that they would have been taxable from the date of the entry. See Camp vs. Smith, 2 Minn. 155; Carroll vs. Safford, 3 How U. S. Rep. 509.

The equitable title was in the pre-emptor upon entry, although the legal title remained in the United States until the issuing of the patent, which, when issued, took effect by relation from the date of the original entry. The commissioner, however, for some reason, which does not appear, refused to confirm these entries,

and the pre-emptors then applied to Congress to do what the commissioner refused to do.

Congress thereupon passed an act on the 21st day of June, 1860, declaring "That all entries which have heretofore been allowed by registers and receivers, and in regard to which no adverse claims have arisen under the decision of the Secretary of the Interior or the Commissioner of the General Land Office, setting aside such entries under the provisions of the act of 1855, be and the same are hereby confirmed, and the Commissioner of the General Land Office is hereby directed to issue a patent upon payment of $1.25 per acre for the lands embraced in such patent." The issuance of the patent, I presume, was not absolutely necessary to vest the title in the contractor, the confirmatory act alone being sufficient for that. Grignon's Lessees vs. Astor, 2 Howard, 319.

The act does not require a new entry, but recognizes and confirms the old one. It also recognizes an equity in the pre-emptor which it is the object of the act to confirm. Now if lands may be taxed while the legal title remains in the government, provided an equity has passed to the pre-emptor, and if the confirmation by the department of the interior has the effect simply to ratify the original entry, and takes effect by relation from it, I am unable to perceive why a confirmation by another branch of the government should be held to have a different effect. The law creates no equitable title, but simply confirms an old one.

The inducements moving Congress to the passage of the act were unquestionably the equities created by the entry. Now it is impossible under this state of facts to say that there ever has been a moment of time since the original entry, when the contractors were entirely without interest in the lands thus entered. The tax laws act upon the interest of the owner, whatever it is, and upon the confirmation of a previously defective entry the legal title thus created at once enures to the benefit of the holders of the equities previously acquired.

It was held by the courts of Ohio, in an opinion cited by me in a recent communication, that if a party entered a tract, and it was taxed after entry, and he then abandoned that entry and made another on the same land, the title, when acquired by the issuance of the patent, would enure to the benefit of the purchaser at the tax sale.

Mr. Marsh claims, however, that the government was the owner of the land until the subsequent confirmation. This may be admitted, and it may be also admitted that if the original entry had been disregarded, and in a new and entirely distinct transaction the contractors had purchased the same lands and received a patent therefor, entirely ignoring and abandoning the original entry, the title would have dated from such purchase. But this is not the case here; the original entry instead of being ignored is expressly recognized and confirmed, and that confirmation takes effect from such entry, and cures all defects, if any existed. The lands are taxable from the date of the entry.

ST. PAUL, April 18th, 1864. G. E. COLE, Atty. Gen.

County Attorney, Freeborn County:

SIR: I am in receipt of your favor, enquiring whether a person living upon school lands, but who has not leased them, has a right to cut timber to make improvements upon the land. The Commissioner of the State land office has control of all public lands, and all inquiries with reference to them should in the first instance be addressed to him. All persons who have settled upon school lands since January, 1861, are trespassers, and acquire no right by such settlement. Those who settled prior to that time are suffered to remain and are protected in their improvements; they are in a certain sense tenants of the State, and perhaps it would not be going too far to say that in the absence of express provision, the rules of good husbandry which would govern a lease by an individual proprietor ought to apply to them. Conceding that strictly no right to cut timber exists, in a case in which a *bona fide* settler is in good faith proceeding to make improvements, cuts timber necessary for

this purpose and thereby enhances the value of the land, I would not advise any interference with him; but a settler should not be suffered under a mere colorable pretence of making improvements to commit waste upon school lands.

ST. PAUL, April 22d, 1864. G. E. COLE, Atty. Gen.

O. A. Hadley, Esq., County Auditor:

DEAR SIR: I am in receipt of your favor of the 21st inst., stating that the list of delinquent taxes for your county was first published in the "Post," which should have been issued on Saturday, the 16th of April, but that the paper was not distributed to subscribers until Wednesday, the 20th, and you enquire whether the sale will be legal. Perhaps it avails little to enquire whether the sale will or will not be legal, as the defect, if defect there is, cannot now be remedied. The law requires that the list shall be published four weeks, between the third Monday of March and the third Monday of May, or in other words, a publication for the full period of twenty-eight days between those dates. If the first publication was on Wednesday, the 20th of April, it is clear that the publication for the time required cannot be had between those dates. The question turns therefore upon this—was the notice first published on Saturday, the 16th, when the paper bears date, or on Wednesday, when actually distributed?

The definition of the term "publication" is "the act by which a thing is made public." The intention of the law was to give the tax payer a notice for the full time of twenty-eight days, and he is by law informed when he is to look for the notice, viz.: between the third Monday of March and the third Monday of May. The mere printing of the paper, so long as it was kept in the office, cannot be said to be in any sense a publication. If so, a neglect to distribute the paper at all would be sufficient, provided it was duly printed. The law must be strictly and literally followed, even in matters which may not seem essential, and I do not think the sale in this instance will stand the test of judicial scrutiny.

ST. PAUL, April 25th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor

SIR: I am in receipt of your favor enclosing letter from the auditor of Freeborn county, enquiring whether the owner of land sold for taxes can redeem after the expiration of the two years allowed for redemption, but before the execution of the tax deed. Section 85, chapter 1, Laws of 1860, allows the owner to redeem at any time within two years from the sale. Section 29, chapter 2, Laws of 1860, authorizes the auditor to execute a deed at any time after the lapse of two years. By section 30, chapter 2, the deed vests in the grantee a good and valid title, both at law and equity, and constitutes *prima facia* evidence thereof. The only two cases, that I am aware of, which discuss this question, are conflicting:

In Ferguson vs. Miles, 3 Gilman, 358, the court held that upon the execution of the tax deed, it took effect by relation from the expiration of the period of redemption, and that the interest of the purchaser, after the expiration of the period of redemption and before the execution of the deed, might be taken and sold upon execution.

In Donahue vs. Veal, 19 Missouri, 331, the court held that the doctrine of relation did not apply to tax sales, and that the interest of the purchaser prior to the execution of the deed was simply the right to receive the purchase money and interest from the owner, who might redeem at any time after the expiration of the time for redemption and before the execution of a deed.

The explicit language of the statute and all the analogies of the law are opposed to the Missouri decision. If the doctrine of relation does not apply to tax sales, then a tax sale is an isolated case, in which the principles applicable to all similar cases are disregarded; but for what reason, it is impossible to perceive. After the expiration of the time for redemption, and before the execution of the deed, it would

seem that the purchaser stood in the same position as the pre-emptor prior to the issuing of the patent; the equitable title is in him, and the valid legal title, although suspended until the evidence of it is formally executed and delivered, when that act is performed, vests in the purchaser, by relation, from the date of the inception of his equitable title. Mr. Blackwell, in his work on tax titles, takes the same view of the subject. Blackwell on Tax Titles, 458.

I think the owner's right to redeem is gone after the lapse of two years, whether the deed is executed or not.

ST. PAUL, April 29th, 1864. G. E. COLE, Atty. Gen.

R. C. Mitchell, Esq., County Attorney, Anoka County.

SIR: I am in receipt of your favor, enquiring as follows:

1st. In criminal cases before a justice of the peace which have been appealed by the defendant, are the county commissioners required to allow, and cause to be paid, the costs which have already accrued before the final determination of the action? They are not. Sec. 49, p. 594, Compiled Statutes, declares when such costs shall be paid from the county treasury, viz.: when the prosecution fails; when the defendant shall prove insolvent, or escape, or be unable to pay the fees *when convicted.*

2d. Are persons who enter into a bond for the payment of costs in a criminal case before a justice liable for the costs in the district court after the case has been appealed and the defendant acquitted? I presume you mean cases in which the justice has required the complainant to give security for costs. Sec. 200, page 527, authorizes the justice to require security for costs of the complainant, and sec. 198, page 525, provides that if he certifies in his docket that the complaint was wilful and malicious and without probable cause, he shall enter judgment against the complainant for costs. In the case stated by you I suppose the defendant must have been convicted before the justice, as no one but a defendant can appeal from a judgment in a criminal case. But the fact that he was convicted before the justice furnishes pretty strong grounds for presuming that there was probable cause for the prosecution. This provision of law was passed for the purpose of protecting the county from the expense of numerous petty prosecutions before a justice originating in spite and malice, and has no application to district courts. The district court can only render judgment for costs against a party to the proceeding—the complainant is certainly not a party and cannot be required to pay the costs in the district court.

3d. You inquire whether, if a county treasurer is garnished and appears and discloses an indebtedness to the defendant, but does not disclose the fact that he is county treasurer, and that fact is not in evidence, the justice may rightly render judgment against him. *Certainly.* A court is to decide upon the evidence before it, and facts not proved cannot be regarded.

4th. You inquire if A steals $15 worth of property of B, would B lay himself liable by accepting $25, and agreeing not to prosecute?

See sec. 20, page 722, and sec. 23, page 760, Comp. Stat.

ST. PAUL, April 29th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor, stating that several of the friends of the St. Paul and Lake Superior Railroad desire an extra session of the legislature for the purpose of appropriating the lands donated to the State by a recent act of Congress for the construction of a railroad from the navigable waters of the Mississippi to Lake Superior—and you propose to exact of these parties a bond to pay all the expenses; and you inquire whether a bond taken for this purpose would be unquestionably valid. In reply I have respectfully to say, that either the public interests require an extra session or they do not. If they do the public should defray the expenses. If they do not I think none should be called. The proposal to call a legis-

lature together at the expense of a private individual or individuals is a novel one. I believe and I think the Governor has no authority to exact or receive the bond proposed. It seems to me that it would be void upon grounds of public policy.

ST. PAUL, May 5th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor inquiring whether in case you order a new appraisal of school lands pursuant to sec. 17 of chap. 62, of Session Laws of 1862, and a portion of the lands are appraised higher than at the first appraisal and a portion lower, you are at liberty to adopt the appraisal as to the lands whose value is raised, and disregard it in those cases where the appraisal is lower than the previous one. In other words, whether you are at liberty to adopt the appraisal if it meets your approval and disregard it if it does not. There can hardly be two sides to this question. If this unlimited and arbitrary power is vested in the land commissioner it would seem that the appointment of appraisers is a useless formality. In place of three gentlemen selected in view of their good judgment in such matters and acquaintance with the value of property in their neighborhood, it is proposed to substitute the judgment of one, doubtless equally good, but not made an appraiser by law and not resident in the vicinity or conversant with the value of the property to be appraised. Your question must undoubtedly be answered in the negative.

ST. PAUL, May 6th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, Commissioner State Land Office:

SIR: You ask me what powers are conferred upon you, with reference to the granting the right of way over school lands, &c., by secs. 19 and 20 of an act to amend an act entitled "An act to facilitate the construction of the Minneapolis and Cedar Valley Railroad and to amend and continue certain acts in relation thereto," approved February 1, 1864. The law is as plain as I can make it and clearly confers the requisite authority upon you. I have always entertained a doubt as to the power of the State to dispose of any interest in school lands for such purposes, and have thought it more prudent for the company to have the land regularly condemned for the purposes of the road.

The authority to grant the right of way to the company is, however, by the law vested in you, and where there is doubt about the constitutionality of a law, I believe it is the custom of executive officers to execute the law and leave the question of constitutionality for tribunals more competent to decide it. You will therefore rightfully use your own judgment as to whether you will make use of the authority conferred upon you by law.

ST. PAUL, June 6th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor stating that the charter of the city of St. Paul exempts firemen from the payment of a poll tax, while the poll tax law of 1863, framed subsequently to the charter, declares that every white male citizen or legal voter, except soldiers in the United States service, shall be liable to a poll tax of one dollar, and you enquire whether this clause of the subsequent general law repeals that of the prior special enactment. Assuming the general law to be constitutional, I am of opinion that it is a repeal of the previous law, and that such exemptions cannot be claimed. Smith on Constitutional Construction, 899.

ST. PAUL, June 9th, 1864. G. E. COLE, Atty. Gen.

Andrew C. Dunn, County Attorney, Faribault County:

SIR: I am in receipt of your favor, enquiring where the proceeds of a criminal recognizance goes, and intimating that it is your impression that it goes to the general county fund, and if so, is payable in county orders. I do not think it by any means follows, admitting that it goes to the county fund, that it is payable in county orders. It is a mistake to suppose that fines, penalties and forfeitures imposed as a punishment for crimes against the public, are mere debts to the county, and governed by the same rules as an ordinary obligation. The fine or forfeiture takes place at the suit of the public, represented by the State government, and the county as a mere corporation has no concern in the matter. The proceeds of the recognizance may, it is true, be paid into the county treasury, but in this, as in by far the greater number of instances, county officers act as public officers, and not as mere agents for the county in her corporate capacity. It would require an express provision of law to authorize the receipt of anything except money for penalties or forfeitures of this nature.

Sec. 30, chap. 103, Comp. Stat., requires the court, upon forfeiture of a recognizance, to render judgment for the Territory. Sec. 11, chap. 69, declares that fines and forfeitures not especially granted or appropriated, shall be paid into the treasury of the Territory.

ST. PAUL, June 15th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, claiming the right on behalf of the State to tax the lands of the St. Paul and Pacific Railroad Co., as soon as they are disposed of by agreement by the company, but before the execution of the deed, and enclosing a communication from the president of the company objecting to this claim.

Sec. 18, of ch. 1, Laws of 1857, Ex. Sess., being the original charter of the company, declares that the lands thereby granted to the company shall be exempted from taxation until *sold and conveyed* by the company. A conveyance is at common law defined to be "an instrument of writing by which real estate or *interest* in lands is transferred from one person to another." Burrill's Law Dictionary, title, "Conveyance." The definition given to the term by the legislature in several instances is somewhat broader, and extends to every instrument in writing by which the title to real estate may be affected in law or equity, with certain exceptions not applicable here. Sec. 30, p. 400; sec. 10, p. 405, Comp. Stat. I do not therefore consider the actual execution and delivery of a deed in fee simple, a condition precedent to the right of taxation. The object of the clause was to exempt the interest of the company merely from taxation, and I do not understand the auditor to assert the right to prejudice the interest of the company by taxation. The most that could be claimed, would be the right to tax the estate or interest of a purchaser in possession, under a contract to purchase and to convey to a purchaser at a tax sale, the interest of such person under the contract. In other words, that the purchaser at a tax sale might step into the shoes of the original purchaser and succeed to his rights to receive a deed from the company, upon paying the instalments maturing upon the contract.

I appreciate fully the force of your arguments upon this point. The policy of the company will undoubtedly be to sell their lands upon long time, at a low rate of interest, with annual payments, and the deed will be withheld until the final payment. I do not mean to intimate that this course will be resorted to, to avoid taxtion, but because it is the policy adopted by all land grant roads, and is one which ensures the readiest sales and highest prices. If these purchasers for a long series of years shall escape from the payment of taxes upon the amount which they have invested in these lands, the public will to that extent be a loser.

But questions of public policy address themselves to the legislature. The question for me to consider, is, what are the present rights of the State under existing laws? It has been repeatedly held that the interest of a purchaser in possession

under a contract to purchase, who has not paid the entire purchase money, is not a legal estate and cannot be taken on an execution at law. Bogart v. Perry, 17 Johns. 356; Ellworth v. Cuyler, 9 Paige, Ch. R. 417.

The only manner by which such interests can be reached is by bill in equity. The statute has enacted a system of taxation, and has prescribed the means by which it is to be enforced. It is a familiar principle that when the statute enacts a right, and prescribes the manner of enforcing it, the means thus prescribed are exclusive, and none other can be adopted. Hence, in the well considered case of the Supervisors of Albany v. Durant, 26 Wendell, 66, it was held that as the statute provided a means of collection by means of a warrant to the collector, chancery had no jurisdiction to enable the public to reach equitable assets in the hands of a delinquent tax payer. The case is very different from that of a pre-emptor who has paid the purchase money, but not received his patent; as against every one but the United States, he is the absolute owner; he has the entire beneficial interest in the lands, is recognized as the owner by State laws, and his interest may be sold, assigned or taken on execution. The formal evidence of his title alone is wanting. I am of opinion that under existing laws, the interest is not taxable, and that the legislature alone can apply a remedy.

ST. PAUL, June 28th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I have just laid my hand upon a communication from the county auditor of Mower county, under date of June 25th, and transmitted to me under enclosure from yourself, which I mislaid at the time of its receipt. The question submitted is this: A bids in a tract of land for the tax of 1858. B bids in the same land for the tax of 1859. The time for redemption on B's purchase has expired; he receives the tax deed and desires to record it, and the auditor is in doubt whether he can certify that the taxes are paid, so long as the taxes paid by A have not been refunded to him.

I think several different decisions from this office embrace all the points raised: A, by purchasing the land at the tax sale, was substituted in the place of the owner so far as subsequent taxes were concerned,—that is, if he desired to preserve his lien, he should have paid all subsequent taxes; by virtue of his prior purchase he became a redemptioner from B. If the owner had sold the land he would have been required, before his deed would have been entitled to record, to pay all taxes due, whether to the State or to a purchaser at a tax sale. But B stands, by virtue of his purchase, in the place of the State; and A, who by his prior purchase stands in the place of the original owner, is entitled to no greater rights as against B, than the owner would have had by neglecting to pay subsequent taxes until the time for redemption has expired on B's purchase; he has forfeited his lien, and B's deed is entitled to record, and the auditor may properly give the certificate.

ST. PAUL, July 21st, 1864. G. E. COLE, Atty. Gen.

D. B. Johnson, Esq., County Attorney, Mower Co.:

I am in receipt of your favor inquiring "whether upon an execution to collect fines and costs in an action of assault and battery property is exempt to the same extent as an execution in civil actions?"

Sec. 99, p. 570, Comp. Stat., is as follows: "No property hereinafter mentioned or represented shall be liable to attachment, execution or sale, or any final process issued from any court in this State." I think the language broad enough to include the case you mention.

You also inquire whether, when A and B purchase land at tax sale of 1857 and 1858, and have not recorded their deeds, they have such an interest in the land as will allow them to redeem from a subsequent sale on which the time for redemp-

tion has expired. I think they have. You will find several opinions, I think, in the published decisions of this office which cover the point.

ST. PAUL, August 1st, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, stating that the certificate of incorporation of the State Bank of Minnesota only provides for $25,000 capital stock and that the bank claims the right to file an additional certificate increasing the stock to $50,000, under ch. 52, Laws of 1864. Whatever power may exist in the bank or its stockholders under the original banking law, I do not think that chap. 52 was intended to meet a case of this kind. That statute contemplates the supplying of any defects or omissions in the original certificate in cases where it did not meet the requirements of law, and does not appear to have any reference to cases where a certificate originally perfect is sought to be amended by conferring additional and enlarged powers and privileges on the bank.

ST. PAUL, August 6th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, enclosing communication of county auditor of Blue Earth county, inquiring whether, in case of lands sold for taxes, the owners at the time of sale being minor heirs, he shall allow them to redeem after the expiration of two years and before the execution of a tax deed. I think they must be allowed to redeem in the case stated. Sec. 85, chap. 1, Laws 1860. The auditor further inquires how he shall proceed in case the land passes into the hands of minors after the sale. I think the right of all parties is fixed by sale, and cannot be affected by subsequent transactions; parties purchasing after the sale acquire the rights of the original owner only.

ST. PAUL, August 6th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor inquiring whether there is any legal or constitutional objection to pardoning a person during imprisonment and while awaiting trial. The constitution (sec. 4, art. 5) authorizes the Governor to grant reprieves and pardons *after conviction*. It is a principle of construction that the expression of one thing excludes another not expressed. I think, therefore, the pardoning power is confined to its exercise after trial and conviction.

ST. PAUL, August 11th, 1864. G. E. COLE, Atty. Gen.

J. B. Gilfillan, Esq., County Attorney, Hennepin County:

MY DEAR SIR: I am just in receipt of your favor stating that certain lands were sold for taxes under the general law approved March 11th, 1862, and the title has fully matured and tax deeds have been duly executed, when the same lands were sold under the provisions of a special act of 1864, for delinquent taxes due the city of St. Anthony. The latter act provides that any surplus shall be paid to the owner at the time of the forfeiture, and the question arises, shall the surplus be paid to the original owner or the holder of the tax deed under the law of 1862. Unquestionably the latter, I should say, and such I understand to be your opinion; but as that sale in certain contingencies might be held void, in which case the original owner would be the party entitled, you suggest the propriety of requiring the original owner and the holder to interplead. If in the case in question both are making a claim for the surplus, this, I suppose, may be done, or what will occasion less

trouble to the treasurer, and at the same time furnish him a sufficient protection, he may safely pay to either party who will execute a bond to indemnify him from the consequences of such payment.

ST. PAUL, August 17th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of a letter from R. J. Baldwin with reference to my opinion upon the power of a bank to increase its capital by virtue of the provisions of chap. 52, Laws of 1864. I have no pride of opinion in the matter, and will cheerfully receive and consider any suggestions Mr. Baldwin may desire to make upon the true construction of that act. The object of the law was, and still seems to me to be, the corrections of errors and omissions in the original certificate in cases where it did not conform to the general law, but having no reference to certificates which were originally perfect, but were sought to be amended simply for the purpose of conferring upon the bank more enlarged powers. If I am wrong I shall be glad to be corrected.

The clause of the opinion quoted by Mr. Baldwin, viz.: "what powers may exist in the bank or its stockholders under the original banking law," was thrown in for the purpose of confining the opinion to the precise point submitted to me.

Sections 17 and 18 of the banking law contemplate simply that the stockholders might in their original articles provide for an increase of the capital stock or the number of their association, but has no reference to a subsequent amendment. Sections 4 and 5, says Mr. Baldwin, do not limit the amount of notes which may be issued to the declared amount of the capital stock, and he says that as circulating notes is but one branch of the business of a bank, discounts and deposits might as well be limited to the capital stock as its circulation. I have always regarded Mr. Baldwin's views upon the subject of banking as sound and correct, and I may be permitted to doubt whether, if his position in this matter were that of a judge, rather than an advocate, he would attach much weight to this argument. It is true a bank may have more capital than it chooses to invest in circulating notes, but it by no means follows that it can have less. The primary object of the banking law, as of all banking laws, is the protection of the circulation so as to insure the citizens of the State a sound currency. Discounts and deposits may be safely left to regulate themselves, but the manifest evils of a worthless or depreciated paper currency require the careful guardianship of the legislature. One of the guards thrown by the legislature around the currency issued to banks is the individual liability of every stockholder to an amount equal to double the amount of stock owned by him. If there is no limit to the discretion of the auditor in the issuing of bills, and such issue may take place without regard to the amount of capital invested, the value of this security would be seriously impaired. Sections 13 and 14 provide that no change shall be made in the articles organizing such bank whereby the rights, remedies or securities of existing creditors shall be in any manner impaired, and this is the only clause in the law from which an inference can be drawn of any power in the stockholders to change the original articles. But when it is remembered that the powers to be exercised under the banking law are to be strictly pursued, being in derogation of the common law, and that the auditor possesses no authority except that expressly conferred, I think the implication is too remote to justify his action.

I see no practical objection to the change in this instance, but the banking department is the most responsible of any in the State government. Changes have heretofore been made, which have subjected the auditor to the severest censure, and I think his only safety consists in confining himself to the letter of his authority.

ST. PAUL, August 24th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor enclosing requisition of the Governor of Iowa for the arrest and delivery to the agent of that State, of W. J. Jackson, charged with the crime of obtaining goods by false pretences. Were this an application to the Governor of this State for a requisition upon the Governor of another State for a fugitive from justice charged with crime committed here, or were the Governor vested with any discretion in matters of this kind where a requisition is made upon him by the Governor of another State, I should unhesitatingly advise the refusal of the application. By far the most common cases of a resort to requisitions are those in which creditors who have failed to enforce payment from their debtors by a legitimate resort to civil process, have, actuated by motives of malice, revenge, or pecuniary profit, sought to accomplish their object by making use of the more effectual powers of criminal process. Such attempts cannot be too strongly censured and ought never to be countenanced by public officers.

I have rarely seen a more palpable case of this character than the present. The indictment charges in substance that the accused became indebted to the prosecutor upon a running account for various articles, such as tea, sugar, clothing, etc., by representing that he was part owner in a mill and in certain wheat therein stored. The papers in the case and in particular the letter from the prosecutor, from whom the goods were obtained, to the Governor of Iowa, indicate that the case is not being prosecuted at the instance of the public authorities, but that the prosecutor is seeking to subvert this extraordinary power, and make it useful simply for the purpose of collecting his debt. The granting of warrants in cases of this character has always occasioned a great deal of dissatisfaction in the State, and with reason, as, I have no doubt, innocent men are frequently dragged from their homes to answer in a distant tribunal to a charge unfounded in fact, and resorted to as a means of enforcing the payment of private demands. These considerations, however, should have addressed themselves to the Governor of Iowa. Your Excellency, I fear, has little or no discretion in the matter.

Sec. 2 of art. 4 of the constitution of the United States declares that "a person charged with treason, felony or other crime, who shall flee from justice and be found in another State, *shall*, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

The act of Congress of February 12, 1793, prescribes simply the powers by which the constitutional provision shall be enforced. The papers in this case are in form and I do not see how the Governor can avoid a compliance with the requisition.

Chap. 100, p. 738 of the Comp. Stat., authorizes the reference of cases of this character to the district (now county) attorney, who is to investigate the grounds of such demand and report to the Governor all material *facts* which come to his knowledge, as to the situation and the circumstances of the person so demanded, and especially whether he is held in custody or is under recognizance to answer for any offence against the laws of the State or United States or by force of any court process. This law is probably valid so far as this, that if the person sought is charged with crime in this State the Governor may properly refuse the application, but I think no other state of facts would justify a refusal.

If thought advisable, your Excellency may properly make such reference, as you are undoubtedly entitled to a knowledge of all the facts before acting.

ST. PAUL, August 30th, 1864. G. E. COLE, Atty. Gen.

Miles Carpenter, Esq., County Auditor, Fillmore Co.:

SIR: I am in receipt of your favor stating that a new school district was illegally organized, or that an attempt was made to organize such district; that the petition upon which the commissioners acted in attempting the creation of the district was not legally sufficient to confer jurisdiction upon the board. That a tax was levied by this district while thus defectively organized, a part of which has been collected.

That upon a new and sufficient petition the county commissioners have since proceeded to organize the district with the same name and boundaries; and you enquire what disposition is to be made of the money already collected, and whether the remainder of the tax can be collected. Upon this statement of facts it seems that the tax was imposed by authority of an assumed corporation, having no real existence. If so, all its acts were nullities; the tax was imposed without authority, and collection cannot be enforced. Those who have already paid may recover back the amount paid, as money paid under duress and compulsion. If the original act of the commissioners and district were void, no subsequent acts could render the original action valid.

ST. PAUL, August 31st, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: In accordance with your request, I herewith hand you a rough draft of form of conveyance of the first 120 sections of land to which the St. Paul and Pacific Railroad Company are entitled. A fair copy should be made and submitted to the officers of the first division of the St. Paul and Pacific Railroad Company for their approval before execution. As they are the parties mainly interested, any alteration suggested by them should be made in the form of the conveyance.

ST. PAUL, September 4th, 1864. G. E. COLE, Atty. Gen.

This indenture, made this ——— day of ———, in the year of our Lord one thousand eight hundred and sixty-four, between the State of Minnesota, party of the first part, and the first division of the St. Paul and Pacific Railroad Company, a body corporate, created and organized by and under the law of the State of Minnesota, party of the second part, witnesseth:

Whereas, by an act of the Congress of the United States of America approved on the third day of March, in the year of our Lord one thousand eight hundred and fifty-seven, entitled "An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State," there was granted by the United States of America to the late territory of Minnesota, for the purpose of aiding in the construction of certain railroads therein named, and among others of a railroad from Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the legislature of said territory might determine, every alternate section of land designated by odd numbers, for six sections in width on each side of said roads and branches; but in case it should appear that the United States should have, when the lines or routes of said roads and branches should be definitely fixed, sold any sections or any parts thereof granted as aforesaid, or that the right of pre-emption had attached to the same, then it should be lawful for any agent or agents to be appointed by the Governor of said territory or future State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections as should be equal to such lands as the United States had sold or otherwise appropriated, or to which the rights of pre-emption had attached as aforesaid, which lands, thus selected in lieu of those sold and to which pre-emption rights had attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid, should be held by the territory or future State of Minnesota for the use and purpose as aforesaid. And whereas, it was further in and by said act provided, that the said lands thereby granted to said territory or future State, should be subject to the future disposal of the legislature thereof, for the purposes therein expressed and no other, and that the lands thereby granted to said territory or future State, only in the manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads and

branches, and included within a continuous length of twenty miles, each of said roads and branches might be sold, and when the Governor of said territory or future State shall certify to the Secretary of the Interior that any 20 continuous miles of any of said roads or branches is completed, then another quantity of land thereby granted, not to exceed one hundred and twenty sections for each of said roads and branches having twenty continuous miles completed as aforesaid and included within a continuous length of twenty miles of each of such roads or branches might be sold, and so from time to time until said roads and branches are completed.

And whereas, the legislative assembly of the late territory of Minnesota, by an act approved on the twenty-second day of May, in the year of our Lord one thousand eight hundred and fifty-seven, entitled "An act to execute the trust created by an act of Congress, entitled 'An act making a grant of land to the territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State,'" and granting certain lands to railroad companies therein named, did cause the Minnesota and Pacific Railroad Company, a body politic and corporate by that name and style, with authority to locate, construct, maintain and operate the railroad hereinbefore mentioned, and did grant to said company, all the interest and estate present and prospective of said Territory and of the future State which should succeed it, in and to any or all the lands granted by the United States as aforesaid, for the purpose of aiding in the construction of such road, subject to the condition and upon the terms in said act mentioned, to which reference is made.

And whereas, by a deed of trust, executed by said company on the twentieth day of September, in the year of our Lord one thousand eight hundred and fifty-eight, and a supplement thereto executed in the month of December, of the same year, to Elon Farnsworth, Edward P. Cowles and William H. Welch, trustees, to which reference is made for further description, the said Minnesota and Pacific Railroad Company conveyed to said trustees, all their right, title and interest in said railroad, and the lands hereinbefore mentioned, in trust for the payment of the first mortgage bonds issued by said company; and whereas, the State of Minnesota, pursuant to the provisions of the constitution of said State, became the owner and possessed of six hundred of the first mortgage bonds of said company, of denominations of one thousand dollars each, and whereas said company made default in the payment of the interest due upon said bonds, and the said trust deed was fully foreclosed, and the lands, roads and franchises therein conveyed, sold pursuant to a power of sale contained in said deed and supplement, and all the right, title and interest of said company therein bid off and purchased by the Governor of said State of Minnesota, for and in the name of said State pursuant to law.

And whereas, by an act entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad and to amend and continue the act of incorporation relating thereto," approved March 10th, 1862, all the rights, benefits, privileges, property, franchises and interests of said Minnesota and Pacific Railroad, acquired by the State of Minnesota, by virtue of any acts, deeds, agreement or thing by the said company heretofore done or suffered, or by virtue of any law of the State or the constitution thereof, or of the former Territory of Minnesota, or by reason of any sale of the same, or any part thereof, by the Governor of the State, on the twenty-third day of June, 1860, and bid in and purchased for the benefit of the State, were granted and transferred to Dwight Woodbury, Henry T. Wells, R. R. Nelson, Edmund Rice, Edwin A. Hatch, James E. Thompson, Leander Gorton, Richard Chute and William Lee, their associates and successors, who it was provided should hereafter be known as "The St. Paul and Pacific Railroad Company," and by that name have and exercise all the rights, powers and privileges which theretofore pertained to the Minnesota and Pacific Railroad Company; and

Whereas, it was further provided in and by said act that whenever said company should actually complete that portion of the road between St. Paul and St. Anthony, so that regular trains of cars are running thereon, the Governor should certify the same to the Secretary of the Interior, and thereupon the title to one hundred and twenty

sections of land should vest in said company; and it was further provided in and by said act, that it should be the duty of the Governor whenever said road should be completed between St. Paul and St. Anthony, in his official capacity and on behalf of the State, to convey to said company one hundred and twenty sections of land.

And whereas, it was further provided in and by said act, that upon the written authority of said company filed with the State Treasurer, said lands when the company was entitled thereto might be conveyed by the State directly to the assigns of said company.

And whereas, that portion of said railroad between St. Paul and St. Anthony was completed pursuant to the requirements of law, on the thirtieth day of June, in the year of our Lord one thousand eight hundred and sixty-two.

And whereas, by a written request and authority filed by said company in the office of the treasurer of the State of Minnesota, the Governor was authorized and directed by said company to convey the quantity of land hereinbefore mentioned and hereinafter described to Valentine Winters, of Dayton, in the State of Ohio; and whereas, by a written request and authority of said Winters duly filed, the Governor was duly authorized and directed to convey said lands to the first division of the St. Paul and Pacific Railroad Company aforesaid.

Now, therefore, this indenture witnesseth, that the party of the first part, in consideration of the premises, has granted, bargained, sold, conveyed, transferred and assigned, and by these presents does grant, bargain, sell, convey, transfer and assign unto the party of the second part and assigns, one hundred and twenty sections of land, as follows, to wit: ————.

To have and to hold the same unto the said party of the second part and its assigns forever.

In witness whereof, the party of the first part has caused the great seal of the State to be hereto affixed, and this indenture to be signed by the Governor, pursuant to the authority aforesaid.

Signed, sealed and delivered in presence of
————————
————————

State of Minnesota, County of Ramsey, ss.:

Be it known that on this ——— day of ———, A. D. 1864, personally appeared before me, Stephen Miller, Governor of Minnesota, and acknowledged that he executed the foregoing conveyance as the deed of the State of Minnesota, pursuant to the authority vested in him by law.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor enclosing petition of citizens of Redwood county, asking for the appointment of certain persons therein named, as justices of the peace, constables and notary public, and by your letter it appears that there is no county organization in that county. The Governor has no authority to appoint a justice of the peace or constable, but may, in counties not divided into towns, appoint three commissioners, (sec. 1, art. 2, ch. 15, Laws 1860,) who may establish election districts and appoint assessors and overseers of roads, and at the State election, constables, justices of the peace, and county officers may be elected. Sections 27 to 32, art. 2, ch. 15, Laws of 1860.

ST. PAUL, September 9th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor enclosing communication from the auditor of Dakota county. The auditor desires a construction of chap. 11, Laws of 1864. He says but a few of the towns in that county have had town meetings, and generally the appropriations have been made by the supervisors only.

Chap. 11 is a confirming act, having reference to action taken prior to its passage or authorizing subsequent action based upon action prior to its passage. The general authority to vote money is found in ch. 8 of General Laws of the extra session of 1862. The power to raise money is confined by that act to the electors of the town and is limited to the purpose of paying bounties to soldiers or supporting soldiers' families. Sec. 3.

The auditor also desires instructions in relation to "the transfer of quitclaim deeds." I do not know that I can express my views upon the subject of the transfer of land for taxation and the certificate that the taxes are paid, required as a condition precedent to the record thereof, more fully than I have heretofore done. The policy of the law is, that all property should be taxed in the name of the real owner. Hence, when any change of title occurs, by which the person to whom the land is required to be taxed is changed, the purchaser is required to procure the transfer upon the books of the Auditor, before his deed can be admitted to record. As a part of the same system, the account of the State with the former owner is also to be balanced before the land passes out of his hands. All conveyances by which the title to the fee is changed and a new tax payer substituted in place of the former one must therefore be noted, and the land transferred, but mortgages and other conveyances by which a mere lien is created, the legal ownership not being changed, are not within the intent of the law.

ST. PAUL, September 15th, 1864. G. E. COLE, Atty. Gen.

H. J. Horn, Esq., County Attorney, Ramsey County:

MY DEAR SIR: I am in receipt of your favor desiring my opinion upon the right of a State to tax United States Treasury Notes. I entertain no doubt that such notes are exempt from taxation by State authority. Prior to the passage of the recent acts of Congress, I had supposed that those notes were within the principle of the decisions of the Supreme Court of the United States, in the cases of Weston vs. City Council of Charleston, 2 Peters, 449, and McCulloch vs. State of Maryland, 4 Wheaton, 316.

The authority of these cases has, it is true, been disputed by the Court of Appeals of New York, in a case reported in the 24th volume, I think. The decision was by a divided court and prior to the recent acts of Congress, and in any event will hardly be regarded as an authority in other States against the decisions of the court of last resort cited above. But whatever construction might have been the correct one, in the absence of express legislation, the language of the second section of the act of February 25th, 1862, seems to place the matter entirely beyond question: "All stocks, bonds, and other securities of the United States, held by individuals, corporations, or associations, within the United States, shall be exempt from taxation by or under State authority." Treasury notes would seem to be both within the letter and spirit of the exemption, and certainly within the principle of the decided cases.

In Weston vs. City Council of Charleston, Chief Justice Marshall thus states the point of the decision: "The tax on government stocks is thought by this court to be a tax on the contract, on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution."

I see no distinction in principle between bonds and treasury notes in this particular.

ST. PAUL, September 17th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

DEAR SIR: I am in receipt of your favor enquiring whether receipts taken by the auditor for money paid out of the State treasury, or receipts given by the State Treasurer to the county treasurers for money paid in by them on settlement with the State for tax collections, &c., require stamps. The United States revenue law makes no special exception of State or official documents issued by State officers, neither does it declare in terms that such instruments shall be taxed.

I endeavored to show in a communication addressed to the State Auditor under date of February 20th, 1863, that the law does not contemplate the taxation of the business of States as States, and that the taxation of any proceedings connected with the collection of the current revenue of a State, including all taxes directly for the benefit of the State at large, as well as those of any local subdivision, as county, town, school taxes, &c., would be a palpable violation of the constitution of the United States. See p. 72, published decisions of this office. The commissioner of internal revenue, in reply, disclaimed any intention to decide that official documents issued by State officers, or proceedings for the collection of *State* taxes, were subject to taxation, but intimating that proceedings for the collection of county taxes were.

The absurdity of any such distinction is too obvious to require comment. A State government would be as readily undermined and destroyed by the destruction of local taxation as by that of the direct tax levied for the support of the state government proper.

The power of taxation by a State includes local as well as general taxes, and it is the free exercise of this power, without interference by the general government, that the constitution is invoked to protect. In times like these, when the tendencies of the day are towards the centralization of power, it behooves State officers to maintain, not the political dogma of State rights, but the just and constitutional rights of the State as protected by that instrument and expounded by the federal tribunals.

The receipts are not taxable.

ST. PAUL, September 24th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor enclosing letter from county auditor of Brown county.

Ch. 5 of Laws of 1864 has no application to the regular June tax sales, but only applies to lands sold for taxes of 1859 and previous years, or remaining unsold, but forfeited to the State under the provisions of the special act of 1862.

By section 6 of ch. 5, of Laws of 1864, the owner has one year to redeem, not after recording the tax deed, but after sale, and the section is of general application to all sales *under that act.* A party purchasing at a tax sale should not make improvements until the period for redemption expires, and for those made afterwards, in cases of sales under the general tax law, he is protected by sec. 91, ch. 1, Laws of 1860. The case stated by the auditor seems to be governed by the general tax laws, and I do not see that the chapter he refers to has any application to it.

The land was offered in June, 1861, for the taxes of 1860, and forfeited to the State in August, 1864. A party paid into the county treasury the amount of taxes due and obtained a tax deed. This was done, I presume, under the provisions of sec. 4, ch. 17, Laws of 1864. If this section is valid, the owner had no right of redemption in the case stated. I have supposed, however, that this law could not be sustained as to lands forfeited prior to its passage.

Under the law as it stood in 1861, when this land was forfeited, the owner had six months to redeem after a sale at forfeited sale under sec. 96, ch. 1, Laws of 1860.

No forfeited sale has yet taken place, and I do not see what power the legislature possesses to step in and cut short the owner's right of redemption by a retrospect-

ive law. It has been urged that under the provisions of sec. 29 of ch. 2, Laws of 1860, the owner's right to redeem is gone after the State has disposed of the land in any manner. My own understanding of that section is that the owner is entitled as against the state to a deed at any time before the state has disposed of it, under the existing provisions of law. Thus, in 1861, when this land was forfeited, sec. 39, ch. 2, authorized the owner to redeem at any time before the State has disposed of the land.

Sec. 93, ch. 1, Laws of 1860, declared that the State should dispose of such lands as therein provided, and allowed the owner to redeem within six months from such sale.

Construing these acts together, I think the owner's right to redeem at any time before a forfeited sale, and for a period of six months afterwards, became vested, and cannot be affected by subsequent legislation. A party purchasing and placing improvements upon land before the expiration of the period of redemption, cannot recover for improvements. If I am right, the owners may redeem without paying for improvements.

ST. PAUL, October 15th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor enclosing communication from auditor of Freeborn county stating that after the expiration of two years from a tax sale and after a tax deed has been executed, a minor having no guardian appointed desires to redeem, and he wishes to know whether its mother can redeem in the name of the child, or whether the guardian can redeem, or the child, and if either can redeem what evidence should be presented to the auditor. The auditor should be satisfied that the application is made on behalf of the child, and that the child was a minor, and the owner of the land at the time of the sale.

He should afford every facility to the party desiring to redeem, and no particular species of evidence is necessary. He should be satisfied that the application is *bona fide*, and much must be left to his discretion. It is not expected or intended by the law that he will decide any difficult questions arising in such cases, so as to affect the legal rights of parties.

He is only required to use his best judgment, and if he errs and issues a certificate of redemption in a case not warranted by law, it will simply be void, and cannot prejudice the rights of the holder of the tax title.

So far as the auditor is concerned I think he may allow the redemption by any one acting in the name of the child, although strictly the guardian is the proper party to protect its interests.

ST. PAUL, October 15th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor enclosing communication from Hon. Geo. L. Becker, President of the 1st Division of the St. Paul and Pacific Railroad, requesting a deed of 120 sections of land, and stating that forty miles of road on their branch line from St. Paul in the direction of Watab is completed. Mr. Becker states that the company have heretofore received 240 sections upon a certificate that 20 miles of road in the same direction were completed. The Congressional land grant act, approved March 3d, 1857, provided that a quantity of land not exceeding 120 sections for each road and branch might be sold, and when the Governor should certify to the Secretary of the Interior that any 20 continuous miles of any of said roads or branches are completed, then another quantity of land hereby granted, not to exceed 120 sections for each of said roads and branches, and so from time to time until said roads and branches are completed.

Chapter 20, Special Laws of 1862, section 6, provides that whenever the company

shall actually complete that portion of the road between Saint Paul and Saint Anthony so that regular trains of cars are running thereon, and not before, the Governor shall certify the same to the Secretary of the Interior, and thereupon the title to 120 sections of land shall vest in said company, and *when twenty continuous miles of said road* shall be completed and regular trains running thereon, the title to a further quantity of 120 sections of land shall vest in said company, and it shall be the duty of the Governor whenever said road shall be completed between St. Paul and St. Anthony, in his official capacity, to convey to said company 120 sections of land, and whenever any *further* twenty continuous miles or its branches shall be completed and in operation, the Governor shall in like manner convey a further quantity of 120 sections of land until there shall be conveyed to said company all the lands to which they shall be entitled.

It would seem from the provisions of the act of Congress that the company was entitled to 120 sections at least before commencing operations, 120 sections upon the completion of twenty miles, 120 upon the completion of a further twenty miles, which would be equivalent to 360 sections upon the completion of forty miles of road, and the question is how far are these provisions modified by State legislation?

Chapter 22, Special Laws of 1862, declares that the company shall receive no land until they have completed ten miles of road, or that portion between St. Paul and St. Anthony, and upon the completion of that they are to receive 120 sections. The next provision is that upon the completion of twenty continuous miles they shall receive another 120 sections. This language must apply to the road or branch in the direction of Watab, as the construction of the main line west is specifically provided for in the next clause.

The question arises whether twenty further continuous miles in addition to the ten miles to St. Anthony is intended or twenty miles inclusive of that. Did this provision stand alone and unqualified I should have no doubt that it was the intention that while the grant of the first 120 was delayed until ten miles of the road were completed as a security for the faithful prosecution of the work, they should receive all subsequent instalments of land whenever they became entitled thereto by the act of Congress; but this language is qualified by a subsequent provision of the same section, which expressly prescribes the terms on which the Governor shall make the deed, viz.: when the road is completed between St. Paul and St. Anthony he shall deed 120 sections and whenever any *further* twenty miles of the road or its branches are in operation 120 sections more. The term "further" excludes the idea that the ten miles already built are to be included in the computation, and the intention of the legislature is further evinced by the provisions relating to that portion of the road west of Minneapolis. The same section provides that before receiving any land appertaining to that portion of the road, they shall build 20 continuous miles in *addition* to the ten between St. Paul and Minneapolis, while the amendment (sec. 5, ch. 3, Special Laws of 1864) makes a similar provision for that line, to that respecting the road towards Watab; they are to receive 120 sections upon building 10 miles, and 120 sections more upon the completion of 20 *further* continuous miles. From these provisions it may be presumed that it was the intention of the legislature to retain at every stage of the enterprise a portion of the company's lands in the hands of the State as an additional incentive to the prosecution of the work to final completion.

It is true that the contemporaneous legislation with reference to the Southern Minnesota, and Winona and St. Peter roads, indicates a different intention; the word further being omitted in the provision for the second instalment; these companies receive 120 sections upon completion of ten miles, and 120 sections more upon the completion of 20 miles, and then afterwards 120 sections upon the completion of 20 *further* miles. But this fact, although it might throw some light upon a doubtful phrase in the act under consideration, cannot be allowed to nullify express terms used in the act in question. The fact that the legislature has used different language in the two acts indicates a different intention. It cannot be presumed that the change in phraseology is meaningless. But the argument drawn from contemporaneous legislation is greatly weakened by the fact that such legislation is not

uniform; the intention of the legislature to adopt different restrictions for different roads is shown by the fact that in the case of the Minneapolis and Cedar Valley company, the company were to receive no lands until fifty miles of said road were completed. I think, therefore, that the Governor is right; that he should deed 120 sections upon the completion of ten miles to St. Anthony, 120 sections more upon the completion of twenty *further* miles, or 30 miles in all, and 120 sections more upon the completion of 20 further miles, or 50 miles in all.

ST. PAUL, November 15th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, enquiring whether a sale of forfeited lands advertised "to be held at the court house or place of holding courts, and if not completed at the first day, the same will be adjourned and continued at the office of the county auditor until all the lands are disposed of," can be legally adjourned to the office of the auditor and continued there. In answer I have to say, that I see no authority for such advertisement and sale. The sale is required by law to be held at a certain place, and the advertisement is required to so state. The auditor is authorized to adjourn the sale from *time to time*, but not to a different place. The question is not whether another place would not do as well. The legislature has seen fit to make certain requirements, and no principle of law is better settled, than that every legislative requirement must be strictly and literally followed, to give force and validity to a tax sale.

ST. PAUL, November 24th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath:

SIR: In reply to your favor stating that the chairman of the judiciary of the House, Mr. Armstrong, intimated the opinion that sec. 39 of the banking law did not require the present auditor to give a bond as bank comptroller, but only the one in office at the time of the passage of the law, and that his successor's bond if given would have no legal effect.

The language of that section is very loose, and does not perhaps in terms require the then auditor's successors to execute a bond. There can be no possible doubt, however, that the legislature did not intend to intrust interests of such vital importance to any officer without adequate security. Whether the courts will declare a bond executed by you valid or otherwise is a matter to be determined when the question arises, but the presumption that they would hold it void would not afford the slightest justification for a neglect to execute and file one. You suggest the execution of a bond for $100,000, and that the legislature ratify it at its next session.

I advise a simple compliance with the existing law.

It may be that in the present state of the banking department the amount of the present bond is not sufficient. If not, it is the legislature's province to make provisions for a sufficient one, and not yours.

ST. PAUL, November 24th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, enclosing communication from Meeker county, stating that the office of county auditor of that county became vacant by resignation of the incumbent, that a person was appointed to fill the vacancy, that at the next general election the original term not having expired, the vacancy was filled by election, and it is asked whether the person so elected holds for a full term or for the unexpired term only. For the unexpired term only, I think. See sec. 46, p. 114, Session Laws 1861.

The supreme court have held that in case of an election to fill a vacancy, in the office of judge of probate, the person elected would hold on for a full term, but this decision was based upon a peculiar provision of the constitution applicable to judges, but having no reference to other officers, or at least not to those like the one in question.

ST. PAUL, November 24th, 1864. G. E. COLE, Atty. Gen.

Geo. L. Becker, Esq., President 1st Div. St. P. and P. R. R.:

MY DEAR SIR: I am in receipt of your favor of the 23d, concerning my letter to the Governor, transmitted to you under enclosure of recent date. I think I did not misunderstand your position, which was then as now very clearly stated, although I may have been a little obscure in my statement of it. Your construction of the act of Congress is probably correct, as is also your statement of the rights of the company to lands on the main line as affected by sec. 5, p. 176, Session Laws 1864. By that act your rights are as follows: On main line before commencing operations, 120 sections. By the section last quoted, you should receive 120 sections more, on completion of ten miles west of Minneapolis, making 240 upon completion of twenty miles of the main line, and thenceforth you would take your lands as fast as the State should receive them under the land grant. Upon the branch line in the absence of State legislation your rights would now stand as follows:

Before commencing - - - - - - -	120 sections.
Completion of 20 miles - - - - - -	120 sections.
Due you on branch line alone - - - - -	240 sections.

I cannot agree with you in the statement that were it not for the State legislation you would be entitled to 480 sections upon the completion of forty miles of road, if by that you mean to include the ten miles from St. Paul to St. Anthony; the construction of that would, under the act of Congress, be credited to you upon the main line, and for the construction of the branch the statement above would be correct. Under the act of Congress you would not be entitled to any lands in addition to the 120 sections given you at the outset on the main line until twenty miles of *that* line were completed.

We do not materially differ as to the company's rights on the main line; the question now recurs, as to how State legislation has affected your rights upon the branch line. You have received 120 sections upon the completion of the first 20 miles of the branch and now having completed ten miles further you ask another 120 sections.

My opinion is based upon that portion of section 6 of chapter 20, of Special Laws of 1862, found on page 252 of the laws of that session, which, as it seems to me, obviates the necessity of recurring to the act of Congress in determining the duties of the Governor in the premises: "Whenever said road shall be completed between St. Paul and St. Anthony it shall be the duty of the Governor in his official capacity and on behalf of the State to convey to said company 120 sections of land, and whenever any *further* twenty continuous miles of said road *or its* branches shall be completed and in operation the Governor shall in like manner convey a further quantity of 120 sections of land, and so often as any *further* twenty continuous miles of said road or its branches shall be completed, shall in like manner convey to said company a further quantity of 120 sections of land."

Agreeing in everything else this is "the rock upon which we split," and I should have been glad to have had your views upon the manner in which this apparently plain direction to the Governor was to have been construed to sustain your claim.

The energetic manner in which the enterprise has thus far been prosecuted will, I have no doubt, incline the legislature to relax these restrictions so that the company may hereafter receive their lands as fast as intended by Congress, but until

this is done, I do not feel at liberty to advise the Governor to an act which is not apparently in accordance with the legislation to which I have cited you.

ST. Paul, November 25th, 1864. G. E. COLE, Atty. Gen.

John L. McDonald, Esq.:

DEAR SIR: I am in receipt of your favor stating that the county attorney of Scott county is in the army and has appointed you as his deputy, and you enquire whether a county commissioner who was elected at an election at which he presided as one of the judges is legally elected and whether his opponent could not legally contest his election on this ground. Clearly not. I think the duties of a judge of election are ministerial rather than judicial. While it is a principle of universal application that no man shall be a judge in his own case, the courts of this country have uniformly held that a judge or inspector of elections is not a judicial officer within the meaning of this principle. Angell & Ames on Cor. sec. 141.

The provisions of sec. 6, on page 100 of Session Laws of 1861, are directory merely, and a non-observance of them will not invalidate the election. The electors should have proceeded to elect an inspector in place of the one who was disqualified, but their neglect to do so, in the absence of any fraud in the conduct of the election, will not vitiate it. People v. Cook, 4 Selden, 67.

ST. PAUL, December 6th, 1864. G. E. COLE, Atty. Gen.

Chas. S. Bryant, Esq., County Attorney, Nicollet County:

DEAR SIR: I am in receipt of your favor inquiring with reference to the act to regulate insurance companies not incorporated by the State of Minnesota, ch. 6, Session Laws of 1860.

You inquire 1st, what court has jurisdiction of officers under that act? Sec. 8 provides that the punishment for any violation of its provisions shall be by fine not exceeding $1,000, or by imprisonment in the county jail not more than 30 days, or both. Sec. 5 of article 6 of the constitution declares that the district court shall have original jurisdiction in all criminal cases where the punishment exceeds 3 months' imprisonment *or* a fine of more than one hundred dollars. The district court is a court of general jurisdiction, and I have no doubt under the decisions of our courts has jurisdiction of the case in question. Agra vs. Hayward, 6 Minn. 110; Cressey vs. Gierman, 7 Minn. 398; Boyd vs. State of Minnesota, 4 Minn. 321.

Ch. 6, Laws of 1860, is not repealed by ch. 12, of Laws of Extra Session of 1862, any further than sec. 1 of the latter conflicts with sec. 1 of the former; the remaining sections of ch. 6 are unaffected by subsequent legislation. It is a principle of law that repeals are not to be presumed, and a subsequent law not expressly repealing a former one should be so construed as to allow the provisions of both to stand if possible. The intention of the legislature not to repeal any portion of the act of 1860, is indicated by the fact that they have expressly repealed chapters 59 and 60 of Laws of 1862.

I do not see why the law is not valid. Similar laws have been sustained in other states. 6 Gray, 376; 3 Gray, 500. A neglect to comply with the provisions of sec. 1 by filing the prescribed agreement with the State treasurer might, I have no doubt, be punished under the provisions of sec. 8.

The only doubt would seem to arise as to the power of the court to punish the violation of sec. 3, from the difference of the language of the two sections, sec. 1 declaring that it shall *not be lawful* to take any risks, until the provisions of that section shall be complied with, while sec. 3 simply makes it *the duty* of the company to file a copy of the statement in the office of the clerk of the district court, and to publish a copy of the statement and treasurer's certificate before taking risks.

The latter clause of sec. 1 of the act of 1860, also that of 1862, authorizes the treasurer to issue his certificate upon compliance by the company with the terms

of that section, with authority to transact business of insurance. It is the compliance with this section which gives the company its authority, and makes it lawful for it to act, and sec. 3 seems to be a directory requirement devolving a duty upon the officers of the company, but not perhaps necessary to the validity of its acts.

It seems to me that this will be the most formidable argument against the attempt to maintain a prosecution upon sec. 3 alone. It is my impression, however, that a person neglecting the duty required of him by sec. 3, violates the provisions of the act within the meaning of sec. 8, and is liable to a prosecution.

ST. PAUL, December 6th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor enclosing enquiry of the Governor of Indiana, viz.: "Is the evidence of negroes allowed in cases where white persons are parties. If it is, what restrictions, if any?" In reply I have to state that no discrimination is made by the laws of evidence in this state, between white persons and negroes, and no restrictions peculiar to them as a class, implied upon the latter. I am also in receipt of your favor covering letter from T. M. Newson on behalf of a Mrs. Green, who has sustained loss at the hands of the Chippewa Indians, desiring to be informed what course to pursue to obtain relief.

There is no provision of law by which she can obtain relief from the State, and I think none of Congress. I should suppose a memorial to Congress for relief would be the appropriate course. The Indians are, I suppose, the wards of the government, which has, at least, in case of the Sioux, assumed the responsibility for losses sustained at their hands. Col. Aldrich, who was on the commission for adjusting claims for Sioux depredations, would probably be able to give her valuable advice in the matter, and point out to her the course most likely to succeed.

ST. PAUL, December 14th, 1864. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor, enclosing communication from E. S. Drake, Esq., president of the Minnesota Valley Railroad, inquiring whether in cases where the lines of two land grant railroads intersect, the road first locating its line acquires a prior right to the lands within six miles on either side of the line so fixed, to another road crossing it and making a subsequent location. The original land grant act of Congress was a contract or grant between the government and the State, by which alone no particular company acquired any rights. The lands thus acquired by the State were to be subsequently distributed by the State or Territorial legislature, to such persons or companies as they should see fit to entrust with the prosecution of the several roads provided for by that act. It was, in the language of Attorney General Cushing, "a conditional grant *in præsenti* in the nature of a float, which did not attach to any particular parcel of the public lands until the necessary determinative lines were fixed upon the face of the earth." In other words, the grant, although *in præsenti* in the sense of requiring no other act on the part of the government to perfect it, was conditional upon the performance of certain acts by the State or under its direction; one condition precedent to the vesting of the title to any particular section of the State, being the survey and definite location, and staking out of the road. Up to this point, the operation of the grant was in the nature of an escrow. Upon the performance of this condition the title vested, without further act of the government, in the State, taking effect, as to all lands not in the interim pre-empted or otherwise disposed of, from the date of the act by relation.

In cases of intersecting lines, the definite location by either would thus vest the title in the State, but would *under this act* have no effect upon the rights of any particular company. The paramount rights which the State would thus acquire would vest as against the government and its grantees, subsequent to such location,

this is done, I do not feel at liberty to advise the Governor to an act which is not apparently in accordance with the legislation to which I have cited you.

ST. PAUL, November 25th, 1864. G. E. COLE, Atty. Gen.

John L. McDonald, Esq.:

DEAR SIR: I am in receipt of your favor stating that the county attorney of Scott county is in the army and has appointed you as his deputy, and you enquire whether a county commissioner who was elected at an election at which he presided as one of the judges is legally elected and whether his opponent could not legally contest his election on this ground. Clearly not. I think the duties of a judge of election are ministerial rather than judicial. While it is a principle of universal application that no man shall be a judge in his own case, the courts of this country have uniformly held that a judge or inspector of elections is not a judicial officer within the meaning of this principle. Angell & Ames on Cor. sec. 141.

The provisions of sec. 6, on page 100 of Session Laws of 1861, are directory merely, and a non-observance of them will not invalidate the election. The electors should have proceeded to elect an inspector in place of the one who was disqualified, but their neglect to do so, in the absence of any fraud in the conduct of the election, will not vitiate it. People v. Cook, 4 Selden, 67.

ST. PAUL, December 6th, 1864. G. E. COLE, Atty. Gen.

Chas. S. Bryant, Esq., County Attorney, Nicollet County:

DEAR SIR: I am in receipt of your favor inquiring with reference to the act to regulate insurance companies not incorporated by the State of Minnesota, ch. 6, Session Laws of 1860.

You inquire 1st, what court has jurisdiction of officers under that act? Sec. 8 provides that the punishment for any violation of its provisions shall be by fine not exceeding $1,000, or by imprisonment in the county jail not more than 30 days, or both. Sec. 5 of article 6 of the constitution declares that the district court shall have original jurisdiction in all criminal cases where the punishment exceeds 3 months' imprisonment *or* a fine of more than one hundred dollars. The district court is a court of general jurisdiction, and I have no doubt under the decisions of our courts has jurisdiction of the case in question. Agra vs. Hayward, 6 Minn. 110; Cressey vs. Gierman, 7 Minn. 398; Boyd vs. State of Minnesota, 4 Minn. 321.

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letter or look to its spirit and intent, we are necessarily led to the same conclusion, *i. e.*, that each branch is, for the purpose of receiving its share of the Congressional grant, a separate and independent road.

You state in your letter that you do not desire my opinion as Attorney General but in my professional capacity, and that you desire to remunerate me. Although it is not my province as Attorney General to advise railroad officers, yet as this opinion, or rather the necessity for it, grows out of a previous opinion to the Governor, I have deemed it proper to address you officially. In any event, as the question is one, as you say, likely to arise in the legislature and upon which my official opinion may be required, I should deem it entirely improper to give you my views in a private capacity, and to receive compensation therefor.

ST. PAUL, December 24th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor.:

SIR: Im am in receipt of your favor, inquiring what is the salary of the Warden of the State prison? and referring me to sec. 2, chap. 68, Laws of 1864, and to the first and thirty-eighth clauses of the general appropriation law of the same year. The first fixes the salary at $800, the latter appropriates $900, or so much as may be necessary to the payment of the salary of the Warden. There can be no doubt that his salary is $800. The general language of the appropriation bill cannot control that of the law which expressly provides the amount of the salary, but there is no conflict. The appropriation law does not absolutely appropriate $900, but only so much as may be necessary. You also inquire whether county treasurers can legally deduct fees for paying over moneys belonging to the school fund apportioned by the Secretary of State. I know of no provision of law authorizing this. Sec. 3, of chap. 2, Laws of 1863, contain, I believe, the last amendment on the subject of Treasurer's fees, and I see nothing in that section authorizing it.

ST. PAUL, December 24th, 1864. G. E. COLE, Atty. Gen.

H. O. Gale, Esq., County Auditor, Hennepin Co.:

DEAR SIR: I am in receipt of your favor, stating that a school district was divided, and that the two divisions were afterwards united; that while divided one of the divisions—*i. e.*, a new district created out of a portion of the old one—voted a tax to build a school house, a portion of which has been collected and remains in the hands of the officers of that district unexpended. That a reunion having taken place, it is proposed to equalize the burdens of the united district by voting a tax upon that portion of the district not included in the portion voting the previous tax, equal in amount, or an equal percentage, to the latter. The power vested in the county commissioners of changing the boundaries of existing school districts should be exercised very sparingly and with great caution. The freedom with which this power has been exercised heretofore, has, I have no doubt, by reason of the doubts thrown upon the tax and other proceedings of districts, been productive of great evils. I am of opinion that the course proposed in this case cannot be sustained. The law contemplates that school district taxes shall be levied by a vote of the legal voters of the district, and that every voter should have a voice in the taxation of his property for district purposes.

Now suppose in this case that the inhabitants of that part of the district who have already voted and paid their portion of the tax are in the majority, has the citizen of that portion of the district upon which the balance is to be levied any effective voice?

The tax already levied upon a portion of the district may have been extravagant, yet he had no opportunity to vote upon it. It is true he has a nominal vote upon the question of raising the balance. The majority who have no interest in the mat-

ter except to compel him to pay an equal amount with that which they have voluntarily paid, will have the power and the inclination to vote the tax. Were the previous tax out of the question, I suppose no one would contend that a majority of the voters of the district could assemble and vote a tax upon the property of the minority to the exclusion of that of the majority. How can the fact that the majority have heretofore, without consulting the minority, seen fit voluntarily to donate an equal amount for the same purpose, affect the question? Or, to state the question in another form:

Suppose twenty men in a district of thirty voters raise a sum of $100 by subscription among themselves for the purpose of building a school house, can they call a meeting and vote a tax upon the property of the other ten, proportionate to that contributed by the former? If this question must, as I suppose, be answered in the negative, I see no distinction between this case and that stated by you in principle. It matters not to the voters of the portion of the district sought to be taxed whether the amount paid by the other portion of the district was by contribution or by pursuing the forms of levying and collecting a tax. To extend the illustration still further—a person who is attached to a district after a vote to raise money has passed, cannot be assessed for the payment of it. Richards vs. Daggett *et al.*, 4 Mass. 536. But can the district assemble and vote the same per centage upon him alone as they have already done upon the balance of the district? And if not, can they do towards a number what they cannot do towards one? which is precisely this case. Further, the only power conferred by law upon the voters of a school district is "to vote an amount of money to be raised by tax on the *taxable property of the district.*" School districts are creatures of statute, and have no powers except those expressly conferred. School District vs. Thompson, 5 Minn. 280. When, therefore, power is given to vote a tax upon the taxable property of the district, it means *all* the taxable property. Sec. 26, page 26, Laws of 1862.

ST. PAUL, December 28th, 1864. G. E. COLE, Atty. Gen.

Hon. D. Blakely, Superintendent of Public Instruction:

DEAR SIR: I am in receipt of your favor enclosing letter from L. Clark, desiring certain information with reference to the remedies against school districts, for the payment of debts, &c. As the question is one of general importance, and comes to me through an officer entitled to an opinion, I shall not hesitate to reply; but I desire to remind you in this connection, that as public officers the law makes it our duty to advise school district officers, when the application is made through the proper channel, viz., the county auditor, (chap. 1, sec. 37, Laws of 1862.) but it is no part of our duty to advise private citizens, who, having claims against school districts, desire advice as to the mode of collecting them. It is asked:

1st. Is a school house built by the district upon land owned by the district subject to sale on execution? It is. Such property is exempt from taxes and assessment, but not from sale on execution.

2d. Have the district board authority to bind the district for any indebtedness of said district by signing their names to said note as officers of the district, without the district first voting that they should do so? I am of opinion that not only have the trustees no such power, but that the district has itself no power to confer such authority upon the trustees. In the case of the School District v. Thompson, 3 Minn. 280, the court, while not expressly deciding the point, more than intimate the opinion that no such power exists; and the reasoning upon which the opinion is based, and the authorities cited in support of it, abundantly sustain the position.

3d. If said board should give such note and simply sign their names to it, and afterwards, in order that the party can dispose of it, add their official title, and the note is sued and judgment obtained and execution issue, will the execution lie as against the school house, and if the house is sold is the sale good and valid in law? If a district has a legal defence to the note, it must appear and interpose it when sued; and if the district neglects to interpose such defense at the proper time, and

judgment is entered by default, its rights are gone, and the judgment (unless an appeal or writ of error is taken in season) is as binding on the district as though no defence had ever existed.

4th. If not, how can a debt be collected of a school district? The answers to the preceding questions render an answer to this question unnecessary. While upon the subject, however, it may be well to remark, that school districts are *quasi* corporations, having no corporate fund, and by the common law every member of such a corporation, *i. e.*, every citizen of such district, is liable for its debts, and an execution may be levied on the individual property of any citizen. Secs. 24, 35, 629, Angell on Corporations; Merchants' Bank v. Cook, 4 Pick. 414.

This common law rule has been abrogated by statute in the case of counties, but not as respects school districts.

ST. PAUL, December 29th, 1864. G. E. COLE, Atty Gen.

H. J. Horn, Esq., County Attorney, Ramsey County:

SIR: I am in receipt of your favor making the following inquiry: "Can a bank organized under the National Banking Law be taxed by or under the State Law, for the amount of discounts or bills receivable, moneys loaned or deposited, etc., in accordance with the provisions of our State Law in regard to listing the capital of banks and brokers?"

Sec. 41 of the act of Congress of June 3, 1864, Statutes at Large, 1863–4, page 112, provides that "in lieu of all existing taxes, every such association shall pay to the Treasurer of the United States a duty of one-half of one per cent.," &c., and provides further that "nothing in this act shall be construed to prevent all the shares in such associations held by any person or body corporate from being included in the valuation of the personal property of such person or association in the assessment of taxes imposed by or under State authority, at the place where said bank is located and not elsewhere," &c., and provides further that "the taxes so imposed under the laws of any state shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located." These provisions, as it seems to me, contain a strong implication that those banks are not subject to State taxation except as therein expressly permitted; they embrace not only a bare permission or consent to their taxation by State authority, but that permission is coupled with numerous restrictions and regulations as to manner and plan of exercising the rights by the State, and would seem to indicate an intention to limit State taxation to such modes as are therein prescribed. I do not deem it necessary to determine this question definitely, as the answer to your question hardly seems to require it.

It would seem that the decision of the question referred to me may be arrived at by a reference to the state law alone. Sec. 54 of the tax law (chap. 1, Laws 1860) and the following sections, which specifically provide for the taxation of banks, by taxation of loans, discounts, &c., are expressly confined in their operation to banks incorporated under the laws of this State, and confer, so far as I have been able to discover, no authority upon the officers of the State or county to tax in that manner corporations organized under the laws of another State or of the United States.

On the other hand, provision is made by sec. 2 of the tax law for the taxation of all shares in any corporation for the taxation of which no special provision is made by law. See also subdivision 9 of sec. 3. Under these provisions shares in banking corporations organized under the laws of another State, and held by citizens of this State, may doubtless be taxed. In order, however, to conform to the provisions of the act of Congress it will be necessary to make certain changes in our present tax law, before even this mode of taxation can be applied to banks organized under that act, as by its provisions the shares must be taxed at the place where the bank is located.

ST. PAUL, January 5th, 1865. G. E. COLE, Atty. Gen.

Hon. Oscar Taylor, County Attorney, Stearns County:

DEAR SIR: I am in receipt of your favor of recent date stating that on July 9th, 1864, the county commissioners of Stearns county conveyed by deed to one Joseph Boker certain parcels of land in St. Cloud; that prior to the execution of the deed the assessor had completed and returned his assessment to the county auditor, but that the county board of equalization ordered the assessor to make an amended or supplemental return and assessment of these lots; and you inquire if this assessment was legally made. The assessor is required to make his return on or before the 1st Monday in August, at which time taxes become a lien upon property; all property therefore becoming subject to taxation prior to that time may be legally assessed, provided the assessment and return is made prior to the first Monday in August. Any return or assessment made after that time is void. The assessment rolls are imperatively required to be filed on or before that day. To this rule, however, there is this exception, that if the county auditor shall discover that any tract of land or town lot has been omitted in the return of the assessor, he shall add the same to his list of real property, with the name of the owner, and shall forthwith notify the assessor in whose return such omission occurred, who shall forthwith proceed to ascertain and return to the county auditor the value thereof. Sec. 31, Laws 1860.

If this has been done, I think the proceedings regular; but it will be seen that it is the auditor's duty to attend to this, and the board of equalization as such do not seem to have any jurisdiction of the matter.

ST. PAUL, January 24th, 1865. G. E. COLE, Atty. Gen.

Hon. C. D. Sherwood, President of the Senate:

SIR: I am in receipt of a series of resolutions adopted by the Senate, requesting my opinion upon certain propositions therein submitted. I shall answer them in their order.

1st. Whether the person named in the act of the Legislative Assembly of the Territory of Minnesota, entitled "A bill for an act entitled 'An act to incorporate the Nebraska and Lake Superior Railroad Company,' approved May 23d, 1857," ever became a legally constituted corporation. If so, when and by what act; and was it competent for the legislature of the State, by amendment of said act, to transfer their corporate rights and franchises to others without their consent? The act referred to in this resolution, conferred upon the persons therein named, extensive and important corporate powers and priviliges, upon the condition embodied in section 19 of the act, viz.: "The said company shall give notice in writing to the Governor of said Territory on or before the first day of January, 1858, of their intention to proceed under the provisions of this act, and in case of their failure to give such notice, the act and all the powers herein granted shall become null and void." A charter is a contract between the sovereign power from which it emanates and the corporators upon whom it is conferred. Until, therefore, the indispensable prerequisite to a valid contract, the assent of both the contracting parties, exists, it is a mere nullity. The acceptance of the charter is as vital to the existence of the corporation as the charter itself.

In cases where no special provision for a formal acceptance is contained in the charter the acceptance of a grant of important and beneficial privileges will usually be presumed. Bank of U. S. v. Dandridge, 12 Wheaton, 164. When, however, the time, manner, and form of the acceptance is explicitly prescribed by the charter, and it is declared that if not so accepted all the corporate powers intended to be conferred shall become null and void, I entertain no doubt that a compliance with the terms of the charter in that particular is a condition precedent to the vesting of any corporate powers. The Brookville and Greenburg Turnpike Co. vs. McCarty, 8 Indiana R., 392.

It was said by the court in the case of Head vs. Providence Insurance Co., 2 Cranch, 127, that the act of incorporation is to the corporators an enabling act; it

gives them all the powers they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated. This principle, I think, applies with equal force to the contract from whence all their powers are derived. The legislature may impose upon its own grant any conditions which it pleases, and the neglect to comply with them effectually rebuts the presumption of acceptance which would have attached in the absence of the condition. If, therefore, the corporators in the bill referred to never accepted the grant in the manner prescribed, the intended franchises acquired no vitality, the law became as effectually null as if it had never been passed, and there being nothing to revive or amend, could not be revived or amended in any case in which a new law on the same subject could not be constitutionally enacted. State vs. Dawson, 16 Indiana, 40.

Whether the acceptance of the corporators was filed with the Governor within the time prescribed is perhaps at this distance of time difficult to decide. The executive journals are silent upon the subject; very few Territorial papers remain on file in the executive office, and a somewhat careful examination has failed to disclose any paper of the character referred to. I have, however, discovered a paper purporting to be a letter to Governor Ramsey, dated and filed at about the time of the passage of the act to amend the act entitled "An act to incorporate the Nebraska and Lake Superior Railroad Company," approved March 8th, 1861, and signed by "C. W. Iddings, William Wallace and Alfred J. Hill," stating that a majority of the corporators of the Nebraska and Lake Superior road did file a notice of their intention to proceed under the provisions of the act, a few days after the passage of the act, and prior to January 1st, 1858. These gentlemen do not appear to be corporators under the act, and of their means of knowledge I am not advised.

Assuming that such notice was filed, the contract became perfect. It vested extensive franchises in the corporators, of which they certainly could not be deprived without their consent, save by forfeiture judicially declared. Town vs. Bank of River Raisin, 2 Douglass, (Mich.) 538.

A mere misuser or nonuser of its franchises will not work a dissolution of a corporation, nor deprive the corporators of their vested rights until the default has been judicially ascertained and declared. 2 Kent, Com. 312.

2d. Whether the act of the legislature of the State of Minnesota entitled "An act to amend an act entitled 'An act to incorporate the Nebraska and Lake Superior Railroad Company,' approved March 8th, 1861," is or is not in conflict with the constitution of this State, or of the United States; and whether, by virtue of said last named act, the persons therein named, or any persons, have acquired any property, rights or powers? I think that I have already shown that if the charter was ever legally accepted, the corporators acquired certain rights of property under the contract thus made between the Territory and themselves, and that a law impairing the obligation of that contract, and seeking to divest them of such rights without their consent, or without a determination of their franchises by forfeiture, would be a palpable violation of the clause of the constitution of the United States, prohibiting the enactment of any State law impairing the obligation of contracts. Whether any provision of the constitution of the State is in conflict with the law in question, remains to be considered.

Section 2 of article 10 of the constitution of the State is as follows: "No corporation shall be formed under special acts, except for municipal purposes." This clause by no means prohibits the amendment or modification of a charter having its origin prior to the adoption of the constitution. The distinction between a new charter and the renewal of an old one is fully recognized by authority. "The extension of a charter as to time, the increase of the capital of a corporation, the curing of any informalities, the waiving of any supposed forfeitures, in short, any amendments or modifications *within the scope of the original charter*, the better to enable the company to fulfill the object of its creation and to adapt itself to change of time and circumstances, are the legitimate exercise of legislative power, upon the principle that every grant or concession of power carries with it, by necessary

implication, all others essential to the efficient exercise of that granted." People vs. Marshall, 1 Gilman, Illinois, 672.

Keeping these principles in view, the only question which would seem to arise, is this: Are the subjects of the act in question, so far within the general scope of the original charter as to entitle them to be regarded as the legitimate exercise of the legislative power of amendment; or is the law instead of being an amendment to facilitate and afford increased advantages to the company in the prosecution of its enterprise, in reality the inauguration of a new and distinct undertaking, having no necessary connection or relation to the original one, seeking shelter from the constitutional inhibition under the provisions of an old and obsolete charter, which, not only in its entire scope and object, but in its name even, has been so altered as to destroy its identity?

Is the enterprise sought to be inaugurated by the act of 1861 the same in its general scope and purpose as that of 1857, or is it a new and different one? Upon the answer will depend the validity of the former enactment. The bill incorporating the Nebraska and Lake Superior Railroad Company, (sec. 2, p. 323, Laws of Extra Session 1857,) authorized the corporation "to construct and operate, *to alter the line thereof without changing the eastern terminus*, a railroad to commence at some convenient point or place within the territory of Minnesota, at the west end of Lake Superior or on Superior Bay, in said territory, or on the Bay of St. Louis, in the territory of Minnesota, and running thence westerly within said territory via Sheyenne City to the Nebraska line, *or such route as the corporators may deem most expedient*, with a branch from some point east of the Mississippi, to the Wisconsin State line at Taylor Falls."

So long as the leading object of the bill is preserved, so long as the identity of the enterprise is not destroyed, so long as a road intended to secure the advantages of a particular line of travel and transportation is not so changed as to defeat that general object, it may be admitted that any amendment tending to the more convenient prosecution of the enterprise is within the power of the legislature. It should be remembered that at the period of the passage of the original charter, Minnesota comprised the present State and most of the present territory of Dakota, and was bounded on the entire extent of her western line by the territory of Nebraska, since organized into the territories of Idaho and Montana. In order to ascertain the real intent of the legislature, it will be necessary to refer to the maps of that period. Nebraska was then a wilderness, and it was impossible to determine at what point on the line of that territory it would be desirable to fix the western terminus of the road, hence that point was left to the selection of the company; so also, in view of the selection of some point on the line which might render it inexpedient to construct the road to Sheyenne City, the company were authorized to adopt such other route as they should find most convenient; but the identity of the road could not be destroyed either by the company under the charter or since the adoption of the constitution by the legislature. The leading idea of the bill, that which gave name and character to the enterprise, was the construction of a railroad from Lake Superior, through the then territory of Minnesota, in a general westerly direction, to the Nebraska line, as then located.

Is this idea preserved, or indeed can such a road be constructed under the provisions of the present bill? The bill of 1861, which purports to be an amendment of that of 1857, (p. 201, Session Laws of 1861,) *first* changes the name of the company from the "Nebraska and Lake Superior" to the "Lake Superior and Mississippi Railroad Company;" *second*, it strikes out with one exception, all of the old corporators and inserts new ones; *third*, instead of a road from Lake Superior westerly to Nebraska, as it was in 1857, with a branch to Taylor's Falls, it provides for a road from the west end of Lake Superior, by the most feasible route within the State, to some point on the Mississippi, with the right to extend the same to the Minnesota river, and with the right to construct a branch to the navigable waters of the St. Croix. In short, so indefinite are the terms of the bill that the company may construct a road to almost every important point in the State, except in the direction required by the original bill.

This right of the legislature to change the terminus of the road, to a limited extent, and so long as it is substantially the same road as before, is not denied; but by the bill in question the company have the power, and it is its avowed intention, recognized by the Legislature, (see ch. 49, Special Laws, 1864,) not to build the road to what was in 1857 Nebraska, but to swing the road round from its original direction to a southerly one, and construct a road from Lake Superior to St. Paul, an enterprise as utterly and entirely dissimilar as any two railroads can be. The act of 1864 is also, in effect, an amendment to the charter, and fixes the terminus at St. Paul. 10 Ohio State R., 57. It is true that both the original act and the amended one provide for the construction of a railroad, but here the resemblance ceases. In every other respect there is the broadest possible difference. The power to prosecute the original enterprise is without their consent and without any declared forfeiture, taken away from the original corporators and the power to enter upon another and a different one, is vested in a new and a distinct board of corporators, under a new and dissimilar corporate name.

It is an established principle, that that which cannot be done directly cannot be done indirectly. If new corporate franchises cannot be created and conferred by a bill ostensibly for the purpose, under the constitution, they cannot be created and conferred by styling the act creating them an amendment.

I suppose it would not be seriously contended that under a colorable pretence of amendment the Legislature may so amend an old and obsolete charter for a railroad, as to establish a bank or insurance company; or, to confine myself to the matter of railroads, would it be competent for the Legislature to amend a territorial charter authorizing the construction of a road from St. Paul to St. Anthony, by depriving the company of that power, and conferring in its stead power to construct a road from Winona to Rochester? But the distinction between these cases and the one under consideration is not very obvious in principle. If this liberty of amendment is to pass unquestioned, the constitutional prohibition is of little avail, as there are obsolete charters enough upon the territorial statute books to furnish franchises for every variety of corporation, and in sufficient quantity to meet the real or fancied wants of the community. If a new name, new corporators and a new enterprise are not equivalent to a new corporation, I am at a loss to perceive what is.

The Supreme Court of Iowa have gone to the length of holding, that a constitutional provision of the charter I am considering, not only prohibits the creation of a new corporation, but that in that is included by implication an absolute prohibition against the amendment *in any form* of a corporation incorporated prior to the adoption of the constitution. *Ex parte* Prity, 9 Iowa, 30. The court put as an extreme case one like that under discussion, and assuming that the unconstitutionality of an amendment, which essentially changes the character of the corporation, cannot be denied, they infer that *no amendment whatever* is allowable.

In striking contrast with this narrow and illiberal view of the subject, is the decision of the Supreme Court of California, who, while they by no means hold that a bill like the one in question could be sustained upon constitutional grounds, have laid down the broad principle "That the constitution, while prohibiting the creation of corporations by special act, does not prohibit the grant by the Legislature of special privileges; that therefore a party has only to become incorporated under the general law, and the corporation being thus ushered into being, the constitution is satisfied, and the Legislature may then grant to it the most extensive and important special privileges." California State Telegraph Co. v. Alta Telegraph Co., 22 Cal., 398.

Between these extremes, the one operating to absolutely tie the hands of the Legislature in matters of this nature, and the other to destroy the efficacy of the constitutional provision by a very simple process of evasion, stands the case of the People vs. Marshall, decided by the Supreme Court of Illinois, whose principles I have adopted as most consonant with reason and the analogies of the law. It occurs to me that the fairest test of the question, as to whether the bill in question is really a legitimate amendment or the creation of a new corporation under the form of an amendment, is to consider whether the amendment might legitimately be made

without releasing a subscriber to the stock of the original company from his obligations. If it is an amendment within the scope of the original charter, it would be binding upon the stockholder, but if it inaugurates a new and distinct enterprise it would not. If this test is properly applicable, the authorities have no room for doubt of the correctness of the previous reasoning.

In the case of Blunt vs. Sangamon Railroad Co., 13 Ill., 504, the original charter provided for a road running from Alton, on the Mississippi, by the way of Carlineville and New Berlin to Springfield; the amendment struck out Carlineville and New Berlin, and provided that the road should run direct to Springfield. The court held the amendment within the general scope and object of the bill, but distinguished between that and one which essentially changes the nature or objects of a corporation.

They say: "A road intended to secure the advantages of a particular line of travel and transportation cannot be so changed as to defeat that general object. The corporation must remain substantially the same and be designed to accomplish the same general purposes and subserve the same general interests. The *termini* of the road remain the same; the straightening the line of the road, the location of a bridge at a different place on a stream, or a deviation in the route from an *intermediate point*, will not have the effect to destroy or impair the contract between the corporation and the corporators. Such amendments may be made as may be considered useful to the public and beneficial to the corporation, and which will not divert its property to new and different purposes; but if the charter had been so amended as to authorize the construction of a road from Alton to Vandalia or Shelbyville, or from Springfield to Bardstown or Peoria, instead of the one originally designated, the company would be committed to a new and different enterprise, and the stockholders might, with much force and justice, say this is not the undertaking in which we agreed to invest our funds. Halford and New Hampshire Railroad Co. vs. Croswell, 5 Hill, 383; Blunt vs. Alton and Sangamon Railroad Co., 13 Ill., 504; Marietta and Cincinnati Railroad Co. vs. Elliott, 10 Ohio St. Rep'ts 46."

For these reasons, therefore, I am of opinion that the act of 1861 is of no validity, so far at least as it is an attempt to confer upon the corporators new corporate franchises. It has been urged that if the charter is void the same principles will apply to every land grant road in the State. There is a broad distinction between the cases, which illustrates the fallacy of this position. It should be borne in mind that the point of the decision upon the bill in question is the admission of the right to modify and amend the original charter, keeping within its general scope and object; and the denial of the power under pretence of amendment to depart from that object and create substantially new corporate franchises. The land grant roads created prior to the constitution were objects of special regard in framing that instrument. A loan of State credit in aid of these enterprises was therein provided for, and the several companies were authorized and required to execute a mortgage upon their lands and franchises to secure the State for this loan. It must have been within the contemplation of the framers of that instrument, that in case of the foreclosure of that mortgage, which the Governor was required upon their default to cause to be made, the State might be compelled for her own protection to become the purchaser.

If so, it could not have been intended that the valuable rights necessary for the successful prosecution of these important enterprises, should be merged and destroyed by the very action which the State would be obliged to take for their preservation and her own security; if so, the means of securing their completion would be converted into a potent instrument for their destruction.

The act of August 12, 1858, framed by the same legislature which framed the amendment to the constitution, and being upon the same subject, to be construed with it, authorized the purchasers or their assigns, at a sale upon foreclosure, to organize under the original charter, with all the rights, powers and franchises of the original corporators. The act of June, 1860, authorized a purchase by the State. The assigns of the State therefore were, by the act of 1858, authorized to organize

under the original charter, with all the corporate powers of the old company, without any further legislative action; hence, a mere assignment by the State of the rights acquired under foreclosure, would have vested all the corporate franchises of the land grant companies in her assigns. Mosier vs. Hilton, 15 Barbour, Sup. Ct. Repts.

It is to be observed that the rights of the State and her assigns, in these cases, rest for their validity upon the mortgage of the company and its subsequent foreclosure, and are essentially different from rights acquired by a forfeiture by the company by misuser or nonuser. Even in the case of a forfeiture judicially declared, and the franchises seized into the hands of the State, or of a surrender by the voluntary act of the company, the franchises are not merged or destroyed, but exist in the hands of the State, and may be granted to the same or a new set of corporators. King vs. Passmore, 3 Tenn. Repts., 199; Pierce vs. Emory, 32 N. H., 507; State Bank vs. State, 1 Blackf., 267.

Although there is little analogy between these cases and that of the State becoming a purchaser on a foreclosure of a mortgage executed by the company, it is apparent that if the franchises are not merged in such cases there can be no propriety in asserting such merger in a case like that of the land grant roads, where the amendment of the constitution, the act of August 12, 1858, and that of June, 1860, constitute a connected series of acts upon the same subject, all indicating, by the strongest possible implication, the intention of both the framers of the amendment and the legislature to preserve the franchises of the land grant roads for the prosecution of those enterprises.

The subject of railroad mortgages is as yet new in this country, and very few judicial decisions shed much light upon it.

The case of Pierce vs. Emory, 32 N. H., 484, is the most instructive one which has yet arisen in this country, and illustrates very fully the position of parties taking under the mortgages of the land grant companies. The court say: "The purchasers, under the deed of the trustees acquire all the rights, franchises, powers and privileges which said corporation possessed, and the use of said railroad, with all its property and right of property, for the same purposes and to the same extent that said corporation could use the same if said deeds had not been made, subject to the same liabilities as to the use of said railroad, that said corporation would be under if said deed had not been made." Thus far the court quote the law, which is substantially similar to the law of 1858, to which I have referred. They proceed: "All the rights and franchises of the corporation and the use of the road, are transferred to the purchasers by the deed of the trustees, and they hold the corporate rights and franchises subject to the same liabilities as to the use of the road, by which the corporators were bound before the sale. They have all the property and all the rights and franchises, and are likewise bound to perform all the public duties of the corporation. If the purchasers, under the trustees' sale, take what was originally mortgaged, and take all the property, rights and franchises of the corporation, to hold and enjoy as the corporation held and enjoyed them, they take substantially the corporation itself, and the corporation itself was the thing originally mortgaged."

The State becoming the purchaser at the foreclosure, could only make the purchase available by an assignment to parties willing to embark their capital in the enterprise, but a transfer of the mere road bed and other corporeal property of the road, would be useless in the hands of a purchaser without the important franchises, by which alone the property acquired by the purchase could be employed. Upon the principle, therefore, that by a grant, not only the thing specifically granted passes, but everything necessary to the due enjoyment thereof, the necessary franchises would have passed as incident to the grant, without any express legislation, other than in the act of August, 1858. Allen vs. Montgomery Railroad Co., 11 Ala.

Assuming these principles to be correct, the only remaining question is, whether the various amendments to the land grant charters are within the rule already stated, viz.: incidental amendments, not foreign to the general scope of the original charter, or the creation of substantially new corporate franchises. That they are the former, I think a slight examination will suffice to demonstrate. These en-

terprises remain substantially the same as before, and, indeed, could not, under the congressional land grant, be materially changed; the general scope of the original charters was the construction of certain lines of road, as fixed and provided for by the land grant act, and in all the changes made in the several charters this leading object has been steadily kept in view, and the modifications have been merely amendments within the scope of the original charters, the better to enable the companies to fulfil the objects of their creation, and to adapt themselves to change of time and circumstances, within the rule laid down in People vs. Marshall, 1 Gilman. To this it may be urged that the legislation upon the St. Paul and Pacific road affords an instance of a violation of the rule which I have laid down, and one which is analogous to the case under consideration. By an act approved March 6th, 1863, the St. Paul and Pacific Railroad Company was authorized to construct a branch road to Lake Superior.

A slight examination will show, I think, that this action is not at variance with the principle on which I have proceeded. The St. Paul and Pacific Railroad Company was incorporated for the express purpose of receiving the grant of lands and carrying out the purposes of Congress with reference to certain roads in this State. This was the general scope and object of the charter; when, therefore, a portion of the line of the contemplated road was changed by Congress, with the assent of the company, and a new grant made in accordance with the proposed change, the original charter was amended so as to conform it to this change of circumstances, and to enable the company to carry into effect the modified purposes of Congress. When it is remembered that the company was organized solely for the purpose of enabling the State to avail herself of the congressional grant, an amendment of the charter consequent upon and made necessary by a change in that grant, does not seem to me objectionable.

I have endeavored thus at length to mark the distinction between the several roads and the one whose charter I am considering, in anticipation of an attempt to confound with the present charters which have repeatedly received the endorsement of this office and of the executive. Amendments within the general scope and objects of a charter are not objectionable; but new corporate franchises, foreign to the purpose of the original charter, cannot be created under the pretense of amendment. The franchises of the land grant railroads are not new corporate franchises, created since the adoption of the constitution, but are the franchises of a corporation created prior to that instrument, which have passed to their present holders by foreclosure of the mortgage executed by the old company and assignment from the State, the purchaser at the sale. See Mosier vs. Hilton, and Pierce vs. Emory, cited *ante*.

By the charter I am considering, the rights and franchises of the Nebraska and Lake Superior road are destroyed and the right to build that road taken away, while new rights and franchises are created, and the right to construct another and a different road never contemplated by the original charter, is conferred. The last clause of the resolution, viz.: "Whether by virtue of said last named act, the persons therein named, or any persons, have acquired any property rights or powers," has been partially, perhaps sufficiently, answered. Certainly no corporate rights or powers were acquired under it, if the foregoing conclusions are correct.

Most of the charter is devoted to the vesting corporate powers in certain persons, under the corporate name of the Lake Superior and Mississippi Railroad Company. Section 18 is a provision for granting swamp lands to the company, created by the previous sections. It is not in terms a present grant, but had the attempt to incorporate the company by the previous sections of the charter been successful, and accepted by the corporators, would have constituted a compact and agreement between the State and company, which could not have been impaired by subsequent legislation. This compact was not between the State and the individual corporators, but between the State and the company. It is the company who is to own the lands, and to whom they are to be conveyed, and not the individual corporators. It is indispensable to the validity of a grant of this nature, that there should be a competent grantee, and to the validity of a contract, that there should be two contracting parties; and I am unable to see, there having been no company, how these indis-

pensable requisites can be said to exist, or how there can be any vested rights, there having been *in esse* no person in whom those rights could legally vest. Harriman vs. Southan, 16 Indiana, 190.

3d. Whether the act of the legislature of the State, entitled "An act to extend the time for the grading and completion of the Lake Superior and Mississippi Railroad," approved March 6th, 1863, was or is of any force or effect. The answer to this resolution has become immaterial, by reason of the conclusions arrived at in considering the preceding ones. The original act falling, the supplementary one falls with it.

4th. Whether the act of the legislature of this State, entitled "An act to legalize the action of the Common Council of the city of St. Paul, in relation to the bonds of said city in the aid of the construction of the Lake Superior and Mississippi Railroad," approved February 3d, 1864, is of any force or effect. To this resolution the answer to the third is also applicable. So far as it rests for its validity upon the assumption of the existence of the road under the charter, the charter being held void, the act to that extent falls also.

5th. Whether there is any duly and constitutionally created or chartered corporation, by the name of the Lake Superior and Mississippi Railroad Company. If so, when and under what act created or chartered; has it received any grant of lands, or other state aid, and what are the legal liabilities of the stockholders in regard to its obligations? On the thirteenth of May, 1864, Messrs. W. L. Banning, Wm. Branch, Lyman Dayton, Charles H. Oakes, Parker Paine and Robert A. Smith, filed in the office of the Secretary of State, under the general railroad law, page 319, Comp. Stat., articles of incorporation, and became legally incorporated, as I think, under the name of the Lake Superior and Mississippi Railroad Company. There are no grants of land to any company by that name, other than those already considered.

The gentlemen constituting the corporators under the general law, are, with one exception, different from those named in the charter of the company; but though legally a different corporation, as a matter of fact, I understand that the charter and the rights acquired by virtue of the corporation, under the general law, are in the hands of the same parties, the filing of articles under the general law being for the purpose of curing any defects which might exist in the original charter, of which it would seem, from this precautionary measure, that even the corporators themselves entertained grave doubts. As I have said, the corporators, under the general law, are different from those named in the charter, and I am not definitely advised whether the former have acquired, by assignment or otherwise, the rights of the latter, under the charter. Such, however, seems to be the popular belief. If so, assuming that charter to be valid, would not the filing of articles under the general law be equivalent to an acceptance of its provisions, and so bring the company within the clause of sec. 14 of the general railroad law, (p. 322, Comp. Stat.,) declaring "that any existing railroad corporation may accept the provisions of this act, and after such acceptance, all conflicting provisions of their several charters shall be null and void?" However this may be, it is certain that there does exist, and has existed since May 13th, 1864, a corporation, incorporated under the general law, under the name of the Lake Superior and Mississippi Railroad Company, with power to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, and to do all acts necessary to carry into effect the objects for which it was created.

Sec. 3 of article 10 of the constitution provides: "That each stockholder in any corporation shall be held liable to the amount of stock held or owned by him." This provision applies to all corporations organized under the general railroad law.

To recapitulate the conclusions above stated:

1st. If the charter of the Nebraska and Lake Superior Railroad Company was not accepted by the corporators within the time and in the manner prescribed, the act never took effect, and there being no act, there was nothing to amend or revive.

2d. If it was so accepted, it constituted a contract between the Territory and the State as its successor, and the corporators, whereby vested rights were created, and which could not be impaired without the consent of the corporators, surrender, or forfeiture, judicially ascertained and declared.

3d. The amendatory act of 1861 not being a mere incidental amendment to enable the company the more conveniently to fulfill the objects of its creation, and to conform to change of time and circumstances, and intended to promote the general object of the original enterprise, but the creation of new and distinct corporate franchises in aid of a different enterprise to the destruction of the original franchises, is repugnant to the clause of the constitution prohibiting the formation of corporations by special acts.

4th. The charter being void, all acts, grants, &c., supplemental to the charter, and depending upon that for their validity, must fall with it.

5th. There does exist a corporation, incorporated under the general railroad law, by the name of the Lake Superior and Mississippi Railroad Company, which is now, and has been since May last, capable of receiving any grant of lands from the State, city, or national government, in aid of their enterprise, which has been since that time or may be hereafter made to it.

ST. PAUL, January 31st, 1865. G. E. COLE, Atty. Gen.

H. L. Gordon, Esq., County Auditor, Wright County:

SIR: I am in receipt of your favor of the eighteenth inst., suggesting that my reply to your previous communication does not cover the points upon which you desire information. Upon referring to your previous letter in connection with the one before me, I perceive that you are right. The lands sold at forfeited sale in your county were advertised to be sold at the county auditor's office, instead of at the Court House, or place of holding courts, as required by law, and were sold pursuant to the advertisement. This was irregular, and probably, as I have already decided, rendered the sale void, so far as it attempted to convey the interest of the owner. You now inquire whether the lands can remain on the books as unsold, and the money be refunded to the purchaser. I know of no law authorizing the county auditor to refund the money. It would be a very dangerous power to confer upon the auditor to authorize him whenever an executive officer should be of opinion that a sale made by him was void, to cancel the sale and refund the money. Until the matter has been determined by the courts, we cannot be certain that your opinion or my own in the matter is correct, and without express authority, I do not think the auditor would be justified in refunding the money. Neither does this seem necessary for the protection of a purchaser at a forfeited sale.

Section 99 of chapter 1 of Laws of 1860, has made provision for this class of cases. The true construction of this section, I think, is this, that although the sale may be void so far as to enable the owner to maintain his action for the recovery of the land, and for the eviction of the purchaser, notwithstanding the expiration of the period of redemption, it will nevertheless operate to transfer to the latter, as the assignee of the State, the lien of the public upon the lands, which lien must be discharged by the owner before he can maintain his action for the eviction of the purchaser. This at least would seem to be the intention of the legislature, and whether this section is effectual for the purpose intended or not, it is at least sufficient to rebut any presumption that the auditor possesses any power to protect the purchaser by refunding the purchase money.

ST. PAUL, February 22d, 1865. G. E. COLE, Atty. Gen.

Hon. Thos. H. Armstrong, Speaker of House of Representatives:

SIR: I am in receipt of a resolution of the house, requesting the Attorney General to inquire and report whether the contract reported as made with the public

printer by the committee on printing on the part of the two Houses, is legal and binding upon the State. As the contract referred to is not before me, I have no means of judging whether there is a defect or invalidity attaching to that particular contract, and can only answer generally, that the law (ch. 88, Laws of 1860) provides that "all printing to be executed for the State shall be done on a scale of prices to be agreed upon by the printing committee of the Senate and the printing committee of the House and the State printer." Adequate power seems to be conferred by this language upon the printing committees of the two Houses to enter into a valid and binding contract on behalf of the State with the public printer. These committees are constituted by the law the agents of the State for that particular purpose, and in the absence of fraud I am unable to perceive why a contract when consummated by them and the printer is not conclusive upon both parties. Certainly a resolution of either House, acting without the concurrence of the other, would be ineffectual to affect the rights of the parties as established by law, or to deprive the printing committee of any powers vested in them by any existing law.

ST. PAUL, February 25th, 1865. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I have examined and herewith return an act entitled "An act relating to the taxation of railroad lands." The main features of the bill are the absolute exemption from taxation of the interest of the company in any lands granted to any railroad company in this State, and a provision for the payment of a percentage upon the gross earnings in lieu of all taxation. Many special charters or grants have passed, containing similar provisions, and perhaps the objections which now occur to me should have been raised at an earlier period. Most of these provisions, however, have been mere amendments of charters of certain land grant roads which were originally passed prior to the adoption of the constitution, and contained a provision that the land granted to the companies should be exempt from taxation until sold and conveyed, and that a percentage on the gross earnings should be paid in lieu of taxation. A contract between the State or Territory and the company, whereby the company was exempted from taxation in consideration of a payment of a percentage of its gross earnings, having its inception prior to the constitution, would be protected by the constitution of the United States, and the people by the adoption of a State constitution containing repugnant clauses could not impair it. Gordon vs. Appeal Tax Court, 3 How. 433. Our own constitution, however, contains a provision continuing all contracts in force. See section 1, schedule of the constitution. A grant of swamp lands to the Southern Minnesota Railroad Company has passed the legislature at its present session. This company was prior to the constitution authorized to pay into the State treasury a percentage on its gross earnings *in lieu* of all taxation whatever upon the property of said company. This provision it is conceived would have applied with full force to after acquired property, and the company without the limitations contained in the grant made at the present session would probably have taken the swamp lands discharged of taxation under this provision.

Thus far, the various bills do not appear to be obnoxious to the principles which I am about to state. The Lake Superior and Mississippi Railroad, however, has received a congressional grant transferred to it by the State at the present session containing an exemption clause similar to the provisions of the general bill which I am considering. As the charter of that company contained no such clause, or rather as, in my opinion, the company had no existence prior to the adoption of the constitution, the act granting the congressional lands was probably open to the objections which I am about to urge. My reason for not interposing them when that bill was before your Excellency for signature, were these: A good deal of feeling had existed with reference to the bill and I had been charged with prejudice and hostility towards the company. The bill transferred a large congressional grant which had been obtained mainly through the efforts of the company, and the objectionable

clause of course could not be vetoed without destroying the entire grant. There was also an appearance of fairness in placing this company upon an equal footing with reference to the lands, with other land grant companies. Had the bill required that amount of wild lands to be taxed at once it would probably have been a burden rather than a benefit to the company. For these reasons, as the constitutionality of the tax-exemptions was in doubt, never having been determined by our courts, I allowed the bill to pass without objection. But where a general bill is passed adopting this principle and applying it to all railroad companies in this State existing or to exist, I think that the objections and dangers attending this species of legislation should be laid before you.

Our constitution contemplates a uniform rule of taxation based upon a fixed and ascertained valuation. Under a similar provision of the constitution of Wisconsin, the supreme court in an early case sustained the power to exempt railroads from taxation in consideration of the payment of a percentage of their gross earnings in lieu thereof. The State acted for several years upon this decision; important interests grew up under it which were dependent upon its correctness.

In the case of Attorney General vs. Winnebago Lake and Fox River Plank Road Company, 11 Wis., 35, the court overruled its previous decision, and held the exemption void, but in the case of Kneeland vs. City of Milwaukee — Wis. 454, the court, after again deciding against the validity of the exemption, upon a motion for rehearing receded from their later decisions, and adopted the rule first laid down by the court sustaining the right to exempt the property of the company upon payment of a percentage on the gross earnings. In this decision, the court seems to have been reluctantly driven from consideration of public policy alone; the judges all agreeing that as an abstract proposition of law the right to absolutely exempt the property of railroads could not be sustained, but placing their decision solely upon the ground that extensive and important interests have grown up upon the faith of an early decision of the court; that if the right of exempting a portion of the property of the State was denied, every tax assessment throughout the entire State during the period that such exemptions had existed would be void, and a train of disastrous consequences ensue, difficult to foresee, and impossible to prevent. It is clear from the decision that the court thought themselves compelled to abandon the law to protect the public interests.

In view of the history of these experiments in our sister State, and of the fact that the exemption of a large portion of the property of the State from taxation, would hazard the validity of the entire assessment, we may well pause before involving ourselves in similar perils by the passage of a sweeping general law upon this subject.

ST. PAUL, March 1st, 1865. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor stating that disputes have arisen as to the construction of section 96, chap. 1, Laws of 1860, which provides that whenever any tract or parcel of land or town lot, shall be hereafter sold under the provisions of this act at forfeited sale, any person desiring to do so may redeem the same at any time within six months from the sale thereof by depositing with the county treasurer, as provided in section 88 of this act, the *amount of said sale*, together with *fifty per centum thereon*. You say that you have held that the fifty per centum is to be computed upon the amount of the tax, &c., due at the date of the sale, and not upon the amount for which the land was sold in cases where the same bid exceeded the amount of the tax.

There seems to be no reason for such construction. The language is plain and simple, and when you hold the law does not require the per centum to be paid upon the amount of the *sale*, but upon the amount of the tax only, it seems to me to be a palpable contradiction of the terms of the law, which expressly declares that it shall be paid upon the amount of the sale.

ST. PAUL, March 10th, 1865. G. E. COLE, Atty. Gen.

T. R. Huddleston, Esq., County Attorney, Dakota Co.:

DEAR SIR: I am in receipt of your favor stating that your county auditor claims that he is entitled to extra compensation for preparing the statement of receipts and expenditures which the county commissioners are required to make by section 21 of chap. 15 of Laws of 1860, as amended by chap. 22 of Laws of 1864. The county auditor is paid an annual salary for his services and the law nowhere makes any provision for fees or any further compensation. Among the duties of his office are those of clerk of the board of county commissioners. The preparation of the statement referred to would seem to be clearly a clerical act and one properly devolving upon the clerk under the direction of the board. For all duties or acts of this character he is already paid and is entitled to no additional compensation. You also enquire the meaning of the term "preceding year" as used in chap. 22, Session Laws of 1864. The statement of expenditures and receipts is to be made on the second Tuesday in March. The annual settlement with the treasurer is made on the last day of February. This statement is to contain in addition to the statements of receipts and expenditures of the preceding year an accurate statement of the finances of the county at the end of the fiscal year. I think there can be no doubt that the fiscal year extends from settlement to settlement and expires on the last day of February, and that it is this period that the statement is to embrace. The objects of the statement and the time at which it is required to be made, unite with the letter of the law as it seems to me in indicating the period named.

ST. PAUL, March 25th, 1865. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor stating that the Governor, Treasurer and Auditor were by sec. 7 of chap. 12, Laws of 1863, created a board of commissioners to invest all moneys received upon the sale of school lands; that the investment has been made in United States bonds and our own State stocks; that you have a good offer to exchange some of the United States bonds for Minnesota State stocks; and you desire to know whether the law confers authority upon the Governor, Auditor and Treasurer to make the exchange. I think not. The Governor, Treasurer and Auditor were created a board for the performance of a specific duty, viz., the investing of the school funds. That duty they have performed, and are "*functus officio.*" If you were employed by letter in the language of the act to invest for a private party money in United States bonds, I conclude that upon the investment your powers and authority would cease. The property in the bonds would vest in your employer, and without special authority you would have no power to dispose of them.

The law simply contemplated an investment, and not a general power of disposition over the stocks in which such investments are made.

ST. PAUL, March 25th, 1865. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor of the 14th inst., enclosing communication from Hon. Geo. L. Becker, and copy of the land grant act of congress of 1865, not submitted with his previous communication. Mr. Becker now renews his demand for a deed of 120 sections of land on account of the branch line of the St. Paul and Pacific railroad, claiming that the company is entitled to 120 sections for the branch prior to construction. This claim would have been tenable under the congressional land grant of 1857, as stated in my communication of April 10th. Section 2 of an act entitled "An act to aid and facilitate the completion of the St. Paul and Pacific Railroad and branches," approved March 2d, 1865, provides as follows: "Any and all additional grants of land made prior to the passage of this act, or which may hereafter be made by the Congress of the United States to the State of Minnesota, for the purpose of aiding in the construction of the lines of road, or any portion of

them, authorized to be constructed by the St. Paul and Pacific Railroad Company, shall enure to the benefit of said company, and said lands and the present and future interest of the State in or to them are hereby granted and assigned unto the said company upon the same terms and conditions as the lands heretofore granted for the same purpose, together with the conditions contained in said act of Congress granting the same, and the title of all lands heretofore or hereafter granted by the Congress of the United States to the State of Minnesota for the purposes aforesaid, shall vest in said company at the time and upon the terms prescribed by said act or acts of Congress making the grant; and it shall be the duty of the Governor on behalf of the State to convey to said company the land so granted according to the terms and provisions contained in the act or acts aforesaid." This section was intended, I think, to conform the action of the Governor to the regulations of Congress on the subject, and does not purport to affect in any manner the rights of the company, and the duties of the Governor, but refers us to the acts of Congress for the law on those subjects.

Section 6 of the act of Congress entitled "An act extending the time for the completion of certain land grant railroads in the States of Minnesota and Iowa, and for other purposes," approved March 3d, 1865, declares "that the lands hereby and heretofore granted to said Territory or State of Minnesota, shall be disposed of by said State for the purposes aforesaid only and in manner following, namely: When the Governor shall certify to the Secretary of the Interior that any section of ten consecutive miles is completed in a good, substantial and workmanlike manner as a first class railroad, and the said Secretary shall be satisfied that the said State has complied in good faith with this requirement, the said Secretary shall issue to the State patents for all the lands granted and selected as aforesaid, not exceeding ten sections per mile, situate opposite to and within a limit of twenty miles of the line of said section of the road thus completed, extending along the whole length of said completed section of ten miles of road, and no further, and so on as often as ten consecutive miles are completed, connecting with the preceding section, or with some other first class railroad in successful operation."

It is also provided that said lands granted by this or prior acts shall not in any manner be disposed of except as the same are patented under the provisions of this act. The act of Congress last cited and that of the State legislature were pending at the same time, the latter being approved one day earlier than the former. The language of the act of the legislature and the circumstances under which it was passed indicate an intention to adopt the regulations which have been or should be by the act then pending prescribed by Congress. By the latter a new policy with reference to the distribution of the land grant is adopted and applied to all lands granted to the State for railroad purposes, whether by the act of 1857 or that of 1865. The distinction between the lands between the six and fifteen mile limits was abolished, an additional quantity of land granted, which was to be selected by the Secretary from the lands adjoining the section constructed, and within a distance of twenty miles from the road.

These lands, when so selected, are, upon certificate of the Governor of the completion of any section, to be patented to the State, and the Governor may, when so patented, convey the lands described in the patents to the company to whom the State has contracted to convey them. This is the manner in which all lands not distributed or vested in the company by reason of the construction of a portion of its road prior to the passage of the act of 1865, are hereafter to be vested in the company entitled thereto, and the State and companies, by the acceptance of the additional grant and the extension of the time for the construction of the roads, must be deemed to have given their consent to this change in the terms of the grant, if that were needed.

Sec. 6 of the act of Congress of 1865, contains certain provisos as follows: "That nothing herein contained shall interfere with any existing rights acquired under any law of Congress heretofore enacted, making grants of land to the State of Minnesota to aid in the construction of railroads; and provided, that no land shall be granted and conveyed to the said State under the provisions of this act on account

of the construction of any railroad, or part thereof, that has been coustructed under the provisions of any other act at the date of the passage of this act." These provisions, when read in connection with the remainder of the act, clearly indicate the intention of Congress to leave all roads or portions thereof already completed, and all rights acquired by such completion, to be regulated by the act under which such work was prosecuted, and rights acquired, to wit, the Congressional grant of 1857, but to prescribe a new mode, and the time of distribution, which is to apply to all further portions of the road to be hereafter constructed. The act of the State legislature of March, 1865, by adopting the provisions of these acts of Congress, amounts to a repeal of the restrictions imposed upon the grant by the act of the legislature of 1862, and by removing all regulations sought to be prescribed by the State Legislature, leaves the rights of the company where the several acts of Congress place them, and to be determined by the construction of the act of 1857, in connection with that of 1865.

It is to be observed that the lands granted by the act of 1857, are every alternate section not exceeding six sections to the mile along the entire extent of the line, which were to be vested in the company in advance; that is, the road was to be divided into sections of 20 miles, and the lands to which the company should be entitled for building each section, were to be vested in the company in advance of its construction. If, therefore, the company have thirty miles completed on their branch line, they would have been entitled to 240 sections of land on account thereof, but would have to build ten more miles of road before entitled to any further quantity of lands. At this stage of the enterprise the law of 1865 steps in, and leaving the rights of the company as to the road already completed as it finds them, abandons the policy as applicable to portions of the road hereafter to be built, of advances, provides that the lands shall hereafter vest in sections of ten miles each, and not until such sections are completed. In the case supposed, when thirty miles of road are completed, the company's rights are a deed to 240 sections of land, and its obligations are to build ten more miles of road, for which it has received its land in advance. The company is therefore entitled to a deed for the lands applicable to two sections of 20 miles each on its branch road, at the rate of 6 sections to the mile. Having received this, it will be required to fully complete such sections, when the accounts between the company and the Government under the grant of 1857 will be squared. It will then commence work under the law of 1865, and having completed a further section of ten miles, will be entitled to receive a deed of the land, when the same shall have been patented to the State, applicable to that section at the rate of 10 sections to the mile. Whether, when it receives its lands for the section last named, it will be also entitled to receive an additional grant of four sections to the mile for that portion, the section for which it has received payment in advance at the rate of 6 sections to the mile under the law of 1857, which is completed after the passage of the act of 1865, will be a question for the Secretary of the Interior to determine when the question arises before him upon the Governor's certificate.

ST. PAUL, April 17th, 1865. G. E. COLE, Atty. Gen.

F. W. Cady, Esq., County Auditor, Faribault County:

SIR: In reply to your favor, I have to say that school officers are to be elected on the last Saturday of March, and that a school district meeting cannot, except upon the formation of a new district, be called by notices by legal voters of the district. All meetings should be called by the clerks. A request signed by five freeholders, filed with him, justifies him to call such meeting.

ST. PAUL, May 8th, 1865. G. E. COLE, Atty. Gen.

H. L. Cordon, Esq., County Attorney, Wright Co.:

DEAR SIR: In reply to your favor of the 13th inst., I have to say that the bastardy process provided for by ch. 19, Comp. Stat., is, I think, a *quasi* criminal process, but partaking largely of the attributes of a civil action. It is described in several adjudged cases as "*sui generis*," not strictly a civil or criminal suit, but partaking of the nature of both. For the purpose of trial I think it must be regarded as a transitory civil action, and that as such it may be brought in a county where one of the parties resides, although the child was begotten in another county. I am also of opinion that the act abolishing imprisonment for debt does not extend to or affect proceedings under this statute. I think the recognizance may run to the county commissioners. For authorities on these points I refer you to Hill vs. Wells, 6 Pick., 104; Williams vs. Campbell, 3 Niel, 209.

ST. PAUL, May 17th, 1865. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of a letter from the auditor of Wabashaw county, stating that a party located Sioux Half-Breed Scrip on some land in that county, and supposing that he owned the fee of the land paid the taxes as they became due, that subsequently the government cancelled the scrip location and allowed a pre-emption on the land by another party; the scrip holder now desires the money so paid refunded to him, claiming that the lands were government lands until pre-empted. I think the money should be refunded. If the land did not belong to the party paying the taxes, but did belong to the government at the time of the assessment and payment, the State clearly had no right to tax and the auditor none to enforce payment. The money was paid under mistake to protect the property supposed to be that of the party paying, from sale. It has been frequently held and is doubtless good law, that lands pre-empted or upon which half-breed scrip is located are taxable from such pre-emption entry or location and prior to the issuance of the patent or confirmation of the location, upon the theory that the land becomes the property of the party locating, when paid for by him; that the subsequent patent or confirmation has relation to and takes effect from the original location. The confirmation is equivalent to a decision of the General Land Office, or Secretary of the Interior, who are the tribunals having jurisdiction of the matter, that the party has been the owner from the location; but if the confirmation is refused and the location cancelled, the reverse is true, and it is merely a decision that the land has always remained the property of the Government. The location is allowed by the officers of the local land office conditionally, and subject to the approval of the commissioners of the General Land Office. If, therefore, that approval is withheld, the title does not pass out of the Government, and hence could not have been a proper subject of taxation, by the authorities of the State.

The obvious distinction between this case and an application by Marsh & Co. to the auditor of Rice County some time since, is, that there the entry was defective merely, and the general land office refusing to confirm, a special act of Congress was passed, doing what the commissioner of the general land office refused to do, viz., confirming the original entry; and I held that such confirmation had the same effect as the confirmation by the general land office would have had, and related back to the original entry. If the party in this case, instead of submitting to the decision of the commissioner, had appealed to Congress, and procured the passage of an act confirming his title, the case would be parallel to the one cited above, and I should have held the lands taxable from the location, but under the circumstances it seems clear that until the pre-emption, the Government did not part with its title, and hence no liability to taxation attached until that time.

ST. PAUL, June 12th, 1865. G. E. COLE, Atty. Gen.

R. C. Mitchell, Esq., County Attorney, Anoka County:

SIR: I am in receipt of your favor inquiring whether upon a complaint under section 3 of chapter 15 of Laws of 1862, for an assault being armed with a dangerous weapon with intent to do great bodily harm, the justice may, if he finds that an assault has been committed, but does not find the circumstances of aggravation, impose a fine for a simple assault and battery. The justice, in the case stated, has no jurisdiction over the offence *charged*, and whenever he sought to assume jurisdiction upon *that complaint*, it would seem that the objection might be raised. In State of Minnesota vs. Boyd, 4 Minn., 324, the court held that the extent of the charge, viz., the extent to which the punishment might be carried under the indictment, determined the jurisdiction, rather than that actually inflicted. If this is true, a charge under which the accused may be imprisoned in the State prison for the term of five years, must oust the justice of all jurisdiction in the matter. If the accused were subsequently brought before a justice upon a charge of simple assault, and battery arising out of the same transaction and the prior conviction were sought to be pleaded in bar, would not the record disclose the fact that the accused was in that proceeding convicted upon a complaint charging an offence beyond the jurisdiction of the court passing sentence? If so, the plea would be rejected and the party again put upon his trial. I think the correct practice in such cases is to proceed with the examination (which is only a preliminary investigation to ascertain whether a party should be held for trial) and if the justice finds that there is no probable cause for believing that an aggravated assault has been committed, to discharge the accused from custody and cause him to be re-arrested upon a complaint charging simple assault and battery.

ST. PAUL, June 15th, 1865. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, enquiring whether under the provisions of ch. 9, Special Laws of 1865, the lands of the St. Paul and Pacific Railroad Company, contracted to be sold prior to the passage of that act, or only those contracted to be sold subsequently, are taxable. The act provides that whenever any lands heretofore or hereafter granted to that company *shall* be contracted to be sold, conveyed or leased, they shall be placed upon the tax list by the proper officers. Laws are, by a very well settled rule of construction, held to operate prospectively and not retrospectively, unless a different intention is manifest. Here the language is prospective only; the words "have been or shall have been," would have been employed had it been intended to apply the rule to lands heretofore conveyed; thus the legislature, intending to apply the rule to all lands which had been or should be granted to the company, used the words "*heretofore or hereafter.*" The lands of this company were by a valid compact binding on the State, and the company, prior to the constitution, exempted from taxation until conveyed by the company. It was not competent for the legislature to impair the obligation of this contract without the consent of the company, which is expressly provided for in the act. But as it is the interest of the purchaser and not that of the company that is sought to be reached by the law, the rights of the purchaser ought not to be affected or prejudiced by that consent. Prior to the passage of that law, contracts of purchase had been made with reference to the then existing law, and with the expectation and understanding that the rights of the purchaser would not be liable to taxation until the payment of the entire purchase money, and a conveyance by the company. Rights thus acquired should not be modified or impaired by subsequent legislation. Hence the justice of confining the law to a prospective operation.

ST. PAUL, June 24th, 1864. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, enclosing letter from city assessor of St. Paul with reference to the taxation of National banks. Section 34 and the following sections of chap. 1, Laws of 1860 of this State, provide a special mode of taxation for banks organized under our laws, but make no provision for the taxation of foreign corporations, under which term are included all associations incorporated under the laws of a foreign country, a sister State or the United States. Taxation of the property of these corporations is provided for under the head of "investments in stocks," by section 2 of the same act. In the absence of any objection arising out of the constitution and laws of the United States, there would, under the present revenue laws of the State, be no difficulty in reaching the shares of the capital stock of such corporations in the hands of the stockholders.

The National banking act has expressly authorized the taxation of those shares, but has incorporated a proviso which the banks rely upon as exempting them from taxation altogether. This proviso is as follows: "That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under authority of the State where such association is located." The objection raised by the bank is a mere quibble, and ought not for a moment to have delayed the assessor in the exercise of his duty.

It is true that under our revenue law, shares in State banks are not taxable *eo nomine*, bnt it is equally true that they are taxed in a different form by a taxation upon loans and discounts. In the one case the tax is paid by the bank itself, and the value of the shares and amount of dividend accruing to the stockholders is to that extent diminished, while in the other case the tax is paid by the stockholder directly; *in either* case, the amount paid is, by the constitution, intended to be the same. Sec. 4, art. 9, Const. The difference is in form and not in substance.

The object of the proviso in the act of Congress was simply to prevent any attempt to crush out these National institutions by the State by a resort to invidious and unjust discriminations in taxation. So long, therefore, as the burden actually imposed upon the shares, no matter in what form, or whether directly or indirectly, is not higher or more onerous than those imposed upon the State banks, the spirit of the proviso is not violated. The intention of the proviso is precisely the same as the constitutional provision, providing for equality in taxation, and yet it was never claimed that the difference in the form of taxing State banks from that of other corporations was creative of any inequality. Indeed the very object of the constitution in providing for this mode of taxing State banks, was to subject them to a taxation equal to that imposed upon the property of individuals. But in the absence of any proviso in the act of Congress allowing the taxation of these shares by State authority, it is doubtful whether the State have not full power to tax the shares in the capital stock of these national institutions. They perhaps would have no power to tax the business of the banks as such, or the bonds which secure their circulation, but the interest which an individual holds in the capital stock of a corporation is his private property, and may, it would seem, be taxed without detriment to the Government. The case is directly within the exception of the opinion in the case of McCulloch vs. State of Maryland, upon which the denial of the power of the State to tax a national bank or national securities rests. The court thus says that the "opinion does not extend to a tax paid by the real property of the bank in common with other real property within the State, *nor to* a tax imposed on the interests which the citizens of Maryland may hold in the institution in common with other property of the same description throughout the State."

The vast amount of property which is escaping taxation at present by reason of the construction heretofore placed upon the relative powers of Congress and the several States is exciting great and rapidly spreading dissatisfaction, and there can be no doubt that the courts will confine the exemptions within the narrowest possible limits, and as I believe, following the exception in the cases cited, they would hold the shares in these institutions taxable even in the absence of the

proviso contained in the act. I anticipated trouble in this and other provisos in the act of Congress, and in a communication addressed to you during the last session of the legislature, recommended certain modifications in the State laws to remove all doubt upon the subject, which were unheeded. My views then, as now, were that the tax could be enforced, but that in a matter which would probably soon involve the heaviest financial interest in the State, it was well to avoid all possibility of litigation. The answer of H. Thompson, cashier, also enclosed me, "that the banks have no property subject to taxation under State laws," is perhaps correct, but the assessor should not have applied to the bank, but to the stockholders. I do not see why the forms furnished the assessor are not sufficient. His duty commences and ends with the ascertaining and returning the value of the shares held by any person in such bank. Having done this in proper season and manner, he will not be responsible if the tax should prove uncollectible. It would be useless for me to change the forms in use, as they are based upon the act of 1860, and any taxation by the State must also be based upon it. The exception in the act of Congress is at most only permissive, and would not in the absence of an operative State law confer any authority for taxation.

I understand that the officers of the bank are willing to furnish the names of their stockholders, and the assessor can have no difficulty in making the assessment with the present form, in the same manner that he would assess the shares in any other corporation, the taxation of which was not specially provided for by the act of 1860.

ST. PAUL, July 18th, 1865. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor, enclosing communication from the county auditor of Dodge county. The principal question submitted is one of considerable importance, and has been the subject of much perplexity with county officers. It is this: "When land has been sold for taxes, the time for redemption expired, and a tax deed issued to the purchaser, if the original owner quitclaims the land, or his interest in it, to a third person, must the register require the certificate of the auditor that the taxes are paid before admitting the deed to record, and is it the duty of the auditor to give such certificate?"

The question turns upon the construction of section 1, chapter 9, Session Laws of 1862. In construing this section, resort must be had to the entire context. From this it will be seen that the legislature had in view three objects in the enactment of this section.

1st. That all lands should be taxed in the name of the real owner at the time of the assessment, and hence the requirement that upon a transfer of title the land should be transferred to the name of the purchaser for taxation. This is the leading and initial feature of the section. But when the transfer of any lands for taxation becomes necessary, by reason of any conveyance by deed—*and in such cases only*—the auditor is to ascertain whether all prior taxes have been paid, and the register is to refuse to record such deed until the auditor certifies that the taxes are paid. There seem to have been two objects for this requirement: 1st. As the theory of the tax law requires all lands to be taxed in the name of the real owner, whenever any land is transferred, to prevent confusion, the account of the public with the owner is to be settled and balanced, and a new account opened with the purchaser. But another, and perhaps more important object, was to secure the prompt payment of taxes. The State has a lien upon all lands for the taxes assessed thereon, which, in the absence of this section, would attach and pass with the land to the purchaser. But the legislature, instead of relying upon this, has seen fit to provide that this lien shall be discharged, the taxes paid, and the account balanced at the time that the owner disposes of the land.

Now the case submitted to me is not only not within the letter of the law, which only requires the certificate that the taxes are paid when the transfer of any land *for the purposes of taxation* becomes necessary, but is not within its reason or spirit. *"Cessante ratione legis cessat et ipsa lex."*

The land was transferred for taxation to the name of the purchaser at the tax sale, when he received and caused to be recorded his tax deed, and no further transfer for taxation can become necessary until such purchaser disposes of it. The original owner, in the contemplation of the tax law, lost all interest in the land upon the expiration of the period of redemption; the amount of the taxes accruing prior to the tax deed have been received by the State, and those subsequent to that are levied in the name of the purchaser. The State, recognizing no interest in the original owner, has no motive for interfering with any conveyance he may choose to make. Her account with the original owner, as respects that land, ceased with the execution of the tax deed to the purchaser at the tax sale, who was substituted in his place; and to conveyances by such purchaser only will the provisions of section 1 thereafter apply. See sec. 16, ch. 2, Laws 1860.

Certainly the state will not require him to pay the taxes on the land before the record of his deed, as this would be an impossibility, he having no right of redemption. It has been suggested that as the State has received the money from the purchaser at a tax sale, the Auditor would be justified in certifying that the taxes were paid. This is a mistake. By no possible construction can a purchase at a tax sale be regarded as a payment. It is no more a payment than a forfeiture to the State. The purchaser simply becomes the assignee of the State. But such a certificate would be the means of entrapping innocent purchasers, and of encouraging the grossest frauds. A purchaser generally has no other means of ascertaining that the taxes are paid except the certificate of the auditor—at least this is the means which the law provides—and he is fully justified in relying on it. If the taxes are in fact paid, he acquires a perfect title, discharged from any lien of the State or individuals for taxes; but if instead of being paid, the land has been purchased at a tax sale, the time for redemption expires, and a tax deed executed, the certificate is false. The seller has no title: the purchaser acquires none, but is defrauded of his money by a falsehood, recognized and sanctioned by law. Such construction, it requires no argument to show, cannot for a moment be admitted.

Upon the whole, I am of the opinion that the case is not within the meaning of the section; that it is only in cases in which the transfer of land becomes necessary for the purposes of taxation, that the subsequent provisions of that section are applicable; and that deeds under the circumstances stated require no certificate from the auditor.

In answer to the second question submitted to me, I have to say that by a tax sale, expiration of the time of redemption, and execution of a tax deed, the owner's title is divested, he ceases to be the owner, and as his right to redeem depends upon his ownership, that failing, all rights dependent upon it must fail also.

ST. PAUL, July 21st, 1865. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor enclosing communication from William Rhodes, Esq., Secretary of the La Crosse and Minnesota Steam Packet Company, stating that the company is incorporated under the laws of Wisconsin, and that by the laws of that State, the principal accounting officer is required to list the capital stock of the company for taxation at the place of the principal place of business of the company, which is La Crosse. The company has refused to list its property at La Crosse, and the assessor has, upon default of the company, listed it pursuant to the laws of that State.

It is claimed that inasmuch as the company is taxed in that State for its capital stock, its stockholders ought not to be taxed upon their shares in this. But our laws require each stockholder resident in this State, to list his shares in such company. Sub-division 2, sec. 2, p. 12, Laws of 1860.

Now if the company was incorporated under the laws of this State, it certainly would not be competent to tax the company on the amount of its capital, and the

shareholders on the shares held by them, as this would be double taxation, and in violation of the constitutional rule of equality; but we do not propose to tax the property but once. The State has an undoubted right to tax her citizens for all shares in any corporation incorporated in this or another State. Shares of corporate stocks are personal property, and as such are taxable to the owner at the place of his residence. Now because Wisconsin saw fit to assert the same right, can Mr. Rhodes assign any good reason why the State of Minnesota should yield an undoubted right to a certain portion of her revenue to Wisconsin, who has no higher or superior right? The result may be, that the company may be required to pay a tax upon this property twice; but with this the State of Minnesota has nothing to do. She is in pursuit of her legal and constitutional rights, and is not bound to take notice of the action of the revenue officers of Wisconsin in the premises. In 1835 the precise question arose between Massachusetts and New York; the former State claiming the right to tax the stockholders resident therein, upon their shares in a turnpike company, incorporated under the laws of the latter, and whose capital stock was taxed by the latter. The case was taken to the supreme court of Massachusetts, which sustained the power of that State to tax such shares. Inhabitants of Great Barrington vs. County Commissioners of Berkshire, 16 Pick., 572.

ST. PAUL, July 28th, 1865. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

SIR: I am in receipt of your favor inclosing contract between the St. Paul & Pacific Railroad Company and E. B. Litchfield, Esq. From your letter and the inclosed contract it appears that prior to the legislation of the last session, the St. Paul & Pacific Railroad Company made a contract and agreement with Messrs. Winter, Harshman & Drake, whereby it was agreed that the company should convey to them certain lands, which the company were to acquire upon completion of a portion of their road, in payment for the construction of such portion of the road by Messrs. Winter, Harshman & Drake, the contractors; that subsequently Mr. E. B. Litchfield, having also contracted for and actually completed a portion of the road, a contract was entered into by the company with said Litchfield, the legal effect of which seems to have been the absolute assignment to said Litchfield and his associates of the road from St. Paul to Watab, and all the rights of the company appertaining to or connected therewith. An act of the Legislature to enable Mr. Litchfield to avail himself of that contract was also procured, and under this and the contract the First Division of the St. Paul & Pacific Railroad Company has been organized and is in operation,—the only portion of the St. Paul & Pacific Railroad Company which has been constructed. Upon the organization of this division of the road Messrs. Winter, Harshman & Drake, it seems, canceled their contract for lands, by an agreement between them and the directors of the First Division of said road, and accepted stock, and the First Division of the St. Paul & Pacific Railroad Company, by virtue of this contract and act of the Legislature above referred to, became and are entitled to all of the lands appertaining to that portion of the road owned by them; and you inquire whether all or any of these lands are taxable by the State; it being conceded that they are taxable when disposed of by the company. I think the lands are not taxable in the hands of the First Division of the St. Paul & Pacific Railroad Company. By a reference to the contract and act hereinbefore referred to, it will be seen that the rights of the present owners of the road were acquired by the issuance to them of special and preferred stock, which is only another form of a railroad mortgage. Now, if in the construction of the road it had become necessary to issue the first-mortgage bonds of the company, and such mortgage had been foreclosed and the mortgagees had continued to operate the road, would there have been any doubt that they would have succeeded to all the chartered rights of the mortgagor company, and among them, that they would have taken the lands with the same exemption from taxation which attached to them while in the hands of the original company? By referring to the history of legislation on this subject, it will

be seen that the object of the exemption was to afford the company, or any company or capitalists, an inducement to build the road, and to guaranty, not to that particular company, but to capitalists who might invest their capital in the enterprise, a partial immunity from taxation. The lands were transferred, accompanied with this exemption. If the company failed and another succeeded to its rights, I apprehend that the exemption would still attach, and it is only when the company or capitalists have applied them to the purpose of the road, and disposed of them to other parties, that the right to tax accrues. Had the contract with the contractors, Winter, Harshman & Drake, been consummated, the lands might have been taxable in their hands; but under the facts as stated a new company has stepped into the place of the old one, as to a portion of its road, and succeeded to its rights, and until they have parted with their lands I cannot see that those rights are other or different than they were in the hands of the original company.

ST. PAUL, August 10th, 1865. G. E. COLE, Atty. Gen.

A. A. Harwood, County Attorney:

SIR: I am in receipt of your favor inquiring whether the county commissioners of any county which has adopted the system of a county superintendency, as provided for by chapter 1 of the Session Laws of 1864, cannot afterwards reject it and return to the old system. I think not. The policy, and, indeed, the legality, of an act, the validity or adoption of which is made dependent upon the action of a particular locality, is very questionable, and certainly the *quasi* power of legislation which is conferred upon towns and counties in such cases should not be enlarged by construction. The act in question depends for its operation in any county upon the action of such county through its commissioners. When that action takes place the law becomes valid and operative in that county, and is the law of and for such county.

This being so, can a valid and operative law be changed or annulled by any other than the law-making power of the State? Clearly not. It would be intolerable if the several boards of county commissioners were to be constituted petty legislatures, with power to adopt one school system one year and another another. The vacillation and uncertainty which would result would be likely to throw the entire system into inextricable confusion. On the contrary, the law in question, like laws changing county lines, submitting for ratification to towns a law authorizing the issue of town bonds, and all other laws of a similar character, become, upon its adoption by the commissioners, the law for the county, and can only be changed by legislative action.

ST. PAUL, September 7th, 1865. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor inclosing letter from the president of the Minnesota Valley Railroad, stating that the company will soon have 10 miles of its road completed, and will apply for all the lands within the six-mile limits of the road, commencing west of Mankato and running 20 miles in the direction thereof; also for an amount of lands nearest said lands selected from the indemnity lands, equal to the amount of lands sold by the United States within the six-mile limits; also for a deed of 51,200 acres, being the additional grant of four sections to the mile granted by the act of congress of May 12, 1864, to the lands granted by the act of 1857, being 120 sections to be selected within six miles on each side of a section of 20 miles, if practicable; and if not within 15 miles, the company will be entitled to a deed under the provisions of section 2 of Spec. Laws 1864, p. 159. There is no special provision for a deed of the additional grant of four sections to the mile by the Governor. On the contrary, section 8, p. 112, Spec. Laws 1864, seems to intend the absolute vesting of future grants to the company without any deed or

other act on the part of the Governor. Whether Mr. Drake is right in his claim to receive, upon the completion of 10 miles of road, an amount of lands from the additional grant equal to the amount appertaining to a section of 20 miles; or, in other words, whether any portion of that grant was to vest in the company in advance of construction,—is a fit matter to be decided by the Secretary of the Interior, and upon which I express no opinion. As the State is only a trustee in this matter, the clerical labor of preparing the deed should be performed by the attorney of the company. I have prepared one or two deeds,—one, I think, for the St. Paul & Pacific, and one for the Winona Road. I did this intending that they should be precedents, and that, therefore, parties preparing similar deeds would, by consulting those forms, so far as general provisions are concerned, have no difficulty in meeting my views of the nature of the instruments. I prefer, therefore, that the attorney of the company should prepare the deed, and submit to me for approval.

ST. PAUL, September 9th, 1865. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor inclosing letter from Capt. Lee, and desiring my opinion as to the right of persons who, during the late rebellion, escaped to Canada to avoid the draft, and have since returned, to vote at the ensuing fall election for State and county officers. You also inclose a slip extracted from some newspaper, stating that by proclamation of the President, issued pursuant to an act of Congress, such persons are disfranchised. I have no sympathy with this class of persons, and were I in a position where I could properly do so, would not hesitate to vote for their disfranchisement. In my present position I must, however, expound existing laws as a lawyer, rather than as a politician. The constitution and laws of this State prescribe the qualifications of voters, and confer upon certain classes of persons political rights, of which they can only be deprived as a punishment for crime. This punishment can regularly be inflicted under the rules of the common law only after a formal judicial investigation and a sentence passed in accordance with the finding of the tribunal. A law which should attempt to disfranchise a class of citizens, while denying them a trial according to the course of the common law, would not only be most unjust and oppressive, but would strike at the very foundation upon which the fabric of every free government is raised, and would also be a palpable violation of the constitution of this and of every State in the Union. Under the constitution of the United States the power to define the qualifications of voters at State elections in Minnesota is vested in the people of the State, and neither Congress by enactment, nor the President by proclamation, possesses any power to vary, modify, or in any manner affect these qualifications. The constitution and laws of this State attach no such punishment to desertion from the armies of the United States as that indicated in your letter, and, indeed, could not properly do so, as the punishment devolves upon the nation whose laws have been violated. A refusal to allow a person to exercise the elective franchise at a State election for the cause referred to would find no warrant in either the constitution or the election laws, but would be a palpable violation of both, and I know of no authority competent to override them and establish other and different regulations. A precedent of this character, however desirable as a present expedient, would be of the most fatal and dangerous character. Whenever the States are prepared to yield this or any other State law to the proclamation of the President, all laws are liable to the same supervisory power; the State government sinks powerless and paralyzed at the feet of the nation, and the liberties of citizens are dependent upon the breath of the occupant of the presidential chair. The government ceases to be one of laws and becomes one of men. In a legal point of view there can be no question that your interrogatories must be answered in the negative.

ST. PAUL, September 18th, 1865. G. E. COLE, Atty. Gen.

P. Belfoy, County Attorney:

SIR: I am in receipt of your favor stating that your county commissioners voted to pay the sum of five dollars per month to the families of men enlisting under and on the faith of the resolution; "that at the time of taking this action the commissioners had no power in the premises, but that afterwards the Legislature attempted to legalize such action." I have ever been of the opinion that an attempt to legalize an act which was absolutely void in its inception is vain, and am not surprised that you should have given a similar opinion.

Such I believe to be the only sound and rational doctrine upon which a constitutional government can be administered, and such, I presume, would be the inclination of the profession generally.

Great efforts have been constantly made by courts and legislatures to loose the stringency of this salutary rule, and both the Supreme Court of the United States and those of many of the States have gone very far towards supporting the legislation referred to by you, holding that remedial laws, such as laws legalizing void acts of public officers, defective conveyancing, defective marriages, etc., may be sustained as remedial laws which impair the obligations of no contract, but on the other hand confirm and sustain rights equitably under a contract which by reason of some legal defect could not be enforced. The line separating these extreme cases from others confessedly within the constitutional prohibition is but illy defined. The cases are examined and commented on in Smith on Constitutional Construction, §§ 380, 381, 382, 267.

My advice to you, as a county officer, is, that while the cases would furnish strong and plausible arguments in support of the position of the plaintiffs, a strong argument can also be urged in support of the position of the county upon general principles, as well as upon authorities, perhaps, as analogous as those referred to. It is one of those cases in which, the law of this state not having been determined upon by the tribunal of last resort, an attorney on either side can fairly advise his client to test the question.

ST. PAUL, October 1st, 1865. G. E. COLE, Atty. Gen.

A. Gutshen, County Auditor:

SIR: I am in receipt of your favor inquiring what is the taxable year for taxing merchants and manufacturers. I cannot see any room for escaping the conclusion that it is the year next preceding the day of making the statement. Sections 11, 12, and 13 are very clear.

I note your comments on the propriety of this rule and concede their force, but these, as well as most criticisms which have from time to time been made, should have been addressed to the Legislature. Executive officers have very little to do with consequences. I am no friend to judicial legislation, but believe in administering the law as I find it. There are, it is true, cases in which the language of a law is ambiguous, when we are justified in resorting to construction, but never when the language is as plain as I deem it to be in this instance.

ST. PAUL, October 7th, 1865. G. E. COLE, Atty. Gen.

J. B. Gilfillan, County Attorney:

SIR: You inquire whether there is, under our laws, any such thing as a common-law *certiorari*, and whether such writ will lie from the District Court to that of a Justice of the Peace. The Constitution confers upon the Supreme Court appellate jurisdiction *in all cases*, and original jurisdiction only in such cases as may be prescribed by law, and upon District Courts original jurisdiction in all cases, and appellate jurisdiction only in such cases as may be prescribed by law. By statute, writs of *certiorari* may issue from the Supreme Court, but no provision is made for its issuance from the District Courts. At the common law, this writ issued from the Court of King's Bench. I do not think, therefore, that the statutes,

having provided the mode of review in the District Court of the decisions of a justice, the writ will lie from that court. There is more doubt, however, whether the writ may not issue out of the Supreme Court to the Justice. It has been frequently held in New York that the fact that an appeal had been given by statute from a Justice to the Common Pleas did not deprive the Supreme Court of its common-law jurisdiction to cause a *certiorari* to be issued in a proper case; but the writ (the issuance of which is in the discretion of the court) would only be allowed under special circumstances. Kellogg vs. Church, 3 Denio, 228; Comstock vs. Porter, 5 Wend. 98. It has also been intimated in the same State that the writ ought not to be granted when the right to appeal was conferred by statute. In the Matter of Mount Morris Square, 2 Hill. 27. So, also, in Massachusetts. Palmer Co. vs. Fevill, 17 Pick. 62. Our own courts have recognized its power to grant the writ in similar cases; but, couple the recognition with conditions which render an application of this character very precarious, as a case would seldom arise in which the court would be disposed to grant the writ. Wood vs. Myrick, 9 Minn. 149. With reference to the other question suggested by you, as to whether section 199, p. 526, Comp. St., is repealed by chapter 22, Sess. Laws 1865, I am clearly of opinion that it is not. All those sections intended to be repealed are expressly named in section 6. The provision in section 3, that an appeal upon *questions of law* may be taken in any case, civil or criminal, only refers to that particular mode of appealing, and may well stand with the provision of the criminal sections regulating the time within which all appeals must be taken.

ST. PAUL, October 31st, 1865. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor inclosing letter from Mr. Huddleston, county attorney of Dakota county, asking a conditional pardon for Muban, the accomplice of McCue, who is in custody upon a charge of murder, in order that he may be used as a witness for the State. The Attorney General has power to pledge the public faith to the extent of procuring a free pardon to an accomplice upon condition that he will give material testimony against his confederate in the guilt. Under the circumstances of this case I have deemed it advisable to write the county attorney that he may assure Muban of a free pardon if he testifies as the county attorney wrote me he would, at the same time advising the county attorney to ascertain whether Muban could and would testify to any material facts before making the promise. This, I think, is all that is necessary at present. If Muban, on the faith of this assurance, appears and testifies as he will be expected to if the assurance is given, and which is the condition upon which the assurance is given, it will then be proper to grant a full pardon. This is the usual course taken in such cases.

ST. PAUL, November 13th, 1865. G. E. COLE, Atty. Gen.

Hon. Chas. McIlrath, State Auditor:

SIR: I am in receipt of your favor inclosing communication of auditor of Meeker county, inquiring as to the regularity of the county commissioners in a district of that county. In reply I beg to remind you that except inquiries concerning the tax laws or school laws, neither the state auditor nor myself are required to advise county officers. The question should be referred to the county attorney.

I am also in receipt of your favor inclosing communication from the auditor of Wabasha county, stating that the town of Plainview in that county has made no return of its assessment, and that the auditor has repeatedly written to the town officers on the subject, and inquiring what he shall do. I presume the assessor can be compelled by *mandamus* to perform his duty. I do not see why the auditor has not done all that can be required of him in the premises.

The letter of the auditor of Martin county, inquiring whether a new town created

out of a portion of the territory of an old one can be made liable for its obligations, has been so often answered by opinions from this office that there seems to be little excuse for addressing me again upon the subject. See Opinions.

ST. PAUL, November 20th, 1865. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor, inclosing letter from the President of the Minnesota Valley Railroad Company, requesting that the bonds issued by the Southern Minnesota Railroad Company be canceled. The law is as plain as I can make it. See section 4, p. 161, Spec. Laws 1864. I also return Peter Fladden's certificate, inclosed to me in a former communication, as requested. I am also in receipt of your favor inclosing letter of J. E. Haines, inquiring whether a party can at the same time hold the offices of Register of Deeds, Clerk of District Court, and Judge of Probate. There is nothing in the nature of these offices rendering them incompatible, in the absence of statutory provision, and I do not now remember any. Parties should be instructed to apply to county or private attorneys for advice in such matters. It is not the province or duty of the Attorney General to furnish gratuitous advice to mere citizens.

ST. PAUL, November 24th, 1865. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I am in receipt of your favor inclosing deed prepared for your execution, by the Minnesota Valley Railroad, for 120 sections of land. Also letter from the Secretary of the Interior requiring further proof of character and extent of completed road. You state in your letter that the company desires a *further* deed of 120 sections. I am not aware that any previous deed has been executed; certainly none has been submitted to me, and by the terms of the recitals in the deed submitted it would appear that the land conveyed was the first 120 sections to which the company is entitled upon the completion of 10 miles of road. By section 2 of chapter 2 of chapter 1 of Special Laws of 1864, p. 159, the company is entitled to a deed of 120 sections, upon the completion of 10 miles, and upon the completion of every 20 consecutive miles to a deed of the lands appertaining thereto. Now, 120 sections, or three sections in width on each side of the section of 20 miles, is the quantity appertaining to that section. The company, therefore, upon the completion of 10 miles of road, are entitled to the lands appertaining to the entire section of 20 miles, and can be entitled to no more upon the completion of the section, as they have already received their complement. The language of this act is peculiar, and differs from that of the other roads. If the deed submitted to me is for the first 120 sections, accruing to the company upon the completion of 10 miles of road, it is correct; but if they have received that, they have already received all the lands appertaining to the section completed. The Secretary of the Interior may, or may not, be mistaken, as the president of the road alleges, in his supposition that the rights of the company to their additional grant depended upon the act of 1865, and this company received an additional grant earlier than the other land-grant companies, and takes subject to the same conditions and limitations that are imposed upon the original grant of 1857. See section 7 of an act approved May 12th, 1864, p. 74, St. at Large 1863 and 1864. As to Mr. Drake's claim, that the State is a trustee and is the only proper party to determine when the company is entitled to its lands, I have to say that, so far as it is necessary to place our construction upon State laws, or even acts of Congress, in order to enable the State to execute the trust reposed in her officers, must, of course, in the first instance, do so; but I should decline to go beyond and place any construction upon the congressional grants in regard to questions which must necessarily be determined by the Secretary of the Interior in the discharge of his duty. As it was necessary to place a construction upon the act of Congress of

1864, and the subsequent one of March, 1865, entitled "An act extending the time for the completion of certain land-grant railroads in the States of Alabama and Iowa," I have thought proper to advise the Governor to act in the matter of deeding to the company, as required by the law of the State, page 159, Spec. Laws 1864. This statute confers upon the Governor authority to execute the deed, as I have herein advised; but whether that deed will be valid, or confer any rights on the company, is at least questionable, and the Secretary of the Interior may be right in holding, as I infer from his communication that he does, that the act of Congress of 1865 extended to all land-grant railroads in Minnesota, and subjected all prior grants to its provisions. Such a condition, imposed upon the extension of time for the completion of the roads, would not be open to any legal objection, as all the companies, by neglecting to build as required by Congress, had forfeited all rights, and the extension of time was purely a matter of favor and might be coupled with any condition which Congress saw fit to impose.

The act of 1865 is extremely ambiguous and involved in its terms, but there are several clauses which indicate this design; among others, the following: "that said lands granted by this or prior acts shall not in any manner be disposed of except as the same are patented under the provisions of this act." If this construction is correct, the act of the State Legislature of 1864, empowering the governor to execute a deed of 120 sections upon the completion of 10 miles of road, would conflict with an act of congress, and would, therefore, be void, as upon all matters which are the proper subjects of congressional legislation State laws must yield.

There is a distinction to be noted between this application and that of the St. Paul & Pacific Railroad (see opinions of this office) in this, that the whole of the road of this company has been constructed since the passage of the act of 1865. As an executive officer I deem myself justified in advising action under State laws until they are held nugatory by competent authority.

ST. PAUL, November 28th, 1865. G. E. COLE, Atty. Gen.

Hon. Charles McIlrath:

SIR: I am in receipt of your favor inclosing letter from Auditor of Sibley county, stating that the board of supervisors of a town in that county levied a tax of 30 mills on the dollar in 1864 for the years 1864, 1865, and 1866, and he desires to know whether, without any further action on the part of the town, he is justified in extending the tax for each year. I think not.

The term "taxes" signifies an annual levy or assessment, and I do not think it competent for one board of supervisors to legislate for future years. If they may do so for three years in advance they may do so for all time. When the town machinery was once put in motion I do not see why, if the first board can thus do the work of their successors, any further election of supervisors would be necessary.

ST. PAUL, December 16th, 1865. G. E. COLE, Atty. Gen.

His Excellency, Stephen Miller:

SIR: I have received a communication from E. F. Drake, Esq., President of the Minnesota Valley Railroad, combating the position taken by me in a recent opinion, in which I advised against the execution of a deed for the second 120 sections of land to which that company is entitled under the act of Congress of 1857 until 40 miles of the road is completed. It has ever been my belief that now that our railroad enterprises are being vigorously prosecuted the true interests of the State required that the companies should be liberally dealt with, and that, so far as the acts of Congress are concerned, upon which the claim of the State to railroad lands rests, they should receive a liberal construction in aid of the enterprise they were designed to promote. If we should err in our construction in favor of the companies I presume no harm would result to any party, as if it should be determined that an erroneous construction had been adopted and a deed executed in a case in

which the Governor, under existing laws, possessed no power to execute it, it would be simply void and vest no title in the company; while, on the other hand, if an error should occur in the refusal to execute a conveyance, in a case in which the company should be entitled to it, by the delay to furnish the companies with the muniments of title, these enterprises may be greatly retarded and the companies embarrassed in their negotiations with capitalists. These considerations, however, are only important in cases where the letter of the law leaves the matter in doubt, and thus opens the door to construction. If the law is plain an executive officer has no option but to enforce and obey it. In this case the language of sec. 2, page 159, of Spec. Laws 1864, is as follows: "Upon the construction and completion of ten miles of road the company may demand and receive a deed of 120 sections of land, which the State may then be entitled to receive under the act of Congress of 1857, and upon the construction and completion of each and every consecutive twenty miles the Governor shall execute a full and absolute title in fee-simple to all the lands appertaining thereto."

I held that the word "appertaining" was the controlling word of the clause; that 120 sections of land was appropriated by the act of Congress of 1857 to each 20 miles of road, and was to be distributed to the companies in advance; that 120 sections, therefore, must be considered as appertaining to each section of 20 miles; and the company having received the 120 sections appropriated to the first section of 20 miles, when 10 miles of *that* section were completed, were entitled to no more until the next section of 20 miles, or 40 miles in all, were completed. Upon a careful examination of the argument on behalf of the company and a re-examination of the law, I am inclined to modify my construction of the act. Section 2 of the act of Congress of 1857, authorizes the State to dispose of 120 sections, included within a continuous length of 20 miles, before any work is done upon the road. The act of the State Legislature of 1864 requires, as a guaranty of good faith in the prosecution of the work, that this land shall not be deeded to the company until 10 miles of the road is completed. The act of Congress authorizes the State to dispose of another quantity of 120 sections, making 240 sections in all; and the act of the State Legislature of 1864, after providing that 120 sections shall be deeded when 10 miles of the road is completed, proceeds: "and upon the construction and completion of each and every consecutive 20 miles, the Governor shall execute a deed of all the lands *appertaining* thereto." Now, unless some lands were intended to pass upon the completion of 20 miles, this language would seem to be without meaning; but, under my previous construction, there would be no lands to pass, and the only manner in which force and effect can be given to this clause, is to assume that the intent of the Legislature was, while requiring a guaranty for the prosecution of the enterprise, by delaying the first installment of lands until a portion of the road was completed. After that portion was completed, to vest their lands in the company as fast as the act of Congress contemplated. The word "appertaining" does not seem to be a very appropriate one. All lands which by the act of Congress belong to the company upon the completion of 20 miles, may perhaps be said to *belong* to that section, or, what is equivalent to this, to belong to the company by reason of its completion. I can see no very distinct reason why the Legislature, while authorizing the execution of a deed to the company of the first 120 sections upon the completion of 10 miles, should have delayed any further deed until 30 additional miles were completed. Upon a careful perusal of the entire law, I cannot fail to arrive at the conclusion that the intention of the Legislature was as above stated, and, in view of the effect upon the company by retarding the prosecution of their enterprise of a different construction, I am constrained to adopt this view, leaving the final construction of the law to the authorities of the United States.

The additional grant of four sections to the mile, made by Congress to the company by the act of May 12, 1864, (section 7, p. 74, St. at Large 1863 and 1864,) was made subject to the same conditions, restrictions, and limitations contained in the original land-grant act of 1857, and by the act of the State Legislature of 1865, (chapter 15, Gen. Laws 1865,) (which, by reason of its publication in the general laws instead of the special laws, where it should have been published, has hereto-

fore escaped my notice,) the governor was directed to execute a deed of these additional lands in the same manner and proportion as the other lands of the company. Assuming, as I think we should, that the company's rights rest upon these acts, there can be no doubt that the governor should convey the new grant at the same time and in the same manner as the original grant. The arguments in favor of bringing the company, under the provisions of the act of 1865, extending the time for the completion of the roads in this state, I have referred to in a previous opinion, and have stated the reasons why I think the State should regard the rights of this company as resting upon the special laws referred to, rather than upon the general law applicable to all the roads.

ST. PAUL, December 31st, 1865. G. E. COLE, Atty. Gen.

Hon. Henry Hill, Co. Attorney:

SIR: You ask my opinion, in substance, whether a piece of land once held under the homestead act, but which, abandoned or relinquished by the claimant, reverted to government, and was afterwards entered at private entry by another party, is subject to taxes assessed against it while held as such homestead. My predecessor, in his opinion upon the validity of taxes levied upon lands taken for homesteads, states expressly that in case the land reverts to government the tax becomes void. See Op. of Attys. Gen. p. 296.

The grantees of government take their titles from a source outside of and beyond the reach of State laws or State officials from the instant of sale, and not until then do our tax laws affect them. Clearly your county auditor should not regard the taxes assessed against such lands as a homestead and which becomes extinct with the homestead itself, but should give his certificate as if such taxes never in fact existed.

ST. PAUL, January 15th, 1866. G. E. COLE, Atty. Gen.

WILLIAM COLVILLE, ATTY. GEN.—JAN. 8, 1866, TO JAN. 10, 1868.

Hon. Charles McIlrath, State Auditor:

SIR: Yours of the twenty-seventh inst., presenting the claim of the Register and Receiver of the United States land office at Minneapolis against the State, "for entering upon the records of their office the swamp lands selections in their land district," for my opinion as to its legality, has been carefully considered. The act of Congress upon which it is sought to be based, (act of July 4, 1864,) provides that "for the *location* of lands by states and corporations under grants from Congress the Register and Receiver of the district where such lands may be located, for the services therein, shall be entitled to receive a fee of one dollar for each '*final location*' of 160 acres, to be paid by the State or corporation making such location." This refers to cases where the lands are *selected* by the State or corporation to which they are granted, and which State or corporation would then have to "finally locate" the lands selected, in the office of the district in which they are situated. The swamp lands of Minnesota were granted by the act of March 12th, 1860, entitled "An act to extend the provisions of an act to enable the State of Arkansas, and other States, to reclaim the swamp lands within their limits, to Minnesota and Oregon, and for other purposes," and in the body of this act the provisions of the Arkansas act are extended to this State. One of the said "provisions" is that the Secretary of the Interior shall make out an accurate list and plats of the said swamp lands, and transmit the same to the Governor of the State, and, at his request, cause

a patent to be issued to the State therefor, and this is the manner in which the swamp lands of Minnesota are designated and conveyed. The field-notes of the government surveys furnish the requisite evidence of what lands are covered by the grant. The State has nothing to do with the local land offices in the matter. The entries relative to swamp lands that may be made in their records are not made in behalf of the State, and do not in any manner affect its title, but are made for the convenience of the land officers themselves, and to prevent mistakes by which other parties would receive duplicates for lands not belonging to the government. I am, therefore, of the opinion that the claim in question is not valid.

ST. PAUL, January 29th, 1866. W. COLVILLE, Atty. Gen.

His Excellency, Wm. R. Marshall:

SIR: I have given such consideration as time will admit to the bill transmitted yesterday for my opinion upon its constitutionality, the said bill being entitled "An act authorizing the Lake Superior & Mississippi Railroad Company to construct and operate an additional branch." The only question that can be raised in the case is whether the bill conflicts with the constitutional provisions of this State forbidding the formation of corporations under special acts. Bills presenting this question in like manner have quite frequently been discussed in this State, and all, after ample consideration, having been passed by the Legislature, were approved by the executive, and some of our most important railroad enterprises have been for years conducted under them. So that every motive of public policy and common business interests requires that, unless clearly repugnant to the constitution, no such cloud as the vetoing of a similar bill upon constitutional grounds would create, should be cast upon them.

The discussions above referred to, and in particular the able opinion of my predecessor, given at the request of the State Senate at the last session of the Legislature, upon various legal questions connected with this same company, present the authorities bearing upon it so fully as to avoid the necessity of a labored opinion now.

The doctrine approved in the opinion above referred to, and which I consider does not go so far as the best authorities warrant, fully sustains the bill. It is presented in The People vs. Marshall, 1 Gilm. (Ill.) 672; a case that arose under that clause of the constitution of Illinois, prohibiting the legislature from creating any banks. The charter of the bank of Illinois, which was in force before the adoption of the constitution, was subsequently thereto "extended for the period of twenty years, and authority given it to establish branches." This last act was sustained by the court, which in its opinion says: "The plain interpretation of the constitution is, there shall be no banks but those already in being; they may exist subject to the control of the Legislature as to the period of their existence, the amount of their capital, and all other modifications compatible with their legal rights. If the exercise of this power was intended to be inhibited, it is difficult to conceive why it was not forbidden in explicit terms. It is not pretended to be thus forbidden, and as the subject is one of Legislative cognizance, the power of the Legislature must be considered plenary, unless restricted by clear and explicit language. This results from the well-settled principle of constitutional law, that a State constitution is a limitation upon and not a grant of Legislative power; that all power is inherent in the Legislature unless clearly withheld by the people in their organic law." This is completely analogous to our constitutional provisions in relation to corporations; it does not forbid the conferring of even *new franchises* upon corporations already in existence, but simply forbids the formation of new corporations by special act. There is nothing in the constitution from which it can even remotely be inferred that special privileges are not to be granted to existing corporations, and if we look to custom or precedent for light upon this subject we find that ever since the constitution existed all kinds of incorporations that have needed and asked for it have been the subject of special legislation; have received new power and franchise from a liberal hand,

some within and many without the scope of the purposes of their original organizations. In this bill, however, no new powers or franchises appear to be granted.

The right to enter upon and condemn the property necessary for the construction of their road, to charge and collect fares, etc., sue and be sued, and all the franchises and privileges in question, already exist, and these rights are by this bill simply extended, the field of operations of the company enlarged, and it empowered to construct and operate a branch line of road accessory to and of advantage to their first or main line. The objection raised by my predecessor to the legal existence of this company, to sustain which the case above quoted was relied upon, was that the Legislature, without the consent of the original company, had arbitrarily changed its name and transferred its franchise and rights to a new set of stockholders—to a new company, in fact. This bill provides for no new corporation or stockholders, and does not come in force until it is accepted by the present company.

The work contemplated is of great importance and when completed will be a public benefit. This company receives nothing from the State but the right to construct —a right conflicting with no other person or interest, and which any other person has or may exercise. It is a work free to all to enter upon, and should, therefore, not be prevented by the Executive veto because of a doubt of the constitutional right of this company to do so. There should be no reasonable doubt of the constitutionality of a bill vetoed on that pretext in the mind of the Governor. So much is at least due to a legislative body that is presumed to act intelligently and for the best interest of the people.

ST. PAUL, February 15th, 1866. W. COLVILLE, Atty. Gen.

Hon. Thomas Russell:

SIR: I have carefully considered the question you submitted, to-wit: Whether the action of the county commissioner of Sibley county offering bounties to soldiers credited to that county, and a monthly allowance to their families, which action was taken before the act of the State Legislature legalizing, or purporting to legalize, such action, passed at the special session of 1862, came into force, is valid. The general power given boards of county commissioners by the statute of 1852, and still in force, is that they shall have the care of the county property, and the management of the county funds and business. Comp. St. 1854. At the time the above action was taken, the system under which soldiers were afterwards drafted had not been perfected, but it was very well understood that a draft would be eventually enforced, and therefore it was of the utmost importance to the people that all persons within the county that should enlist should be credited to it, and large premiums offered by other localities made it necessary to secure this that bounties to soldiers and allowance to their families should be given. The fact that each township was afterwards made a separate district, and required to fill its own quota, did not affect the merits of the case, as such action was of general interest to the towns, and the soldiers credited to the county could be appointed among the several towns as should be just. To this may be added the consideration which has in many cases been held to justify a great stretch of authority on the part of far more prominent officials than county commissioners: the necessity of our country, the existence of which depended upon the increase of our armies.

I think, therefore, that the raising of soldiers and having them properly credited was properly the business of the county and properly the subject of such action on the part of the county commissioners, and that every consideration of justice and patriotism and public policy will justify the courts in holding it to be such. By the act of the Legislature above referred to such action, as far as it could be done, was legalized, and the county commissioners *empowered* to levy a tax to pay such bounties and allowances. I find that the legal authorities hold generally that when officials have acted in the line of their duty any defect in such action which renders it inoperative may be cured by remedial statutes, provided that such statutes do not interfere with vested rights, and that generally retrospective acts which do not impair the obligations of contracts or inflict pains or penalties are valid. As no such

questions are or can be raised in this case on the part of the county, I am of the opinion that even though the said action was defective in form or a stretch of authority, it became by force of the said statute valid and binding. Claims of soldiers or their families arising under said action being then legal and valid no subsequent action of the county commissioners "rescinding" or attempting to rescind their former action could affect them, and the acts of 1864 and 1865 directing the levy of taxes to pay such claims, with interest, apply with the same force as if no such "rescinding" action had been taken.

In the case you refer to me of a bounty bond issued by the town of Arlington in the year 1864, the act of 1865 legalizing the action of towns in voting such bounties applies, and whether the action of the town in voting such bounties was had strictly in accordance with the law as it then existed or not, the said bond is valid and binding upon it. The soldier received it in good faith and for a valuable consideration, which the town had the benefit of, and all the authorities concur in holding that a remedial statute in such a case is valid. See Dart vs. Verplank, 7 Johns. Rep. 455.

ST. PAUL, March 1st, 1866. W. COLVILLE, Atty. Gen.

Albert S. Ward, Esq.:

SIR: I think no judgment for a debt contracted before the issue of the homestead patent will be a lien upon the homestead. This provision of the homestead act does not apply to taxes, (see Op. Attys. Gen. pp. 296 and 356. Even though it should finally be construed by our courts to apply to taxes, homesteads will not be exempt from taxation for county bonds coming due after patent issues, or from any other county debt, no matter when it became due, that remains unpaid at the time. The case of a homestead after patent issues, will be precisely the same as that of lands entered at private entry after the bonds or debt becomes due. All bonds not belonging to the government, no matter when or how entered, will be subject to equal taxation, regardless of the object for which the tax is levied. And to make things fair, I think it would be a good idea for counties where there is a large proportion of homesteads, in case our courts should hold the latter exempt from present taxation, to put their debt in the form of bonds coming due after homesteads are patented.

ST. PAUL, March 4th, 1866. W. COLVILLE, Atty. Gen.

H. O. Gale:

SIR: By the provisions of our statute, each tract or subdivision must be sold separately for taxes and described separately in the certificate, with the amount for which it was sold. The order of the county commissioners need not specify that point. The county commissioners can only order particular tracts to be sold in case the public interest require, and that they may be sold for less than the amount required to redeem them. I suppose the lots you mention were sold under the act of 1862, c. 4, § 3, where only can be found the authority above referred to. The next section of such act contemplated the delivery of certificates immediately upon payment of the amount for which the land was bid off, with fees. Section 54, c. 12, Rev. St. (p. 241 of the Compiled Statutes still in force,) requires that lands bid off at tax sale shall be paid for within 24 hours. Section 61 of the same chapter requires that the certificate shall be dated the day of the sale. All these acts contemplate that the certificate shall be made at the time of the sale by the officer making the sale. There is no power conferred upon the officer to make it at any subsequent time in his pleasure, and no provision made, in case of a mistake, for its rectification by another officer. The tax law, according to the decisions of our courts, is to be construed strictly,—all its provisions literally complied with. No power can be given in a tax law by implication, no matter how just or proper the exercise of such power would seem. I think, therefore, that the only remedy your friend has is to proceed under section 70 of said chapter 12, in case the land has not been redeemed, or in case it has, under section 71 of the same chapter, for the return of his money.

ST. PAUL, March 5th, 1866. W. COLVILLE, Atty. Gen.

J. S. Walker, Esq.:

SIR: The act of 1865, in relation to the compensation of County Treasurer, provides that when the amount annually collected is $10,000, or less, the fees for collection shall be 5 per cent. On all sums over ten thousand and less than twenty thousand dollars, 4 per cent.; and upon all sums in excess of this last amount, 3 per cent. As these fees accrue as fast as the taxes are collected, the Treasurer is entitled to deduct 5 per cent. from the first $10,000 collected; 4 per cent. from the second, and so on; and accordingly, when an officer, whose term has expired during the current year, has collected the first $20,000 of the tax for that year, his successor will only be entitled to 3 per cent. upon the amount of taxes which he may collect for that year. This, I think, is the proper construction of the act, and the only one that effects justice, as the outgoing officer has performed the main part of the work, and the incoming one will have the same rights as against his successor.

ST. PAUL, March 7th, 1866. W. COLVILLE, Atty. Gen.

Hon. John S. Prince:

SIR: I have the statement that property in St. Paul, occupied by Bishop Grace as the episcopal residence, and for other church purposes, the title being nominally in accordance with the canons of the Catholic church vested in him, is actually held by him as trustee for the church, and I am requested to send you my opinion as to whether it, by the statutes of this State, is exempt from taxation. Undoubtedly, under the foregoing statement, the said property is exempt from all taxation under our statutes; but the fact of its being so held not appearing of record, it was the duty of the assessor to include it in the list of taxable property. The remedy is by an application to the Board of County Commissioners, whose duty it will become, upon satisfactory evidence being presented to it of the fact that it is so held, to order that it be dropped from the assessment roll, the tax upon it, if any has been levied, remitted, and if paid, refunded.

ST. PAUL, March 10th, 1866. W. COLVILLE, Atty. Gen.

Hon, Charles McIlrath, State Auditor:

SIR: In regard to the construction of an act to amend an act relating to the compensation of County Treasurer, approved March 2, 1865, it is my opinion that the words "annual tax collected" in said act have reference to the amount of taxes collected for a calendar year; the word "annual," in this connection, having to be construed in the same manner as the word "year" is directed to be by our statute. There is no warrant for a current year or financial year differing from a calendar year; all taxes for State, county, and town purposes being required by the statute to be levied for and during the calendar year, no matter when collected. The word "sums," and the word "amount" following, in said act, must be taken as having reference to the "annual tax" first mentioned.

ST. PAUL, March 14th, 1866. W. COLVILLE, Atty. Gen.

John E. Putnam, Esq.:

SIR: Our statute makes it the duty of district clerks, in October of each year, to transmit to the county auditor a written report, showing the names of all persons between the ages of five and twenty-one years, residing in their respective districts, and it is made the duty of the county auditor, in November of each year, to report to the State Superintendent an abstract of these school-district reports; and, upon the abstracts so reported, the State Superintendent, in February and August of each year, apportions the school money among the several counties. The counties only receive from the school fund an amount in proportion to the number of scholars actually reported, and it would be an injustice to these scholars and to the school-district reporting, to have their proportion of it reduced by an allowance to school-

districts not reporting. Such an allowance would tend to defeat the object of the law, and I know of no authority given to the county auditor to make it; on the contrary, he is required to apportion the money in the county treasury for the support of schools in March and October of each year, among the several school-districts of the county, according to the number of scholars, as shown by the *reports* of the several districts, which reports are the same required to be made by the district clerks, between the first and fifteenth of October of each year. The county auditor should require the correction of district reports improperly made out, and, in case it is not done, should make his own report to the State Superintendent conform to the actual facts of the case, stating the reason for the alteration.

ST. PAUL, March 16th, 1866. W. COLVILLE, Atty. Gen.

Chas. Harkins, Esq.:

SIR: Yours of the sixth inst. was not mailed until yesterday. You say that the land of A., sold for a sum in excess of taxes due, was subsequently quitclaimed by him to B., and that B. thereupon presented the deed to the county auditor, and drew the amount of such excess, which amount is now claimed by A. A. has an undoubted right to it. The money belonged to and was payable to him upon demand before the execution of the deed, and there can be no pretense that a quitclaim of the land covers the money in question. B. bought the land subject to all equities and lawful claims of other parties, and by virtue of such purchase has the right to redeem the land in pursuance of the statutes by paying the amount it sold for at the tax sale, with interest.

ST. PAUL, March 18th, 1866. W. COLVILLE, Atty. Gen.

Hon. T. E. Baldwin, Co. Atty.:

SIR: Under the law of 1865 your sheriff is entitled to mileage upon each writ—the writ for the grand jury and the writ for the petit jury for the distance actually traveled in summoning jurors and returning to the place of holding the courts. The law provides for mileage upon all writs the same as for mileage upon a summons. For instance, if there is more than one defendant in a summons, he gets mileage only for the distance actually travelled in summoning all; but if he has two summons, even though both were against the same party, and even the same trip, he is allowed mileage upon each.

ST. PAUL, March 21st, 1866. W. COLVILLE, Atty. Gen.

Hon. R. C. Mitchell:

SIR: It is a pleasure to me to answer such inquiries from a proper source, and in the line of my official duties, as may be required. On re-examining yours of the thirteenth inst., I find that the gist of it is whether the special law in relation to the Rum river bridge or the general law for the protection of bridges governs that bridge. As I stated in my answer to that communication, either law may be enforced by keeping up the particular notice required by it. As to an additional notice, I am of opinion—*First*, that the town supervisors have nothing to do with it. The Compiled Statutes, p. 205, puts the charge of roads and bridges in the board of supervisors, but the subsequent special act of 1861, directing the keeping up of a notice on Rum river bridge, puts that charge especially in the board of county commissioners, but leaves it in their discretion to keep up the old notice or change it in accordance with the new act. *Second*, that but one notice should be kept up.

ST. PAUL, March 27th, 1866. W. COLVILLE, Atty. Gen.

Hon. Henry Hill, Esq.:

SIR: I have given a brief consideration to your statement in relation to the robbery of money belonging to your county treasurer. From the evidence you inclose, it appears that the money was taken from the county safe which was kept in the

office provided for the treasurer by the county. The details show no neglect on his part, and, were there no other circumstance connected with the case, the county would sustain the loss of the whole amount which, according to the evidence, was stolen. [See *contra*, 18 Minn. 199; 19 Minn. 214; 28 Minn. 45.] It appears, however, from the treasurer's statement that he was in the habit of keeping his own money, indiscriminately, with that of the county, and of so depositing with Dawson & Co., bankers of St. Paul, to his credit as treasurer of the county, and of so issuing it in the transaction of his private business. He stated that $500 of the money so deposited actually belonged to one Johns, and, upon my inquiring as to how this came about, you state that the treasurer says it was the balance due Johns on a draft of eight or nine hundred dollars which he had bought of Johns, and which draft was deposited by him to his credit, as county treasurer, with Dawson & Co., as above. In his statement he does not claim the whole amount of the draft as belonging to himself, or to himself conjointly with Johns, and, therefore, admits that the balance belongs to the county.

From the above statement I infer that the Treasurer had bought the draft in his own name. He could not buy it as County Treasurer, and from his admissions, as above, that the amount paid on it some three or four hundred dollars, which he admits belongs to the county, was the money of the county. Now, 1st he bought the draft of Johns; therefore Johns can have no interest in the deposit, and must look to the Treasurer individually for the balance of the purchase money, his due; as the Treasurer kept on hand or upon deposit, and added his own money indiscriminately with that of the county in his own private business, in the event of a loss of a part of the funds so used indiscriminately, it cannot be ascertained what proportion of the money lost belonged to him and what proportion belonged to the county; and it cannot be permitted him to claim that his share of the money was on deposit, and therefore safe, while of the amount stolen all belonged to the county. The reverse of this is the rule of law, because this confounding of the money of the county with his own, so that it becomes impossible to separate the one from the other, was entirely his own fault, and owing to his improper and unlawful manner of conducting the affairs of his office. In addition to this, this whole business—the mixing and using his own money with that of the county indiscriminately in his private business—is tainted with crime, and therefore, in my opinion, he must account to the county for the whole amount of the funds so improperly used and appropriated. In other words, this use and appropriation amounts to a conversion of the county money to his own use, and makes him accountable for it, no matter how it was lost. Three hundred dollars of the amount lost was in government bonds, which could not be confounded with his own funds, and are distinct and recognized property. This amount the county must lose. Giving him credit for and retaining the five hundred dollars which he says belongs to Johns, but which belongs to the county, as I have shown above, and there remains six hundred dollars, or thereabouts, for which he is responsible to the county. The remedy against him for it is by the prosecution of his official bond as Treasurer, and by such a prosecution all the merits of the case would appear. An indictment would also lie for malfeasance in the office of County Treasurer. As to the remaining questions submitted, I am of opinion that in case the County Treasurer is not liable for the whole or any portion of the county funds stolen as above, he should be credited with the amount for which he is not liable, upon settlement with the County Commissioners. The loss will not fall upon any particular fund, whether state, school, town, or bounty, but upon the general fund of the county, and the amount of it should be included in the next tax levy for general county purposes. It is the duty of the County Attorney to bring suit upon the Treasurer's bond by direction of the County Commissioners.

ST. PAUL, April 14th, 1866. W. COLVILLE, Atty. Gen.

Theodore Bost, Esq.:

SIR: I think that the general government has no control over the election laws of the State, and that the act disfranchising deserters cannot be carried out in this State until the State Legislature provides for the manner of doing it. Thus, what evidence can you now produce before a board of election that a man is a deserter? I mean legal evidence. The Legislature might ascertain from the provost marshal the names of all deserters, and have them furnished election boards, or provide some other way by which the fact that a man is a deserter may be properly established. Until this is done and our State law declares that such persons shall not vote, which I think would have to be through an amendment to the State constitution, their votes must be received.

ST. PAUL, April 22d, 1866. W. COLVILLE, Atty. Gen.

A. C. Hand, Esq.:

SIR: I do not think that a County Auditor can act as a deputy for a County Treasurer or *vice versa*. These offices are intended by the law to be a check upon each other, the law expressly providing that the Auditor cannot be Treasurer; and for one person to act in both capacities would be a violation of the whole spirit of it. Neither County Auditor nor County Treasurer can employ any person other than a sworn deputy to act for him or in his place.

ST. PAUL, May 1st, 1866. W. COLVILLE, Atty. Gen.

SIR· Section 2 of the act you refer to, (page 91, Sess. Laws 1864,) regarding marriages, provides that every male person of the *full age* of 18 years, and every female person of the full age of 15 years, shall be capable, in law, of contracting marriages, if otherwise competent. Section 7 provides that if any person intending marriage shall be under age, and shall not have had a former wife or husband, the consent of the guardian must be given before the issue of the license. The term "under age," in section 7, evidently refers to the age specified in section 2, and as the law does not prohibit the marriage of persons under that age, I think that it is for such persons that the consent of the guardian is required, and therefore it would be proper for you to issue license to marry to persons over that age, without such consent. The terms "of age," "over age," and "under age," in common use, are *slang*, and have no peculiar legal signification; their meaning must be arrived at from the context.

ST. PAUL, May 1st, 1866. W. COLVILLE, Atty. Gen.

S. N. Wright, Esq.:

SIR: Under the act of 1862, *c.* 68, § 9, the county commissioners have authority to appropriate not exceeding the sum of $1,000 for extraordinary purposes in any one year, and any money appropriated for roads and bridges shall be considered a part of this $1,000. But additional sums may be appropriated to any necessary extent, by the Commissioners, to assist in building bridges, which additional sum may not be expended without a ratification by the vote of the people. By the act of 1860, *c.* 15, art. 2, § 22, the County Commissioners could not levy taxes for any one year exceeding three mills on the dollar for county purposes, unless first authorized to do so by a vote of the people; but in 1861, (chapter 6, § 2,) this section was amended so as to give the County Commissioners authority to fix the amount of county tax to be assessed and cause the sum to be collected. The county of Wabasha, among others, was exempted from the provisions of this amendment and left on the same footing as in 1860. In 1864, (page 369, Sess. Laws,) this amendatory act, so far as Wabasha county was excepted from its provisions, was repealed, leaving Wabasha on the same footing as the counties not specially exempted from the provisions of the act of 1861; that is, with the power in the County Commissioners, under the act of 1861, to fix the amount of the county tax to be assessed and cause the same to be collected, and under the act of 1862 to appropriate "additional sums

for building bridges," which additional sums are not to be *expended* except upon ratification thereof by a vote of the people. We have, then, in your County Commissioners the power to assess and collect a tax and to appropriate the money for a special purpose, viz., "the building of bridges." The money being raised and appropriated, those to whom it becomes due may enforce the payment in accordance with the terms of the appropriation. I think the collection and appropriations of the money equivalent to its expenditure, but, to save the question, would advise the submission of the whole matter to the ratification of the people.

ST. PAUL, May 4th, 1866. W. COLVILLE, Atty. Gen.

E. P. Freeman, Esq.:

SIR: Under the provisions of chapter 1, Session Laws 1861, it is my opinion that personal property belonging to non-residents of the county not situate upon farms must be listed and assessed in the township within the county in which the persons having charge thereof reside, if such person is a resident of the county; if he is not, it must be done in the township in which the property is situated.

ST. PAUL, May 7th, 1866. W. COLVILLE, Atty. Gen.

Capt. G. Edward Davis:

MY DEAR SIR: The title to the mineral lands being in the general government, of course the right to regulate the holding and making of mineral claims is in it. This right the government has not seen fit to exercise, but leaves its mineral lands free to all to occupy and work in such manner as they may see fit. The State has not abstractly any right to interfere with the possession of any miner, provided he holds the same peaceably, but as a matter of police regulation the laws of the State have an evident bearing—thus: If two miners come in conflict in regard to the possession of the same claim, which conflict leads to a breach of the peace or the infliction of personal injury by one upon the other, the State courts will have jurisdiction of the offense, and it will be for the courts to determine which was in the wrong and to punish the offender. In determining this question a jury will properly take into consideration the prior occupancy, the sufficiency of the improvements to show an occupancy, and the extent of the claim, whether it was such a one as the claimant might reasonably hold, and on all the facts the question will depend, other circumstances being equal, which is in the wrong. Now if the miners in a certain locality have got together and organized a certain district and prescribed in their rules and regulations in regard to mining what shall be a sufficient occupancy and what shall be the extent of the claims, which rules and regulations are generally acquiesced in and agreed upon by the miners, a jury will properly consider such rules and regulations to be conclusive of the rights of the parties, and will find for the party acting in accordance with them. This will be necessary for the peace and good order of the country.

I am but slightly acquainted with the mining laws of the Pacific States, but they seem to be of a remedial character to give the sanction of the law to the prior action of the miners, and to produce, so far as is possible, uniformity of action in the different districts. Thus I find that the laws of the states making quartz mines transferable as real estate, and enforcing contracts in regard to them, are sanctioned by the courts, while other legislation providing for their taxation as real estate has been set aside as unconstitutional, showing clearly that these laws are only in force for the preservation of order, and cannot really give any legal title through possession which the miner has without them to the claim.

I think you will understand the point I make without further illustration, and I finish by giving as my opinion that the miners in a district have the right to make such reasonable regulations in regard to holding and transferring claims as they see fit, and that the legislature, from motives of policy, after a system has been adopted and generally acquiesced in, or has become the established custom among the miners, will give its sanction to it.

ST. PAUL, May 21st, 1866. W. COLVILLE, Atty. Gen.

Wm. Kittredge, Esq., County Attorney, Waseca Co., Minn.:

DEAR SIR: There is no provision in relation to the debts of a town divided subsequently to the incurring of such debts. It would, however, be such a gross violation of the rights of creditors as well as tax-payers to relieve a certain portion of the tax-payers from liability to pay debts contracted for their benefit, by setting them into a new town or transferring them to another town, that even a statute provision relieving them from such debt, as a consequence of such action being taken, would, in my opinion, be void. The best way will be to bring the matter before the next Legislature, and it will doubtless provide for the course to be taken in such cases, both as respects towns already divided, as well as those hereafter to be divided.

As the matter stands now, the amount of debt owing by the old town at the time of the division should be divided between the two towns in proportion to the amount of property within their respective limits at the time of the division, as appears by the assessment roll made last before the division; and the county commissioners, in apportioning the tax for the payment of such debt, should include the proportion due from each town in the tax-list of the same.

The county treasurer should receive town orders issued by the old town prior to division upon taxes due the old town before the division the same as if there had been no division, and upon taxes due since the division in proportion to the amount of such order due from the town in which the property is situated upon which tax is sought to be paid.

In regard to filling vacancies in township offices occasioned by the division, (see section 2, art. 7, c. 8, Comp. St., pp. 186–7,) the remaining town officers can fill the vacancies. No special town meeting can be called to elect officers in case of vacancy. The division creates vacancies in those offices in the old town which were filled by persons residing at the time of the division in the new town. I think if suit was brought on the bonds that both towns should be made defendants. I offer what is said above in regard to the manner of collecting the tax and paying orders with some diffidence, as being the manner in which it seems to me it ought to be done until a statute provision is made. Cannot the matter be made the subject of a judicial decision that will settle it in time to meet the exigencies of the case?

ST. PAUL, May 24th, 1866. W. COLVILLE, Atty. Gen.

L. S. A. Chaffee, Gen. Agt. Rock River Ins. Co.:

DEAR SIR: I am of the opinion that your company, having filed a statement conformably to the insurance act of 1862, and received from the State Treasurer a certificate thereof, with authority to transact business in this State during the year 1866, is authorized to transact such business during the year without filing the statement required by the act of last winter, which act does not, as no legislative act can, affect insurance companies for the period for which they were duly licensed at the time of its passage.

ST. PAUL, June 8th, 1866. W. COLVILLE, Atty. Gen.

Wm. Kittredge, Esq., County Attorney, Waseca County.:

MR DEAR SIR: I think, in the case mentioned in yours of the seventeeth inst., that of a school-district which has been divided, the surplus funds of the original district should be distributed between the two in proportion to the number of scholars in each at the time of the division. The division of a school-district is an act in the discretion of the County Commissioners, even to deciding which district shall have the old number, or, in other words, which part of the old district shall be set off from the other; and it may happen that all the district officers are set off with the new district, and thus legislated out of office, and both districts left without an organization. All the real property of the original district may also be within the

limits of the new district, and a great part of the taxable property. Would it be just to saddle all the debt of the original district, perhaps amounting to thousands of dollars, upon the remnant of the old district, left without property or organization or anything but a name to show for it? On the other hand, the district with the old number may retain the real property, and the district set off have nothing to show for the money contributed by the tax-payers towards the costly school buildings remaining in the old district and in which it has no interest.

From this it seems clear to me that in the absence of a statutory provision justice to both creditors and tax-payers requires that the district as originally organized have a legal existence after its division in reference to its debts, and that the same can be assessed upon and collected from it, and that the surplus property belonging to it that is divisible should be distributed as I have above stated. Section 25 of the school act of 1862 fully recognizes this principle, and I have no doubt that the courts will be governed by it in any similar case that might present.

ST. PAUL, June 28th, 1866. W. COLVILLE, Atty. Gen.

W. G. Hayden, Esq., County Auditor, Nicollet County:

MY DEAR SIR: Yours of the twentieth inst., inclosing copy of minutes of proceedings of school-district meetings in district No. 4 in your county, was duly received. It does not appear that at any of said meetings a majority of the legal voters of the district designated a site for the school-house, as required by section 10, *c.* 1, Laws 1862. If at any of said meetings such majority did designate a site, that site could not be changed except by vote of a majority of all the legal voters of the district. I do not think the fact that a site had been lawfully designated prior to the voting of a tax to build a school-house, affects the right of a majority of the voters to select a new site, at a subsequent meeting called for that purpose. I presume that all the meetings were legally called and held, although this does not appear by the minutes, and although some part of the action taken is in disregard of the powers of the district officers, and therefore invalid.

ST. PAUL, June 28th, 1866. W. COLVILLE, Atty. Gen.

E. J. Thompson, Esq., County Superintendent, Filmore County:

DEAR SIR: In district No. 113, in your county, it was not proper to elect new district officers at a special meeting, if any of the old trustees remained in the district. The law in case of vacancies gives the remaining trustees the power to fill them; and in case there was no annual meeting the old officers would hold over. Therefore, I think, they are right in refusing to surrender the books, etc. The district having voted that the old school-house shall be sold and the proceeds distributed *pro rata* among those who had built it, the same having been built by subscription, said proceeds cannot be applied for any other purpose.

In school-district No. 112, in your county, the appointment of Stearns to fill vacancy as district clerk was invalid, because—*First*, there was no vacancy,—the old district clerk holds over until his successor is elected; *second*, 10 days is allowed for the newly elected clerk to file acceptance; his filing a non-acceptance is superfluous and gives no right to the district officer to act upon it, and as Farmer, the Treasurer, qualified within the time fixed by law, if a vacancy had been caused by reason of neglect of the clerk to qualify within 10 days, that vacancy did not exist until after Farmer qualified, when he would have an equal voice in filling it. With regard to the old district clerk voting as such upon the appointment of his successor, I do not see how an officer can have a voice in the appointment to a vacancy in his own office. The act itself would show there was no vacancy at the time. Although the Treasurer, Mr. Farmer, has accepted a certificate of Stearns, as district clerk, in order to draw money from the district, and has otherwise acknowledged that Stearns is district clerk, such act does not make him such clerk, and Farmer is right in refusing to

recognize him as such. I think the old clerk still holds over, and that it is his duty to act as such.

ST. PAUL, June 28th, 1866. W. COLVILLE, Atty. Gen.

To His Excellency, W. R. Marshall:

SIR: I have the honor to acknowledge the receipt of yours of the twenty-fourth inst., requesting my opinion whether the act of last winter creating the seventh judicial district in this State is unconstitutional, and whether the Governor has the power to appoint a judge for said district to fill the original vacancy. Article 6, § 4, of the State constitution, provides that the State shall be divided by the Legislature into six judicial districts. Section 9 of the same article provides that "all judges other than those provided for in this constitution shall be elected by the electors of the judicial district, county, or city for which they shall be created;" and section 12 provides "that the Legislature may at any time change the number of judicial districts or their boundaries when it shall be deemed expedient, but no such change shall vacate the office of any judge."

"To change the number of judicial districts" must be either to increase or decrease them in number; not to change the "number of a district" or the "numbers of districts,"—a power which would hardly require an express constitutional provision; and from this clause, with the provision attached that no such change shall vacate the office of a judge, taken in connection with the proviso in section 9, above quoted, in regard to the manner in which judges of judicial districts not provided for in the constitution shall be chosen, etc., and the provisions of section 4, regarding six judicial districts to be organized, it is apparent that the intention of the framers of the constitution was, and the clear import of that instrument is, that there shall be not less than six judicial districts in this state, and as many more as the Legislature may see fit to establish, provided they are bounded by county lines. The act, having been duly passed and approved, cannot be questioned by an executive officer, and must be obeyed until it is decided to be unconstitutional by the courts. Article 5, § 4, of the constitution, makes it the duty of the Governor "to take care that the laws are faithfully executed," and fill any vacancy that may occur in any of the several state or district offices. We have, in this case, a certain part of the State set off into an additional judicial district from the time the act takes effect. The people of this district can have no civil or criminal process in any other district, and, unless a judge is appointed, will be entirely without legal remedies until the election and qualification of a judge for the district under the general laws. The Legislature has no control over the appointment. The general power to fill such offices, in case of vacancy, ("any vacancy" is the language of the constitution,) is in the Governor. The fact that it is an original vacancy does not take it out of the spirit or even the letter of the law. It comes within the general scope of the power and duties of the chief executive officer to see that the laws are faithfully executed, and to fill any "vacancies in the State or district offices;" and this is in accordance with the construction of the constitution of the United States, and of the constitution of the several states, which has hitherto generally obtained in such cases. The neglect to provide for the salary of the judge during the present year can be remedied at the next session. It is my opinion that the act in question is constitutional, and that the Governor has the right to fill the vacancy by appointment.

ST. PAUL, July 27th, 1866. W. COLVILLE, Atty. Gen.

Silas Newcomb, Esq., Dept. Co. Auditor:

MY DEAR SIR: You inquire whether, when a piece of land is sold for cash at a tax sale, and the owner subsequently redeems it by depositing with the county treasurer the principal and interest due, the county treasurer, upon settlement with the auditor, should be allowed his percentage upon the amount paid as redemption

money. The percentage of the county treasurer, under the statute, is upon the amount of taxes collected in the county. The tax was collected by the sale of the land for the amount due, and the treasurer's fees accrued, and was allowed upon it. The money paid to redeem the land does not belong to the county, nor was it properly "collected" by the treasurer. It was received by him under the statute for the benefit of the purchaser at the sale, and is only retained as a deposit. The services of so receiving and keeping it are among the incidental duties of the office, the compensation for which is covered by the general provision of the statute allowing the treasurer a percentage upon the amount of tax collected for his services, not for his services in collecting the tax, but in full for all his services.

ST. PAUL, August 7th, 1866. W. COLVILLE, Atty. Gen.

P. Weego, Esq., Auditor of Carver County:

DEAR SIR: You inquire whether, under the existing laws and regulations in regard to common schools, either the trustees of a school-district or the teachers have the right to prescribe and enforce the use of the Scriptures as a text or reading book in the school against the will of the parents or guardians of the pupils, and whether a pupil refusing, by the direction of its parent or guardian, to read the Scriptures can be turned out of or refused the privileges of the school. I answer that when the use of the Scriptures in a common school is objected to by the parents or guardians of pupils on account of religious or conscientious scruples, their adoption as a text-book is improper, and the pupil may decline to use them for the same reason without being liable to be deprived of the privileges of the school.

ST. PAUL, August 7th, 1866. W. COLVILLE, Atty. Gen.

To His Excellency, Wm. R. Marshall:

SIR: I have the honor to acknowledge the receipt of yours of the 8th inst., received this morning, requesting my opinion upon the questions presented in the communication of Hon. F. R. E. Cornell, therein inclosed. It seems from this communication that the Minnesota Central Railway Company has completed fifty continuous miles of railway upon its line, and is therefore entitled under the act of 1864, relating to said company, to a conveyance by the Governor on the part of the State of "so many and such portions of the lands appertaining to the completed portions of said road, and not exceeding one hundred and twenty sections, as the State may then be entitled to under and by intent of the act of Congress," etc.; the said act of Congress being the Minnesota land-grant act of 1857. The question presented is whether the company is limited in the selection of the one hundred and twenty sections mentioned in the above act of 1864, to a district coterminous with the fifty miles of road completed, or can select the same in the manner provided by the said act of Congress from the lands of the State appropriated under the said act of 1864 for the construction of this road. The said act of Congress grants the State a quantum of one hundred and twenty sections of land upon the location of the said road, and of one hundred and twenty sections upon the completion of each twenty miles of it, and the only limitation upon the selection of these lands is, that each quantum shall be made up of lands included in a continuous length of twenty miles, etc., the object of which is evidently to prescribe that at whatever point the selection of a quantum is commenced the State shall take their lands clear as it goes. I do not see that this manner of selection has been changed in the act of 1864. The words "lands appertaining to the completed portion of said road," refer to the lands due under the act of Congress in advance of the construction of each twenty miles as above stated, and can in no sense be considered as requiring the lands selected by the company to be coterminous with the said completed road, and, therefore I am of the opinion that the company has the right to select its lands under this act in the same manner it might have been, and, as I suppose, was done, by the State under the original act of Congress.

There seems an additional fitness in the method of selection proposed by the company, in that it chooses to commence at the Iowa line, where it would seem if the act of Congress could be construed in any sense as specifying the point from which selection should begin, that it was the understanding of Congress that the construction of the road would be commenced, and therefore the point at which the selection of the first one hundred and twenty sections would probably be made.

ST. PAUL, August 15th, 1866. W. COLVILLE, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

DEAR SIR: You request my opinion upon this question, "Are county treasurers entitled to fees for receiving moneys deposited for the redemption of lands sold for taxes?" Section 2, chapter 7, Sess. Laws 1864, also incorporated in the Revision of 1866, provides that upon the purchase and the surrender of the tax certificate, and upon the payment of the Auditor's fees, the County Auditor shall draw his warrant upon the County Treasurer, in favor of such purchaser, for the amount of money deposited for the redemption of the land. This is clear and explicit and subject to no other conditions, and under it the purchaser is entitled upon presenting the warrant to all the money it calls for without any deduction whatever. If it is claimed that the Treasurer is entitled to receive his fees upon such deposits upon settlement with the County Commissioners and County Auditor, it seems to be clearly unwarranted by the statute. There is no provision for it, and the payment of it would be a dead loss to the county, which has already allowed the Treasurer his fees for the collection of the same tax for which the land was sold and the money deposited for its redemption.

Section 28, chapter 2, Sess. Laws of 1863, and all amendments thereto, provides that "each County Treasurer shall be allowed, at the time of his settlement, for his services, three per cent. upon all moneys by him collected, excepting that upon which some other rate of compensation is fixed."

The term "for his services," covers not only his direct services in the collection of taxes, but all duties incidental thereto and all services for which no compensation is otherwise provided by law. The opinion of Attorney General Cole, page 293, Op. of the Attys. Gen., is based upon a provision in section 89, c. 1, Sess. Laws 1860, which has since been repealed by section 2, c. 7, Sess. Laws 1864, above referred to, the repeal of which provision also shows that the Legislature intended that no fees should be allowed in such cases. The fee having before been paid by the purchaser, the repeal of the provision requiring it, with no provision made for its payment in any other way, clearly indicates such intention.

ST. PAUL, August 21st, 1866. W. COLVILLE, Atty. Gen.

Rudolph Lehmicke, Esq., Auditor Washington County:

DEAR SIR: Yours inclosing communication of Isaac E. Trevette, of school-district No. 36 of your county, was duly received. That communication states that on the fourteenth of July last, a site for a school-house was selected at a school meeting in that district, and that at an adjourned meeting held two weeks afterwards the minutes of the above meeting were read and approved, and a motion to reconsider a vote of the former meeting selecting the site for the school-house adopted, and another site then selected by a large majority of voters present, and inquire whether having approved the minutes of the former meeting, the adjourned meeting had authority to designate another site. The majority of the legal voters of a school-district may at any special meeting called for that purpose, or at any annual meeting, the notice for which specified that such question would be presented, fix the site for the district school-house or rescind the vote of any former meeting fixing the site. The approval of the minutes of the former meeting is not an approval of the proceedings of that meeting, and the new or adjourned meeting has the right to select another site with

regard to the minutes or proceedings of the former meeting. See sections 10 and 18, school laws 1862.

ST. PAUL, August 29th, 1866. W. COLVILLE, Atty. Gen.

G. H. Fowler, Esq.:

MY DEAR SIR: You inquire *first*, who are legal voters at a school meeting? All persons resident of the district who would be legal voters at a town meeting or general election are legal voters at a school meeting.

Second. Can an adjourned meeting, after adopting the minutes of a former meeting, reconsider a vote of a former meeting? An adjourned meeting can reconsider a vote of a former meeting held next before the vote is proposed to be reconsidered. The fact of its having adopted or approved the minutes of the former meeting has no bearing on the question.

Third. Is there any limitation of the amount of a special tax for building school-houses in the bond act of last winter? A tax for the amount of bonds maturing next after the levy must be levied by the board of trustees, and in addition thereto the board may levy 20 per cent. of the amount to be due upon such maturing bond, principal, and interest at maturity, which 20 per cent. is to constitute a fund for the payment of the remainder of the bonds; these amounts are all that can be levied.

Fourth. Would the business at an adjourned meeting organized one hour and a half after the time specified in the adjournment be binding on those that were not present? I do not suppose that a delay in the organization of the meeting would affect the legality of it, provided it was the same meeting. An adjourned meeting is supposed to be already organized, as, unless a chairman and clerk had been acting at the previous meeting, it could not be adjourned. Whether the action of the meeting is binding upon the school-district depends upon the nature of the business transacted, and the number of voters present and assenting to it. If those opposed to the action of the meeting have doubts as to the legality of its proceedings, they should take action in the courts to prevent the object of the proceedings being attained; otherwise, and the object having been consummated, the district will be bound.

No apology is required in requesting my opinion upon any public matter as Attorney General, and I will at all times cheerfully respond.

ST. PAUL, August 30th, 1866. W. COLVILLE, Atty. Gen.

Hon. Chas. McIlrath, State Auditor:

DEAR SIR: Yours of yesterday, inclosing a communication from Hon. A. C. Smith of Meeker county, setting forth certain facts in relation to Kandiyohi county, is here. It appears from Mr. Smith's statement that one Piper, for the past four years a resident of Meeker county, to which he had removed from Kandiyohi, is exercising the functions of several county officers for the latter county, such as assessing, levying, and collecting taxes, making tax deeds, recording conveyances, and doing almost all kinds of county business that does not involve the paying out of any of the money he receives. The removing of Piper from Kandiyohi of course deprives him of any office he held while there, but this does not give cause for the interference of the Attorney General, because the act organizing Kandiyohi county was repealed last winter, and therefore there are no county officers there. The ground for interference by the Attorney General is when there is a usurpation of an office by a person wrongfully claiming to hold the same. There being no office of course there is no usurpation of one. Persons who are deceived by his representations have a right of action against him for their money, and the criminal statute providing for the punishment of swindling will probably reach his case. An indictment at common law would probably also lie for pretending to authority which he does not professs with intent to defraud, although our statute only covers the case of persons pretending to be peace officers.

Mr. Smith's inquiries in relation to the record and taxes for Kandiyohi county are more difficult to answer.

Under the Revised Statutes of 1851, the business of the unorganized counties, including that relating to taxes, records, election returns, etc., was all transacted through the counties to which they were respectively attached for judicial purposes. The Revised Statutes of last winter repealed this provision of the old law without substituting anything in its place. The constitution requires all property not exempt to be taxed. It also guaranties the right to vote for State officers, and unless these provisions are not in substance complied with, the validity of the whole State tax will be seriously endangered, and the legality of the election of State officers seriously to be questioned.

I should therefore think it expedient for county officials of counties to which unorganized counties are attached for judicial purposes, to continue to act for such unorganized counties until the Legislature otherwise provides for the collection of taxes, and the holding and returns of elections therein. There is more danger to be apprehended, and the substance of the law is not complied with, and the object of it entirely unattained, than can result from any defect in the manner of the compliance. In this view of the case the officials of Meeker county should require from Piper the delivery of the official records and other property of Kandiyohi in his possession, and in case of refusal, prosecute him under this statute therefor.

ST. PAUL, September 5th, 1866. W. COLVILLE, Atty. Gen.

Hon. F. J. Whitlock, County Attorney, Scott County:

MY DEAR SIR: It is my opinion that your salary as County Attorney having been fixed by the Board of County Commissioners for a certain term cannot be reduced during that term. The fixing of the rate of compensation by the board and the entrance upon duty thereunder by the officer, the same having been done in pursuance of the statute, constitutes a valid contract, the obligation of which would be impaired by a reduction of the rate during the term.

ST. PAUL, September 5th, 1866. W. COLVILLE, Atty. Gen.

Hon. M. Hess Dunand, County Auditor, Scott County:

DEAR SIR: You say that the legal voters of district No. 41, of your county, at their annual meeting voted to levy a tax to keep school six months, and also that the district clerk omitted to return the amount voted in mills to the County Auditor. Such omission will not invalidate the tax, and it is the duty of the County Auditor in such case to himself compute the percentage and extend it in mills upon the duplicate.

ST. PAUL, September 17th, 1866. W. COLVILLE, Atty. Gen.

Roswell Judson, Esq., County Attorney, Dakota County:

MY DEAR SIR: Your inquiry in relation to the collection of taxes assessed upon the personal property of married women is at hand. As the statute now gives to the wife the sole control of her property—real and personal property—it should be taxed and the tax collected in the same manner as if she were *feme sole.*

ST. PAUL, September 17th, 1866. W. COLVILLE, Atty. Gen.

J. N. Castle, Esq., County Attorney, Washington County:

DEAR SIR: Whether a weapon used in committing an assault is "dangerous" must be for the jury to decide as a question of fact.

The fact that the assault was committed in the "heat of passion" does not affect the case nor modify the offense. A night-watch, appointed in pursuance of a statute, having authority to keep the peace and arrest offenders, is a public officer within the purview of the common law.

ST. PAUL, October 15th, 1866. W. COLVILLE, Atty. Gen.

Hon. A. A. Harwood, County Attorney, Steele County:

DEAR SIR: You inquire whether a judge of probate appointed to fill a vacancy can hold the office during the remainder of the unexpired term, provided his successor has been duly elected and qualified and demands the office. By the provisions of section 10, art. 6, of the constitution, and sections 42 and 43, *c.* 1, Rev. St., it is clear that any State, county, or district officer appointed to fill a vacancy can hold the office only until his successor is duly elected and qualified. To be duly elected, under the provisions of the section of the constitution above referred to, requires that the officer should be elected at a general election held more than 30 days after the happening of the vacancy. To be duly qualified he should file his oath of office and official bond in the office of the treasurer of the county; the bond to be approved by the treasurer.

ST. PAUL, December 3d, 1866. W. COLVILLE, Atty. Gen.

To His Excellency, W. R. Marshall:

SIR: You request my opinion as to whether the act of last winter, submitted to the electors of McLeod county for their adoption or rejection, under the provisions of section 1, art. 11, of the State constitution, was required, also, to be submitted to the electors of Lincoln county, at that time, viz., at the time of the passage of the act, unorganized. It is my opinion that said section does not apply to the unorganized counties, and, consequently, that the legislature may change the boundaries of such counties without submitting its action to the electors thereof. The fact that subsequently to the passage of the act, but before it came in force, Lincoln county became organized, does not alter the case, as the Legislature had the power at the time of the passage of the act even to entirely annul the legislation which brought such county into existence.

ST. PAUL, December 8th, 1866. W. COLVILLE, Atty. Gen.

James M. Harvey, Esq., Register of Deeds, Meeker County:

DEAR SIR: You state in your letter of December 15th that you were elected Register of Deeds in November, 1865, at the general election, and entered upon the duties of your office in January following. You do not state whether there was a vacancy, at the time you were elected, to fill, or whether you were elected for a full term. I imply, however, the existence of the former state of facts, because you state that John Blackwell was elected to same office last November. The question then is whether the unexpired term of your predecessor, extending to January 1, 1867, and you having been elected in November, 1865, you were elected for a full term or for the unexpired term. The constitution leaves the authority to regulate the election of county officers, except Judge of Probate and Clerk of the Court, in the hands of the Legislature. There is no express provision of the statute authorizing an election to fill a vacancy, but there are several sections which seem to imply that such an authority exists, and the general idea to be gathered from them seems to be that vacancies shall be filled in that manner at the next general election taking place more than 30 days subsequent to the time they happen, (see section 46, *c.* 15, Sess. Laws 1861;) and I am therefore of the opinion that there shall be an

election to fill such vacancies, and that the term of the officer elected ends with the unexpired term for which his predecessor was elected.

ST. PAUL, December 24th, 1866. W. COLVILLE, Atty. Gen.

H. M. Allen, Esq., County Auditor, Mower County:

DEAR SIR: Minor children whose land was sold for taxes before they acquired the title thereto, but the time for redemption of which had not then expired, have two years subsequent to the time at which they come of age to redeem the same. The tax deed is not void, absolutely, but becomes so upon application of minor heirs to redeem the same within the time above specified. See sections 130, 131, 132, and 140, Rev. St.

ST. PAUL, December 28th, 1866. W. COLVILLE, Atty. Gen.

B. Flynn, Esq., Clerk District Court, Redwood County:

DEAR SIR: When the parties both reside and are married in a county having a Clerk of the Court, they must have license therefor issued by him, and any person solemnizing such a marriage without such license having been issued is liable to the penalties of the law.

ST. PAUL, February 2d, 1867. W. COLVILLE, Atty. Gen.

J. W. Kasson, Esq., Director District No. 30, Dodge County:

DEAR SIR: The case you present regarding the money held by the District Treasurer of old district No. 55, which has, since said money was raised, been attached to your district, is not provided for by the statute. There are reasons to be urged by both sides, but I think the Treasurer of your district has the most meritorious claim to the money, although perhaps the Treasurer of old district No. 55 would not be authorized to pay it over, as the matter now stands. I would advise the bringing of an action in your District Court to settle the question.

ST. PAUL, February 2d, 1867. W. COLVILLE, Atty. Gen.

E. O. Wheeler, Esq., County Attorney, Mower County:

DEAR SIR: The act of congress authorizing a State government, known as the "enabling act," which will be found immediately preceding the State constitution in the Revised Statutes, was the act by which the school lands were granted to the state, and took effect upon the acceptance by the constitutional convention of certain propositions offered by congress.

The statute also provides that the official certificate of the State Land Commissioner to the title to any of the State lands shall be received as evidence in all the courts of the State. See section 5, *c.* 38, Rev. St.

These, I believe, are all that will be necessary to show the title of the State in any of its lands.

ST. PAUL, February 2d, 1867. W. COLVILLE, Atty. Gen.

A. H. Barrows, Esq.:

DEAR SIR: I have received yours of January 17th, forwarded through the County Auditor of Blue Earth county. You state that the school director of your district, for certain reasons, left the district and was absent two months, and that in the mean time the remainder of the trustees, considering the directorship vacant, ap-

pointed you in his place. The statute provides (chapter 9 of the Revised Statutes) that such offices shall become vacant upon the incumbent ceasing to be an inhabitant of the district. I do not think, he having left his family behind, that such a temporary absence can be claimed as a change of residence, nor do the facts you mention show that he intended to change it, and therefore the legality of your appointment is questionable. The late director's remedy, if he wishes to dispute it, is in the courts. The appointing power having declared the office vacant and appointed a successor, who entered upon the duties of his office, the appointment must be taken as valid until the courts otherwise decide, and all official acts performed before such decision by the said appointee are just as valid as if he had been legally appointed. Whether a minor whose parents reside in another part of the State has a right to attend school in your district, depends upon whether said minor is a resident of your district.

ST. PAUL, February 2d, 1867. W. COLVILLE, Atty. Gen.

S. M. Flint, Esq., County Attorney, Ramsey County:

DEAR SIR: You inquire whether the jailer of your county can make a county charge for the fuel used by him in cooking for the prisoners. It is fairly to be inferred from the statutes, as well as from universal custom, the fuel as well as office-room furniture and other conveniencies for carrying on the county business is a public charge, and under this construction I am of the opinion that fuel, as well for cooking as for the warmth of the prisoners, should be furnished the jailer at the public expense.

ST. PAUL, February 7th, 1867. W. COLVILLE, Atty. Gen.

George P. Wilson, Secretary State Senate:

SIR: You state in yours of this date that the Senate has this day passed a resolution instructing me to examine the question whether the grant of lands to the State of Minnesota under the act of Congress of 1862, entitled "An act to promote the liberal and practical education of the industrial classes in the sciences relative to agriculture and the mechanic arts," can be legally diverted to the State normal schools without making the leading feature of these schools the teaching of military tactics and sciences relative to agriculture and the mechanic arts, and whether such diversion of such lands could be legally made without destroying the distinctive features of normal schools as such. The act referred to provides that the interest of the proceeds of the lands therein granted shall be inviolably appropriated for the endowment, maintenance, and support of at least one college in the State wherein the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are relative to agriculture and the mechanic arts.

It is clear from the above that the interest of the proceeds of the lands granted in said act cannot be appropriated to the endowment, support, or maintenance of the State normal schools, unless science in general and the classics and military tactics are taught in them, and unless instruction in such branches of learning as are relative to agriculture and the mechanic arts is made the leading object of the same. Teaching might be one of the studies pursued, but it should be, like military tactics and general scientific and classical studies, in subordination to the leading object.

Such is not the object of normal schools, which, according to the proper definition of the term, and to the intent of our statutes relating thereto, are exclusively for training up persons to teach common schools, and therefore the students thereof are obligated to teach common schools for a certain term as a profession, while under the provision of the agricultural college grant students are not bound to follow any particular profession or business, and are not to be trained exclusively for one.

Indeed, the object of the grant, "to promote the liberal and practical education of the industrial classes," seems to indicate that a particular class of one people only are to receive the benefit of it, while our normal schools are for all classes alike. Therefore, in my opinion, the proceeds of the grant cannot be legally transferred to the normal school without first destroying their distinctive feature as such, and making them in fact not what the name denotes and what they were intended to be,—"schools for the training of persons as teachers."

ST. PAUL, February 11th, 1867. W. COLVILLE, Atty. Gen.

Wm. H. Wood, Esq., County Attorney, Benton County:

DEAR SIR: Section 104, *c.* 8, Rev. St., provides that the County Commissioners shall exercise no other powers than such as are given by law. Section 88, *c.* 11, provides that the County Treasurer shall receive county orders in payment for county taxes. There is no other provision of law in regard to the manner that any county taxes shall be paid. The County Commissioners have no authority to give one person's claim a preference over another until authority is given to raise money by special tax, or upon county bonds. Contractors for buildings will have to take orders on the county treasury in payment the same as other creditors.

ST. PAUL, February 11th, 1867. W. COLVILLE, Atty. Gen.

H. S. Bailey, Esq., Chairman County Commissioners, Jackson County:

SIR: Yours of the twenty-fourth of December last was on the ninth inst. referred to me by the State Auditor, for answer. It appears that Jackson county was organized before the Indian outbreak of 1862, and during the hostilities the people generally were obliged to remove from the county, by which means the several offices therein became vacant, and no provision of law being in existence by which they could be filled, in the year 1866 the legislature reorganized it. The question that now occurs is whether the present organization is responsible for the debts of the former one. Of this there can be no doubt. The present, although a new organization, is the legitimate successor of the old one, having the same name, powers, and territory, and obliged to carry out all its legal acts and obligations so far as is possible. Even the township and school organizations formerly established have still a legal existence, although, perchance, their powers may be suspended for the same reason that those of the county were, and they will in all cases be obliged to recognize their former obligations, and the commissioners of the county cannot so disorganize or change them as to interfere with such obligations. In fact it seems to be a case in all respects like that of the states recently in rebellion against the general government, in which, so far, the courts have all decided that the powers of the states, as organizations, were only suspended by the rebellion of the people, and whether again set in motion by the proper filling of the vacancies in the state officers, or through any of the various plans of reconstruction proposed and discussed at the present time, they will equally be responsible for their old obligations. You should see that the books of the original organization are delivered to the proper officers.

ST. PAUL, February 12th, 1867. W. COLVILLE, Atty. Gen.

C. C. Comee, Esq., County Auditor, Waseca County:

DEAR SIR: I understand that the provision in section 5, tit. 1, *c.* 36, Rev. St., authorizing the county commissioners to change the boundary of a school-district whenever a petition for such change, signed by a majority of the voters of the territory affected thereby, is presented, is intended to require that the majority of the

voters of each district affected, both the one that loses and the one that gains in territory, shall petition, and I have so uniformly held.

ST. PAUL, February 16th, 1867. W. COLVILLE, Atty. Gen.

Hon. Chas. McIlrath, State Auditor:

SIR: You refer to me the statement of the auditor of Washington county, by which it appears that by the terms of a certain contract for the sale and delivery of a quantity of logs to Schulenburg, Bockler & Co. by C. & J. Bean & Co., a large sum of money was to become due; certainly a part of it beyond contingency, and I think the whole of it, because the sale and delivery was absolute (with a certain exception) during the year 1866, and upon which the sum of $15,000 was assessed as due, or as a debt certain, to the said Bean & Co. from said Schulenburg, Bockler & Co. I suppose this is the state of facts, though the auditor's statement is rather vague, and if such are the facts the amount so found due as a credit was a proper subject for taxation. See section 9, *c.* 11, Rev. St. "Every credit for a sum certain, payable either in money, property of any kind, labor, or services, shall be valued at the full price of the sum so payable."

ST. PAUL, February 18th, 1867. W. COLVILLE, Atty. Gen.

Hon. Thomas Armstrong, President of the Senate:

SIR: Agreeably to the Senate resolution of the sixteenth inst., I have the honor to transmit my opinion upon the following questions:

1st. Whether the Legislature has the constitutional power to fix and regulate freight traffic upon the several railroads in this State.

2d. Whether the Legislature has the constitutional power to fix and regulate passenger rates upon the several railroads in this State.

3d. And particularly, whether the fixing of rates for passengers and freight would be in conflict with the judicial power.

All the railroad corporations of this State hold their franchises subject to the provisions of section 4, art. 10, of the State constitution, for, although these franchises were in existence before the constitution came in force, they were subsequently forfeited, and the fact of such forfeiture is the basis of the right, and even of the legal existence of the present companies, and therefore they cannot dispute it; and though the constitution does not prohibit the revival or extension of these franchises, and their transfer to another company, yet such revival and extension is subject to the prescribed conditions for the regulation of such corporations,—one of which is that common carriers, having the benefit of certain franchises, shall carry freight on equal and reasonable terms.

Beyond this constitutional provision there is also a well-settled question of public policy, which would of itself control the matter. Franchises are conferred in all cases for the benefit and convenience of the public, as well as of the individual or company to whom they are granted, and therefore, "as a general rule, a corporation may forfeit its charter by misuser or nonuser judicially ascertained, viz., by *scire facias*, where an existing corporation abuses its power, and by *quo warranto*, where a corporation *de facto* assumes authority which does not belong to it." 2 Ashmead, 349; Case of Commonwealth vs. U. S. Bank. All authorities are agreed upon this point, and therefore unequal, unreasonable, or oppressive rates of fare or freight would, without the constitutional provision, work a forfeiture of the charter of the company so offending.

It is to this point that the power of legislature to control and regulate such corporations applies.

It cannot, by enactment, do anything to interfere with the just and full exercise of their franchises by the companies. It can only prevent or provide for the punish-

ment of the abuse of them. It may define the reasonable causes which shall work a forfeiture of the penalty, and the manner in which it will be ascertained that the same has been incurred. For instance, a statute offense might be made and defined of a character similar to the common-law offense of forestalling, regrating, engrossing, etc., and, on conviction for this offense, subject the corporation to a prescribed penalty; and such a statute would probably correct the principal abuses practiced by such corporations. Other remedies, by which such abuses may be reached, are already prescribed by our statutes, and others may be devised. But it seems to me that the right to regulate freight or passenger tariffs does not extend further, because the constitutional limitation, as well as that prescribed by public policy, that such charges shall be equal and reasonable, can only be enforced through the courts. On this all the authorities are agreed; and the fact, whether such rates are equal and reasonable or not, which depends on many circumstances, such as cost and expense, amount of business, value of money, and other conditions which subject such rates to constant change the world over, must be passed upon by the jury.

From these considerations I am forced to the conclusion, in answer to all the questions submitted, that as the courts must decide, from the evidence in each case as it arises, whether such rates are equal and reasonable, that, therefore, legislative enactment to fix or establish such rates specifically would, unless accepted by the company, be in derogation of the judicial powers, and of no binding force or validity.

ST. PAUL, February 20th, 1867. W. COLVILLE, Atty. Gen.

Hon. Chas. McIlrath, State Auditor:

SIR: You refer me to the question, whether the County Board of Equalization has the power to raise or reduce the assessment of any town for the personal property tax, it being claimed that this can only be done in individual cases. The board has the power to do either, the same as in case of real property. The directions (section 82, *c.* 11, Rev. St.,) are as follows: "The said board shall also at the same time hear complaints and equalize the assessment of all personal property, new entries, and new structures returned for the current year by the township assessors, and the said board shall have power to add to or deduct from the valuation of the personal property of any person returned by the assessors." Here are two separate powers given to equalize the assessment of personal property returned by the different township assessors, and also to raise or reduce an individual assessment. The term "equalize" refers not to individual cases, but to the total return from each township, and the object of its use is to provide that the personal, the same as the real property assessment,—shall not bear a different proportion to the actual value in the different towns, as otherwise would naturally be the case, for no two men can be expected to exactly agree in their judgment as to the value of the property, and without such power of correction a great and unjust discrepancy in the assessor's value of property taxes would often occur.

ST. PAUL, February 26th, 1867. W. COLVILLE, Atty. Gen.

E. Webb, Esq., President Home Ins. Co.:

SIR: You request my opinion whether an insurance company organized under the laws of this State is required to file the statemant contemplated by section 53 of title 2, and secs. 117, 118, 120, of title 6, of chapter 34 of the Revised Statutes, in January of each year. The first section above mentioned provides that the other sections mentioned shall apply to home insurance companies, but does not refer directly to section 121 of said title 6, which provides that the statements made under the provisions of said title 6 shall be renewed annually in January. As the statements of home insurance companies are made under the provisions of said title 6 as

well as of said title 2, of course the provisions of said section 121 apply to home as well as to foreign insurance companies.

ST. PAUL, February 27th, 1867. W. COLVILLE, Atty. Gen.

J. N. Castle, Esq., County Attorney, Washington Co.:

DEAR SIR: I was consulted by the finance committee of the House in the matter to which you refer in yours of the eighteenth inst. My advice to it was that as the prosecution for trespass upon the school lands was a criminal prosecution, it, with others of that nature, as the law now stands, shall be had at the expense of the county where the offense was committed. I also gave it as my opinion that justice and good policy required that a general law should be passed providing for the defraying of the expense of such prosecutions by the State.

ST. PAUL, February 28th, 1867. W. COLVILLE, Atty. Gen.

Albert S. Ward, Esq., County Attorney, Martin County:

DEAR SIR: I can see no contradictions in the powers of sections 73, 74, and 78, *c.* 11, Rev. St. The tenor of these sections is that the tax levied shall not exceed 10 mills on the dollar for all expenses of the county other than for roads and bridges, and the payment of principal and interest of debt,—50 per cent. in addition thereto,—making, with the said 10 mills, 15 mills in all for payment of interest and principal of county debt, and 5 mills per cent. to be voted by the townships for roads and bridges. If the said "50 per cent. additional" is insufficient to meet the interest in county orders, there may be an additional amount levied, sufficient, with the said 50 per cent., to defray said interest. I think your construction of said section 78 is wrong, and that it authorizes the levy of but 5 mills per cent. for payment of principal and interest of debt, instead of 15, which your board has levied.

ST. PAUL, March 2d, 1867. W. COLVILLE, Atty. Gen.

F. B. Dean, Esq., County Auditor, McLeod County:

DEAR SIR: Section 5, tit. 1, *c.* 36, Rev. St., provides that a petition for the alteration of a school-district, the territory of which lies in two counties, shall be presented to the Board of Commissioners of each county, of course, for their concurrent action. It is, therefore, necessary that the proposed alteration should be agreed to by each of the boards before it can take effect. I believe this answers all your questions.

ST. PAUL, March 2d, 1867. W. COLVILLE, Atty. Gen.

James Tuttle, Esq., County Attorney, Monongalia County:

DEAR SIR: The fact that school officers, acting and duly elected or appointed as such, did not take the oath of office, even though the law required such oath, (which it does not,) would not invalidate their proceedings; and their proceedings or qualifications as officers have nothing whatever to do with the action of the County Commissioners in creating districts. The district would have a legal existence, although it should never organize, and the residents of it would be entitled to the privileges of no other school-district. So, setting other districts off from district No. 1, although it never had been organized, would be legal.

ST. PAUL, May 2d, 1867. W. COLVILLE, Atty. Gen.

J. B. Hood, Esq., County Auditor, Benton County:

DEAR SIR: Where a school-district was set off from another on the eighth day of January last, and the clerk's report received on the twenty-seventh of March following, no money should be apportioned to that district at the March apportionment. In the case you state, it does not appear that any school had been taught before the making of the report, and it is clear that the residents of the district have had the benefit of a term at least of the school taught in the old district. The money is apportioned to pay for schooling already received, not for what may be received hereafter. The clerical errors in the clerk's report will not vitiate it. The county auditor, when he knows that names are improperly returned as residents of one district which belong to another, should strike out such names from the return and apportion the school money according to the actual number of children.

ST. PAUL, May 2d, 1867. W. COLVILLE, Atty. Gen.

C. A. Lounsberry, Esq., Auditor, Martin County:

DEAR SIR: You say the town of Fairmount, in your county, at their annual town meeting, voted to raise a tax of $350 for the cancellation of a certain bond, and the sum of $200 to pay outstanding orders and current expenses, and that you, in carrying out these taxes on the tax-rolls, included them both in one column for their gross amount and as town taxes. You inquire whether all shall now be applied for the general purpose of the town, or whether the amount of $350 thereof shall be applied towards the cancellation of the bond. Your oversight in not keeping the items separate on the tax-roll will not justify you in applying the money for the general purpose of the town, but you must apply it for the purpose for which it was voted.

ST. PAUL, May 2d, 1867. W. COLVILLE, Atty. Gen.

George N. Moody, Esq., Chairman Board of Supervisors, Lakeville, Minn.:

DEAR SIR: A District Attorney may also be a Justice of the Peace at the same time. A man living upon a town line, claiming his residence in one town, may change his residence to the other town upon the same conditions as other persons living in said town. His residence will depend upon his intention. If he intends one town as his home, and actually abides there, it will be his residence; and ten days of such residence constitutes him an elector of said town, and the fact that he is such elector makes him eligible to any office in the said town. If he formed the intention to become such resident but five days before his appointment, he would not be eligible. If he was a voter of the town at the time he was appointed Justice of the Peace, he can lawfully hold the office. The Board of Supervisors can do nothing to vacate or declare vacant the office. Having the appointment from the proper authority, (even though it may be illegal,) and acting as such, they would be obliged to recognize him until the courts decided that he has no right to the office.

ST. PAUL, May 2d, 1867. W. COLVILLE, Atty. Gen.

E. O. Wheeler, Esq., County Attorney, Mower County:

DEAR SIR: In criminal actions in Justice Court neither party is entitled to peremptory challenge.

Challenges for cause should be tried by the court in the same manner as in civil actions, (see section 56, *c.* 65, Rev. St.,) and also in the same manner that challenges to individual grand jurors are tried. See sections 15, 16, 17, *c.* 107, Rev. St.

ST. PAUL, May 2d, 1867. W. COLVILLE, Atty. Gen.

W. L. Coon, Esq., Dept. Clerk, Dist. Court, Blue Earth County:

DEAR SIR: Justices of the Peace are elected for a full term, never for less. There is no reason why their term of office should end on alternate years.

ST. PAUL, May 2d, 1867. W. COLVILLE, Atty. Gen.

Ezra Mullen, Esq.:

DEAR SIR: You say that after a tax was voted at a school-district meeting of your district to pay teachers' wages and for summer schools, and after the district clerk has made his report to the county auditor and the tax had been entered upon the rolls and partially collected the district voted at an annual meeting to rescind the vote authorizing the tax. This last action was illegal and void, and the tax must be collected in due course.

ST. PAUL, May 2d, 1867. W. COLVILLE, Atty. Gen.

Hon. Chas. McIlrath, State Auditor:

DEAR SIR: Application to redeem lands from taxes or for patents to which an heir at law is entitled should be made by the qualified executor or administrator of the estate of the deceased or by the heir at law after the property and the rights of the deceased have been duly transferred to him through the action of the Probate Court. It would not be advisable to adopt a rule transferring titles upon *ex parte* statements when there is no legal representative, and when the heirs have not yet been declared such by the court. An authenticated copy of the order of the court will be evidence of the authority of the applicant to receive the title in either of these cases.

ST. PAUL, August 12th, 1867. W. COLVILLE, Atty. Gen.

John Kennedy, Esq., County Auditor, Dakota County:

DEAR SIR: Section 10, *c.* 11, Rev. St., contemplates the case where there is a reversionary or remainder interest, where, until the estate is forfeited to him, the remainder-man or reversioner could not pay the taxes or redeem the land. This is not the case as between husband and wife; he cannot forfeit the estate to her, the same being her separate property, and thus give her the right to pay the taxes or redeem the land, for he will still have the same interest in her estate that he had before, by virtue of the marital relation, and to call this forfeiture would therefore be an absurdity. Besides, she always had the right to pay the taxes or redeem; her coverture did not interfere with that. By the provisions of section 3, *c.* 70, Rev. St., the wife is placed precisely in the same condition as regards her separate property as if she were *feme sole*, and subject to the same obligation to pay taxes, and therefore it seems to me clearly she has only the same right to redeem she would have had had she remained unmarried and permitted the land to be sold for taxes.

ST. PAUL, August 19th, 1867. W. COLVILLE, Atty. Gen.

Geo. H. Ellsbury, Esq., Register of Deeds, Winona County:

DEAR SIR: Chapter 11 of the Revised Statutes provides for the listing of the real estate of the county for taxation in the name of the owner or person responsible for the taxes, and in case of any change of title, whereby the premises should be listed to another person, for the transfer of the premises from the name in which it was originally listed to the name of its new owner; and section 40 in said chapter requires that all deeds shall be presented to the County Auditor before registry, in order that such change of title may be noted and the transfer duly made upon the grand list, and also that he may note upon the conveyance whether the taxes have been paid. Such transfer is not to be made unless the change in the title is of such

a nature as requires the property to be assessed to a different person, and therefore mortgage deeds (this section referring only to conveyances which do affect such change) are not included in its provisions, and are entitled to registry without payment of taxes.

ST. PAUL, August 29th, 1867. W. COLVILLE, Atty. Gen.

F. R. E. CORNELL, ATTY. GEN.—JAN. 10, 1868, TO JAN. 9, 1874.

Hon. J. Q. Farmer, Speaker House of Representatives:

SIR: The following resolution adopted by the House of Representatives has been received by me: "Resolved, that the Attorney General be requested to give his opinion upon the question of taxation of the lands granted by Congress to the State of Minnesota, to aid in the construction of certain railroads." Although there may be some doubt in regard to the particular point of inquiry to which this resolution is directed, yet it is assumed that it has reference to the constitutional question growing out of the policy heretofore adopted of exempting such lands from taxation prior to their being leased or contracted to be sold by the respective companies receiving the grants from the State in consideration of an agreement on their part to pay annually into the treasury a certain percentage of their gross earnings in lieu of all taxes. When the disposition of the lands granted by Congress in 1857 to aid in the construction of certain railroads in the then Territory, now State, of Minnesota was under consideration by the Territorial Legislature, the question arose, what rule of taxation would prove most beneficial and equitable, as applied to the several companies to be intrusted with these enterprises, and to become the recipient of the lands granted for that purpose? Two lines of policy were suggested: the one was to subject the property of the companies to local assessment and general taxation, in the same manner and to the same extent as all other property of like character is assessed and taxed; the other was to require the annual payment by them into the State treasury of a certain percentage of the earnings in lieu of all taxes. In behalf of the latter policy it was urged that inasmuch as the franchises given by the companies belonged to the whole people, the taxes which they should pay ought to be contributed to the general fund for the benefit of all, especially as the use of these franchises in the construction and operation of railroads must necessarily prove of greater advantage to localities along which they should be built, than the parts of the country distant therefrom. The main object of the grant was to secure an early completion of the roads, with a view of encouraging a rapid settlement of the country, and consequent development of its resources. To subject the lands to general taxation as fast as received by the company, and before they could make them available while struggling in their infancy to obtain the means requisite to complete the roads, would tend to delay if not to defeat the very object of the grant. The application of the other rule of taxation, while likely to prove equally, if not more, remunerative to the State in the end, would, by graduating its burdens to the abilities of the companies, probably induce capital to take hold of the enterprises at an earlier day than might otherwise be expected.

These and like considerations prevailed in the adoption of the policy regulating the tax to be paid by the original land-grant railroad companies by the amount of their annual earnings, and in each of their charters granted prior to the adoption of our State Constitution, a provision was inserted in the nature of a contract obligating the then Territory, now State, to receive and the company to pay annually a certain percentage of their earnings in lieu of all taxes. That it was competent for the Territorial Government and those corporations to enter into this contract there can be no doubt, and that the obligation thus assumed rests with binding force upon

both parties to the contract, and their respective legal successors and assigns, and cannot be changed or modified except by their mutual consent, is equally free from doubt.

The power of the State to tax the lands *eo nomine* belonging to the railroad corporations legally created and organized under charters granted prior to our State constitution, and containing a provision of this character, has been fully considered and officially passed upon by one of my predecessors in an opinion bearing date March 1, 1865, and given to the then Governor of the State, and also in a subsequent opinion to the same officer dated March 3, 1865. See printed volume Attys. Gen. Op. pp. 483, 486.[1] The conclusion to which he arrived was adverse to the existence of any such power, and seems to be well supported both upon principle and the authorities by him cited. Whether the same rule or mode or taxation can be applied to railroad companies created and formed since the adoption of our State constitution, the provisions of sections 1 and 3 of article 9 of that instrument would seem to be decisive against the proposition. This appears to be the view taken by Atty. Gen. Cole in the opinions hereinbefore adverted to, and the judicial decisions to which he refers, certainly lead to the same conclusion. It would seem from the premises that in respect to lands and property belonging to any railroad company legally created and organized under a charter obtained prior to our State constitution, and containing a provision exempting its property from taxation in consideration of an annual payment of a portion of its earnings, it is not within the power of the Legislature to substitute another and different mode of taxation without the consent of the company. In respect to other companies, their lands and property are liable to assessment and taxation to the same extent as like property belonging to individuals.

ST. PAUL, February 25th, 1868. F. R. E. CORNELL, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

Your communication, submitting to me the order of the Board of Inspectors of the State Prison requesting you to draw your warrant in favor of J. L. Taylor, the Warden of the prison, for $5,000, to meet the necessary expenses of the prison for the ensuing quarter, as follows:

For salaries of officers and guards of prison,	$1,450
For current expenses,	3,350
For prison library,	200
	$5,000

—is before me, together with the reasons which have controlled you in declining to comply with such request, as well as the argument presented in behalf of the board urging such compliance as a matter of strict legal right. An examination of the statutory provisions relating to your powers and duties, as well as those of the Board of Inspectors, leads me to the conclusion that you are right in declining to draw your warrant in accordance with their request.

The order in question purports on its face to be for expenses not then incurred, but which the board estimate will accrue during the ensuing quarter. This presents the question whether money can be drawn from the State treasury and placed in the hands of the Warden quarterly in advance to meet such claims against the State on account of the prison as may, in the opinion of the board, arise during such quarter, and whether the power has been conferred upon the board of determining the amount of moneys required for each succeeding quarter, and directing a warrant to be drawn therefor in advance of actual expenditure. The existence of such a power cannot be implied; it must be found in some express provision of the statute, clear

[1] See *ante*, p. 199.

and unequivocal in its terms. I have not been able to find any such provision, and I feel safe in assuming that none such exists.

Reference is made by the board to section 72, tit. 2, *c.* 120, as containing the necessary authority for the State Auditor to draw his warrant in pursuance of the order in question. By this section "the Auditor of the State is authorized and required to draw his warrant on the State Treasurer for such sums as the inspectors may from time to time direct for defraying the proper and necessary expenses of the prison." This section very clearly confers upon the auditor the power to draw his warrant for such sums as the Inspectors may from time to time legally direct, but it does not assume to designate the person or persons in whose favor the warrant shall be drawn, nor does it in any way indicate the existence of any right or power in the Inspectors to direct any sums to be drawn to meet future liabilities. The most that can be claimed from this section is that whenever a proper and necessary expense has been incurred on behalf of the prison, the Inspectors may direct a warrant to be drawn to defray such expense. There is nothing in this section, it seems to me, countenancing the idea of advance payments on the part of the State; neither is there anything of the kind in section 42 of the same chapter which provides that "there shall be paid to the officers of the prison the following salaries and compensation, to be paid quarterly out of the State treasury, on the warrant of the Auditor," etc. It will be seen by this that these salaries are to be paid quarterly, not quarterly in *advance*, and it may further be suggested in this connection that this section evidently contemplates the payment of these salaries directly out of the State treasury to the different officers entitled thereto, on warrants drawn in their favor, and not in favor of the Warden for them. My conclusion is adverse to the claim of the Board of Inspectors.

ST. PAUL, June 29th, 1868. F. R. E. CORNELL, Atty. Gen.

Hon. Charles McIlrath, State Auditor:

The question submitted by you to this office relative to the construction of the act of March 6, 1868, is relieved of all doubt by a reference to the enrolled bill in the secretary's office. The quotation marks after the words "claiming," in the title of the act, as well as after the word "land," in the first section, as they appear in the printed law, are not found in the act itself on file. They belong after the word "domain," both in the title of the act and in the first section. When thus placed they indicate truly the title of the act of Congress referred to, viz., "An act to secure homesteads to actual settlers on the public domain," and relieve the act of the Legislature of all apparent difficulty. The first section, in express terms, makes it the duty of the assessors "to appraise and determine the actual cash value of all improvements made by settlers on the public lands," under the homestead act, "and of the interest of the claimant in and to such lands;" this clearly requiring the assessor not only to appraise the improvements made by the settler on the land, "and belonging to him, but also his '*interest*' in the *land" itself*. All the provisions of the act harmonize with this idea. The assessor is required to enter on the assessment roll "the name of the person occupying or owning such improvements," and "having such interest;" that is, "his interest in the land;" also "a description of the land," and "the value of such improvements, and interest." The third section declares such improvements and interest of the claimant in the lands to be personal property, for the purpose of taxation. In determining the value of the interest of the settler in the land, the assessor must treat him as the real owner, who has purchased the land from the government by an entry under the homestead act, and is entitled, upon the expiration of the prescribed term of residence, to a patent evidencing the full consummation of such purchase. He must also assume, as a fact, that the settler will fully comply with the provisions of the homestead act in perfecting his title, as the law never presumes that a person will fail to fulfill all his assumed obligations.

To conclude, the Legislature evidently intended by this law to reach, for the purpose of taxation, the real interest of the homestead settler in the land entered by him, as well as his improvements thereon; and, to avoid all embarrassments that might arise in the attempt to enforce the tax against the land itself, very judiciously and properly declares such interest in the land, and the improvements made thereon, to be personal property within the meaning of said act.

ST. PAUL, July 1st, 1868. F. R. E. CORNELL, Atty. Gen.

Hon. Mark H. Dunnell, Supt. Public Instruction:

Your communication of the nineteenth inst. is received, asking an official opinion in reply to the following questions: 1st. Does the power to change the boundaries of an independent school-district lie with the County Commissioners; or, in other words, can the County Commissioners add to or take from the territory of an independent district? 2d. "If the County Commissioners cannot change the limits of the district as above, in what manner can they be changed?" It is well settled that County Commissioners possess only such powers as are specifically conferred by statute, or are necessary for carrying into effect powers expressly granted.

Among the powers granted to County Commissioners I find none authorizing them in any way to interfere with the territorial limits of independent school-districts created and organized under the provisions of title 3 of chapter 36 of the General Statutes. Such districts are created in a manner entirely different from school-districts organized under the provisions of title 1 of that chapter. The latter may be created and their boundaries changed by County Commissioners in these cases, and in the manner pointed out by section 5 of said title 1, as amended by chapter 11 of the General Laws of 1868. But the provisions of this section do not in any manner relate to independent school-districts. They are created and organized by the electors of the territory to be affected in the manner provided by title 3, c. 36, and without regard to any action of the County Commissioners, who are powerless either to prevent or aid in the formation of such districts. And inasmuch as the right to change the boundaries of any such district, when once formed, is not given to County Commissioners, unless in express terms, and as it cannot be claimed as a necessary incident to any power expressly granted, your first question is answered in the negative. In regard to your second question our statutes seem to be silent. Of course the conclusion necessarily follows that no change can be effected in the limits of such a district otherwise than by legislative action.

ST. PAUL, August 21st, 1868. F. R. E. CORNELL, Atty. Gen.

Hon. Mark H. Dunnell, Supt. Public Instruction:

DEAR SIR: Yours of the twenty-first ult. is before me, asking for the construction, by this office, of section 24 of chapter 36 of the General Statutes, relating to the duties of County Auditors in apportioning the school moneys among the several school-districts in their respective counties on the last Wednesdays of March and October in each year. So far as respects the reports from such districts which are to be used by them in making such apportionment, each school-district clerk is required, between the first and fifteenth days of October in each year, to make and transmit to his County Auditor a report stating, among other things, "the names of all persons residing in his district on the last day of September preceding the date thereof, between the ages of five and twenty-one years." (Section 19, c. 36, Gen. St.) The County Auditor of each county is required, between the first and fifteenth of November in each year, "to report to the State Superintendent an abstract of the reports of the clerks of the several districts in his county." (Section 22, same chapter.)

In February and August next succeeding the return of such abstracts by the

County Auditors, the State Superintendent makes his semi-annual apportionment of the school funds in the State treasury among the several counties of the State, upon the basis of the resident scholars, of the requisite ages therein, as disclosed by such abstracts. (Section 44, same chapter.) It will be seen from these provisions that the State Superintendent takes as his basis for apportionment the census of scholars made by the several school-district clerks between the first and fifteenth of October of the year next preceding his apportionment. Undoubtedly, the same census must be taken by the County Auditors in making their apportionment, under section 24 of said chapter, among the several school-districts of their respective counties. Hence, in the making of their October apportionment they will not regard the census taken by the school-district clerks during that month, but the reports of October of the year next prior thereto. The proviso added to section 24 by chapter 2 of the General Laws of 1867, removes all doubt, if any existed, as to this being the true construction of this section.

ST. PAUL, December 12th, 1868. F. R. E. CORNELL, Atty. Gen.

Hon. Emil Munch, State Treasurer:

SIR: Section 1 of the act of March 4, 1865, extending the time for the completion of the Minnesota Central Railway, contains the following clause relating to the payment by the company of a percentage on its gross earnings in lieu of taxation: "Said company shall, during the first three years after 30 miles of their railroad shall be completed and in operation, on or before the first day of March of each year, pay into the treasury of the State 1 per centum of the gross earnings of the said railroad for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever, and shall, during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of the State, on or before the first day of March of each and every year, 2 per cent. on the gross earnings of said railroad, and shall, from and after the expiration of the said seven years, on or before the first day of March of each and every year, pay into the treasury of this State 3 per cent. of the gross earnings of said railroad."

My opinion is asked as to when the 1 per cent. clause ceases, and when the 2 per cent. clause begins to operate. The obvious meaning of the statute, is that, of the gross earnings acquired by the company of the road during the full period of three calendar years, commencing upon the completion of said road and putting it in operation, 1 per cent. thereof shall be paid to the State, and for the seven years next ensuing, after the expiration of this period of three years, 2 per cent. of said earnings shall be paid, and thereafter 3 per cent. So much of such percentage as accrues during each fiscal year, ending on the last day of December, whether it be 1 per cent. or 2 per cent., or partly both, is to be paid on or before the first day of March next following. This fiscal year is established with reference solely to the convenience of the State in keeping an annual account and exhibit of its finances, and has no reference whatever to the time during which the earnings of the road are liable to the assessment of the 1 per cent. As has happened in this case, the first period of three years terminated some months prior to the close of the fiscal year on the last day of December, and upon the gross earnings accruing during that year 1 per cent. must be collected down to the expiration of such period, and 2 per cent. thereafter.

ST. PAUL, February 1st, 1869. F. R. E. CORNELL, Atty. Gen.

Hon. C. D. Davison, Speaker House of Representatives:

SIR: My written opinion is requested by the honorable body over which you preside as to the time when its present session must expire by constitutional limitation. Section 1, art. 4, of the constitution, provides that the Legislature shall meet

h times as shall be prescribed by law, but no session shall exceed the term of days. The law passed in pursuance of this provision has fixed the first Tuesfter the first Monday in January as the time for the annual meeting of the slature, which happened this year on the fifth day of January. If the days refd to in this constitutional provision mean solar days, and the phrase "term of sixty days" implies that number of consecutive days, then the legislative session must end on the sixtieth day of its session, the fifth day of March inst. Such, it would seem to me, is the fair, and indeed necessary, construction of the clause in question. Its manifest object was to limit beyond legislative action and control each session to a definite period of time,—a period fixed by the constitution itself, and not left to be determined by the action of anybody. I am aware that it is urged by some that the word "days" mentioned in this section means legislative days. If this is the true meaning, then there was no necessity in expressly excepting Sundays from the days mentioned in section 11 of the same article, which prescribes when a bill shall become a law if not returned by the Governor. Moreover, this construction would make the length of each session dependent upon the wishes and physical ability of a majority of the members composing the Legislature, for by extending each daily session over two or three days the entire term might be prolonged to an indefinite period. Such a construction, it seems to me, is not warranted by the language or object of the prohibition. I arrive at the conclusion, however, with some hesitancy and distrust of my own judgment, from the fact that the House of Representatives of 1861, after a somewhat lengthy discussion, came to a different conclusion as to the meaning of the word "day," as used in section 22 of the same article. That section declares that "no bills shall be passed by either house of the Legislature upon the day prescribed for the adjournment of the two houses." The fifty-ninth solar day of that session was extended beyond midnight and into the next or sixtieth day. The point was distinctly raised that no bill could then be passed, inasmuch as it was on the last day of the session; and although the speaker held the point to be well taken, yet the House overruled the decision, and passed a very important bill, under which large interests have since grown up, thus expressly holding that it was competent to pass bills on the sixtieth day of the session, provided there had been a continuous session without adjournment from the preceding day. This is a legislative interpretation of the meaning of the word "day," as used in this and similar clauses in the constitution, and of course entitled to weight and respectful consideration, although I have never been able fully to agree with its correctness, especially in view of the well-known fact that the members of every Legislature, in drawing their per diem, have regarded the "term of sixty days" as applying to a period of sixty consecutive solar and not legislative days, Sundays included.

ST. PAUL, March 4th, 1869. F. R. E. CORNELL, Atty. Gen.

Hon. Thomas Simpson, President State Normal Board:

DEAR SIR: Yours of the thirtieth inst. was received just on the eve of my leaving home to attend a term of court. My first impression in regard to the question therein presented was adverse to the validity of the deed from Mrs. Stearns to Gov. Miller, and I so expressed it to Mr. Stearns, with a promise, however, to give it a more careful examination before my final determination. On further reflection and examination, I am confirmed in my first impression. It cannot be disputed that a married woman can only convey her separate real estate in the manner indicated by statute. Section 2, *c.* 35, p. 379, Comp. St. 1858, provides that this may be done by the joint deed of husband and wife. The proviso in section 106, *c.* 61, p. 571, same statutes, gives no power to the married woman to convey, but is in the nature of a negative upon such power so far as that section is concerned. In the case you present, Cornelia Stearns gave her quitclaim to the premises in question to Mr. Miller, her husband not joining. On the same day Mr. Stearns also gave a quitclaim to Mr. Miller. By no process of construction can this be regarded as join-

der by him in her deed. Its effect was only to convey his interest or estate, if any, and not his wife's; nor can it be treated as a consent on his part that his wife might grant her estate. Clearly, there is sufficient doubt about the validity of this title to warrant you and the board in declining to treat it as valid. Before any expenditures are made on the part of the State the title should be made perfect beyond any reasonable doubt.

ST. PAUL, May 12th, 1869. F. R. E. CORNELL, Atty. Gen.

Hon. Mark H. Dunnell, State Superintendent Public Instruction:

SIR: You present for my opinion two questions, involving the construction of section 46, c. 36, tit. 2, Gen. Sts.: *First.* At what time ought the County Commissioners of any county, electing to adopt the provisions of that title of the statutes, to appoint a County Superintendent? Clearly after their first appointment at their annual meeting in September. *Second.* After such election and first appointment, can the County Commissioners, in case of neglect to make an appointment at their annual meeting in September for the term commencing on the first day of January next succeeding, make an appointment for that term on or after such first day of January, or does the then incumbent of the office hold over until the next year? In such a case it cannot be claimed that any vacancy exists in the office under the provisions of section 2, chap. 9, of the General Statutes, as amended last winter, so that no appointment could be made on that ground. Then the sole question remaining is this: Can the appointment be made to fill the regular term after that term has commenced running? I am quite clear that it cannot. The statute in unequivocal terms gives the power and makes it the duty of the Commissioners to make the appointment at their annual meeting in September. The additional provision that they may so appoint "*at any other time in case of vacancy,*" would seem to exclude the idea that they can exercise this power "at any other time," in any other case except that of "a vacancy." Add to this the following clause of the same section: "Said officer shall enter upon the duties of his office on the first day of January *succeeding* his appointment, and hold the same one year, and until his successor is elected and qualified,"—and it would seem as if there was no chance for doubt in the construction of the statute. The conclusion is inevitable that the appointment for the regular term cannot be made after that term has commenced running and after the term fixed by law for the appointee to enter upon the discharge of the duties of the office, and that in such case the old officer may hold over and cannot be ousted until his successor is appointed at the next annual meeting of the board in September.

ST. PAUL, May 20th, 1869. F. R. E. CORNELL, Atty. Gen.

F. W. Fink, Esq., County Auditor, Rice County:

Yours of the 26th ult., with inclosure from clerk of school-district No. 45, is before me. The facts, as I gather them from his statement, are as follows: The board of trustees of that district hired a teacher for three months, but neglected to put the contract in writing till she had taught one month. She had, however, procured from the County Superintendent a third grade certificate, authorizing her to teach in that district before the parol agreement to teach had been made and before she commenced teaching, but by mistake the number of the district, as described in the certificate, was stated as "42" instead of "45," the true and intended number.

On discovering this mistake, the certificate was corrected by the County Superintendent, and a written contract containing the terms of the parol contract was ante-dated, signed, and filed upon these facts. I am asked the question whether she can recover for the first month's services. I have no doubt she can.

ST. PAUL, August 7th, 1869. F. R. E. CORNELL, Atty. Gen.

Hon. Wm. R. Marshall, Governor:

SIR: By the act of February 16, 1865, Special Laws of that year, the State of Minnesota granted to the Southern Minnesota Railroad Company, upon their complying with the conditions of said act, certain odd sections of the swamp lands belonging to the State, lying within a particular district therein mentioned, and west of range 29, and south of the Minnesota river. That company claims to have complied with the conditions of said act so far as to have become entitled to a portion of said lands. Assuming that that company has fully complied with the terms and conditions of law entitling them to the benefits of the grant, of which satisfactory proof should be made, the question arises as to the right of the company, in any event, to a conveyance of any portion of the swamp lands so granted before the grant to the Winona branch of the St. Paul & Pacific road made by chapter 4 of the Special Laws of 1863, approved March 6, 1863, is satisfied, and my official opinion is solicited upon the validity of such right. This involves a construction of section 1 of that chapter. That section, so far as it relates to the question under consideration, is as follows: "That for the purpose of aiding in the construction of a branch railroad from St. Paul to Winona, along the valley of the Mississippi river, there is hereby granted to the St. Paul & Pacific Railroad Company all the swamp lands belonging to this State, lying and being within the limits of seven miles on each side of the line of said branch road from St. Paul to Winona, as the same shall be located and constructed; and as soon as any 20 continuous miles of said branch road shall be located, and as often thereafter as any further 20 continuous miles thereof shall be located, the said lands within the limits aforesaid shall be withheld from market and sale, and as soon as any 20 continuous miles of said branch road shall be completed, and as soon and as often thereafter as any further 20 continuous miles thereof shall be completed, the said lands within said limits shall be certified and conveyed to the said company by the Governor of the State; and if, when and as often as 20 continuous miles of said branch road shall have been completed, with the cars running thereon, it shall be found that any portion of the said swamp lands within the said seven miles have been sold or otherwise disposed of by the United States or this State, the amount shall be made up and supplied to said company out of the swamp lands belonging to the State, to be selected by said company outside of said limits. And if, upon the completion of any 20 continuous miles of said road as aforesaid, it shall be found that within the said seven miles of said line there shall not be an amount of swamp land on each side of said line, belonging to the State, equal to at least seven full sections per mile of said road so completed, then the said company shall have the right to and may select from the swamp lands belonging to this State, outside of said seven-mile limits, other swamp lands in an amount equal to such deficiency, and the said lands so selected by said company outside of the said seven-mile limits, shall be certified and conveyed to said company by the Governor of the State." The grant made by this act is clearly in the nature of a floating grant, inoperative either as a lien or conveyance of any portion of the public domain until the company shall have done some act fixing the location of the grant by the location of this line of their road as prescribed by the terms of the act. Prior to such location of the road the State undoubtedly had the legal right to dispose of any portion of its swamp lands without regard to their location, and even though it had been found, on the location of the road, that the State had conveyed all its swamp lands within the limits of seven miles on each side of the line of said road subsequent to the passage of the act making the grant, yet such conveyance would be held good. By the terms of the act no lands were to be withheld from market and sale until the location of the first section of 20 miles, when all the swamp lands within the said seven-mile limits were to be withdrawn from market, and so as to each subsequent section of 20 miles. And as fast as each section of 20 miles of road is completed the company is entitled to a conveyance of all the swamp lands so withdrawn from market and lying within the limits aforesaid.

It is further provided that if, upon the completion of each of these sections, it shall be found that any portion of such lands, within said limits of seven miles, have been sold, or that the quantity obtained within such limits shall fall short of seven

full sections per mile, then (but not till then) the company shall have the right to select from the swamp lands sufficient to make up the deficiency belonging to the State. At what time? Clearly at the time when the company has the right to make such selections, and chooses to exercise it. This cannot happen until after the completion of some twenty-mile section of road. It will be seen that as to the lands outside of the seven-mile limits there is no provision whatever withholding any of them from market or sale as is the case in respect to the lands inside of the limits. This of itself raises the necessary implication that as to such lands the State resumed, and intended to resume, the right of disposing of the same, from time to time, as she saw fit. I can see nothing in the act of February 16, 1865, granting certain swamp lands upon the conditions therein named to the Southern Minnesota Railroad Company, in any way conflicting with the provisions of this act, or interfering with the rights thereby secured to the St. Paul & Pacific Company or its assigns.

ST. PAUL, September 2, 1869. F. R. E. CORNELL, Atty. Gen.

Hon. M. H. Dunnell, Supt. Public Instruction:

DEAR SIR: Yours of the third inst., with inclosure, is received. Upon the facts stated in Mr. Ruter's letter to you clearly the contractor has no legal right to take possession of the school-house, nor to sell it to satisfy his lien, if he has any, until after he has obtained a judgment, in a proper court, determining the fact that he has a lien, and adjudging a sale of the property to satisfy it. Whether the contractor in this case has a lien or not I prefer not to decide without a copy of the contract, and a knowledge as to these facts: What steps has the contractor taken, if any, to fix his lien? Has he filed any statement in the register's office, and, if so, what and when? Were the funds for building the school-house raised or authorized by the district, and why has not the order been paid? Undoubtedly the acceptance of an order legally drawn upon funds provided would extinguish any lien. But the question is not necessary to be decided in this case. The school-house, having once been turned over to the district, cannot be taken from its possession until a judicial determination to that effect by the court.

ST. PAUL, December 4, 1869. F. R. E. CORNELL, Atty. Gen.

A. W. Stoughton, Esq., County Auditor, Steele County:

SIR: You ask for the decision of this office upon substantially the following questions: In case the legal voters of a school-district neglect to determine the length of the time during which a school shall be kept in any one year, is it competent for the Board of Trustees to employ a teacher for a longer period during that year than three months, provided the district has adequate means provided from the common-school fund, and without a resort to a tax upon the district to support a school for such longer period? As an original question, I should be inclined to hold that they had such power, and that they could lawfully contract with a teacher for such a period of time as the means thus obtained would warrant, and no subsequent action of the district could invalidate such a contract. But an examination of the opinions and decisions of my predecessors discloses the fact that the ruling of this department has been the other way, and I do not feel at liberty to change it prior to a judicial decision authorizing it. Inasmuch as the case to which you refer grows out of acts already done, I trust the question will be properly presented to and determined by the courts.

ST. PAUL, May, 1870. F. R. E. CORNELL, Atty. Gen.

Hon. Mark H. Dunnell, Superintendent Public Instruction:

SIR: My official opinion is asked upon the following question, viz.: "For what purposes may the school moneys coming into the district treasury, through the county treasury, be used by the district?" Those moneys are meant which come from the State current school fund and the "two-mill tax." Or, as you state it more fully, "what items of expenditure in the maintenance of schools may be paid by public-school money, and what items must be provided by a tax upon the property of the district?" The only limit upon legislative authority, as respects the disposition of the income arising from the lease or sale of the school lands granted by the United States for the use of schools, is found in section 2, art. 8, of the constitution, which requires that it shall be faithfully applied. In view of this decision, it is obvious that, as respects the income arising from the lease or sale of the school lands, any expenditure thereof in support of the common schools, similar in character, and made in pursuance of legislative authority, would be warranted as falling within the "specific object of the original grants." Section 3, art. 8, of the constitution, imposes the duty upon the Legislature of making "such provisions, by taxation or otherwise, as, with the income arising from the school fund, will secure a thorough and efficient system of public schools." This clearly implies that the moneys derived from the two sources, income and taxation, are to be devoted to the common purpose of securing a thorough and efficient system of public schools.

The means by which such a system may be best secured, and the mode and manner of applying the moneys to that end, are questions falling peculiarly within the province of legislative discretion to determine. This brings us to the examination of the question as to what the legislature has done under this section of the constitution; whether, in its "provisions to secure a thorough and efficient system of public schools," it has made any distinction in these two sources of revenue, so far as their application is concerned in the support of common schools, and what authority it has conferred upon school-districts and their officers in the disposition of these funds. In this examination two principles must be borne in mind: *First*, it is to be presumed that the legislature in the discharge of its constitutional duty has adopted provisions fully adequate to secure a thorough and efficient system of common schools, and those provisions must receive a construction with reference to that end; *second*, that school-districts and their officers can take no powers except those expressly granted or necessarily implied. For the purpose of maintaining common schools each county is required to levy an annual tax of one-fifth of one per cent. on the amount of the assessed property therein, and the money collected therefrom must be paid by the County Treasurer for the support of common schools. This money, and that received into the county treasury from fines and also from the income arising from the lease or sale of the school lands under the State apportionment, is apportioned semi-annually by the County Auditor among the several districts of such county wherein a school has been taught for three months during the year by an authorized teacher. Sections 35, 24. The moneys thus derived are denominated the common school fund. Aside from this each district is authorized: "1st. To raise by tax a sum sufficient with the apportionment of the common school fund to support a school the length of time voted by the district; 2d. To purchase or lease a site, and to build, hire, or purchase such a school-house when the same is necessary; 3d. To keep in repair and provide the same with the necessary furniture and appendages; 4th. To procure fuel and to purchase or increase a library and school apparatus," provided the tax for building a school-house, or leasing or purchasing a site therefor, shall not in any one year exceed eight mills on a dollar; and the moneys thus raised are known as the district fund.

So much of this fund as is raised under the first clause manifestly becomes a part of the common school fund so far as the purposes and objects to which it may be applied is concerned, and that portion of the fund raised for any of the other specific objects named must be devoted exclusively to the purpose for which they are voted, and cannot be diverted to any other use. As respects the common school fund proper, however augmented as it may be by a district tax, there seems to be no express provision of statute restricting its application exclusively to any of the

purposes connected with the support of common schools, nor with the exception of the payment of teacher's wages, pointing out particularly any purpose to which it may be applied.

It is, perhaps, a matter of regret that in reference to a subject of so much importance and vitality, affecting the whole State, greater care and precision had not been exercised by the Legislature in designating specifically the objects to which these moneys might be applied. And in view of the rapid accumulations of our common school fund, whereby all the current and ordinary expenses of a school may be defrayed in each district of the State for a much longer term during each year than three months without resort to a district tax, it may become a question of proper consideration for the Legislature whether the time during which a school shall be kept, in order to enable a district to be entitled to the benefits of this fund ought not to be correspondingly increased or extended.

It is quite evident that our present school laws were framed in view of the fact that at the time of their adoption the common school fund was wholly inadequate, in a majority of the districts, to meet their wants in hiring teachers and defraying such incidental expenses as must necessarily be incurred, from time to time, in the support of a school, and which frequently in practice would not be anticipated. Hence authority was given to the voters of each district to raise by tax: 1st. A sum sufficient with the apportionment of the common school fund to support a school the length of time voted by the district. 2d. To purchase or lease a site for a school-house, and to build, hire, or purchase such a school-house when the same is necessary. 3d. To keep in repair and provide the same with necessary furniture and appendages. And 4th. To procure fuel and to purchase or increase a library and school apparatus. And to the end that the voters may act intelligently the trustees are required "to submit an estimate of the expenses of the district for the year, including in their estimate a school for at least three months, and all things necessary for such school." Section 11. The purposes named in this section for which a tax may be voted, are sufficiently broad to embrace all classes of expenditure likely to arise in the establishment and maintenance of schools, and were these the only provisions bearing upon the question it would be difficult to resist the conclusion that money raised under the clauses named in this subdivision could not be used for any of the objects specified in any of the other clauses. Regarding this section alone it would seem to be equally clear, upon familiar principles of construction, that the power given by the first clause to raise money sufficient with the apportionment fund to support a school was not intended to cover any of the purposes named in the succeeding clauses of the section, for if they were so included in the first clause the subsequent clauses are entirely useless. It is apparent, also, that the moneys raised under the first clause and the money derived from the common school fund are to be used for the same purpose in defraying those expenses incurred in the support of schools, and not named in any other clauses of the section.

But there are other provisions of the statute that must be taken into consideration in arriving at a correct construction of this and the intent of the Legislature. Section 34 gives express preference to the payment of teachers' wages over all other claims against the district, with the proviso, however, that such payment is not thereby authorized to be made out of any money other than that raised or apportioned for that purpose. This distinctly recognizes as a fact that the primary object of the common school fund, increased as it may be by a district tax voted to support a school, is the payment of teachers' wages, and no money can be paid out of the district treasury for any other purpose, while any claim of this character is outstanding. By section 10 the trustees are authorized to build, hire, or purchase a suitable school-house out of the funds provided for that purpose, and as the district is expressly empowered to raise money by a district tax, it is fair to presume that such moneys constitute the funds herein referred to, and are the only moneys that can be so used. Section 13 makes it the duty of the school director "to provide fuel for the schools of the district if the district makes no provision for fuel at their annual meeting," and also imposes upon him the duty of "furnishing all things

necessary for the school-house during the time a school shall be kept therein." The discharge of either of these duties involves an expenditure of money, and it is not to be presumed that the Legislature intended to require the performance of a duty in the absence of the necessary means, and such a construction of our statutes must be had if possible as to avoid this absurdity. Such a construction can be given to these statutes, then, and it seems to me that it is one that harmonizes all these provisions and accords with the obvious intention of the school laws. The policy of these laws seems to be that a school shall be kept three months during each year and as much longer as the ability of the district will permit; that it will use and exhaust the public moneys, or common-school fund, in the payment of teachers' wages, and in case they are inadequate, that they will raise in addition thereto a sufficient sum for that purpose by a direct tax upon the district, and that for each of the other purposes named in the fifth subdivision of section 26 the district will provide the requisite means therefor by a like tax. In practice, however, it would probably frequently happen that the trustees might not, and in many cases could not, correctly anticipate all the things with which it would be necessary to furnish the school-house during the coming year by reason of the accidental breaking of seats, stoves, and like necessary articles of furniture, and from these and other causes might not always make sufficient estimates for the action of the district at its annual meeting; and the voters of the district at the annual meeting, through inadvertence, the want of proper estimates, or otherwise, might omit to provide by the requisite tax sufficient fuel, or furnish other things absolutely necessary for the school-house, and might even neglect to raise a sufficient sum with the apportionment fund to support a school the requisite period of three months.

Now, it was to guard against these contingencies and their injurious consequences to the children of the district that the power was expressly given to the Board of Trustees, without a vote of the district, to levy a tax sufficient to support a school three months in the year, and the duties of providing fuel and furnishing all things necessary for the school-house, as prescribed by section 3, were cast upon the director, and whenever he incurs an expense in the necessary discharge of either of these duties, I have no doubt but that it is a proper charge against the district, payable out of the common school fund, augmented by the district tax, if any, after the payment of all claims against the district for teachers' wages.

My conclusion, then, is this: that the moneys in the district treasury belonging to the common school fund proper, as well as those derived from a district tax,—in pursuance of the first clause of subsection 5, section 26, must be used, in the first place, to pay teachers' wages; and the balance, if any, may be used in the payment of any debt properly incurred by the director in the discharge of his duties,—imposed by section 13 aforesaid,—whenever, of course, there are no other moneys belonging to the district treasury out of which the same can be properly paid; that the moneys raised by district tax for any of the other objects named in section 26, must be devoted to the specific purpose for which they were raised and can be devoted to no other. Under the rule above laid down, the case to which you refer, of a stove purchased by a school director, with which to warm the school-room during the time a school was kept, there being no other means of warming the same and the district having failed to make any provision therefor, is one where the director can properly be reimbursed out of the common school fund belonging to his district, after the payment of the teacher, such sum being adequate for both.

ST. PAUL, May 5th, 1870. F. R. E. CORNELL, Atty. Gen.

His Excellency, Horace Austin, Governor:

DEAR SIR: Your communication regarding the effect of the resignation of the County Auditor of Mower county, and the appointment of his successor by the Board of County Commissioners, is before me. The facts, as I gather them from your communication, are briefly as follows: The County Auditor filed with the Board of County Commissioners his written resignation substantially in the follow-

ing words: "I, Henry M. Allen, Auditor, etc., tender my resignation as such County Auditor, to take effect upon the appointment of H. H. Shack as my successor." The resignation was accepted by the board, and Mr. Shack was at the same time appointed as the successor, and he has since duly qualified. I have no doubt but that Mr. Shack has the legal right to enter upon the discharge of the duties of the office. The fact that the county board appointed the same person named in the resignation as the one upon whose appointment such resignation was to take effect, removes all question as to what would have been its effect in case he had not been appointed, and renders a discussion thereof unnecessary.

ST. PAUL, January 23rd, 1870. F. R. E. CORNELL, Atty. Gen.

Hon. Emil Munch, State Treasurer:

SIR: Referring to your communication of the —— inst., it appears that the First Division of the St. Paul & Pacific Railroad Company, in rendering its annual account of its gross earnings for the year 1869 to the State Treasurer, has treated its two lines of road as separate and distinct lines, designating the one as the main line and the other as the branch line, and has retained the gross earnings of each of said lines of road separately, claiming as to the main line that it is only required to pay into the State treasury for that year 1 per cent. of such, the gross earnings on that line, on the ground that the first 30 miles of such main line was not completed and in operation until November 1, 1868. And the question as to the correctness of this claim is presented for my consideration and opinion. It may be remarked, in passing, that if this claim is well founded, there was no liability on the part of the company to pay any percentage upon the earnings of any portion of that line prior to November 1, 1868, and the payments heretofore voluntarily made upon the earnings accruing to the company prior to that time upon that portion of such line between St. Paul and St. Anthony and Minneapolis, the State had no legal right whatever to receive into its treasury, and should at once hasten to restore, not only as an act of justice to its subject corporation requiring all its means in prosecuting a great enterprise, but as due to its own character as a great and just State.

But a careful examination of the law bearing upon this question leads to the conclusion that the practical construction heretofore placed upon its provisions by the company and your department is manifestly correct. Ten miles of such main line and 30 miles of the branch line were completed and in operation prior to the year 1865. The next section of 20 miles of such main line was not completed until November, 1868. Under this state of facts the company is required to pay 2 per cent. of the gross earnings on both its lines of road for the year 1869. The right of the State to demand, and the right of the company to insist upon the payment of a percentage of its earnings, in lieu of all taxation, rests upon the fact that this company has succeeded to the chartered franchises, rights, privileges, and obligations of the St. Paul & Pacific Railroad Company, so far as these lines of road and the lands given in aid thereof are concerned. Its rights and immunities in this regard were acquired from the latter company or its assigns, and it holds them subject to all the obligations and duties imposed upon that company. (This is settled in the case of First Div. St. P. & P. R. Co. vs. Parcher, recently decided in the Supreme Court.[1]) These rights and obligations, so far as the question before us is concerned, are defined by the act of March 2, 1865, entitled "An act to aid and facilitate the completion of the St. Paul & Pacific R. R. and branches," the proviso to section 1 of which declares "that, in consideration of an annual payment of a per centum (as provided in the section) by said corporation as aforesaid, the railroad, its appurtenances and appendages, and all other property, estates, and effects of said corporation, which, by the provisions of this act contained, said corporation is to acquire, purchase, hold, possess, enjoy, or use for, in, and about the construction, renewal, repairs, maintaining or operating its railroad, shall be and hereby are forever exempt from all

[1] 11 Minn. 297; 23 Minn. 217; 30 Minn. 313.

taxation and assessments; and in consideration of the grants made to, and other privileges and franchises conferred upon, said company, and of said exemption, the said company shall, during the first three years, after 30 miles of said railroad shall be completed and in operation, on or before the first day of March of each and every year, pay into the treasury of the State 1 per cent. on the gross earnings of said railroad; and shall, during the seven years next ensuing, after the expiration of the three years aforesaid, pay into the treasury of the State 2 per cent. on the gross earnings of said railroad; and shall, from and after the expiration of 10 years from the completion of 30 miles of said railroad, pay 3 per cent. of the gross earnings of said railroad." The same section requires the company to keep "an accurate account of such earnings," and to secure the State the payment of such per centum, it "declares that the State shall have a lien upon the railroad of said company," etc.

It is clear from these provisions that the railroad, upon the earnings of which the company undertakes to pay a percentage, is the same one which is exempted from taxation and assessment, and upon which the State holds a lien. It also seems equally clear that the railroad thus exempted and covered by the lien includes not only the main line, but all the branch lines of the road which the company was then authorized by law to build. The correctness of this construction is placed beyond all cavil by the preceding provisions of the same section, wherein the main line, crossing the Mississippi at St. Anthony, the branch from St. Anthony to St. Vincent, and the branch from St. Paul to Winona, are expressly designated as "respective portions of the line of railroad" of said company, and as constituting but one road.

A true contruction of this act, then, requires that all the lines and branches of road which the St. Paul & Pacific Railroad Company were then authorized to construct, must be regarded as one entire railroad, the gross earnings of which and every part of which entire road are liable to the payment of 1 per cent. for the three years next after the completion of the first 30 miles thereof; then 2 per cent. for seven years, and thereafter 3 per cent., and no act or transfer of the company of any part or branch of such road can in any way affect the liability to the State.

ST. PAUL, February 18th, 1870. F. R. E. CORNELL, Atty. Gen.

Chas. H. Folsom, Esq.:

DEAR SIR: You desire my opinion as to the construction of section 103, title 3, c. 8, of the General Statutes, so far as it relates to the time the statement therein referred to is required to be published; in other words, whether three or four insertions are required. The clause in question is: "published in some newspaper therein * * * for three successive weeks." This means three insertions, and not four, as you suppose. Each insertion becomes a full week's publication on the expiration of the week commencing with such insertion. This is also the rule in regard to publishing notices of sale in the foreclosure of mortgages, in which cases six successive weekly insertions are all that are required, although I am aware that attorneys usually order seven insertions. The County Commissioners are undoubtedly right in your case in declining to allow pay for any more than three publications.

ST. PAUL, June 13th, 1870. F. R. E. CORNELL, Atty. Gen.

Edward L. Parker, Esq.:]

DEAR SIR: Yours of the twenty-fourth ult. and the ninth inst. are at hand. My absence attending the Nicollet county term prevented my receiving your first sooner. The uniform rule which I have adopted in cases like those to which you have referred, requires a verified complaint or information to be filed in my office by some person having an interest in the question, briefly reciting the facts showing the alleged usurpation of office, and by whom, and the parties rightfully entitled thereto; such facts as must be stated in the complaint to sustain the action. Upon

your sending me such information or complaint, I will either bring the action myself or authorize you to do so for me and in my name.

ST. PAUL, June 13th, 1870. F. R. E. CORNELL, Atty. Gen.

Mr. Thomas Pollard, Supt. Sibley County:

DEAR SIR: Your favor of the twenty-second ult. is received, containing the following inquiry: "Are scholars entitled to instruction in a district in which their parents do not reside, but own land?" The particular case to which you refer is that of a parent desiring to send his children to school in an adjoining district in which he owns land on which he pays taxes, but the trustees of such district refuse them admission to school without the payment of a tuition fee of seven dollars per term. In regard to scholars domiciled out of the district, the Board of Trustees have the sole power of determining whether they shall be admitted to the schools of such district, and the terms on which they may attend, and the fact that the non-resident parent of such scholar owns land in such district on which he pays taxes, in no way modifies or changes this rule of law.

ST. PAUL, June 13th, 1870. F. R. E. CORNELL, Atty. Gen.

E. B. McCord, Supt. of Schools, Wright Co.:

SIR: It appears from your favor of the fourth inst. that school-district No. 42 of Wright county, at their annual meeting last spring, voted to have a six months' school during the year; also $50 to support it. A term of three months has been kept, and it is found that the sum voted is entirely insufficient to maintain a school for six months. Upon this state of facts you inquire as to the authority of the Trustees of the district to levy a tax sufficient to cover such deficiency. They have no such authority. The only case in which they are authorized to levy a tax is when, in the absence of a vote of the district, it is necessary to support a school for the period of three months. If the Trustees are unable with the funds provided for that purpose to maintain a school for the period of time voted by the district in excess of three months, they would not be warranted in entering into any engagement looking to its maintenance for such period. If the voters of a district desire a school for a longer term than three months, they must not only designate the time, but provide the adequate means.

ST. PAUL, August 13th, 1870. F. R. E. CORNELL, Atty. Gen.

Henry Shirtcliffe, Esq.:

DEAR SIR: My attention has just been called to your letter stating that at your last town meeting there was a tie vote between your two candidates for the office of Justice of the Peace, and that, with the consent of both candidates and the canvassing board, the contest was determined by lot, and inquiring if this was right. If the person so elected has entered upon the duties of his office probably his acts will be good as respects third persons, but his election in that way is illegal. The town failed to elect by reason of a tie vote, and the provisions of law applicable to such cases are sections 45 and 46, c. 10, Gen. St. p. 144, which may also be found with the proper forms in Haynes' Compilation relating to township organization, etc., page 81. By these sections the remaining Justices of the Peace and the Board of Supervisors should meet and make an appointment. If the present incumbent chosen by lot is satisfactory they had better appoint him, and he can qualify under the appointment and save all questions that may arise in the future.

ST. PAUL, August 14th, 1870. F. R. E. CORNELL, Atty. Gen.

W. W. Case, Esq., County Auditor:

DEAR SIR: Referring to yours of the twenty-fourth ult. you ask whether the Auditor can certify that the taxes are paid on deeds for record when the premises conveyed by the deed have been sold for taxes, and the time for redemption has expired, provided all the taxes have been paid except those for which the land was sold and the deed given. In such case the land should be transferred for taxation in the name of the grantee in the tax deed, and the Auditor should certify on such deed that the taxes are paid. So, whenever a transfer for taxation becomes necessary by reason of a transfer of the fee, whether by a conveyance on a tax sale or otherwise.

ST. PAUL, September 2d, 1870. F. R. E. CORNELL, Atty. Gen.

Hon. H. B. Wilson, Superintendent Public Instruction:

DEAR SIR: Your favor is received containing the following inquiry: "Are the inmates of our charitable institutions residents of the school-districts in which the respective institutions are located? and if so, are such of the inmates as are between the ages of five and twenty-one years entitled to a portion of the school fund for the benefit of said district?" or, in other words, as I understand your question, must the clerk of the school-district in which such an institution is situated include in his annual census of persons between those ages residing in his district such of the inmates of the institution as have been admitted from outside the limits of the school-district, and whose sole claim to be regarded as residents of such district rests upon such, their connection with the institution. Section 2, art. 8, of the constitution requires the "distribution of the income arising from the lease or sale of the school lands to the different townships throughout the state in proportion to the number of scholars in each township between the ages of five and twenty-one years." The manifest object of this constitutional provision is to secure to each scholar his proportion of this fund by the application of it to the support of a common school for his benefit in the township or neighborhood where he resides. As a basis upon which to make the distribution, the clerk of each school-district is required annually to make a report in writing showing—"*First*, the names of all persons, male and female, respectively, residing in his district on the last day of September preceding the date of his report, between the ages of five and twenty-one years; *second*, the number of those who have attended the school during the year."

It is a fundamental rule, in the interpretation of a statute, that whenever its object is apparent such a construction must be given to its provisions as will harmonize with that object. It is quite obvious, from the provision above quoted, that the right to be enumerated in any district carries with it the right of the scholar so enumerated to attend school in that district. They are clearly correlative rights. Hence the residence which would warrant the clerk in including any person in his census must be such an one as would entitle such person of right to an admission into the common schools of his district. That the residence acquired by students in attendance upon any seminary of learning, or by persons while kept in any of our charitable institutions, or confined in any public prison for reformation or punishment, is of such a character as would give to the inmates thereof the right to attend the district schools in which the institution or prison is located, can hardly be pretended.

The term "residence" implies the voluntary selection of a place of abode and the settling there in pursuance of such choice. Hence, the question as to one's residence involves to a certain extent his intention in respect thereto. For this reason the residence of minors, as a general rule, is held to follow that of their parents or guardians, inasmuch as they are under their legal control. And as to persons kept under restraint and in confinement in a lunatic asylum or reform school, it can hardly be claimed that they possess much freedom of choice in selecting their place of abode.

Another fact bearing upon the question under consideration is the constitutional provision declaring that "for the purpose of voting no person shall be deemed to have lost a residence by reason of his absence while a student in any seminary of learning, nor while kept at any alms-house or asylum, nor while confined in any public prison." To entitle a person to vote in any election district he must have been ten days a resident of such district next prior to the time of offering his vote. This ten days may be the last ten days of the voter's age of minority, and though such voter may have been during the whole of this time a member of some one of our charitable institutions, yet such fact would not exclude his right to a vote at the place of his residence when he became such member. But suppose a school-district census should happen to be taken during this period of ten days, could it be claimed that he had a residence at the institution for that purpose and one elsewhere for the purpose of voting?

It seems to me that such a construction of our laws would be at variance with sound reason and common sense. I have no hesitation, therefore, in deciding your question in the negative.

ST. PAUL, September 26th, 1870. F. R. E. CORNELL, Atty. Gen.

E. Clarke, Esq., County Auditor:

DEAR SIR: Yours of the twenty-second ult. is received. You inform me the assessor of the town of Wisconsin has intentionally omitted to comply with chapter 29, Laws 1868, in not assessing the interests of homestead settlers, and inquiring whether the County Auditor can remedy this omission under section 47, *c.* 11, Gen. St. He can, and it is his duty so to do. As to the better remedy against the assessor for such official delinquency, I will advise you at an early day.

ST. PAUL, October 17th, 1870. F. R. E. CORNELL, Atty. Gen.

Chas. B. Howell, Esq., County Attorney, Meeker County:

DEAR SIR: In regard to the tenure of office of a County Attorney, when elected for a regular and full term, he "holds for the term of two years, and until his successor is elected and qualified." Section 180, tit. 8, *c.* 8, Gen. St. His term commences on the first day of January next succeeding his election. Section 42, *c.* 1, Gen. St. In case a vacancy occurs, by resignation or otherwise, the County Commissioners are required to fill the same by appointment, and such appointee holds until his successor is elected at the next general election and qualifies. Section 187, tit. 8, *c.* 8, above. Such successor so elected does not hold for a full term of two years, but only for the unexpired portion of the regular term of the officer who created the vacancy by resignation or otherwise, and until his successor is elected and qualified. Section 43, *c.* 1, Gen. St.

ST. PAUL, October 24th, 1870. F. R. E. CORNELL, Atty. Gen.

To His Excellency, Horace Austin, Governor:

SIR: In accordance with your request I have examined the matters referred to in the communication addressed to your excellency by the President of the St. Paul & Chicago Railway Company, under the date of the second December inst. It appears therefrom that the company claims the right to select as deficiency lands all the swamp lands heretofore selected and set apart by the Commissioner of the State Land-office pursuant to the provisions of the act of February 13, 1865, appropriating swamp lands to certain educational and charitable institutions, etc., for their erection and support, and also those heretofore conveyed to the Southern Minnesota Railroad Company, pursuant to the grant contained in chapter 1 of the Special Laws

of 1865, and they demand from your excellency a conveyance by deed of the same lands.

This claim of the company is founded upon the act of March 6, 1863, making a grant of swamp lands to the St. Paul & Pacific Railroad Company, to whose rights the St. Paul & Chicago Railway Company have succeeded, in aid of the branch line to Winona; and the company aver that the provisions of that act secured to them prior rights to the land in question, and that the subsequent legislation of the State in favor of the Southern Minnesota Railroad Company, and the different educational and charitable institutions of the State, and the State Prison, and the action of the State officers thereunder, are void as against such their prior rights.

So far as relates to the conflicting claims of the St. Paul & Chicago Railway Company and the Southern Minnesota Railroad Company under these acts, the opinion of this office was solicited and given to your immediate predecessor on the application of the latter company for a conveyance of certain portions of said lands embraced in the deed from the Governor to that company of September 9, 1869, to the effect that there was no real conflict between the provisions of said acts, and that upon proper proofs being made that such company had fully complied with the conditions of their grant, they were entitled to receive the deed asked for. I see no reason to change the conclusion then reached; nor do I deem it legally competent for your excellency to review the action of your predecessor in issuing the deed of the 9th of September, 1869.

As regards the claim of the company against the State Prison, and the educational and charitable institutions of the State, a somewhat different question is presented, involving not only the effect but the validity of the provisions of the act of February 13, 1865, as against the rights secured to the company by the act of March 6, 1863. It seems to be conceded that the action of the Commissioner of the State Land-office under chapter 5 of the Laws of 1865 has been in strict conformity with the terms of that act, and in exact compliance with its provisions.

This leaves, then, for consideration the sole question as to the validity or constitutionality of that act. This question necessarily and properly came before the Executive of the State at the time of the passage of the act, when, in the exercise of his constitutional duty, it was incumbent upon him to determine whether it fell within the legitimate scope and purview of legislative power. Whether the decision then made was correct or incorrect, it must certainly be regarded as final, and not open to review by any executive officer, in the discharge of a mere ministerial duty, until after the judicial power of the State has pronounced its adverse judgment against its validity and constitutionality. Entertaining these views, the application of the company for a deed of the lands in question should be denied.

ST. PAUL, December 31st, 1870. F. R. E. CORNELL, Atty. Gen.

Hon. H. B. Wilson, Supt. Pub. Inst.:

SIR: Your communication is before me requesting an answer to an inquiry addressed to you by the School Superintendent of Winona county, in regard to the validity of a contract for a definite period of time, entered into with a teacher holding a certificate of qualification, whose validity by its own terms expires prior to the expiration of the contract. Such a contract would clearly fall within the reason of the decision made by our Supreme Court in Jenness vs. School-dist. No. 31, etc., 12 Minn. 448, and could not be enforced. The time of the contract cannot extend beyond the validity of the certificate. If a teacher desires to enter a contract extending beyond the time covered by his certificate, he should either procure its renewal, or a new one showing that he is authorized to act as a qualified teacher during the whole period for which he desires to engage.

ST. PAUL, January 5th, 1871. F. R. E. CORNELL, Atty. Gen.

F. W. Frink, County Auditor, Rice County.

DEAR SIR: You request my opinion for the guidance of the officers of school-district No. 86, of your county, upon certain matters of difference between them pertaining to their duties as members of the board of trustees, etc.: "*First*, can the treasurer and clerk, or either two of the Board of Trustees, of a school-district legally hire a teacher for the district? and, *second*, if the director objects to such contract, can he be required to attest an order for the payment of the teacher, provided the contract on the part of the teacher is fulfilled." The Board of Trustees is composed of the director, treasurer, and clerk, and the board, as such, is authorized to hire, for and in the name of the district, a qualified teacher. The acts of a majority of the board in such a matter constitute the acts of the board, and are binding upon the district and all its officers. Hence, the director would not be warranted in refusing to attest an order for the payment of the teacher, on the sole ground that the contract with such teacher had never received his assent. In case of his refusal, he could undoubtedly be compelled to give such assent.

ST. PAUL, March 23rd, 1871. F. R. E. CORNELL, Atty. Gen.

Hon. H. B. Wilson, Supt. Pub. Inst.:

DEAR SIR: Touching the matter of school registers, and your duties in connection therewith, section 43, tit. 1, of chapter 36 of the General Statutes, made it your duty to prepare and distribute them to the several County Auditors of the State, and authorized you to procure them from the State printer. Chapter 10 of the General Laws 1868, so far modifies this section of the General Statutes as to make it the duty of each County Auditor to procure and furnish to the clerk of each school-district in his county such registers, etc., and provides that the expense thereof shall be paid by the County Treasurer out of the fund therein designated upon the warrant of the County Auditor. Under this change in our statutes your duty is undoubtedly limited to prescribing a form for such registers, and giving the several County Auditors such instructions in connection therewith as may be authorized by law, and it will thereupon become the duty of the Auditors to procure and distribute the registers in accordance with such form and instructions.

I am also asked, in case the annual appropriation of $2,000 for the holding of teachers' institutes is not all expended or incurred during the year for which it was made, whether the unexpended balance can be used in holding such institutes in any other year. I answer unhesitatingly that it cannot.

ST. PAUL, April 11th, 1871. F. R. E. CORNELL, Atty. Gen.

J. A. Armstrong, Esq., County Auditor, Martin County:

SIR: It is competent for a majority of the legal voters of a school-district, lawfully assembled for that purpose, to sell or exchange their school-house site and school-house, and designate a new one. See sections 10 and 26, c. 30, Gen. St. Of course, the requisite number of persons must be present at the meeting, as prescribed by the latter section, to constitute a legal meeting.

ST. PAUL, May 13th, 1871. F. R. E. CORNELL, Atty. Gen.

A. D. Seward, County Auditor, Blue Earth County:

SIR: After a tax for school-district purposes has been extended upon the tax duplicate and partly paid, it is too late to raise the question as to its legality before me. It must be treated as regular and valid until an adverse judicial determination.

ST. PAUL, May 13th, 1871. F. R. E. CORNELL, Atty. Gen.

Hon. H. B. Wilson, State Supt. Pub. Inst.:

SIR: Yours of the sixth inst., with inclosure of the Auditor of Anoka county, is received. It appears therefrom that on the eighth day of September, 1870, the County Commissioners of that county created a new school-district, numbered 24, out of territory taken from school-district No. 8. The exact time when this new district was organized, by the election and qualification of its officers, does not appear, although it is stated that it was "on or about the first of October, 1870." "About the middle of October the clerk of such new district made a report to the County Auditor showing the number of scholars in said district, but made no report to the County Superintendent, it being then after the time when the law requiring the annual report to be made to such officer is operative; that the County Auditor, however, filed such report with the county superintendent, who incorporated it in his annual report to the State Superintendent, and filed a copy in the Auditor's office on the first of December. The clerk of the old district made his annual report to the County Superintendent, which was within the proper time, although after the action of the County Commissioners creating the new district."

It is further stated that the clerk of the old district never made any return to the County Auditor, pursuant to the provisions of chapter 1 of the General Laws of 1870. Upon this statement of facts, I am asked the following questions: 1st. Should the County Auditor use the returns made to him by the clerk of the new district as the basis of the apportionment of October, 1870, and also for March and October, 1871? 2d. Was district No. 8 entitled to any share of the apportionment of October, 1870, they having made no report to the County Auditor after the change in the districts, as required by section 1, *c.* 1, Sess. Laws 1870?

The annual enumeration required to be made by school-district clerks, of persons between the ages of five and twenty-one years residing in their respective districts on the last day of September in that year, furnishes the sole basis for the state and county apportionment of school funds made in the months of March and October of the next succeeding year. Hence the apportionment made by the County Auditor to any district, in the months of March and October of any year, will be governed by the number of scholars of the required age residing in such district on the last day of September of the year next preceding, as appears by such annual census. In case such district is divided after the annual census, it is difficult, if not impracticable, for the Auditor to determine from such census how many of the persons therein enumerated reside within the remaining limits of the old district and how many within the new. To obviate this difficulty, the law of 1870 (chapter 1, General Laws of that year) requires the clerk of each district affected by such division forthwith to ascertain how many of the pupils embraced in the preceding annual enumeration resided in his district on the said thirtieth day of September, and to return the same to the County Auditor as a basis for his action, in lieu of such annual enumeration, so far as respects said district. As regards the apportionment of October, 1870, in this case, I do not understand that any return has ever been made to the County Auditor by the clerk of either district as to the number of scholars resident therein on the last day of September, 1869. If not, such apportionment should have been based upon the annual enumeration made by the old district in 1869, and belongs to that district. The action of the clerk of the old district, No. 8, in making his annual report to the County Superintendent after the change, was entirely regular, and entitles his district to its share of the school funds apportioned and to be apportioned during this year. I infer that the clerk of the new district made his enumeration as of the thirtieth September, 1870, but failed to make his report thereof to the County Superintendent in time, because his district was not fully organized by the election and qualification of its officers sufficiently early to enable him so to do.

This would not invalidate his report. Under the circumstances he would have been warranted in making it directly to that officer instead of to the County Auditor, and inasmuch as there has been a substantial compliance with the law, the apportionment for March and October, 1871, should be made to the new district upon his return the same as though they were entirely regular.

ST. PAUL, May 15th, 1871. F. R. E. CORNELL, Atty. Gen.

His Excellency, Governor Horace Austin:

I have examined the papers referred to me relating to the application of the Belle Plaine Salt Company. The act of February 28, 1870, donating to that company six sections of land, does not contemplate the execution of any deed by the Governor in order to convey the title to any lands to which it may become entitled upon complying with the provisions of the act. Whenever and as often as the company shall "expend for machinery, material, and work necessary to the full and thorough development of the salt springs at Belle Plaine, and for land purchased for actual use and occupation in said work," $1,600, and that fact is made to appear to the satisfaction of the Governor by the affidavit of the treasurer of the company, it becomes the duty of the Governor to certify such fact to the Commissioner of the Land-office of the State, and then the company has the right to select 640 acres of land by government subdivision; and when the company makes such selection it files with the Commissioner a certificate thereof, and thereupon the title to such lands so selected and certified vests in the company without any other act whatever. The act itself makes the grant. Section 2 of said act, (Special Laws 1870, p. 422.) The selection must be made by the company after the filing of the certificate of the Governor with the Commissioner, and the company's certificate of such selection should be made to and filed with the Commissioner and not the Governor.

ST. PAUL, June 29th, 1871. F. R. E. CORNELL, Atty. Gen.

His Excellency, Horace Austin, Governor:

SIR: In the case of an organized county attached to another for judicial purposes, I am satisfied that the jurisdiction of a Justice of the Peace of the latter county does not extend over the former, unless there is some special provision to that effect in the law so attaching it to another for judicial purposes, as is the case in regard to the counties provided for in section 33, tit. 4, c. 64, Gen. St. p. 419.

ST. PAUL, August 9th, 1871. F. R. E. CORNELL, Atty. Gen.

T. H. Pressnell, Esq.:

DEAR SIR: Yours of the second instant is before me. It appears that your Board of County Commissioners has heretofore consisted of three members, and that "your county has recently been redistricted, and two more districts created by dividing one of the old districts into four and consolidating the other two." Assuming that your county has been legally redistricted by the county board, under the provisions of title 3 of chapter 8 of the General Statutes, as to which I have no *data* sufficient to form an opinion, you must elect this fall an entire new board; and it makes no difference that one of the members of the old board resides in a portion of an old district which now constitutes one of the new districts. Section 86 of the aforesaid title provides that "in each of said districts one Commissioner shall be elected," etc. Section 88 declares that "at the first election, when the Board of County Commissioners will consist of five members, the person elected from district No. 1 shall hold his office for one year, the persons elected from districts Nos. 2 and 3 for two years, and the persons elected from districts 4 and 5 for three years, and thereafter the Commissioners elected shall hold for the term of three years." These provisions evidently contemplate the election of an entire new board at the first election next after the legal creation of five districts. The term of office of the members of the old board is subject to the power to redistrict, and when such power is legally exercised it necessarily affects the term of such office.

ST. PAUL, September 8th, 1871. F. R. E. CORNELL, Atty. Gen.

His Excellency, Governor Horace Austin:

SIR: I have examined the question referred to me by your excellency in regard to the political situation of the town of Dryden, in the county of Sibley, under the apportionment act of last winter. By that act the counties of Sibley and McLeod constitute the thirty-sixth senatorial district, and it is declared that "the towns of Sibley, Kelso, Henderson, Transit, Arlington, Jessenland, Washington Lake, and Faxon, in the county of Sibley, shall be entitled to elect one Representative; and the towns of New Auburn and Green Isle, in the county of Sibley, and the towns of Glencoe, Helen, Berger, Rich Valley, Hale, and Winsted, in the county of McLeod, shall be entitled to elect one Representative; and all the balance of the counties of McLeod and Sibley lying west of the line between ranges 28 and 29 shall be entitled to elect one Representative. The town of Dryden, in Sibley county, is not named among the towns composing either of the first two described representative districts, nor does it lie west of the line between ranges 28 and 29, but on the east side of said line cornering on a portion of the territory embraced in the last-described district. The question arises as to what representative district, if any, the town of Dryden belongs. In view of the fundamental law prohibiting the disfranchisement of any portion of the State, and declaring that "no representative district shall be divided in the formation of a senate district," it is apparent that the town of Dryden belongs to one of the three representative districts comprising the thirty-sixth senatorial district. The fact that certain towns are specifically named and designated as constituting, respectively, the first and second representative districts, clearly indicates the legislative intention as to the extent and boundaries of those districts, while the language used in describing the remaining district, to-wit, "all the balance of the counties of McLeod and Sibley lying west of the line between ranges 28 and 29," seems to imply that the Legislature intended to create a representative district out of "all the balance of said counties" not embraced within the limits of the towns specifically named as forming the other districts, although in attempting to locate such balance as "lying west of the line between ranges 28 and 29" a manifest error of description has been committed, repugnant to the general proviso and intention of the act. Under these circumstances the repugnant description must be rejected. I am clearly of the opinion that the town of Dryden is embraced within the representative district described in the act as "all the balance of the counties of McLeod and Sibley lying west of the line between ranges 28 and 29."

ST. PAUL, September 8th, 1871. F. R. E. CORNELL, Atty. Gen.

Rev. S. Y. McMasters, Prest. State Normal School Board:

DEAR SIR: You state that you, as President of State Normal School Board, are requested by one of the normal schools to draw your warrant on the State Auditor for money appropriated for building purposes, that the prudential committee of that school may use it for current expenses, and request my opinion as to your legal right so to do. Money specifically appropriated for one purpose cannot be legally drawn or used for any other, and any officer concerned in or in any way conniving at such misapplication of the public funds would be guilty of a gross violation of duty, if not criminally liable for malfeasance in office. Your duty in the premises is clear, and corresponds exactly with the views you express as to the miserable policy of misappropriating the public moneys.

ST. PAUL, September 9th, 1871. F. R. E. CORNELL, Atty. Gen.

F. E. Stauff, Esq., County Auditor, Wabasha County:

SIR: Yours of the thirteenth inst. is received. Section 23, tit. 1, *c.* 38, Gen. St., as amended by chapter 50, Gen. Laws 1870, p. 109, requires all school lands sold by

the Commissioner to be assessed and taxed in the same manner as other lands are taxed. For the purpose of taxation the holder of the certificate of sale is treated as the owner, and the lands as real estate, and not personal property. Section 21 to which you refer has no application to the case, but relates to persons occupying school lands without having purchased.

ST. PAUL, September 23d, 1871. F. R. E. CORNELL, Atty. Gen.

Hon. H. B. Wilson, State Superintendent:

SIR: You are correct in your views as to the effect to be given to a diploma issued to a normal school graduate under section 11, *c.* 37, of the General Statutes. It is only a certificate of qualification to teach in any of the common schools of the State, and does not dispense with the necessity on the part of the holder, in case he desires to become teacher in one of the public schools of an independent school-district, organized under the provisions of title 3 of chapter 36 of the General Statutes, of procuring the certificate required by section 73 of that chapter. The qualifications for teaching in a common school are specified in section 51, tit. 2, *c.* 36. A person may be possessed of all these, and yet fall short of the standard requisite for teaching in an independent school-district.

ST. PAUL, September 29th, 1871. F. R. E. CORNELL, Atty. Gen.

Hon. H. B. Wilson, State Supt. Pub. Inst.:

DEAR SIR: The report required to be made by each school-district clerk on or before the tenth day of October in each year, pursuant to section 21 of chapter 36 of the General Statutes, as amended by chapter 3 of the General Laws of 1871, furnishes to the County Auditors the only records upon which they can legally act in extending upon the tax duplicate any tax against such district. Such report can only legally embrace such taxes as were voted to be raised during the year next preceding the time fixed by law for making the report. Hence, any tax voted after the expiration of such year can neither be reported by the clerk nor extended by the county auditor upon the tax duplicate for that year.

ST. PAUL, November 9th, 1871. F. R. E. CORNELL, Atty. Gen.

Hon. Chas. McIlrath, State Auditor:

SIR: Yours with inclosure relating to the assessment of Mr. Hobbs, a merchant of Meeker county, has received a careful examination. It appears that Messrs. Hines, Kimball & Berdy owned a stock of goods, and were engaged in trade as merchants on and after the first of June last until the twentieth of June, when they sold out to Mr. Hobbs, who then, as I gather from the statement, went into trade at the same place, with the same stock. The assessor did not call upon either the vendors or the vendee, for the purpose of having them list their taxable property, till after such sale. The question arises as to whom the stock of goods should be assessed. It is urged by the attorney for Mr. Hobbs that the first Monday in June is the day in reference to which all property must be assessed, although the assessor has until the first Monday of July in which to complete the assessment. It certainly would be very desirable in practice, and obviate many troublesome questions, should our Legislature see fit to designate some particular day in reference to which all property should be listed or assessed for the purpose of taxation, and I trust it will yet be done. Under our present laws each person must list the property "in his possession or under his control at the time the notice is given him by the assessor," etc. Section 6 of chapter 11. This notice the assessor may give at any time be-

tween the first Monday of June and the first Monday of July, and the assessment must be made as of that time. Section 26 of chapter 11.

As respects Messrs. Hines, Kimball & Berdy, they having sold out previous to receiving the notice to list from the assessor, were no longer liable to be assessed as merchants on account of the stock which they had sold, but of course they were liable to assessment for the avails of the stock, whether consisting of money, credits, or other property. Mr. Hobb's case, as a merchant, falls within section 13 of said chapter, and must be governed by its provisions. He must make the report to the County Auditor, and also the payment into the county treasury, as therein required, unless he can bring himself within the exception to that section.

ST. PAUL, November 11th, 1871. F. R. E. CORNELL, Atty. Gen.

Sylvester Kipp, Esq., County Attorney, Sibley County:

DEAR SIR: Regarding your county difficulties, growing out of redistricting the county into new commissioner districts, while I have no authority to give any official opinion that would be binding upon any one, yet I have no objection to indicating my views upon the subject. In case there should be any controversy between different claimants to the same office, on complaint being properly made to me it would then become my duty, in case my judgment should deem best, to institute proceedings to settle the controversy in the courts, which I should do. In the mean time, from the facts presented, my judgment is that the new board, after January next, will consist of the following persons: For District No. 1, Mr. J. Frank Enfield; for District No. 2, Mr. Edmund Grimes; for District No. 3, Mr. William Carncross; for District No. 4,—in this district it seems to me there will be a vacancy, inasmuch as I understand that there was no election for this district last fall, and the only Commissioner resident now in the new district lives in Arlington, which was a part of the old District No. 5. Under these circumstances he cannot hold over as a Commissioner for the new District No. 4. For District No. 5, the person elected last fall for this district is entitled to the office.

ST. PAUL, December 29th, 1871. F. R. E. CORNELL, Atty. Gen.

Hon. H. B. Wilson, Supt. of Pub. Inst.:

DEAR SIR: Several questions have recently been submitted to me relative to matters connected with common schools, involving a construction of portions of our school laws, which I will proceed to answer in the order presented:

First. What are the relative powers and duties of trustees and teachers in reference to the discipline and management of schools, the modes of teaching, and the branches of study which any given pupil may be required to pursue?

For insubordination, immorality, or infectious disease, the Board of Trustees may expel any scholar. Section 33, div. 13, Haynes' Comp.

By section 11 it is made the duty of each member of the board, at least once in each term, to visit the schools, and give such advice to the teacher as may be for the benefit of the school, and they are intrusted by section 10 with the general charge of the interests of the schools and school-houses in their districts, and are specially authorized by section 12 to employ teachers having the requisite certificate of qualification. These are the principal provisions bearing upon the questions under consideration, and they seem to leave no doubt that with the single exception of the power of expulsion for the causes specified in the statute, the authority of the trustees over the interior management of the schools is solely advisory in its character. The responsibility for the correct government and discipline of the school, as well as the adoption of such methods of teaching as seem best calculated to promote the advancement of the scholars in their several branches of study, rests solely with the teacher. Of course there ought and always will be a mutual interchange of

views, and a cordial co-operation between teacher and trustees in all these matters, whenever a proper regard is had to the important interests intrusted to their charge. The law prescribes what studies shall and what may be taught in our common schools, as well as the text-books to be used; and in determining within this limit what particular study any pupil shall pursue, the teacher always ought to consult the wishes of its parent or guardian, and conform to them so far as practicable, having due regard to the present attainments and proficiency of the pupil, and the general interests of the school.

Second. Have school trustees power to purchase school apparatus or outline maps, when no funds have been provided and no vote had by the district authorizing the same?

The general rule governing trustees in the discharge of their official duties is that they can exercise no powers except such as are conferred in express terms or by necessary implication by some statutory provision.

Sections 10–12, inclusive, (division 13, Haynes' Compilation,) relate to the powers and duties of the trustees as a board, and section 13 to those of a director. If the power claimed exists anywhere, it must be found in some one of these sections. Bearing in mind that sound rule of construction which Chief Justice Black says "is a universal rule of construction, founded in the clearest reason, that general words in a statute are strengthened by exceptions, and weakened by enumeration," it seems to me exceedingly doubtful whether the power exists. After saying that "the Board of Trustees in that capacity shall have the general charge of the interests of schools and school-houses in their district," the Legislature goes on to enumerate the particular powers which, under certain circumstances, the board may exercise, to-wit: To lease or purchase a site for a school-house, etc.; to build, hire, or purchase a school-house: To sell or exchange the same; to open more than one school; to grade the same; to advise the teachers; and furnish to the voters of the district an estimate of expenses of the school, including all things necessary for the coming year; and to employ teachers. Sections 10, 11, and 12. These comprise all the express powers conferred upon the board by these sections. Section 13 requires the director to provide fuel, in case the district does not, at its annual meeting; and to furnish all things necessary for the school-house during the time a school should be kept therein, etc.

It is quite apparent that the power to purchase school apparatus is not in express terms embraced in any of these provisions, and the fact that the general clause in section 10 in regard to the board having "the general charge of the interests of schools and school-houses," is followed by provisions carefully enumerating the powers which they may exercise, militates very strongly against any attempt to imply the power from that clause. Does it exist in the clause imposing the duty upon the director "to furnish all things necessary for the school-house during the time the school shall be kept therein?" This section does not simply confer a power upon the director to "furnish all things necessary," etc., leaving it discretionary with him whether to exercise it or not, but makes it his absolute duty to do it. Now is it clearly a necessary implication that outline maps and school apparatus are embraced among the necessary things which the director must furnish for the school-house? It seems to me not; if so, every director in the discharge of his duty should do it. It seems to me that this clause merely relates to such things as are necessary for the school-house in order to make it fit and suitable for use and occupancy as such, and without which it could not be healthy and comfortably used. This view is strengthened by a consideration of section 26, which in express terms gives to the voters of the district the power to raise money to provide the school-house with necessary furniture and appendages, and to purchase or increase a library and school apparatus. This plainly raises a distinction between necessary furniture and appendages on the one hand, and a library and school apparatus on the other, and requires a specific tax to be raised for each.

Hence my judgment is that school-district trustees would find it the more safe and prudent course not to purchase outline maps or school apparatus without first having the funds expressly provided for that purpose by the district. In regard to

the consequences likely to attach to those officers who have already made such purchases, that is a question properly belonging to the courts to determine. No decision of mine can in any way affect their liabilities.

Third. Have County Treasurers, when there is no school money in the treasury for a certain district, a right to pay out funds of the county on district orders accepted by the treasurer of the district, and held by teachers and others, holding them himself until school money accrues for that district, and then charging the interest that has accrued on the order to the district, and counting the order as so much cash in settling with the district? I answer, emphatically, no; and the practice referred to of County Treasurers redeeming district orders out of district funds on hand, instead of paying those funds over to the district treasurer, is reprehensible, as liable to abuse, and ought to be discontinued.

Fourth. In regard to the subject of holidays, and the meaning of the term "month," as used in section 12 of division 13, Haynes' Compilation, our school laws, I regret to say, do not recognize the existence of the former, with the exception, perhaps, of of the twenty-second of February. As to the term "month," it means four full weeks, with five working days in each week, and not twenty consecutive days, excluding Sundays. The manifest object of the provision is to secure a respite from labor of one day in each week besides Sunday.

ST. PAUL, February 7th, 1872. F. R. E. CORNELL, Atty. Gen.

Hon. A. J. Edgerton, Railroad Commissioner:

DEAR SIR: In order to enable one railroad company to enter upon the right of way or road-bed of another railroad corporation for the purpose of extending its line, and occupying with its tracks any portion of such right of way, such company must first obtain from the Legislature express authority so to extend its line, together with the right for that purpose to condemn the necessary right of way and other property. In case it has such power derived from the Legislature it can exercise it; otherwise not, inasmuch as the right to take private property for public use can only be exercised under legislative authority. As to the second question, whether a railroad corporation, authorized by its charter to build a particular line of road and to condemn property for that purpose, can, after the location and completion of such line, extend the same and condemn property therefor without additional legislative authority, I answer it in the negative. When a company has once fixed the location of its road and built it, its power to relocate or extend its line, and for that purpose to occupy the land of another, or of a public street, ceases. 1 Redfield on the Law of Railways, 390 and 391, and cases there cited.

ST. PAUL, February 9th, 1872. F. R. E. CORNELL, Atty. Gen.

To the Honorable, the Senate of the State of Minnesota:

Referring to the resolution of your honorable body requesting an examination into the validity of the transfer of certain lands therein described, in the counties of Waseca and Blue Earth, by the agents of the government of the United States, to private individuals, the legal rights of the State in relation thereto, and a report as to what legislation, if any, is necessary to enable the State to recover the value of said lands, or otherwise maintain its legal rights respecting them, I have the honor to report that in my opinion no legislation is needed to enable the State fully to protect and enforce all her legal rights to any of these lands. If they belong to the State, no act of any agent of the United States, assuming to convey the same, can in any way prejudice or affect her title, and any person entering upon their possession can be ejected at the instance of the State and made to respond in damages for all injury done or waste committed.

In reference to the remaining question involved in the inquiry which relates to the

condition of the title, a difference of opinion has existed between the State and Federal authorities, which is fully adverted to by the State Auditor in his annual report submitted to the Legislature in 1871, to which I would respectfully call the attention of your honorable body, in order to a more full understanding of the merits of the controversy.

By the organic act of March 3, 1849, it is provided "that when the lands in the Territory shall be surveyed, * * * sections 16 and 36 in each township * * * shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the State and Territories hereafter to be created out of the same."

Prior to the survey, a treaty was made on the twenty-seventh of February, 1855, with the Winnebago Indians, whereby a tract of land in Blue Earth county, embracing the lands in question, was given to said Indians for a permanent home, in lieu of other lands ceded by them to the United States, and the reservation thus established remained until the act of February 21, 1863, providing for their removal and the sale of the lands for their benefit. By the enabling act of February 26, 1857, sections 16 and 36 in every township of public lands in the State, or in case any part thereof had been sold or otherwise disposed of, other lands equivalent thereto, were granted to the State for the use of schools. It is claimed by the Commissioner of the General Land-office of the United States that the organic act did not operate as a grant or dedication, but only as a reservation of the school-section lands, which the National Government was at liberty to disregard at any time before the actual survey; that in the exercise of this legal right was established the Winnebago reservation, in February, 1855, whereby these lands were taken out of the category of public lands remaining in that condition at the time of the passage of the enabling act; they were not affected by any of its provisions relating to the granting of lands for school purposes.

It has been claimed, on behalf of the State, that section 18 of the organic act operated as a dedication of sections 16 and 36 for the purposes therein indicated, so that it was not within the power of the United States to direct them to any other use. This point was presented to the United States Supreme Court for its consideration in the case of the State vs. Batchelder; but the court, not deeming its adjudication necessary in the determination of that case, declined to consider it, or to intimate any opinion in reference to it. Hence, it remains as yet an open question; and, although freely according very great respect to the position assumed by the State in that case, yet I do not regard an ultimate favorable decision by the Federal Supreme Court as sufficiently certain to warrant a litigation, at least until after Congress shall have declined equitably to settle the matter in controversy by an act authorizing the selection of other lands to make good the deficiency occasioned by the sale of the school sections included in the Winnebago reservation. That Congress would pass such an act upon a proper presentation of the facts by the Legislature of the State, I have no reason to doubt.

ST. PAUL, February 18th, 1872. F. R. E. CORNELL, Atty. Gen.

Hon. H. B. Wilson, Superintendent Pub. Inst.:

SIR: In April last school-district No. 167, Filmore county, was formed from parts of districts Nos. 32 and 33, and was fully organized in May following. The clerk of such new district duly made and returned to the County Auditor, pursuant to the provisions of chapter 1, Gen. Laws 1870, an enumeration of the scholars residing, on the last day of September, 1870, within the territorial limits of the new district; but the clerks of the old districts neglected to take any such census, as respected their districts, after such change.

Under this state of facts it was clearly the duty of the County Auditor, in making the apportionment of the school funds among the several districts of his county in October, 1871, to set apart to school district No. 167 its proportion thereof, according to the enumeration returned by its clerk, and to draw his order therefor on the

County Treasurer in favor of the district whenever required, deducting the sum so found belonging to the new district from the amount which the old districts would have been entitled to on the basis of their annual reports of 1870; the remainder would belong to districts Nos. 32 and 33 after the change, to be divided between them whenever their clerks should see fit to return the enumeration required by the law of 1870. Until this was done no apportionment could legally be made as respects those districts. The action of the County Auditor in refusing to make any apportionment to district 167, was clearly erroneous, and makes him responsible to the district for the amount to which it was entitled, a responsibility which the courts will enforce on a proper application.

ST. PAUL, March 11th, 1872. F. R. E. CORNELL, Atty. Gen.

Hon. H. B. Wilson, State Superintendent Pub. Inst.

SIR: I have examined the papers referred to me by joint school-district No. 69, Olmsted and Mower counties, and find no difficulty, upon the facts as therein stated, in coming to the conclusion that the site designated for a school-house at the special meeting is valid and binding upon the district and its officers. The power to select a site for a school-house rests alone with the legal voters of the district. When lawfully assembled, either at an annual or special meeting, they can exercise this power, when it is specified as one of the objects of the meeting, as seems to have been done in this case. When the requisite notice of a special meeting has been given and posted, the mere fact that the notices were torn down by some one wrongfully will not vitiate the meeting, especially when they were replaced as soon as such fact became known.

When a site is designated by the voters it becomes the duty of the trustees to purchase the same, out of funds provided for the purpose, and they should see that the district gets a perfect title. The school-house must be built on such a site. Regarding the plan of the building, and the person to be employed in constructing, the district may advise, but cannot control the judgment or action of the trustees, provided they keep within the means authorized to be raised and expended for that purpose. Whenever any duty is imposed upon the trustees which they refuse to perform, the proper remedy, in most cases, is by *mandamus* to compel it.

ST. PAUL, March 11th, 1872. F. R. E. CORNELL, Atty. Gen.

M. T. Flower, Adjutant General:

DEAR SIR: Referring to yours of the twentieth inst. regarding the matter of taxes assessed against persons who are members of uniformed companies, in disregard of the provisions of section 3 of chapter 22 of the General Laws of 1870, as amended by act of March, 1871, the act should be treated by all executive officers as valid until declared invalid by some court of competent jurisdiction. Questions as to the constitutionality of a law properly enacted by the Legislature, and approved by the Governor, belong exclusively with the courts, and whatever view an executive or administrative officer may entertain concerning it should not interfere, except in extreme cases, in enforcing the same. In case, however, any member may feel aggrieved by reason of what he deems an improper levy, his only remedy is by resort to the courts.

ST. PAUL, May 25th, 1872. F. R. E. CORNELL, Atty. Gen.

His Excellency, Horace Austin, Governor:

SIR: Yours of the twenty-second inst. is before me, submitting for my consideration the following question: "Does not the language and provisions of section

46 of chapter 120, General Statutes, imply, if not absolutely require, that the letting should be a public one; and, if so, is it still in force, or has that section, or that provision of the section, been repealed by chapter 10 of the General Laws of 1866?" Section 46 authorizes the inspectors and warden "to lease the shops, etc., to parties from whom they obtain the highest and best price." This language confers the power to lease and imposes the duty upon the inspectors and warden of obtaining the highest and best price, and leasing to such parties as will give the State the highest and best price. The section, however, is silent in regard to the manner in which the letting board shall ascertain what parties will give the highest and best price. It prescribes no particular means which the inspectors and wardens must adopt to satisfy themselves of this fact. It only requires that they should be governed in their action by the highest and best price they can obtain, leaving it entirely to their discretion to adopt such means to learn this fact as they may deem best. Hence, I do not regard a public letting as essential to the validity of the contract, whether the provision of section 46 in regard to the price still remains in force, or has been repealed by the act of March 1, 1866.

ST. PAUL, July 24th, 1872. F. R. E. CORNELL, Atty. Gen.

His Excellency, Horace Austin, Governor:

SIR: The bill referred to me for consideration, entitled "An act to authorize the village of Kasson, in the county of Dodge, and State of Minnesota, to issue bonds in aid of building a steam flouring-mill within that village," seems obnoxious to objections of a constitutional character. Upon obtaining the consent of a majority of the electors of the village, the bill authorizes an issue of bonds to the extent of $10,000, "to aid in the building of a steam flouring-mill to be located in said village," and provides for the payment of such bonds by taxation upon the property of such village. It provides for the donation of the bonds or their proceeds, or the loan of the same, as the village authorities may deem best, to any person or persons with whom they may be able to contract for the erection of such flouring-mill. Whether such mill, when erected, is to become the property of the village, subject to its future use, control, and disposition, or whether it is to be the private property of the persons erecting it, seems to be left by the terms of the bill somewhat in doubt. Whichever may be the fact is not very important, however, save in this respect: If it is intended that the village shall own, control, and operate the mill, it would be obnoxious to the objection that such an enterprise does not fall within any of those municipal and town purposes for which alone a municipal corporation can be created under our constitution. The principal and underlying objection to this bill, however, is this: the enterprise in aid of which the taxing power is sought to be exercised, is one purely of a private character, and is in no just sense such a public purpose as to justify the state in the exercise of prerogative power.

In the language of Chief Justice Black, in the Sharpless case, "the Legislature has no constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name of and form of a tax, is unconstitutional for all the reasons which forbid the Legislature to usurp any other power not granted to them." Our own Supreme Court, in a recent decision, (Davidson & Allis vs. The Board of County Commissioners of Ramsey County,) defines taxation to be "pecuniary charges imposed by the legislative power of the State upon property to raise money for public purposes;" citing, with approbation, the doctrines enunciated in the Sharpless case as applicable to the question of legislative power under our own State constitution and expressly adopting as its own the expression of the Chief Jus-

tice in that case, "that a law authorizing taxation for any other than public purposes is void." If the erection of a steam flouring-mill and the manufacture of flour for purposes of private gain can by any process of reasoning be established as a "public purpose" within the meaning of those terms as used in defining the limits of the power of taxation, then by the same process of reasoning it will not be difficult to convert every cheese-factory, machine-shop, saw-mill, hotel, bank, and dry goods establishment in the State into public enterprises, inviting and demanding governmental aid and assistance. I am clearly of the opinion that the act in question is beyond the scope of legislative power.

ST. PAUL, February 4th, 1873. F. R. E. CORNELL, Atty. Gen.

His Excellency, Horace Austin, Governor of Minn.:

SIR: Referring to yours of the sixth inst., just received, it seems to me quite clear that the provisions of section 5, art. 9, of the constitution are wholly inapplicable to loans authorized to be made under the recent amendment to that article by the addition thereto of a new section designated as section 14. The debts authorized to be contracted under sections 5 and 6 are for extraordinary expenditures, and must be paid within 10 years after the passage of the law authorizing their creation, while those authorized by section 14 must be for the specific purposes therein named, and the bonds issued therefor must be payable in not less than 10 nor more than 30 years from the date of the same, at the option of the State. The language of these sections is so plain as to leave no room for construction. The two classes of debts are entirely dissimilar, and the provisions governing the one have no application whatever to the other.

ST. PAUL, February 8th, 1873. F. R. E. CORNELL, Atty. Gen.

To His Excellency, Horace Austin, Governor of Minnesota:

SIR: In the matter of the extradition of one George T. B. Garvie, upon requisition of his excellency, the Governor of the Commonwealth of Massachusetts, referred to me by your excellency, I have come to the conclusion, after a somewhat careful examination, that, upon the papers presented, you have no jurisdiction to issue a warrant in compliance with such requisition. The demand is that the said Garvie should be delivered over to the agent of the Executive of Massachusetts as a fugitive from justice, pursuant to the provision of section 2, art. 4, of the constitution of the United States, and the act of Congress passed to carry that article into effect. The constitutional provision is in these words: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." Under this article, one of the essential facts to be established, in order to authorize the Executive of the State where the crime is charged to have been committed to make the demand, is that the party so charged has fled from the State; that he is a fugitive from the justice of the State whose laws have been violated. Ex parte Joseph Smith, 3 McLean, 121; 5 Cal. 238; 23 Cal. 585. This fact must be made to appear by affidavit of competent legal evidence presented to the Governor making the demand as the foundation for his action. He has no power to determine the fact, except upon some competent evidence. No statutory provision nor rule of law, of which I am aware, makes his certificate evidence of the fact; hence, the mere recital in his requisition that the party charged has fled, or is a fugitive from the justice of his State, unsupported by any legal proofs to that effect, is wholly insufficient to warrant him in making the demand, or to justify the Executive upon whom the demand is made in responding thereto, by issuing his warrant for the arrest and rendition of the alleged criminal. 3 McLean, and the other cases above cited.

Whether in a case where it appears from the requisition that such evidence has been legally presented to the Executive making the demand, which he has considered and acted upon, and from which he has determined the existence of such fact, such conclusions would be binding on the Executive to whom the requisition is addressed, and whether such proofs, or properly authenticated copies thereof, should accompany the requisition, are not questions necessary to be considered in this case, inasmuch as it does not appear from the recitals in the requisition or otherwise that his excellency, the Governor of Massachusetts, has ever had presented to him for his consideration any legal evidence whatever going to establish the alleged fact that the said Garvie is a fugitive from the justice of said State of Massachusetts, or that he has ever acted upon any such evidence in determining this question. The case of Joseph Smith, the Mormon prophet above cited, was determined on *habeas corpus* by the circuit court of the United States in the State of Illinois, after very elaborate argument and careful consideration by the court, and is entitled to great weight, inasmuch as it is an exposition by a federal court of the duties and powers of State Executives under this clause of the federal constitution, and the act of Congress to carry the same into effect. Upon the affidavit of one Boggs, charging that an assault had been made upon him at his home in Independence, Missouri, by shooting him with intent to kill, and also charging, upon his information and belief, that said Smith, then a resident and citizen of Illinois, was an accessory before the fact, the Governor of Missouri issued his requisition to the Governor of Illinois for his arrest and rendition as a fugitive from justice. The requisition recited as follows: "Whereas, it appears by the annexed document, [the affidavit,] which is hereby certified to be authentic, that one Joseph Smith is a fugitive from justice, charged with being accessory before the fact to an assault with intent to kill, * * * in this State, and it is represented to the executive department of this State has fled to the State of Illinois." In response to the demand the Governor of Illinois issued his warrant for the arrest of Smith, reciting that "Whereas, Joseph Smith stands charged by the affidavit of Lilburn W. Boggs with being accessory before the fact to an assault with intent to kill, made by one O. P. Rockwell on Lilburn W. Boggs, on the night of the sixth day of May, 1842, at the county of Jackson, in the State of Missouri, and that the said Joseph Smith has fled from the justice of said State and taken refuge in the State of Illinois." In reference to the recital of facts in the requisition and warrant, the court say "those facts do not appear by the affidavit of Boggs. On the contrary, it does not assert that Smith was accessory to O. P. Rockwell, nor that he had fled from the justice of the State of Missouri. The court can alone regard the facts set forth in the affidavit of Boggs as having any legal existence. The misrecitals and overstatements in the requisition and warrant are not supported by any oath, and cannot be received as evidence to deprive a citizen of his liberty and transport him to a foreign State for trial." The court also says, in giving its opinion: "It must appear (from the affidavit) that he fled from Missouri to authorize the Governor of Missouri to demand him, as none other than the Governor of the State from which he fled can make the demand."

There is nothing in the requisition in this case in any manner indicating that the Governor issuing it has ever, upon any evidence before him, determined or even passed upon the question whether Garvie had ever fled from the State of Massachusetts, or become a fugitive from its justice. All that is said upon that subject is this: "The undersigned, Governor of the Commonwealth of Massachusetts, would inform your excellency (the Governor of Minnesota) that George T. B. Garvie, of Yarmouth, N. S., charged with the crime of larceny of money, (as will more fully appear by the copy of complaint, warrant, and affidavits hereto annexed, which I certify to be authentic,) is a fugitive from justice, and now supposed to be within the limits of the State of Minnesota, viz., Minneapolis, in confinement." How or when the Executive obtained the information which he seeks to communicate, viz., that the said Garvie, of Yarmouth, N. S., is a fugitive from justice, is not disclosed. No reference whatever is made to any of the papers accompanying the requisition as bearing in any manner upon the question. Reference is made to such papers in the parenthesis for the purpose of making it more fully to appear that Garvie is

charged with the specified crime, but not that he is a fugitive. The place from which he is a fugitive from justice is not indicated, so far as the requisition is concerned, unless it may be inferred from the "*descriptio personæ*" appended to Garvie's name, indicating that Yarmouth, in Nova Scotia, is his place of residence. Clearly such information, even though properly supported by affidavit that the said George T. B. Garvie is a fugitive from justice from Nova Scotia, or some place not named, would not be sufficient to warrant your excellency to issue a warrant in response to a demand from the Executive of Massachusetts. The accompanying complaint, warrant, and affidavit, referred to in the requisition for the purpose of showing more fully the nature of the charge, throw no additional light upon the question.

The complaint taken and sworn to before the Municipal Court of the city of Boston, the thirteenth of January, 1873, charges the commission of the crime against one George T. B. Garvie, of Boston, laborer, but is silent as to his having fled the State. The warrant bears the same date, and purports to be issued out of the same court, against the same George T. B. Garvie. On the back of it is indorsed what purports to be the return of a constable, dated February 13, 1873, that "the within named defendant cannot be found in his jurisdiction." The extent of his jurisdiction is nowhere made to appear. Aside from the complaint and warrant are several papers annexed together, headed as follows: "Commonwealth vs. George T. B. Garvie; evidence for government." Then follows what purports to be the sworn testimony of several witnesses in said cause, taken before different magistrates on the thirteenth of February, 1873. What commonwealth is intended is left to inference. There is nothing anywhere indicating that the statements were taken in any criminal suit or proceeding pending in the said Municipal Court of the city of Boston, much less that they were taken in support of the complaint, and to procure a warrant for the arrest of Garvie which had been issued a full month prior to their being taken. But aside from these and other irregularities apparent upon their face, they are all silent as to the fact of Garvie's having fled from the State of Massachusetts. Hence, however solicitous your excellency may feel to avoid even the appearance of discourtesy in your official intercourse with the Executives of other States, you cannot, it seems to me, issue your warrant in this case, in response to the requisition, without establishing a precedent of doubtful, if not dangerous, tendency.

ST. PAUL, February 24th, 1873. F. R. E. CORNELL, Atty. Gen.

Hon. H. B. Wilson, State Superintendent Pub. Inst'n:

SIR: Upon the statement of facts transmitted in relation to the legality of the last annual school-district meeting in district No. 21, of Otter Tail county, I have no doubt but that the officers elected at that meeting were the legally-elected officers of that district. It appears that at the time and place specified in the notice calling the annual meeting, the voters of the district assembled in numbers quite too large for accommodation and the convenient transaction of business at the place of meeting so designated in the call. The meeting was called to order by the then school-district director, Mr. James Chambers. A motion was then made to choose Charles H. Goodsell as moderator, but the director declined to entertain such a motion, on the ground that the law made the director the moderator of the meeting. Acting upon this mistaken belief, participated in by others, he entertained a motion that the meeting adjourn to the school-house, which was put and carried, and the meeting declared so adjourned. No objection was made at the time to this proceeding, but the meeting acquiesced therein by thereupon at once adjourning to and convening at the school-house, when the question as to the right of the director to act as such moderator was renewed, and after discussion Charles H. Goodsell was chosen as the moderator of the meeting, on a motion to that effect, put and declared carried by the director, still acting as chairman or moderator. In this discussion the director and others acquiesced by participating in the subsequent proceedings. In fact, the persons present and taking part in the meeting prior to the

adjournment, continued to act and participate in all its subsequent proceedings at the school-house. As the law regards the substance and not the shadow or mere letter of things, it cannot be doubted but that there was no such substantial irregularity, either in the adjournment or choosing of Mr. Goodsell as moderator, as would vitiate any of the proceedings of said meeting. Until Mr. Goodsell was chosen and took the chair, the director was moderator *de facto* by the general acquiescence of the meeting. The fact that he took upon himself the duties of that position under a claim of right, and that the meeting submitted to such claim so far as to allow him, without dissent, to put and decide the motion to adjourn, made him, for the purpose of that motion, as much the moderator by unanimous consent as though he had been declared such by a formal vote. The choosing of another moderator afterwards, acquiesced in as it was at the time, was neither illegal nor even irregular. In fact, it is a power inherent in every body of this character at any time for satisfactory cause to change its presiding officer.

ST. PAUL, February 25th, 1873. F. R. E. CORNELL, Atty. Gen.

Hon. Wm. H. Yale, President of the Senate:

SIR: In answer to the resolution of the honorable, the Senate of the State of Minnesota, this day received, requesting an opinion upon the question of the rights of the Senate to sit and continue in session as a court of impeachment beyond the 60 days limiting the session provided in the constitution, for the purpose of trying William Seeger upon the articles of impeachment presented to the Senate, etc., I have the honor to state, that in order to comply with your request for an immediate answer, I have not had that opportunity to examine the law and precedents relating to the subject I would have desired before giving an opinion upon so grave a question, and can only give the conclusion at which I have arrived after a necessarily hasty consideration, without any reference to authorities or precedents to support the same. The resolution assumes that the Senate is already organized as a court of impeachment, and the question is, does its existence as such an organized body necessarily cease with the termination of the session of the Legislature in being at the time of its organization? It seems to me that the termination of the legislative session does not necessarily affect the power of the Senate thus organized as a court of impeachment, nor its right to sit and continue in session as such court for the purpose of trying an impeachment. Under our constitution the limit to each session of the Legislature is 60 days, and the legislative power of the Senate, which constitutes one branch of the Legislature, of course ceases with the expiration of that period. The Senate, however, when sitting for the purpose of trying an impeachment under section 14, art. 4, is not acting as a part of the Legislature. Its members, although the same are acting under the obligation of an entirely different oath, and the body itself, as such is engaged in the discharge of power, duties, and functions of judicial and not legislative character.

In fact, it is the Senate organized and acting, not as one branch of the legislative department, but as an independent and separate body, clothed with such jurisdiction and powers, of a judicial character, as pertain to a court of impeachment charged with the trial of impeachable officers. Save as limited and prohibited by the constitution, the Senate, sitting as a court of impeachment, necessarily possesses all the rights and powers of a court of that character at common law. It must, as incidental to its existence, have the power to adjourn from time to time, and to adopt all such necessary rules and regulations for the proper conduct of its proceedings, as in its judgment it may deem best.

The constitutional prohibition as to the limit of the legislative session does not, in my judgment, apply to the Senate when organized and sitting as a court of impeachment. Neither would the fact that the House of Representatives was not in session at the time when the Senate may be engaged in the trial of an impeachment, necessarily interfere with the right of the Senate to proceed with such trial. Both these questions were very fully and ably discussed in the proceedings connected

with the impeachment and trial of John C. Mather, in the State of New York, in 1853, and the foregoing views are regarded as in harmony with the practice and doctrines as settled in that case.

ST. PAUL, March 7th, 1873. F. R. E. CORNELL, Atty. Gen.

Hon. A. R. Hall, Speaker House of Representatives:

SIR: In answer to the resolution of the honorable, the House of Representatives, this day communicated to me, inquiring whether it is absolutely necessary that the House be in session during the impeachment trial of William Seeger, State Treasurer, and whether the House can, by resolution or otherwise, confer upon the managers appointed by the House any other or greater authority than that which they now possess by virtue of their appointment, I have the honor to state that, in my judgment, it is not absolutely necessary that the House should remain in session during the trial of such impeachment.

In the case of the impeachment and trial of John C. Mather, it was unanimously agreed by the conference committee of the Senate and Assembly of the State of New York that there was no necessity for the continuance of the Assembly in session during the trial of that impeachment, and the conclusion of that committee was acted upon in that case. See Senate Journal New York, 1853, p. 999.

In regard to the second question contained in the resolution, I deem it competent for the House to confer upon its managers all powers necessary to conduct and prosecute said impeachment in its behalf, but I am not advised as to the extent of the authority already in fact conferred by the House upon its managers.

ST. PAUL, March 7th, 1873. F. R. E. CORNELL, Atty. Gen.

Hon. A. R. Hall, Speaker of the House of Representatives:

SIR: Referring to the resolution of the honorable body over which you have the honor to preside as to its power to adjourn to a day certain, for the purpose of conducting the impeachment against the State Treasurer, I have no doubt it can adjourn to any day it sees fit, but cannot convene after the expiration of the time limited by the constitution for the session of the Legislature.

ST. PAUL, March 7th, 1873. F. R. E. CORNELL, Atty. Gen.

Messrs. Brown and Fletcher, Committee, Board of Trustees of Hospital for Insane:

GENTLEMEN: In compliance with a resolution of the Board of Trustees of the Hospital for Insane, calling for my official opinion as to the legality of the action of the board in awarding the contract to Mr. Boher for the entire completion of the section and return to the present asylum under proposals recently advertised, I have the honor to state that I have examined the copies of the proceedings of the board in connection with such letting, together with the other papers handed me by you, and find nothing which in my judgment can invalidate the action which the board has taken in making the award it has to Mr. Boher. I have not been furnished with copies of the plans and specifications referred to in the advertisement of the board for proposals, but am advised by you that they provide for plumbing and heating, and the manner in which the same shall be done. If this is the case bidders were required to take notice of that fact, and to regulate their conduct accordingly.

The advertisement for proposals was sufficiently broad to enable the board to receive bids for the entire work, including plumbing and heating, and there is no point made, as I understand, that the notice was not published the requisite time.

It appears, from the statement of Dr. Bartlett, that he advised some of the bidders that they would not be required to put in bids for plumbing and heating, under a belief founded upon certain discussions among the members of the board that such was the fact. Nothing, however, appears in any of the official proceedings of the board, nor in the advertisement for proposals, warranting any such belief, and bidders had no right, legally, to go behind these; much less had they the right to act upon the suggestions of any individual, as to the intentions of the board, unless expressly authorized so to do. The fact, however, that such a suggestion was made was a proper one for the consideration of the board in determining the question whether they would make any award on the bids made, or advertise anew. If they were satisfied that the State had been prejudiced by reason of such suggestion they would have been fully justified in advertising anew. If, however, they were satisfied that any one of the bids proposed was advantageous to the State, as much so as any that could be obtained, it was their duty to take such bid; the whole object of the law requiring the board to advertise for proposals and to award the contract to the lowest responsible bidder, is to secure to the State such a contract as will, all things considered, prove most beneficial to the interests of the State. Whether the contract awarded in this case was to the lowest responsible bidder or not, was a question for the determination of the board alone. I am satisfied that there was a substantial compliance with the provisions of law in regard to advertising for bids, and the fact that the board, at the letting, requested and allowed Mr. Boher to supplement his bid by adding an estimate for plumbing and heating, was not such an irregularity as could prejudice the State, or legally affect the action of the board in making its award.

ST. PAUL, April 17th, 1873. F. R. E. CORNELL, Atty. Gen.

Hon. Horace Austin, Governor:

DEAR SIR: According to your request I have examined, to the extent of my limited time, the questions growing out of the Manitoba affair, but have been able to find no new cases in addition to those cited by Mr. Lochren. The conclusions to which I have arrived differ somewhat from his, although my great respect for his ability as a lawyer leads me to doubt somewhat the accuracy of my opinion without a further examination. As between the bail and his principal, it seems to be well settled, both in this country and in England, that the former can take the latter whenever and wherever he may be found, and the latter cannot maintain an action either for assault or false imprisonment for such taking, and it matters not on what soil the bail may have asserted his right to such capture and possession. Neither is the bailpiece in any sense regarded as a process. But there is a question lying back of and behind this, of an entirely different character, when the bail seeks to enforce this right in a foreign jurisdiction. It is admitted that the remedy for the enforcement of a right must be sought in the place and under the laws of the government where it is attempted to be enforced, and, in the absence of any such remedy, it is very questionable, as it seems to me, whether the right could be forcibly exercised at all without a breach of the peace as against the sovereign, and an infraction of its territorial rights. And this, it seems to me, is a question belonging peculiarly to the judiciary of that country to determine, and whether that determination is right or wrong, it must be regarded as binding. Hence, if the judicial authorities of Manitoba obtained, properly and lawfully, jurisdiction over the persons of Mr. Fletcher and others, by their legal arrest on British soil, and also had jurisdiction of the subject-matter, their final adjudication in the premises would be conclusive, however erroneous in fact, according to our view of what should be the declared law on the subject. Under these circumstances, it seems to me, the true course for the friends of the parties to pursue is to establish the fact, about which there seems to be no dispute, that the parties were, in good faith, acting under the advice of lawyers of good standing, and doing what they supposed, and had the right to suppose, they had a legal right to do, and intentionally vio-

lated no law. Upon proof of these facts to the state department, accompanied with proof of the well-known good standing of the parties, it would seem that our government might, in a friendly manner, interpose and successfully appeal to the executive clemency and power of the Canadian government to the immediate relief of the parties. To do this it might be well to secure the affidavit of Mr. Lochren as to the advice given, as well as of the other parties connected with the matter, to file with the department at Washington as a foundation for its action in the premises. This, it seems to me, is the proper course to pursue in case it shall be found, on examination, that the arrest of Fletcher and his associates was not on American soil. If, however, they were arrested on American soil, I have no doubt our government can demand their immediate release, and should do so.

ST. PAUL, July 26th, 1873. F. R. E. CORNELL, Atty. Gen.

In the Matter of the Complaint of Henry R. Wells for the Institution of an Action in the Nature of a Quo Warranto against Sherman Page.

Upon the complaint of Henry R. Wells, Esq., the Attorney General is asked to bring an action against the Honorable Sherman Page, for the purpose of ousting him from the official position which he now holds as Judge of the tenth judicial district, on the ground that he has intruded into such office and is now unlawfully holding and exercising the same. In view of the public importance of the matter, as well as in deference to the wishes of both parties, a hearing was given on such application as to the duties of the Attorney General in the premises, at which the questions involved were ably and elaborately discussed by counsel for the respective parties, the Hon. Thomas Wilson on behalf of the relator, and Hon. Gordon E. Cole on behalf of Mr. Page.

It is admitted that in the fall of 1871 Mr. Page was elected a Senator of the State for the term of two years, commencing on the first of January, 1872; that he qualified, and entered upon the discharge of the duties of such office, and held the same until September, 1872, when he resigned; that during the session of the Legislature of 1872, of which said Page was a member, the tenth judicial district was created, and provision was made for the election of a District Judge thereof, at the then next general election; that at such election Mr. Page received a majority of some 2,000 votes for that office over his competitor, Mr. Wells, the only other candidate voted for at such election for that position, and has since qualified and entered upon the discharge of the duties of such office. No question is made but that the election was in all respects fairly and honestly conducted, and in its result fully reflected the popular choice and wishes of the district.

The sole and only point made by the relator is the alleged disqualification of Mr. Page to hold the office of District Judge of that district, and his ineligibility to such judicial position at the time of the election, by reason of his being such member of the Senate at the time the district was created.

It would seem, under circumstances like these, that the action of the Attorney General ought to be concluded by such a clear and unmistakable expression of the popular will in a matter affecting public interests, unless it is made clearly to appear that some private rights are involved, or that he has no discretion whatever to exercise in the premises. "Courts," says Judge Dillon, in a recent work, "are anxious to sustain rather than to defeat the popular will." With much greater reason, it seems to me, ought this rule to govern the law officer of the people in a case where it clearly appears that public interests alone are to be affected by his action. A careful examination of the authorities leaves no doubt upon my mind that, as applied to elective offices by ballot, the rule laid down by Judge Dillon, in his recent valuable work on Municipal Corporations, is the correct one, viz.: "That unless the votes for an ineligible person are expressly declared to be void, the effect of such a person receiving a majority of the votes cast is, according to the weight of American authority and the reason of the matter, (in view of our mode of election, without previous binding nominations by secret ballot, leaving each elector to

vote for whoever he pleases,) that a new election must be held, and not to give the office to the qualified person having the next highest number of votes." Conceding, therefore, that Mr. Page was ineligible to the office in question, and that he is disqualified from holding, Mr. Wells, the minority candidate, is not entitled to it. Hence, he has no such interest in the question as would entitle him to become a relator in these proceedings, or would authorize the Attorney General, under section 5, *c.* 79, of the General Statutes, to commence the action on his complaint or information, and join him as a party plaintiff with the State. Dill. Mun. Corp. § 135; 56 Pa. St. 270.

The case then resolves itself into one of public right alone, involving no individual grievance, and must be determined by the Attorney General solely with reference to the public interest, and his official duty in such a case as such public prosecutor. The power to institute an action to try the right to a public office conferred by our statute upon the Attorney General is one borrowed from the common law, and has always been regarded as a discretionary power, to be exercised or not, as the public interests required, according to the circumstances of each particular case. Originally the proceeding was instituted by the writ of *quo warranto*, and was prosecuted solely at the discretion of the Attorney General. Subsequently this gave place to the more convenient proceeding of an information in the nature of a *quo warranto*, and the practice obtained of referring to the court to determine whether an information be filed or not in each particular case, and we are informed in Rex vs. Sargeant, 57 Term R. 467, that it became the settled practice, soon after Lord Mansfield came into the court, before granting any application, "to canvass the case, and unless he found *strong* ground for questioning the defendant's title, he, and the court sitting with him, always refused to let the information go." And in this country, whenever this power has been vested in the courts in any class of cases, it has been treated as a discretionary power, to be exercised, not as a matter of right, but in the sound discretion of the court. As is said by a recent text writer: "In proceedings in the nature of *quo warranto* the rule to show cause is not grantable, of course, but depends upon the sound discretion of the court. It will not be granted in all cases. Though the incumbent be ineligible and the relator have sufficient interest to prosecute, the court will look at the relator's motive and the public good, in the exercise of the discretion confided to it. Accordingly a rule was refused against the defendant, the acting mayor, when it appeared there was no adverse claimant. So the court refused to allow an information in the nature of a *quo warranto* when the election day was suffered to lapse, and the election was held in good faith on the wrong day." Dill. Mun. Corp. § 722, and cases cited in note; The People ex rel. Peabody vs. Atty. Gen. 22 Barb. 114; Com. vs. Chily, 56 Pa. St. 270. In the case last above cited the court refused permission to file an information against the successful candidate on the application of the defeated one, who claimed that his competitor was ineligible on the sole ground that the relator had no interest, and without inquiring into the title of the defendant. If such has been the prevailing rule governing the action of courts in the exercise of this discretionary power when confided to them, clearly the Attorney General ought to be governed by the same rule, when called upon to exercise the same power. In the case presented it is not claimed that the public is suffering any detriment by reason of any neglect or improper discharge of judicial duty on the part of the present incumbent, and it is quite clear that a prosecution carried on successfully to his removal might, and probably would, occasion more or less delay and interruption in the judicial business of that district, during the interval between his removal and the election of his successor. Yet the Attorney General is asked to institute this action on his own motion, in defiance of the clearly expressed popular will of that district, with the sole practical result of securing the settlement by a judicial decision of an abstract, and perhaps doubtful, question of constitutional law. For, even though section 9 of article 4 should receive the judicial construction placed upon it by the counsel for the relator, the alleged cause of ineligibility will have ceased to operate by the time of a new election, and it is but fair to presume that the same contingency which so recently elevated Mr. Page to his present position by such a decided

majority, in the face of his proclaimed ineligibility, will reinstate him by an equally decisive vote.

But aside from these considerations I am not so clearly satisfied that Mr. Page is unlawfully holding the office of District Judge, as to warrant me under the circumstances of his case in raising that question for litigation. His alleged legal inability to hold the office is predicated upon the prohibitions contained in section 9 of article 4 of the constitution, which is as follows: "No Senator or Representative shall, during the time for which he is elected, hold any office under the authority of the United States, or of the State of Minnesota, except that of postmaster, and no Senator or Representative shall hold an office under the State which had been created, or the emoluments of which had been increased, during the session of the Legislature of which he was a member, until one year after the expiration of his term of office in the Legislature." The second clause of this section has no application whatever to the present case, inasmuch as the office of the District Judge is one created by the constitution, and not by the Legislature. All the latter can do is to create new judicial districts, as it did in the case of the tenth district, the constitution having already in advance created the office of District Judge for such new district, fixed the duration of his term, and prescribed its powers and jurisdiction beyond the reach of legislative control. Sections 4, 5, 6, and 11 of article 4, St. Const. A similar provision in the constitution of other States has received this construction. People ex rel. Ballou vs. Du Bois, 23 Ill. 550; 9 Minn. 286–7. As to the first clause of the section in question, the practical construction that has been given to it by the uniform practice of the Legislature and executive departments of the government for a long period of time, as in the cases of Mayors Cook, Rogers, Sheardown, and Hayes, Senator Norton, and Superintendent Dunnell, is to the effect that a Senator can hold no other such prohibited office during the same time he is holding the office of Senator, and not that he is ineligible to any such office.

In this view the clause is simply a declaration of the fact that the office of Senator is incompatible with any other, except that of postmaster, and prohibits the holding of the two incompatible offices at the same time. The effect of this is not to make the person holding the office of Senator ineligible to such other office, but to create a vacancy in the former office in case of his acceptance of the latter. The language of the prohibition is against the holding of such other office. Had it been intended also to declare the ineligibility of the person so holding the office of Senator, appropriate language would have been used to indicate such intention, as in the case of Justices of the Supreme Court and the District Courts, who are not only prohibited from holding any other office, but are expressly declared ineligible to receive any votes for any elective office under the constitution, except a judicial one, by section 11 of article 6 of the constitution, which makes all votes so given to them, either by the Legislature or the people during their continuance in office, void. In view of these precedents, hitherto unchallenged and of a character always entitled to respectful consideration, and in cases of reasonable doubt to a controlling influence with courts, the Attorney General, himself a member of one of the departments whose action has concurred in establishing a rule, might well hesitate in disregarding it, especially in a case where the people of a whole district have acted upon it in perfect good faith, and to the prejudice so far as appears of no substantial right or interest, either public or private. But it is not necessary, nor am I inclined, to place the decision upon this application upon any such ground. Section 7, art. 7, of the constitution expressly declares that "every person who by the provisions of this article shall be entitled to vote at any election shall be eligible to any office which now is or hereafter shall be elective by the people in the district wherein he shall have resided 30 days previous to such election, except as otherwise provided in this constitution," etc. To predicate the denial to the people of a valuable right thus expressly secured upon language any less explicit than that used in securing it, would not, it seems to me, accord with any sound principle of constitutional construction. To bring any given case, therefore, within the exception of this section, it is necessary to point out some specified clause creating the exception, as is the case in section 11, art. 6, in regard to Supreme and District Court Judges. It

is not sufficient to rest it upon inference or implication alone. Hence, whatever may be the rule as regards appointed offices, whether the precedents of a legislative and executive character heretofore established in relation to them are correct or incorrect, it seems to me beyond reasonable controversy that the clause in question cannot be construed as limiting or in any manner restricting the people in their choice of elective officers or in voting for whomever they may deem best fitted and qualified to serve them in situations of public trust and confidence. It follows that the election of Mr. Page as Judge was valid, and having therefore resigned his official position as Senator, no question can be pertinently made as to the incompatibility of two offices nor as to his rightful holding, as it seems to me, of the office to which he has been legally elected. The application is denied.

ST. PAUL, December 31st, 1873. F. R. E. CORNELL, Atty. Gen.

GEORGE P. WILSON, ATTY. GEN.—JAN. 9, 1874, TO JAN. 10, 1880.

F. E. Stauff, Co. Aud. Cass County:

DEAR SIR: I am in receipt of your favor stating that one Reuben Gray was elected a County Commissioner in your county at the annual election in November, 1873; that at the time of his election he was an actual resident of Cass county and of the district for which he was elected; that subsequent to the election, and before qualifying, he removed with his family to East Brainerd, in Crow Wing county, for temporary purposes merely, and without any intention of making that county his home,—and ask the question whether the said Gray could legally qualify and enter upon the duties of the office to which he was elected. Assuming the facts as stated by you to be true, I can see no objection to the party qualifying and discharging the duties of said office. The law requires that he should be a resident of the district at the time of his election, and reside therein during his continuance in office; and further provides that the absence of any Commissioner from the county for six months in succession shall be deemed a resignation of the office. If in this case, as has been intimated by others, Mr. Gray has removed with his family to the county of Crow Wing, and is there engaged in business, and designs remaining there an indefinite length of time, although he may have the intention of returning at some future period to Cass county, I should hold that he had lost his residence in Cass county, and hence could not discharge the duties of Commissioner of that county.

ST. PAUL, January 20th, 1874. GEO. P. WILSON, Atty. Gen.

Benj. Soule, Co. Atty. Mille Lacs Co:

DEAR SIR: Your favor of January 19th received, stating that the County Commissioners of Mille Lacs county, at their annual meeting in September last, voted to assess or levy a tax of five mills on the dollar for each and every dollar of valuation in said county as a special county tax, to be applied for the purpose of redeeming county orders issued prior to September 2, 1873, and for the information of your County Treasurer you inquire: 1st. Had the County Commissioners any right to levy said tax? 2d. Can the Treasurer take county orders issued since September 2, 1873, as payment on said special tax? In answer to the first question I would say that it appears the tax in question was regularly extended upon your tax certificate, and that the Treasurer is now, and has been for some time, engaged in the collection of that, among other taxes levied in your county for said year; that it is too late now to raise the question of the validity of said tax before me. The Treasurer is a mere ministerial officer, and must treat the tax as valid and regular until

otherwise determined by a court of competent jurisdiction. In answer to the second question I would say that the tax so levied by the Commissioners must be appropriated exclusively to the purpose for which it was raised, and therefore I coincide with you in the opinion that the Treasurer would not be justified in receiving county orders of a date later than September, 1873, in payment of said special tax.

ST. PAUL, January 22d, 1874. GEO. P. WILSON, Atty. Gen.

Hon. H. B. Wilson, Supt. of Pub. Inst:

DEAR SIR: I am in receipt of your favor of twenty-first inst., inquiring "whether County Commissioners can legally appoint County Superintendents of Schools, under the provisions of section 58 of the revised school law, unless they hold at the time of such appointment a first-grade certificate from the Superintendent of Public Instruction, or from the President of the State University." I am of the opinion that they cannot. The evident intent and purpose of the Legislature was to prevent County Commissioners from conferring this appointment upon incompetent and unfit persons, as probably would be done, in some instances, through favoritism of the appointing power, were no such restriction interposed.

If it be unlawful for the trustees of a school-district to contract with or hire a teacher who has not procured the requisite certificate of qualification, (*vide* 12 Minn. 448,) for more cogent reasons should it be unlawful for the County Commissioners to contract with or hire the services of a County Superintendent not in possession of a first-grade certificate, in direct violation of an equally plain provision of the school law. The possession of the certificate from one or the other of the officers named presupposes a thorough examination; or, in other words, that those officers have done their duty in the premises. The certificate furnishes the only competent evidence the Board of Commissioners can have of the literary attainments and qualifications of the candidate, except it be as to his moral character.

ST. PAUL, January 22d, 1874. GEO. P. WILSON, Atty. Gen.

His Excellency, Gov. C. K. Davis:

SIR: I have examined somewhat carefully the question submitted by your Excellency, as to whether the charge of bastardy, so called, is such "an offense against the State," within the meaning of section 4, art. 5, of our Constitution, as authorizes the Governor to grant a pardon, and have come to the conclusion that it is not. I find, upon examination, many conflicting decisions as to the nature of bastardy proceedings; that is to say, whether they are to be regarded as criminal, or civil, or quasi criminal, in their character. These decisions, too, have all been rendered upon statutes very similar, and in some instances almost identical, with our own, on that subject. Our statute is almost a literal transcript of the Wisconsin statute and substantially the same as the Massachusetts and Ohio statutes upon the subject of bastardy.

I find in the 19th Wisconsin, p. 235, (State vs. Jager,) this doctrine laid down: "The word 'offense' is used as synonymous with crime, and means offense for which a criminal punishment may by law be inflicted. A prosecution in a case of bastardy under our statute seems to be *sui generis*,—not strictly either a civil or criminal suit, but in form and object partaking of many of the incidents of both. This is undoubtedly the view which courts in modern times have taken of bastardy proceedings,—that they are neither wholly civil nor wholly criminal, but have many of the features and incidents of each. Hills vs. Wells, 6 Pick. 104; Marsten vs. Jenness, 11 N. H. 156; Walker vs. State, 6 Black. 11; Beals vs. Furbish, 39 Me. 469.

The statute is intended to enforce the natural obligation which the parent is under to support and provide for the offspring, legitimate or illegitimate, (Duffer vs. State, 7 Wis. 672,) and not to punish for an offense against good morals and common decency. In the case of Marsten vs. Jenness, 11 N. H. 156, the question arose as

to the effect of a former examination and discharge, and in order to determine that point it became necessary to inquire into and settle the question whether the proceedings under the bastardy act were of a civil or criminal character, and whether the order of a court, made in such cases, (see section 7, pp. 2, 11, Gen. St.,) is in the nature of a punishment for an offense, or merely of an indemnity against certain pecuniary cases, etc. Gilchrist, J., delivering the opinion, says: "But the order of court is not a sentence upon a conviction for a crime; it imposes no disability whatever; it does not interfere with the political or legal rights of the respondent. The power of pardoning offenses is by the constitution vested in the Governor and council. If the verdict of the jury establish the fact that the respondent has committed a crime, such offense may be pardoned by the Executive. But the Executive could interfere, not to restore to the party the right of which a conviction has deprived him, for he has incurred no disability, but merely to annul the order of court. It would hardly be contended that the respondent is a criminal in a sense which authorizes the interference of the executive, when such a result would follow, so entirely opposed to the beneficial operation of the statute. * * * It is evident, we think, from these considerations, that the object of the statute is not to impose a punishment for an offense, but to redress a civil injury. For the purpose of affording this redress, the legislature, as they undoubtedly may in all cases of civil injury, have deemed it expedient to authorize the employment of process usually applicable to criminal proceedings alone; but the process is merely the form by which the redress is sought,—the purpose to be obtained is an indemnity; as soon as this indemnity is furnished, the object of the law is satisfied, without affixing any stigma upon the character, as in criminal convictions."

I cannot discover any reason why this reasoning will not apply in the case under consideration. Under our statute (page 592) all *crimes* and *public offenses* are divided into felonies and misdemeanors. A felony is a public offense, punishable with death or by imprisonment; every other public offense is a misdemeanor. In none of the decisions that I have examined do I find this offense spoken of as a public offense. In the case of Robinson vs. Hana, 16 Vt. 477, brought under the bastardy act, this language is used: "It is to be noticed in all these cases they are called prosecutions, although the object of them is to obtain a civil remedy for individual wrong or private wrong." Chapter 100 of the General Statutes provides for the punishment of offenses against chastity, morality, and decency, among which are adultery and fornication.

ST. PAUL, January 28th, 1874. GEO. P. WILSON, Atty. Gen

To the Honorable the Senate of the State of Minnesota:

Referring to the preamble and resolution of your honorable body, directing me to inquire into the facts as to whether the Winona & St. Peter Railroad Company is indebted to the State of Minnesota, upon its gross earnings from 1865 to 1873, in the sum of about $62,000, as stated in the Railroad Commissioner's report, I have the honor to submit the following statement and opinion:

From an examination of the records on file in the offices of the Railroad Commissioner and State Treasurer I find as follows: That for the year 1864 the gross earnings of the Winona & St. Peter Railroad Company were $151,671.34, on which said railroad company paid into state treasury 3 per cent., amounting to $4,550.14. After this it appears that the company adopted the rule of taxation authorized by section 5, c. 10, Sp. Laws 1865, and under that rule the company has paid into the treasury upon its gross earning amounts following, to-wit:

YEAR.	GROSS EARNINGS.	PER CENT.	AMOUNT OF TAXES PAID STATE.
1865	$250,352 68	1	$ 2,503 52
1866	455,661 67	1	4,556 62
1867	272,805 43	1	4,728 05
1868	519,019 98	2	10,380 40
1869	619,050 12	2	12,381 00
1870	512,816 39	2	10,256 33
1871	444,007 45	2	8,880 15
1872	631,298 41	2	12,625 97
Total tax paid,			$66,312 04

Following the rule of taxation laid down in the act approved May 22, 1857, being an act to execute the trust created by congress, and granting lands to the Transit Railroad Company, I find the amounts due the state upon the gross earnings of said company, from 1864 to 1873, to be as follows:

YEAR.	GROSS EARNINGS.	PER CENT.	AMOUNT DUE THE STATE.
1865	$250,352 68	3	$ 7,510 58
1866	455,661 67	3	13,669 85
1867	472,805 43	3	14,184 17
1868	519,019 98	3	15,570 60
1869	619,050 12	3	18,571 50
1870	512,816 39	3	15,384 49
1871	444,007 45	3	13,320 22
1872	631,298 41	3	18,938 95
Total tax on basis of 3 per cent.,			$117,150 36
Total tax paid,			66,312 04
Tax unpaid,			50,838 32

The above amount ($50,838.32) is the amount which was due the State from the Winona & St. Peter Railroad Company on the first day of March, 1873, assuming the last rule of taxation to be the correct one. Adding to the above amount the difference between 2 and 3 per cent. upon the estimated gross earnings of said company for the year 1873, and the amount reported as due the State from the company by the Railroad Commissioner will be substantially correct. I think the Railroad Commissioner is correct in his conclusion that the company ought to have paid 3 per cent. upon its gross earnings during the years named, instead of 1 and 2 per cent., and that, therefore, there is now actually due the State from said company, on account of back taxes, the sum of $50,838.32. Section 5 of the act of March 4th, (Special Laws 1865,) entitled "An act to authorize the Winona & St. Peter Railroad Company to consolidate with the Minnesota Central Railway Company and to bridge the Mississippi river," furnishes the rate of taxation which said company has followed since the passage of said act, and by virtue of which the company claims exemption from the rate of taxation provided by section 4 of its charter, viz., 3 per cent. upon its gross earnings. In the case of the Winona & St. Peter Railroad Company vs. Waldron, reported in the 11th Minnesota Reports, page 515, the objection was urged by the counsel for Waldron, respondent, that the special act of 1865 was in conflict with section 27 of article 4 of the constitution, viz., "No law shall embrace more than one subject, which shall be expressed in its title," in that it embraced more than one subject, to-wit, consolidation, bridging the Mississippi, and taxation, and the majority of the court sustained the objection.

Cooley, in his work on Constitutional Limitations, page 48, says that if the act is broader than the title it may happen that one part of it can stand, because indicated by the title, while as to the object not indicated by the title it must fall. Some of the State constitutions, it will be perceived, have declared that this shall be the rule; but the declaration was unnecessary, as the general rule, that so much of the act as

is not in conflict with the constitution must be sustained, would have required the same declaration from the courts. If, by striking from the act all that relates to the object not indicated by the title, that which is left is complete in itself,—capable of being executed and wholly independent of that which is rejected,—it must be sustained as constitutional.

In the suit against Waldron only that portion of the act of 1865 embraced in section 4, relative to the fencing of the road of said company, was under discussion as affecting the measure of damages, but the objection made by the counsel went to the validity of the whole act, and the ruling of the court in sustaining the objection would render null and void the whole act, and not simply that portion of it indicated by the title. The objection could not have been taken otherwise than it was, and it is difficult to perceive how the ruling of the court could have been different. Had they held only those portions of the act to be unconstitutional, in accordance with Judge Cooley's theory, not indicated by the title, the section relative to taxation would have certainly showed the fate of the fencing clause.

But if we were to disregard entirely the decision of the Supreme Court, and assume the act to be constitutional, the company could not accept only those portions of the act that would inure to its benefit, and reject the balance. They cannot accept a part without accepting the whole. This doctrine seems to be well established. The object and purpose of the act, as expressed in the title, was to permit the companies named therein to consolidate and to bridge the Mississippi river.

It will not be pretended that the companies ever did consolidate, or in any manner avail themselves of the provisions of this act, save as to the matter of taxation upon gross earnings, and this only on the part of the Winona & St. Peter Railroad Company. It is well known that the Minnesota Central Railway Company, in June, 1867, pursuant to the provisions of an act of the Legislature, approved March 7, 1867, merged with the McGregor Western Railway Company, and thereafter put it out of the power of the companies named in the act of 1865 to consolidate. In section 5 of the act of 1865 this language occurs: "And in consideration of the grants made to, and the privileges conferred upon, the said company, they shall, during the first three years after thirty miles of their respective railroads shall be completed and in operation, on or before the first day of March of each year, pay into the treasury of the State one per centum of the gross earnings," etc., giving the rate of taxation. Then, again, the act provides that such payments shall be in lieu of all taxes, and in full of all claims of the State for the grants made to said company. While the language of the act is not as free from ambiguity as it might be, yet I think it would have only conferred this benefit, in the matter of reduced taxation, upon the consolidated company, and not change the established rate of taxation as to either of said roads in case no consolidation took place.

ST. PAUL, January 30th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. C. K. Davis, Governor:

SIR: I have the honor to acknowledge the receipt of your communication, inclosing certain propositions for an agreed case in the suit of the St. Paul & Chicago Railway Company vs. Horace Austin, as Governor, impleaded with Charles T. Brown *et al.*, trustees of the hospital for the insane, and requesting my opinion, as follows: *First*, is the Governor a necessary or proper party to this proceeding? *Second*, is this statement as correct an exposition of the rights of the State or its institutions as could be set up by answer? *Third*, is the title to these lands vested in these institutions, or is it in the State, the lands being merely reserved and set apart for the institutions?

This is a controversy existing between the St. Paul & Chicago Railway Company, plaintiff, and the trustees of the hospital for the insane, defendants, in reference to certain swamp lands, to-wit, 19,816 78-100 acres, which the Commissioners of the State Land-office, on the fifteenth day of September, 1870, and by authority of the act of February 13, 1865, being an act to appropriate swamp lands to certain educational and charitable institutions therein named, and for the purpose of erecting

a state prison, selected, set apart, and duly certified to the trustees of the hospital for the insane, for the use and benefit of that institution. It is proposed to determine this controversy by submitting the facts upon which said controversy depends to the district court in and for the county of Ramsey for its decision and judgment. I do not think that the joint resolution of the Legislature, approved March 11, 1873, and found on page 284 of General Laws, contemplated or in any manner authorized making the State a party to said controversy, which is done in effect in this proposed case by impleading the Governor.

All that can be gathered from said joint resolution is that the decision and judgment of the court, in case of a submission upon an agreed case or otherwise, should be recognized by the state in the person of its chief executive as decisive of the question in controversy. If the trustees of the hospital for the insane accede to the proposition of the plaintiff, and after a full investigation of all the facts it should be found that the plaintiff is rightfully entitled to the lands in controversy, it is fair to presume that the Governor of the State would respect the decision of the court, and discharge his duty in the premises. I cannot see how the Executive can be considered a necessary party in order to determine the rights of the litigants in this action. The lands in controversy, as is admitted by the case, have been selected and certified to the trustees of the hospital for the insane, in strict conformity with the act of 1865, appropriating said lands. So far as these particular lands are concerned the Governor has no duty to perform; at least, until such time as it shall be decided by a competent tribunal that the act of 1865 is invalid, as conflicting with the prior or vested rights of the plaintiff in and to the unappropriated swamp lands of the state under the act of March 6, 1863. I do not see that the Executive is a necessary party to the determination of that question. For the purpose of this action the title to the lands in controversy may be considered to be in the trustees of the hospital for the insane, and not in the State.

Assuming that by voluntarily becoming a party to the suit your Excellency would become subject to the compulsory process of the court, then I can see a manifest impropriety in thus compromising your position. However, as to the propriety of the Executive being made a party to this controversy, that is a matter which must rest in his judgment and discretion.

I have to say, in answer to the second inquiry contained in your communication, that I have examined the several acts referred to in the proposed case, and find some of the statements contained therein to be inaccurate. This is true of some matters of minor importance, and others of very great importance. I herewith submit a statement of the condition of the swamp lands patented to the State, their disposition, etc., furnished by the Auditor of State. After a thorough examination of the act of March 6, 1863,—an act granting lands to aid the St. Paul & Pacific Railroad Company in the construction of the branch railroad from St. Paul to Winona,—I am of the opinion that the said act does not, as assumed in the proposed case, confer upon said road a grant of 14 full sections to the mile, but only 7 full sections per mile, in the event that less than that number were to be found within the 14-mile limit. The language of the act, so far as it bears upon the point under discussion, is as follows: "There is hereby granted to the St. Paul & Pacific Railroad Company all the swamp lands belonging to this State within the limits of seven miles on each side of the line of said branch road from St. Paul to Winona, as the same shall be located and constructed." It then provides for withholding said lands from market as soon and as often as 20 continuous miles of the road should be located, the terms upon which the same should be certified and conveyed to the company, and also that in case any of said swamp lands within the 14-mile limits were sold or disposed of by the United States, or the State, after any 20 continuous miles of said road should have been completed, and cars running thereon, the amount should be made up to the company out of the swamp lands belonging to the State, to be selected by the company, outside of the said limits.

The act then provides as follows: "And if, upon the completion of any 20 continuous miles of said road as aforesaid, it shall be found that within the said seven miles of said line there shall not be an amount of swamp lands on each side of said

line, belonging to the State, equal to at least seven full sections per mile of said road so completed, then the said company have the right to and may select from the swamp lands belonging to this state, outside of said seven-mile limits, other swamp lands in an amount equal to such deficiency." By no possible construction can the said act be made to confer upon the company 14 sections to the mile, unless, forsooth, that amount of swamp lands belonging to the State had been found within the seven-mile limit, whenever and as often as the company had completed 20 continuous miles of road, with the cars running thereon. The act simply gave them all the swamp lands belonging to the State within the seven miles on each side of their road, whenever the company had complied with the terms of the contract on their part, and in the event that the company did not get an amount of land equal to seven full sections per mile of completed road, then the State agreed to make up the deficiency out of other swamp lands, to be selected by the company.

Grants of land to aid in construction of a railroad should be construed strictly against the grantees. Nothing passes but what is conveyed in clear and explicit language. Dubuque & R. R. Co. vs. Litchfield, 25 How. 66, 68. Where there is doubt, the construction is most favorable for the sovereign, and most strongly against the grantees. City of Alton vs. Ill. Transp. Co. 22 Ill. 68; 5 Gilman, 238. I am aware that the preamble to the joint resolution of the Legislature passed at the session of 1873, purports to interpret the act in question to confer upon said company 14 full sections to the mile; but the preamble is only evidence that the facts were so represented to the Legislature, and not that they were really true. Sedg. Stat. Law, 57.

The preamble is no part of the statute, and, strictly speaking, is without legislative force. It can never enlarge it; cannot confer powers *per se*. Potter's Dwarris. The court must construe the law, and legislative interpretation, though entitled to great respect, cannot control their judgment. If my interpretation of this act be correct, it is unnecessary for me to point out in what particular the proposed case would have to be modified and changed in order to conform thereto. I do not see but that the proposed case correctly recites the several acts as to extensions granted to the company, within which they were to perform their part of the contract.

In answer to the question, "Is the title to these lands vested in these institutions, or is it still in the State, the land being merely reserved and set apart for the institutions?" I find that the Attorney General (see 9 Op. Atty. Gen. 253) decided that the act of congress of September 28, 1850, (9 St. at Large, p. 519,) granting all the swamp and overflowed lands within the State of Arkansas and other states, did of itself pass to the grantee all the estate of the United States therein; that the title of the State did not depend upon the issuing of the patent; that the patent was simply the evidence of the title.

By an act approved March 12, 1860, the provisions of the act of Congress approved September 28, 1850, were extended to the States of Minnesota and Oregon, providing further, however, that the selections from the surveyed lands should be made within a given time. I find that in the opinion of the Attorney General, (8 Op. Attys. 247,) the grant of public land to the State of Michigan (10 St. at Large, 35) in aid of the Sault St. Marie canal, being in terms *in præsenti*, to be selected by an agent, vested a floating title immediately in the State, such title to acquire precision of locality by selections in accordance with the act. A patent is not necessary to perfect the title. The fee in land may be directly passed by statute. Stockton vs. Williams, 1 Doug. 546; Ballance vs. Sesion, 12 Ill. 332; Gregnon vs. Astor, 2 How. 319; Wilcox vs. Jackson, 13 Pet. 498; Strother vs. Lucas, 6 Pet. 763. Assuming, then, the title to the swamp lands to have been in the State, in accordance with opinion of the Attorney General cited above, has the State vested the title in the trustees and officers of the several State institutions named?

That it is competent for the Legislature to prescribe the mode by which the public domain shall be disposed of does not require the citation of authorities. The act of February 13, 1865, appropriating swamp lands, enacts that as soon as the title of the swamp lands donated by Congress to the State of Minnesota shall become vested in this state, the Commissioner of the State Land-office shall, from the

even-numbered sections of any such lands not otherwise disposed of prior to the passage of this act, proceed to select, or cause to be selected and set apart, so many acres for each of the institutions named; that all lands so selected and set apart by the Commissioners shall, from and after said selection, be deemed to be reserved, and irrevocably dedicated and set apart, for the purposes for which the same were selected, and shall, upon the organization of any of the institutions mentioned, vest in the trustees or other officers having control of the same for the uses and purposes stated; that a certificate of the lands so selected, describing them, and the purposes for which they were selected, under the hand of the Commissioner and seal of the State Land-office, shall be received in all courts as evidence of title to said lands in the trustees, etc. As between the trustees of the hospital for the insane and the plaintiffs in this case, or any third party, I think it may be said the title is vested in the trustees. The language of the act would certainly warrant this conclusion. The Legislature, in the passage of the joint resolution authorizing these proceedings, seems to have acted upon that assumption. The counsel for the plaintiff, in their statement of the matters in controversy, seem to have so construed the act. As between the State and the officers and managers of the several institutions, I think it cannot be claimed that the State has divested itself of title, or irrevocably dedicated the same. They stand upon an entirely different footing from private corporations. Though, I believe, unincorporated, yet in their relations to the State they may be regarded as standing in the attitude of public corporations. They are the instruments of the government, created solely for its purposes. They are but parts of the machinery employed in carrying on the affairs of the State, and are subject to be changed, modified, or destroyed, as the exigencies of the public may demand. The trustees and officers of these institutions are the agents of the State, and are subject to its control, as well as everything pertaining to these institutions. The whole transaction amounts to no more than a change made by the public in the manner in which, or the agents by whom, it shall continue to hold and use a certain portion of its property; the very essence of a contract—two parties with mutual obligations—is wanting. Nothing has gone out of the public. I do not find that the officers named could do more than simply hold the lands in trust. They are not authorized to dispose of them. If the Legislature were to abolish the several institutions, or repeal the acts granting the lands, it would not, by such legislation, impair any contract, disturb any vested rights, or in any manner change the *status* of the swamp lands granted. They would remain, as they are now, the property of the State, and subject to its disposal.

ST. PAUL, February 3d, 1874. GEO. P. WILSON, Atty. Gen.

Hon. A. R. McGill, Insurance Com.:

SIR: I herewith inclose the declaration of organization or charter of the Grange Benevolent Life & Accident Association without my approval. The incorporators profess to have organized under and pursuant to title 3, *c.* 34, Gen. St. Section 54 of said title reads as follows: "Any number of persons not less than three may associate themselves and become incorporated for the purpose of establishing and conducting colleges, seminaries, lyceums, or any scientific, medical, legal, agricultural, benevolent, or missionary society, fire department associations, or any society for the purpose of instruction or mutual improvement in any art or science, as provided herein." If the organization is authorized by the foregoing section, it must be on the ground that it is a benevolent society. The word "benevolent" is very broad in its signification, and might be construed to cover stock as well as mutual life insurance companies. From reading the articles of incorporation, and circulars attached to the same, describing the plan and purposes of the organization, I do not think it can be said to be a benevolent society, such as is contemplated by the law. Life insurance companies, whether organized on the mutual or stock plan, are not recognized, either by our statutes or by authors treating upon the subject, as benevolent societies. But conceding the organization to be authorized by the General Statutes, I do not

think that the articles signed and adopted by the Grange Benevolent Life & Accident Association contain all that is required by law. They do not disclose the *plan of operation;* nor the terms of admission to membership, *except that the members shall be able-bodied, and are to be charged equally;* nor the amount of monthly, quarterly, or *yearly contributions required of its members.*

Bliss, in his work on Life Insurance, defines a mutual life insurance company to be one in which there are no stockholders, properly so called, but in which every person insured becomes a member, is entitled to an actual voice in the management of the company, shares in its *profits*, and is bound by its rules. The articles of incorporation provide that the membership fee ($10) shall be absolutely the property of, and belong to, the trustees of the association, and in full compensation for their services. Here is a source of considerable profit in which the members could not share, and over which they would have no control. I think in some other particulars (as disclosed by the circulars attached to the declaration) this company does not answer to the description of mutual life insurance companies as defined and understood, and that the certificate should be refused. The law approved February 29, 1872, was doubtless drawn up and passed with the understanding that the General Laws provide for the organization of mutual life insurance companies, but after a somewhat careful examination I have failed to find any law permitting such an organization.

ST. PAUL, February 9th, 1874. GEO. P. WILSON, Atty. Gen.

To the Honorable Senate of the State of Minnesota:

I have the honor to acknowledge the receipt of the resolution of your honorable body requesting my opinion as to whether a vacancy does not exist in the office of State Superintendent of Public Instruction, and whether it is not the duty of the Governor to appoint some person to fill the office. The act approved March 9, 1867, provided as follows: "The Superintendent of Public Instruction shall be appointed by the Governor, by and with the advice of the Senate, and shall hold his office for the term of two years, commencing on the first Tuesday in April." Prior to that time the Secretary of State was *ex officio* Superintendent of Public Instruction, and discharged the duty of that office.

March 3, 1871, Gov. Austin appointed the present incumbent, the Senate confirmed the appointment, and ever since the first Tuesday in April of that year he has performed the duties of that office. The act approved March 7, 1873,—an act entitled an "Act to provide for the management and government of common schools and school districts,"—repealed the act of March 9, 1867, making the office of Superintendent of Public Instruction a distinct office, but at the same time re-enacted in substance the law of 1867 upon that subject; that is, it provided for the appointment of a Superintendent of Public Instruction by the Governor, by and with the advice of the Senate, who should hold his office for two years, commencing on the first Tuesday in April following such appointment. The act of 1873 originated in the House, passed the Senate March 6, and was approved by the Governor March 7, 1873. On the same day the act was approved, the Governor, pursuant to the authority conferred upon him in said act, appointed the Hon. H. B. Wilson Superintendent of Public Instruction. The Senate on the same day confirmed the appointment, and subsequently—to-wit, on the first Tuesday in April—the appointee qualified and entered upon, and ever since has been discharging, the duties of that office. Therefore, I am of the opinion that the office of Superintendent of Public Instruction is not now vacant, nor has it been during the time for which the Governor was authorized to appoint, whatever may have been the case during the time intervening between March 7, 1873, and the first Tuesday in April following.

ST. PAUL, February 10th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. A. R. McGill, Insurance Commissioner:

SIR: I have the honor to acknowledge receipt of your communication submitting the following questions, and asking my opinion: *First*, is there any law of this State authorizing the organization of mutual life insurance companies, and especially upon the plan as shown by the charter and by-laws of the Minnesota Farmers' Mutual Fire Insurance organization? *Second*, if there is such law authorizing such organization of mutual fire insurance companies, do the said charter and by-laws show upon their face that said Farmers' Mutual Fire Insurance Association has complied with its requirements? *Third*, do the said policy, charter, and by-laws confer any power or authority upon said association enabling it to acquire and hold vested rights, under the constitution or laws of this State, which exempt the association from the provisions and operation of the laws now in force, or which may be hereafter passed by the Legislature of this State, regulating fire insurance associations or companies? In answer to the first question, I would say, that I am of the opinion that there is not at present upon our statute-books any law permitting the organization of a mutual fire insurance company upon the plan of the Minnesota Farmers' Mutual Fire Insurance Association, or upon any other plan. The answer to the first question disposes of the second. The Minnesota Farmers' Mutual Fire Insurance Association was organized pursuant to an act approved August 12, 1858, which said act was repealed in 1866. As to whether their charter was or is in strict conformity with the act, or whether such an organization was authorized by said act, I decline to express an opinion. The law required certain things to be done in order to perfect an organization thereunder, the evidence of which I have not before me, nor is it to be found in the office of the Secretary of State, and probably should not be. Then, again, section 31 of the said act provides that persons acting as a corporation under the provisions of this chapter, (act,) will be presumed to be legally incorporated, until the contrary is shown, and no such franchise shall be declared actually null or forfeited except in a regular proceeding brought for the purpose. Your third question is very general, and I will content myself in answering it in a very general way.

The company named is a private corporation, formed under a general law of the state. All private corporations are supposed to have some vested rights. The charter of a private corporation is a contract, within the meaning of the constitution of the United States, and any act of a State Legislature which violates any corporate rights secured by such charter, without the consent of the corporation, is void as against the constitution. The only ground, therefore, upon which the company can rightfully resist any of the provisions of the general law now in force, or which may hereafter be passed, must be that such provisions are in violation of the chartered rights of the corporation. Waiving this objection, the authority of the Legislature is unrestrained. The company took its charter subject to the general laws, and of course subject to such changes as might be rightfully made in such laws. It is not only the right, but the duty, of the Legislature to make all such reasonable and wholesome laws in regard to the various branches of business and pursuits in the community, as may be necessary for the safety and welfare of the body politic. You can apply these general rules to any case you may have in hand.

ST. PAUL, February 12th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. Henry B. Wilson, Supt. of Public Instruction:

SIR: I am in receipt of your favor asking my opinion on the following questions: *First*, when a school-district has once completed its organization by electing its officers, can it subsequently lose its organization by failing to hold its annual meetings, elect its officers, or make the reports showing the schoolable population for a numbers of years? If so, in how many years? *Second*, if the Board of County Commissioners, upon the petition of the requisite number of legal voters, unite portions of two existing districts into a new district, with a new number, thereby leaving out a part of each of the original districts, thus leaving them without any

organization or without a sufficient number of voters to effect an organization, can the board legally annex such parts of the original districts to adjoining districts without a petition therefor?

In answer to the first question I would say that organized school-districts are public corporations, with certain restricted powers, hence, sometimes called *quasi* corporations. While school-districts are not municipal corporations, inasmuch as the term "municipal," strictly speaking, applied only to incorporated villages, towns, and cities, yet both being public corporations, and the officers of such public officers, the doctrine laid down by Dillon in his work on Municipal Corporations, in regard to the dissolution of such corporations, will apply to the case in hand. He says: "The corporation is mainly and primarily an instrument of the government. The officers do not constitute the corporation, or an integral part of it. The existence of the corporation does not depend upon the existence of officers; the qualified voters or electors have, indeed, the right to select officers, but they are the mere agents or servants of the corporations. If all the people of the defined locality should wholly remove from or desert it, the corporation would, from necessity, be suspended or dormant, or perhaps entirely cease, but the mere neglect or mere failure to select officers will not dissolve the corporations; *certainly not while the capacity to elect remains.*"

Section 1 of our school law provides that "every school-district in the State that has been set off and established under general laws or by special charter, or which may be hereafter formed, set off, or established, is hereby declared to be a body corporate." Section 10 provides that the officers elected at the annual meeting shall hold or continue in office until their successors are elected and qualified. But the law provides that when a new district is formed the officers elected at the meeting for organization shall hold their respective offices till the next annual meeting, and that the director elected at such annual meeting shall hold for one year, treasurer for two years, and clerk three years. The only question that could arise would be in regard to the officers of a newly-organized district holding over in case no annual meeting was held nor officers elected on the first Saturday in October following the organization, inasmuch as the law does not in terms provide for their holding longer than until the next annual meeting. "To guard against lapses sometimes unavoidable the provision is almost always made in terms that the officer shall hold until his successor is elected and qualified. But even without such a provision the American courts have not adopted the strict rule of the English corporations, which disables the mayor or chief officer from holding beyond the charter or election day, but rather the analogy of the other corporate officers who hold over until their successors are elected, unless the legislative intent to the contrary be manifested."

While there are many conflicting decisions upon the point raised in the above question, the weight of authority seems to be to the effect that unless the time during which officers shall hold is restricted in positive terms from public consideration, they will continue to hold until they are superseded by the election of other persons in their places. The authority is conferred upon the County Commissioners to form new districts, alter boundaries of districts, or unite districts upon the proper petition; but when a district is once duly organized, I am of the opinion that such organization would continue, notwithstanding the failures named in your inquiry. I am aware that many serious injuries might and would result from such omission, but the presumption, however violent it may seem, is that public officers will do their duty, and if they do not, the law furnishes to the public, or individuals having an interest, a remedy. In answer to your second question, I would say that the case you present is an anomalous one. There is no question about the authority of the County Commissioners, upon proper petition, to form a new district out of parts of two or more districts, but in the formation of new districts great care and discretion should be used in order that justice may be done to all concerned. In this instance a new district is created out of two existing districts, leaving simply a fraction each of the old districts, and those fractions widely separated, and with insufficient population to effect an organization. Properly speaking, a district is

annulled only when its parts are attached to other districts, so that no part of the original district remains. If any part of it remains as a distinct district, although its name and number may be changed, it is not annulled or disorganized. But, recurring to the doctrine as stated by Dillon, the case in hand presents an instance where "the capacity to elect," or to effect an organization, has ceased, and, for the purpose of this case, the old districts may be considered defunct corporations. I am therefore of the opinion that the County Commissioners might, on their own motion, attach the balance of the territory in the old district to existing organized districts adjoining.

ST. PAUL, February 17th, 1874. GEO. P. WILSON, Atty. Gen.

Thomas Rutledge, County Attorney, Watonwan Co.:

SIR: You state that in many of the school-districts in your county taxes have been illegally assessed or levied; that in one instance a special school tax of 90 mills on the dollar valuation was voted and levied; and inquire, shall not the auditor strike out such special tax, and let that portion remain which has been legally levied? I would answer this question by saying that I think no such authority is conferred upon the auditor. The tax in question was, I infer, extended upon the tax duplicate, and has been in some instances paid. It is too late now to raise the question as to its validity before me. The tax must be considered and treated as regular and valid until otherwise decided by some competent judicial tribunal. The auditor has authority to make certain corrections, but such action as you suggest would be clearly unauthorized. You say, "Some of the towns are holding special meetings, and rescinding the votes by which the tax was levied, on the ground that they are not able to pay;" and inquire, "Can they do it?" It is hardly necessary to say that any action they may take at this time can avail nothing.

ST. PAUL, March 24th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. Edwin W. Dike, State Treas.:

SIR: I herewith submit the form of a bond such as required by the act of Legislature approved March 9, 1874, relating to the duties of the State Treasurer and the care of the public funds.

ST. PAUL, March 25th, 1874. GEO. P. WILSON. Atty. Gen.

Know all men by these presents, that we, ———, ———, ———, all of the State of Minnesota, are held and firmly bound unto the State of Minnesota in the sum of ——— dollars, lawful money of the United States, to the payment of which, well and truly to be made unto the said State of Minnesota, we bind ourselves, our heirs, executors, and administrators, and assigns, firmly by these presents. Sealed with our seals this ——— day of ———, A. D. 1872. Whereas, pursuant to an act of the Legislature of the State of Minnesota approved March 9, A. D. 1874, entitled "An act to amend section 28 of title 4 of chapter 6 of the General Statutes of Minnesota, relating to the duties of the State Treasurer and care of the public funds, the Treasurer of said State has selected the * * * of St. Paul as one of the banks in which to deposit the funds of the said State of Minnesota, in accordance with the provisions of said act; and whereas, said bank has agreed with the Treasurer of said state to pay to him, for the use of said state, interest on all daily balances in the hands of the said banks at the rate of 4 per cent. per annum, said interest to be paid on the last day of each and every month: Now, therefore, the conditions of the above obligations are such that if the * * * of St. Paul, aforesaid, well and truly pay over all moneys belonging to the State of Minnesota which shall be deposited with said bank by the Treasurer of said State, upon the order of said Treasurer, or that of his duly-authorized agent, and shall pay interest at the rate of 4 per cent. upon all daily balances in the hands of the said bank belonging to the

State of Minnesota at the close of each and every month, then this obligation to be null and void; otherwise, to remain in full force and effect.

In the presence of

———— [Seal.]
———— [Seal.]
———— [Seal.]
———— [Seal.]

State of Minnesota, County of ———, *ss.:* Be it known that on this ——— day of ———, A. D. 1874, came before me, personally, ———, to me well known to be the same persons who executed the foregoing bond, and they severally acknowledge the same to be their own free act and deed.

————

State of Minnesota, County of ———, *ss.:* Came before me, personally ———, and being by me first duly sworn, doth say, each for himself, that he is the surety above named; that he is a resident and freeholder of and in the state of Minnesota, and worth the amount of ——— dollars above his debts and liabilities, and exclusive of his property exempt from execution.

————
————
————
————

Subscribed and sworn to before me this ——— day of ———, A. D. 1874.
———— [Seal.]

Hon. C. K. Davis, Governor:

SIR: Your letter of the 30th inst., inclosing a communication from W. H. Mellen, of Murray county, received to-day.

Mr. Mellen is correct in the opinion that the bond of the County Attorney of Murray county should be filed with the clerk of the district court in Cottonwood county,—Murray county being attached to Cottonwood county for judicial purposes. Section 2, c. 82, p. 201, Gen. Laws 1873, referred to by Mr. Mellen, would include the bond of the County Attorney and that of the Register of Deeds, but not of the other county officers. The law requires that the County Attorney shall execute a bond to the County Commissioners of his county in the penal sum of $1,000, to be approved by said Commissioners, which bond, together with the oath of office required by law, shall be deposited in the office of the clerk of the district court. If the bond of the County Attorney of Murray county is not on file in Cottonwood county, the Board of Commissioners of Murray county have neglected their duty in not depositing it in the proper office. I assume that the County Attorney executed a bond, as required by law, and that the same was duly approved. Whether the bonds of the various county officers in Murray county have been filed or recorded, as the case may be, or not, cannot in any way affect their validity. Murray county is as secure with the bonds of its various county officers in the hands of the County Commissioners, so long as they remain there, as though they were all duly recorded. The last legislature passed an act for filing the official bonds for county officers in the office of the Secretary of State, but the act does not include the bond of County Attorney nor that of the Register of Deeds.

ST. PAUL, March 31st, 1874. GEO. P. WILSON, Atty. Gen.

O. C. Gregg, County Auditor:

SIR: Your letter of the twenty-sixth of last month was received in my absence. I think the law would have to be pursued strictly in order to render the proceedings thereunder valid, and hence a majority of the people in the town of Marshall petitioning the Board of Commissioners of the County not to grant licenses would not

have the same force and effect as though at the annual election they had voted the question of license. A license to sell liquor, granted by the United States, will not do away with the necessity of taking out a license under the law of this state; nor will such license protect a party in selling liquor where the sale thereof is prohibited. Our Supreme Court, I think, in a case to be found in the 16th Minnesota Reports, decided that the County Commissioners must use their discretion in the granting of licenses. The statute says they may grant licenses. The court says, in view of the dangerous character of the business, they ought to be careful and cautious in granting licenses. Now, it may not be possible for your Board of Commissioners to find any suitable person or persons to grant licenses to in your county, and especially in the town of Marshall.

ST. PAUL, April 8th, 1874. GEO. P. WILSON, Atty. Gen.

S. Lee Davis, Auditor:

SIR: In your favor of the 26th inst. you inquire "whether the law requires you to certify that taxes are paid, so that deeds can be recorded, where the payment of taxes is made by third parties, who hold tax titles, and not by the owner of the fee. For example: A. conveys land to B. in fee-simple; the taxes have been paid by C., who holds tax titles. Must the auditor certify that taxes are paid? If not, is the register required to record the deed of A. to B. without such certificate?"

My predecessor in this office, in answer to a question in substance the same as the foregoing, gave it as his opinion that the auditor should certify the taxes to have been paid, and I see no reason to dissent from that opinion. The auditor's deed, by virtue of the statute, vests in the purchaser at the tax sale a valid title in law and equity, and thereafter the lands described therein stand upon the tax duplicate in the name of the grantee in the deed, and the taxes thereafter are assessed in his name. He is supposed to be the absolute owner of the land so purchased, and is entitled to pay the taxes thereon. When taxes have been paid by sale of the lands, or by forfeiture to the state, the auditor's certificate should be according to the facts in the case; that is, show the manner in which the taxes have been paid, so that the grantee of A. (referring to your example) should not be misled or injured by the unqualified indorsement, "taxes paid." If A. were to convey to C., no question would be raised by the auditor as to his duty in the premises; nor if C., who holds a tax deed, were to convey to A. In either case the auditor would be justified in certifying the taxes paid. In the first instance, however, no transfer upon the tax duplicate would be necessary. In the case of the conveyance from A. to B., while the tax duplicate would disclose no interest in A., but, on the contrary, would show the lands in question to stand in the name of C. by virtue of his deed from the state, yet this fact would not justify the auditor in withholding his certificate, but would justify him in refusing to transfer the same upon his record. He has the record evidence in his office of the fact that the title to the lands in question is vested in C., and that until such time as C. conveys or loses the same by his own laches, said lands must stand upon the records and be assessed in his name; and yet the knowledge of that fact would not excuse him from certifying the taxes to have been paid upon the deed of A. to B., however foolish or worthless he may regard such conveyance. I think the register ought to refuse to receive or record the deed from A. to B. unless it bore the auditor's certificate of taxes paid.

ST. PAUL, April 9th, 1874. GEO. P. WILSON, Atty. Gen.

E. J. Orr:

Your favor of the tenth inst. received. By reference to sections 34 and 35 of chapter 10, Statutes of 1866, it will be seen that the town clerk's oath of office is required to be filed in the town clerk's office. Section 65 of the same chapter requires the town clerk to file his official bond in the office of the clerk of the district court. Section 68 of the same chapter was amended by act approved February

16, 1874, so as to allow town clerks to appoint deputies and provide for filing the oath of deputy town clerks in the office of the clerk of the district court.

ST. PAUL, April 14th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. C. K. Davis, Governor:

SIR: I have the honor to acknowledge the receipt of your favor of the 8th, inclosing a communication from the Hon. Willis Drummond, Commissioner of the General Land-office, requesting a relinquishment of certain lands he claims have been erroneously certified to this State as internal improvement lands, under the act of September 4, 1841. The act of our Legislature, approved February 28, 1866, gives to your Excellency the authority to reconvey lands to the United States when they have been erroneously or improperly certified to the State. Section 8 of the act of September 4, 1841, reads as follows: "And be it further enacted, that there shall be granted to each State, specified in the first section of this act, 500,000 acres of land for the purposes of internal improvement: provided, that to each of the said States which have already received grants for said purposes, there is hereby granted no more than a quantity of land which shall together with the amount such State has already received as aforesaid, make 500,000 acres; the selection in all the said States to be made within their limits, respectively, in such manner as the Legislature thereof shall direct, and located in parcels conformably to sectional divisions and subdivisions of not less than 320 acres in any one location, on any public land except such as is or may be reserved from sale by any law of Congress, or proclamation of the President of the United States, which said locations may be made at any time after the lands of the United States in said States respectively shall have been surveyed according to existing laws; and there shall be and is hereby granted to each new State that shall hereafter be admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission, and while under a territorial government, for purposes of internal improvement as aforesaid as shall make 500,000 acres of land to be selected and located as aforesaid."

The doctrine that the general government may make a perfect grant directly, and without the issuing of a patent or any other evidence of title, is well established by an almost uniform course of decisions in the State and federal courts. In the case of Foley vs. Harrison, 15 How. 447, the supreme court of the United States, in construing the act of 1841, held that the words of the first clause of section 8 were inoperative to pass the fee from the general government. The words import that a grant shall be made in the future. The language of the grant to the new States, however, is that of a present grant. Its words are, 'there shall be and is hereby granted,'—words which operate to vest the specific quantity in each new State immediately upon its admission into the Union. The selections by them are only subject to three qualifications: *First*, they must not be of lands reserved from sale by any law of Congress or the proclamation of the President; *second*, they must be in parcels of not less than 320 acres each; and, *third*, the parcels selected must be in such form as to correspond with the survey of the United States when made. The selection will not, of course, become absolute and definite until the survey. Until then the parcels selected may be subject to a possible reservation from sale. Wilcox vs. Jackson, 13 Pet. 499; Doll vs. Meader, 16 Cas. 295; Summers vs. Dickinson, 9 Cal. 554; 5 Op. of U. S. Attys. Gen. 247, 253, 254-390.

In the case of Bendworth vs. Lake, 33 Cal. 255, the court, speaking of this grant, uses this language: "When the selection and location are once made pursuant to the legal directions, of lands subject thereto, the general gift of quantity to the state becomes a particular gift of the specific lands located, vesting in her a perfect title to the same." The acts of March 3, 1857, and of March 3, 1865, under which the St. Paul & Pacific Railroad Company claim the lands in dispute, each contain the language following: "That any and all lands heretofore reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever,

be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through reserved lands, in which case the right of way only shall be granted subject to the approval of the President of the United States." In a case reported in 9 Wall., (Railroad Company vs. Fremont County, 89,) it appears that the plaintiff claimed title to certain lands within the county of Fremont, under a grant to the state to aid in the construction of railroads. The county claimed title to the same lands under the swamp land grant of September 28, 1850. The grant to the State to aid in the construction of railroads contained a reservation couched in precisely the same language contained in the grants to this State, to-wit, in the acts of March 3, 1857, and March 3, 1865. And the supreme court held that the lands in controversy were otherwise appropriated, and were "reserved" for the purpose of aiding the States in their objects of internal improvements. This opinion was subsequently confirmed by the supreme court of the United States in the case of Railroad Company vs. Smith, 9 Wall. 95. But the language of the swamp land grant differs in many important particulars from the grant of September 4, 1841. The grant of 1850 was of a particular class of land or kind, viz., "swamp and overflowed lands made unfit thereby for cultivation," and imposed upon the Secretary of the Interior the duty of making out accurate lists and plats of said lands, and at the request of the Governor to patent the same to the State. The grant of September 4, 1841, was of no particular kind or class of lands, and all selections were to be made subject to the conditions hereinbefore named.

The grant of lands to the Territory of Minnesota, approved March 3, 1857, gave every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads and branches, and provided for making up any deficiencies arising from the fact of land having been sold or pre-empted; the selections so made to be within the 15-mile limit. The act of March 3, 1865, increased the grant to 10 sections, and allowed indemnity lands to be selected within 20 miles from the line of the several roads and branches; and among other things it provides that the lands granted by this or prior acts shall not in any manner be disposed of except as the same are patented under the provisions of this act; and it further provides "that as soon as the Governor of the State of Minnesota shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads, it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced in this act." The foregoing will doubtless be sufficient to take the lands in controversy out of the list from which selections could be made by the state as internal improvement lands under the act of 1841. In view of these facts and the reasoning of the court, in the cases cited, I am of the opinion that the request made by the Commissioner is in accordance with law and should be complied with, however much we may regret the consequent loss to the State. I am informed by the Auditor of State that the statements made in the Commissioner's letter are in accordance with the facts.

ST. PAUL, April 14th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. Evan Morgan:

SIR: Your favor of the sixth inst. came duly to hand, but on account of urgent official business I have delayed answering until now. Section 9, art. 4, of the constitution reads as follows: "Sec. 9. No Senator or Representative shall, during the time for which he is elected, hold any office under the authority of the United States or of the State of Minnesota, except that of postmaster."

I think that when you qualified and took your seat as a Representative, you thereby forfeited the office of Justice of the Peace; or, in other words, your acceptance of the office of Representative necessarily operated as a vacation of the office of Justice. Section 1, art. 4, of the Constitution declares that "the judicial power of the State shall be vested in a Supreme Court, District Courts, Courts of Probate, Justices of the Peace, and such other courts inferior to the Supreme Court as the Legislature may from time to time establish by a two-thirds vote." Section 1, art.

3, of the Constitution declares that "the powers of the government shall be divided into three distinct departments,—legislative, executive, and judicial,—and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in instances expressly provided in this constitution." Aside from this constitutional inhibition, the doctrine is well settled at common law that if a party accepts another office which is incompatible with the one he holds, the first one will become vacant.

ST. PAUL, April 24th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. Wm. R. Marshall, Ch. Bd. R. R. Com.:

SIR: In your favor of the twenty-second inst. you ask: "Does the proviso (paragraph 14) to section 9 of the act creating this board authorize the commissioners to prescribe differing terminal charges according to distance of transportation or otherwise? In other words, what effect has said proviso on the requirement of section 5 of said act, in regard to schedule of maximum rates for receiving, handling, and delivering freights, etc., as limited by paragraph 2 of section 9?" Section 5 of said act requires the Commissioners to make for each of the railroad corporations doing business within this State, on or before the first day of August, A. D. 1874, a schedule of reasonable maximum rates of charges for any and all distances: *First*, for the transportation of freight of all kinds and qualities; *second*, for transportation of passengers; *third*, for the transportation of cars; *fourth*, for receiving, handling, and delivering freight and cars. Subdivision 2 of section 9 (copy of laws published by commissioners) prohibits the charging, collecting, or receiving at any point, by any railroad corporation, a higher rate of toll or compensation for receiving, handling, or delivering freight of the same class and like quality than it shall at the same time, charge, collect, or receive at any other point upon the same railroad.

Subdivision 14, of the said section 9, provides that nothing in the act shall be construed to prevent any such railroad corporation from charging and collecting such a terminal charge for the receiving, handling, shipping, and delivering of any freight to be transported, or which has been transported, over a less portion of its whole line than the whole thereof, as may be fixed and prescribed by the Railroad Commissioners in the schedule made as aforesaid. Subdivision 15, of said section 9, declares that the said terminal charge shall not exceed 40 cents per ton on all kinds of grain, lumber, coal, salt, and wood. That it was the purpose of the Legislature, by the provisions of subdivision 14, to in some manner qualify that which had gone before, and to confer some privilege or right upon the companies, is apparent; but just what was intended is left so uncertain by the language used that it seems impossible to give any force or effect to the same without overriding more clearly-expressed provisions of this act, or destroying, to a certain extent, its purpose. It is a well-known rule in the construction of a statute that every part of it must be viewed in connection with the whole, so as to make all its parts harmonize, if possible, and give a sensible and intelligent effect to each. There are certain rules of construction that may aid us in the matter. "If he who has expressed himself in an obscure and equivocal manner has spoken elsewhere more clearly on the same subject, he is the best interpreter of himself; he ought to interpret his obscure or vague expressions in such a manner that they may agree with those terms that are clear, and are without ambiguity, which he has used elsewhere. We must prefer the evident meaning of the whole law to the inconsistent meaning of a defective expression. That which helps us most in the discovery of the true meaning of the law is the reason of it, or the cause which moved the Legislature to enact it."

The duty plainly imposed upon the Commissioners by section 5 of the said act is to establish "reasonable maximum rates for receiving, handling, and delivering of freights and cars," for each of the railroad corporations doing business within the State. Subdivision 2, § 9, certainly requires that such rates shall be uniform *at all* points upon the same road for freights of the same class and like quantity.

Subdivision 4, § 9, forbids any discrimination in this regard against persons at the same point.

Now, in what respect do the provisions of subdivision 14 modify or change the foregoing, or the duties of the Commissioners in the premises? If subdivision 14 has any significance whatever, it must be found in the words, "to be transported, or which has been transported, over a less portion of its line, than the whole thereof." For, to strike out this expression, or these words, is to say that the railroads may collect such nominal charges for receiving, handling, and delivery of freights as the Commissioners may prescribe. A very seif-evident proposition. How much does it add to the meaning of this proviso by saying that the railroad corporations may collect such a terminal charge for the securing, handling, and delivery of freight to be transported over a less portion of their lines than the whole thereof as may be fixed by the Commissioners in the schedule made in conformity to section 5? If this proviso means anything, it means that the Commissioners are only to fix a schedule of rates for receiving, handling, and delivering freights carried over a less portion than the whole of their line, or else to establish such rates only for intermediate points, and leave the charge at terminal points in the discretion of the corporations.

Either construction would not only be forced, but would bring the proviso in direct conflict with other provisions of the act, about the meaning of which there can be no doubt; and in addition thereto either construction would, to a certain extent, destroy the purpose of the act. The intention of the Legislature in passing the act was to establish uniform rates; or, in other words, to prevent unjust discriminations against persons and places. The cost of receiving, handling, and delivering of freights or cars is the same whether the distance transported is 10 or 100 miles; or at least this is the theory upon which the Commissioner must proceed, in my judgment. The cost of transportation the distance actually traveled is provided for in a different schedule. Distance cannot, therefore, enter into the consideration of this matter. Subdivision 8, § 9, requires that the companies shall furnish equal facilities at all points for loading and unloading and hauling of freights. This they are supposed to do, and it follows, therefore, that with the same facilities they can handle freight at the same cost to themselves at all points. But whether this be true in point of fact or not, it is a matter the Commissioners cannot inquire into. The rate established by them must be uniform at all points on the same line.

ST. PAUL, May 25th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. H. B. Wilson, Superintendent of Public Instruction:

SIR: Your favor of the first inst., enclosing communications of E. J. Collins, County Superintendent of Schools in Brown county, received. Mr. Collins states that at a meeting for organization, the legal voters of District 41 in Brown county, voted to build a school-house in the center of the district, or as near as possible thereto; that said district consists of sections 4, 5, 6, 7, 8, 9, 16, 17, and 18; that notwithstanding the vote of the districts, and the fact that a site was offered in the center of the district, and another 80 rods east of the center, the treasurer and director had the school-house built 35 rods north of the south-west corner of section four, on the line between sections four and five. He then asks: "Can the tax-payers of the district be compelled to pay for the house in its present location? Must the house remain in its present location? If not, what steps should be taken to effect its removal?" You append the inquiry: "Would one trustee be competent, under the law, to fill vacancies, if the other two move away, die, or resign?" The purpose of the legal voters was to have the school-house built in the center of the district. But if, for any reason, it could not be built in exactly the center of the district, then it became the duty of the trustees to locate it *as near* the center as possible, in accordance with the vote of the district. The trustees had no discretion in the matter save in designating the precise spot on which the school-house should be built, in case the cen-

ter of the district could not be obtained, or for any sufficient reason was unsuitable. It appears that the trustees built the school-house well to the northern boundary of the district, and in so doing ignored the vote of the district in fixing the site. *In this they clearly exceeded their authority, and the district would not be bound by their action, and could not be compelled to pay for the house.*

The statute provides that the site for a school-house shall not be changed after being designated "without having two-thirds of the legal voters of the district voting in favor of such change." I infer that such action on the part of the district has never been taken. It does not appear from the communication whether the district has ever levied a tax for the purpose of building a school-house, nor that the trustees have ever obtained for the district the title to the ground upon which it is built. If a tax was levied and a fund provided for purchasing a site and building a school-house, and that fund has been appropriated by the trustees in purchasing the present site and paying for the school-house, and the district is dissatisfied with the location, the statute provides that the trustees, when directed by a majority of the qualified voters at any legal meeting of the district, "may sell or exchange any such site or school-house." Not knowing the exact *status* of the affairs of the district, it is impossible for me to give any definite instructions. If the tax has been levied and is in course of collection, any tax-payer may have his remedy in court,—it being too late to raise the question before me.

The question of removal must depend also upon the shape the affairs of the district have assumed. If the money of the district is invested in the ground and school-house where located, and the district has a perfect title, the house might be removed to a more convenient locality,—for instance, the site first designated,—and the grounds sold by direction of the legal voters.

The law provides that in case of any vacancy in the board of trustees, the vacant office shall be filled by the remaining members until the next annual meeting, when the vacancy shall be filled by election for the unexpired term. The case you present is an anomalous one, and was not contemplated by those who framed the law.

Subdivision 3, § 1, *c.* 4 of the General Statutes reads as follows: "Words purporting to give a joint authority to three or more public officers, or other persons, shall be construed as giving such authority to a majority of such officers or persons." The duties of the treasurer, clerk, and director are clearly defined, and cannot be performed by any one else; that is, each officer must perform the specific duties imposed upon him by the statutes. To this there are one or two exceptions made, in the case of the absence or refusal of officers to act. Section 19 of the school law provides that the legal voters, *when lawfully assembled,* not less than five being present, shall have power, by a majority of votes of those present, to elect a director, clerk, and treasurer, and, when necessary, to choose a clerk *pro tem.* While this section, doubtless, refers more particularly to the annual meeting, I see no reason why the legal voters, lawfully assembled in a special meeting, could not exercise any of the powers specified therein. Of course, officers elected at such special meetings would only hold until the next annual meeting, when the vacancy would be filled by election for the unexpired term.

This, it occurs to me, would be the better and more satisfactory manner of filling vacancies, rather than for the remaining member to exercise the very questionable authority of filling such vacancies by appointment.

ST. PAUL, June 3d, 1874. GEO. P. WILSON, Atty. Gen.

Hon. E. W. Dike, State Treasurer:

SIR: In your favor of yesterday you proposed the following question: "When a county has once let the keeping of the funds to a bank, can the bids be opened again if there are other competitors? If so, when?" After an examination of the statute authorizing the depositing of the county funds in certain banks to be designated by the Board of Commissioners, I have come to the conclusion that the mat-

ter rests entirely in the discretion of the Commissioners. By inviting proposals, and designating particular banks in which the funds of the county shall be deposited, the Commissioners do not thereby enter into a contract with the designated banks that the funds of the county shall be deposited in such banks for any given length of time. The banks bidding for the deposits, in filing the bond required by the act, attach no condition to the effect that they will pay such a rate of interest on monthly balances, provided the Commissioners will direct the funds of the county, or any portion thereof, to be deposited in such banks for a given time. The Commissioners have no authority to accept a bond so conditioned, or to make any contract for any definite period. This matter is very wisely left in the discretion of the Board of Commissioners. They may at any time invite new proposals, and designate new depositories. By so doing they may possibly obtain much better rates of interest upon monthly balances, and the security be equally satisfactory. Sureties acceptable to the board six months ago might to-day, by reason of adversity in business and other causes, be very unsatisfactory. The Commissioners might be dissatisfied with the banks, even though the security was regarded as sufficient. Many reasons might operate upon their minds, and, in their judgment, make a change desirable. By this act the Commissioners are, to a certain extent, made the custodians or guardians of the county funds, and great diligence and watchfulness is demanded at their hands. It is not to be presumed that they will abuse their discretion, but exercise it in the interest of the county.

ST. PAUL, June 5th, 1874. GEO. P. WILSON, Atty. Gen.

Thomas Rutledge:

SIR: Your letter, inquiring on behalf of the Commissioners of your county whether a woman can hold the office of County Superintendent, was duly received, but on account of my absence from the capital on official business, has not been answered. I do not agree with you in the conclusion that a woman cannot, under our constitution and laws, hold the office of County Superintendent. If it were an elective office, of course your conclusion would be correct, as the constitution of our State prohibits any but males, having the right to vote, from holding elective offices. I am aware of no sufficient reason why women may not be appointed to the office of County Superintendent. They certainly may possess all the qualifications to entitle them to the appointment. It is quite as common in our state to find women possessing "high moral character and literary attainments" as those of our own sex. From an examination of the school law, I can discover no duty imposed upon the Superintendent which could not be performed by one sex as well as the other—perhaps not quite so conveniently. In many of our sister states fully one-half of the County Superintendents are females. I think they ought not to be debarred by their sex, when there exists no constitutional or statutory prohibition. The people are interested in having good schools, and to this end demand that the Superintendents shall discharge their duties efficiently, and to do so must possess the qualifications prescribed by law. I have no official information upon the subject, but venture the assertion that there are more first-grade certificates held by females than by males in this state. They have demonstrated their ability to teach and govern well, and ought to be allowed all the latitude given them by the laws of our state.

ST. PAUL, June 27th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

SIR: Your favor inclosing the certificate of Charles W. Johnson, Secretary of the Senate, in favor of R. J. Keenan, for the sum of one hundred dollars for services rendered, pursuant to resolution of the Senate of last winter, is received. You desire my opinion upon the point as to whether it is your duty to draw your warrant upon the Treasurer for the sum named therein, in view of the act of March 6, 1873, relative to the compensation of the officers and members of the Legislature. The

resolution referred to in the Secretary's certificate was adopted by the Senate, March 5, 1874, and reads as follows: "Resolved, that the Secretary be authorized to employ R. J. Keenan, after the close of the session, for such period, not exceeding twenty days, as may be necessary to assist in closing up the business of his office." It is well known that, prior to the passage of the act of March 6, 1873, it was customary, at the close of each session of the Legislature, to appropriate by resolution to each officer some compensation in addition to the per diem fixed by law, and that the act of March 6, 1873, was designed to cut off all such extra appropriation. With that purpose in view, the compensation of the officers, or at least some of them, was increased quite materially. The compensation of the Secretary of the Senate and Chief Clerk of the House was increased from seven to ten dollars per day. The law of 1873 provides also that the Secretary of the Senate and Chief Clerk of the House shall be paid each one hundred dollars for fully and completely indexing the printed journals of their respective bodies; and it also provides that the compensation therein fixed should be in full for all services which are therein required to be performed, whether rendered during the session or subsequent to the adjournment thereof. The Secretary was authorized to employ Mr. Keenan to assist him in closing up the business of his (the Secretary's) office. Very clearly, the Secretary could not have received any additional compensation for performing the duties imposed upon him as such officer, so long as the law of 1873 remained unchanged. But it was his privilege to do what the resolution of last winter purports to authorize him to do, namely, employ the assistance of one or more in order to close up the business of his office with dispatch. I am of the opinion that the duties named in the resolution of the Senate, to be performed by R. J. Keenan, belonged to the Secretary of the Senate, and are fully covered by the law of March 6, 1873; that the Senate could not change or modify the law by simple resolution, nor evade its purpose and intent. In the second place, the resolution does not, as is customary in like cases, direct the Secretary to issue his certificate in favor of Mr. Keenan for the sum of $100, or any amount whatever, but simply authorizes him to employ him, which the Secretary might have done without the aid of the resolution. If the case is a meritorious one, as it doubtless is, the succeeding Legislature can apply the remedy.

ST. PAUL, July 1st, 1874. GEO. P. WILSON, Atty. Gen.

To the Honorable Board of County Commissioners of St. Louis Co.:

GENTLEMEN: I have received and carefully read the communications addressed to me by your honorable body, having reference to the action of your board on the fifteenth day of June last, in letting the publication of the delinquent list, and submitting the question, "Can the Commissioners now rescind the resolution passed at that time, designating the Duluth *Minnesotian* as the newspaper in which said lists should be published?" It is alleged that the Commissioners who were present on the fifteenth day of June were deceived and misled by interested parties, and should, therefore, be permitted to rescind the action taken by the board at that time. I have carefully considered the misrepresentations said to have been made to the Commissioners who participated in the letting, but have discovered nothing that, in my judgment, could justify the board in arbitrarily setting aside what they have already done, and reletting the publication of the lists. The law fixed the day upon which the Commissioners should meet to designate the paper in which the delinquent tax lists for 1873 should be published, and made it their duty to let the same to the lowest bidder. It was not the duty of the Auditor to give notice of said meeting, no more than to give notice of the January meeting of the board, which had never been required; nor was it his duty to advertise for proposals; the law itself gives the notice to all concerned, that the lowest bidder furnishing the requisite security should have the list for publication. I think it would have been well if the Auditor had given notice of the meeting, and the purpose of the meeting; but the fact that he did not is wholly immaterial, looking at the matter from a legal stand-point;

the laws were published officially, and distributed throughout the State, and the Commissioners were bound to take notice that it was their duty to meet on the third Monday in June last, and let the delinquent tax-list for 1873 to the lowest bidder. In reference to the fact that on that day proposals would be received for the publication of said list, only the publishers of newspapers at the county seat of St. Louis county were interested, as the competition would have been confined, under the law, to such publishers. They certainly could not complain that they were not notified. They, in all probability, published the laws by direction of the Secretary of State, and if they did not the law gave them due notice. It is a well-settled principle that ignorance of the law cannot be urged as an excuse. Then, again, the new tax law, since the day of its passage, has been more generally discussed in the newspapers of the State, and particularly that portion of it under consideration, than any law passed at the last session of the Legislature, and newspaper men were supposed to be conversant with it.

It is urged that certain parties—among others, the Auditor and County Attorney of St. Louis county—informed the Commissioners that it was their duty to let the publishing of the list on that particular day, otherwise other and lower bids might have been obtained. While I am of the opinion that the law is directory rather than imperative in this regard, and that it would have been competent for the board to have adjourned to some other day, within a reasonable time, and on that day have let the publishing of the list, yet the courts might hold otherwise, and in so doing sustain the County Auditor in his view. In any event, the persons so advising the board simply gave their construction of law, and it could hardly be claimed that in so doing they were guilty of misrepresentation. It is claimed that the County Auditor represented to the board that the tax-list was unusually small, and could not, at 15 cents per description, exceed a certain amount, whereas the cost would largely exceed the amount stated, the list being about the same as in former years. Conceding the point that such misrepresentations were actually made, and made for a purpose, would such misrepresentation render invalid the contract entered into by the board with the Duluth *Minnesotian*? I apprehend not. Whether the list was the usual length or not, it was equally the duty of the board to let the same to the lowest bidder, and they could not be heard to say that because the list was represented as unusually small, therefore they concluded to let it at 15 cents per description. But I cannot see that the Commissioners are in fault in this matter. They accepted the only bid that was before them. Had they accepted such bid and closed the contract early in the day, to the exclusion of other bids presented to them during business hours of the day, then their action might have been justly criticised, and I think successfully resisted. But, as I understand, they postponed action until the close of business hours (5 o'clock P. M.) before accepting Pressnell's bid, and that no other bid was presented to the board. It certainly was not the duty of the board to look up the publishers of Duluth and solicit competition. If it had been, they doubtless could have visited all the publishers in the "Zenith City" on that day. But I infer they assumed, and had a right to assume, that no other bids would be offered, otherwise they would have been presented on the day designated by law. It appears however, that on the twelfth day of March last R. C. Mitchell, editor of the Duluth *Tribune*, published in his journal the following notice:

"*To the Board of County Commissioners and to the County Auditor*—GENTLEMEN: As retrenchment is now the order of the day, I hereby offer to publish the delinquent tax-list this spring at one-third the rates allowed by law. Now, if you would really like to save the county probably $500, here is your chance. What say you? Yours, truly, R. C. MITCHELL."

That he subsequently, to-wit, on March 19th, repeated substantially the same offer. While the commissioners had seen the above notice, as I infer from the communication sent me and herewith returned, yet they disregarded Mr. Mitchell's proposition, and for the reason, I assume, that it was not properly before them.

The offer of Mr. Mitchell was made a month and a half prior to the time when the new tax law took effect, and from the phraseology of the notice it is quite evident Mr. Mitchell had reference to the publication of the delinquent list between the

third Monday in March and the third Monday in May, under the old law, which was done in some of the counties. But, whatever may have been Mr. Mitchell's intention, I coincide with the board in the view that the offer was not properly before them, and hence could not have been acted on by them. The letting took place three months after the offer was made. I think the board were justified in concluding that Mr. Mitchell did not propose to stand to his offer; otherwise he would have laid his proposition before them when they convened, as is usual and customary in such cases.

I think the offer of Mr. Mitchell affords no ground upon which the board could nullify their contract.

I am of the opinion that the board are bound by the contract made with T. H. Pressnell, on the fifteenth day of June last, so far as the same pertains to the publication of the delinquent tax-list of 1873, and hence cannot now review their action. I arrive at this conclusion reluctantly, well knowing that the purpose of the law was to invite competition. and have the publication made at the least possible expense to the people. At the same time, Mr. Pressnell had a right to put in his bid at the maximum rate, and I cannot see why the Commissioners are to blame for accepting the bid. They did all that could be reasonably expected of them.

It is urged that the Commissioners did not understand Mr. Presnell's offer to include the delinquent tax-list for tax of 1872, and previous years, but only the delinquent list for 1873. But the offer specifically includes both lists, and the acceptance by the board is as broad as the offer; and hence, unless the board were incapable of reading English, and the same was misread to them by some designing person, they would not be heard to deny the terms of their contract. However, I am of the opinion that the offer ought not to have been accepted by the board for the publication of the delinquent list for tax of 1872 and previous years. The act itself does not designate the day upon which the Commissioners should meet for that purpose, but only that the publication of the list should be let for the lowest sum, and the newspaper designated by resolution of the board at least 10 days prior to the first Monday in August, 1874. The day not being fixed, interested parties had the right to assume that due notice would be given when the board would receive proposals. Parties may not have desired to bid for the publication of the delinquent list for tax of 1873, but to bid for the delinquent list of 1872 and prior years.

The letting of the last-named list on the fifteenth day of June, without notice, was, I think, in violation of the spirit of the act, and, it seems to me, good faith and fair dealing would suggest that, while attaching no blame to Mr. Pressnell for making the bid, he should voluntarily forego any legal claim he may have in the premises, and throw the publication of the delinquent list of 1872 and prior years open to competition.

ST. PAUL, July 8th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. H. B. Wilson, Supt. Public Instruction:

DEAR SIR: It appears from the statement of J. S. Rankin, County Superintendent of Hennepin county, that in April, 1872, school-district No. 52 in Hennepin county was divided, and a new district created out of a portion of the old; that at a meeting of the legal voters of district No. 52, held October 7, 1871, a motion was made and carried to the effect that "if the district be divided, the new part be allowed their proportion of the money on hand."

The amount of money on hand at that time was ascertained to be $420. No division of the district was made until one year thereafter, and it does not appear that at the time the new district was created there were any funds in the treasury of the district nor any action taken as to a division of the funds.

Application having been made by the officers of the new district for their proportion of the $420, the question is raised whether they have any legal claim upon the money; or, rather, whether the officers of the old district would be justified, legally, in paying them their just proportion of the money. While the County Commis-

sioners of the several counties may form new school-districts, upon the petition of a majority of the freeholders, who are legal voters residing in each district to be affected thereby, the school law makes no provision whatever for an equitable apportionment or division of the property, funds, and liabilities, where a district is divided and a new corporation created. In many of the States such a contingency is provided for by express statute, and should be in this State. It is held in Massachusetts that when a new district is created out of a part of the territory of an old one, the remainder, bearing the old name, constitutes the old corporation, retains all its property, powers, rights, and privileges, and remains subject to all its obligations. It continues seized of all its property, including the public money apportioned to it, entitled to all its rights of action and bound by all its contracts, and the new district is entitled to none of its property and bound by none of its obligations. See 4 Mass. 384; 16 Mass. 76. See, also, 35 Md. 206; 19 Mich. 203; 16 Conn. 149; 10 How. (U. S.) 511; 2 Wend. 109. The doctrine just stated may need to be qualified, possibly, as to property having a fixed location and falling within the bounds of the new district.

I am of the opinion that, in the case under consideration, the new district has no legal claim upon the funds of the old district, and that the old district, even if willing so to do, as seems to be the case, cannot so divert the funds of the district without legislative authority.

ST. PAUL, July 10th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. C. H. Berry:

DEAR SIR: The question submitted by you on behalf of Dr. J. B. Le Blond, County Superintendent of Common Schools in Houston county, touching his compensation as such Superintendent, is fully covered and decided in an opinion rendered by my predecessor in this office to the Superintendent of Public Instruction, bearing date October 17, 1873, and in which opinion I fully concur. It does not appear from your communication, or the petition accompanying it, when Dr. Le Blond was appointed such Superintendent, or at what amount his compensation was fixed; but I conclude, from statements contained in the petition, that he must have been appointed by the Board of Commissioners of Houston county at the January session, in 1872, and his compensation fixed at $600 per annum; that he entered upon the discharge of his duties as such Superintendent on the first Tuesday in April, 1872, and served as such officer, by virtue of said appointment, until the second Tuesday in April, 1874. The act of the Legislature approved March 7, 1873, repealed the law under which the appointment was made and the compensation fixed; that the act of March 7, 1873, made no provision for continuing in office the appointees under the old law, nor did it authorize the Commissioners of the several counties to make new appointments until the January session of 1874. The minimum and maximum rates of compensation of Superintendents is fixed under the act of March 7, 1873, (*vide* section 50.) It being admitted that Dr. Le Blond discharged the duties of Superintendent of Common Schools in Houston county during the year beginning April 2, 1873, and ending April 2, 1874, the question arises, what was the measure of his compensation as such officer,—the amount fixed by the Board of Commissioners, to-wit, $600, or the amount fixed by the act of March 7, 1873? I am of the opinion that he was entitled to the amount fixed by the act of March 7, 1873, which would be $10 for each organized district in said county, during the said period. When the number of organized districts was less than 100, the law fixed the amount of the Superintendent's compensation absolutely, leaving no discretion to the Board of Commissioners in that regard.

The contract between the Board of Commissioners of Houston county and Dr. Le Blond, as Superintendent of Common Schools of said county, so far as his compensation was concerned, was terminated by the repeal of the act under which the contract was made. Having come into office rightfully, and continuing in office by common consent, nominally under the new act, he was an officer *de facto*, and as such officer entitled to the compensation fixed by such act.

It is a well-settled principle that the Legislature, in the absence of constitutional limitation, may create and abolish offices, add to or lessen their duties, abridge or extend the term of office, and increase, diminish, or regulate the compensation of officers at its pleasure. 1 Dill. Mun. Corp. § 168, and authorities cited.

ST. PAUL, July 10th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. S. P. Jennison, Sec. of State:

DEAR SIR: Your favor of the eighteenth of June was duly received and would have been answered before this except for my absence on official business.

The first question submitted by you is as follows: "Shall the Secretary of State, in accounting and paying for the stitching, trimming, and covering of pamphlets which are not executive documents, stop at the maximum named in the law for that work, though he may think that rate less than a reasonable sum?"

The answer to this question is contained in the question itself, inasmuch as the law fixes the maximum rate for such work. The Secretary has no discretion to exercise, whether in his judgment such rate be reasonable or unreasonable. The rate fixed in the contract for doing the work, which could not exceed the maximum rate fixed by law, would, of course, govern the Secretary in accounting and paying for such work. You state that the Printing Commissioners have been and are of the opinion that each of the reports in the volume of Executive Documents is considered by itself an executive document, and have, therefore, audited and paid bills for stitching and binding them according to the contract prices for binding executive documents in brochure, regardless of the number of pages in each document, and submit the question as to whether, in my judgment, such interpretation is correct.

That the annual reports of the State officers constituting the executive department are often referred to and spoken of as executive documents is true, but I am of the opinion that they are not so regarded in the act regulating the duties of the Printing Commissioners. See act approved March 16, 1868. Section 28 of said act requires that at the same time the documents mentioned in sections 26 and 27 are printed in pamphlet form, there shall be printed, in the same type, 400 copies of each document named in said section, which shall be bound together in a volume, and styled "Executive Documents;" but this designation is not maintained throughout the act, the word "public" being frequently substituted for the word "executive." The documents referred to in sections 26 and 27 of said act are the reports of the several State officers, of the Superintendents of the several State institutions, and the messages of the Governor, all of which are required to be printed in pamphlet form, and covered in brochure covers.

Section 2 of said act, in defining what should be covered by and included in the third class of public printing, makes the distinction between the reports of the executive officers and the executive documents provided for in section 28.

Section 3 of said act is somewhat obscure, in that the proviso fixing the rates does not use the same terms in describing the work that is used in that portion of the section providing for proposals to do the work; but said section does, in terms, require that the Commissioners shall invite proposals for binding the laws, journals, and volumes of public documents, and the party or parties bidding for the work in class 3 must specifically state the price for binding the *volumes* of *public documents*. Then comes the proviso to section 3, fixing the rate for binding the session laws, journals, and *executive documents per volume* in *brochure covering*. The laws, journals, and executive documents are grouped together throughout the act, and almost invariably the word "volume" or "volumes" either precedes or follows the words "executive documents" or "public documents" wherever they are used in the act, thus clearly maintaining the distinction between the reports of executive officers as well as other officers and the executive documents. See sections 2, 3, 10, 12, 14, 32, 33, 34, 35, and 36.

It follows, therefore,—*First*, that the price allowed by law for binding the "ex-

ecutive documents" in brochure covering, per volume, cannot be applied to the reports of the executive officers any more than it can be to the reports of the several State institutions; *second*, that all reports must come under the rate fixed for "stitching, trimming, and covering pamphlets," viz.: "One hundred cents for one hundred copies not exceeding one hundred pages." But you suggest that the law does not require the Commissioners to invite proposals for "stitching, trimming, and covering pamphlets," which is true, but it does not require them to invite proposals for "folding, stitching, and binding." While the same language is not used, it was doubtless intended to cover the same work. In any event, upon the strictest construction the matter of folding simply would be left without any limitation upon the price. The work of trimming would doubtless fall in the same category with collating, drying, and pressing, and be included in other work. I infer this from the fact that the law requires no proposals in terms for this work, and in the contract of Norman Wright, inclosed by you, purporting to cover all the work in this class, nothing is said about trimming. It is also true that the law requires that the bids shall specify the price for folding, stitching, and binding separately, while the maximum rate is fixed in gross, and at an amount that would make it difficult to have the two correspond. But if this difficulty can be overcome in reference to the reports of officers of the State institutions printed in pamphlet form, it can be overcome in printing the reports of executive officers in pamphlet form; the contract can be made as well under the law for one as the other. But you suggest that many of the reports made by the executive officers exceed 100 pages, and therefore, under the interpretation I have given, the law upon this subject would be without any limitation upon the price. But I do not so understand the law. If a pamphlet contained but 10 pages the cost would be the same for stitching, trimming, and covering as though it contained 100 pages. Now, would not the rule follow, adopted in reference to estimating composition? If a pamphlet exceeded 100 pages, and was less than 200 pages, or did not exceed 200 pages, would not the contractor be entitled to two cents instead of one. The law fixes the rate, and that rate can be applied to any given case more accurately, doubtless, by one of the profession than by myself.

You suggest, again, that the volume of executive documents never has been bound in brochure covering, and never was intended to be, and from this you infer that the words "executive documents" and "brochure covering" must refer to the reports of the executive officers. But the answer to this is found in section 12, which distinctly states that the *journals, executive documents, and laws* required to be *printed and put up in book form* shall be bound with brochure covering. The language of the act on this point is so clear and precise that no interpretation is necessary.

I am aware that the volume of "Executive Documents" has never been bound with brochure covering, but the laws and journals have been, and always are; and yet the law, in language too plain for interpretation, requires precisely the same binding. There is nothing in the whole act either requiring or permitting the Commissioners to make any distinction in the matter of binding between the laws, journals, and executive documents. If so, I have failed to find it. It is true that section 3 fixes the price for pasteboard and other more expensive binding, but the prices so fixed apply as well to the laws and journals as to the executive documents. While it might be inferred from section 3 that other than brochure covering might be used in binding the laws, journals, and executive documents, I think section 12 by its terms excludes all inferences to be drawn from the language used in section 3. Entertaining the views that I have herein expressed, it is unnecessary for me to answer in detail the questions not hereinbefore specifically referred to.

ST. PAUL, July 16th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: You duly referred the following questions propounded by the County Auditor of Pope county to me to answer, and I herewith respectfully sub-

mit my answers thereto: *First*, can a delinquent tax-list be advertised in a paper having a "patent outside," printed out of the county, the inside being printed in the county? *Second*, are lands held under the homestead act, after they are proved up or under cash entries, taxable as real estate prior to issuing of the patents?

Under both of the acts passed at the last session of the Legislature, providing for the assessment and collection of taxes, it is required that the Board of County Commissioners of the respective counties shall designate some newspaper of general circulation, printed in the English language, which shall have been published and circulated for at least four months prior to the time of publishing the notice and delinquent tax-list, either at the county seat, and in the county where the real estate is situate, or at some other place in the county, or in the county where the proceedings are instituted, or within the judicial district.

I am of the opinion that it is wholly immaterial whether the newspaper so designated has a "patent outside" or a "patent inside," or both. The more patent the better. One of the definitions of patent is "open to the perusal of all;" "printing" and "publishing" are not synonymous terms. Bouvier defines publication to mean the act by which a thing is made public. Webster says, "To publish is to make known to mankind or to people in general that which before was private or unknown." Where the type are set and the impressions made is a matter of no importance. Hinchman vs. Burns, 21 Mich. 556. The law permits the delinquent list to be partly published in a supplement, but requires that the supplement be issued with the paper designated to do the work.

The second question must be answered in the affirmative. In either case put, the party is entitled to his patent. The conveyance has not been made, but the government of the United States only holds the legal title in trust for the purchaser. The land no longer constitutes a part of the public domain. The United States have ceased to have any proprietary interest in it. It is henceforth private property, and as such subject to taxation. See Astrom vs. Hammond, 3 McLean, 108; Carroll vs. Perry, 4 McLean, 26; Carroll vs. Safford, 3 How. 441; Gryner vs. Niswanger, 15 Ohio, 361; Eaton vs. Norton, 20 Wis. 449; Ross vs. Supervisors, 12 Wis. 38.

ST. PAUL, July 16th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: I am in receipt of your favor inclosing the communication of A. W. Bangs, County Attorney of Le Sueur county, in which the following questions are asked: 1st. When a mortgage is foreclosed before the time of redemption expires, can both land and mortgage be taxed? 2d. Can a county board refuse taxes paid on homestead, while the title still remains in the Government? 3d. Can they abate such taxes if not paid? 4th. Can county board abate illegal taxes when they have run more than one year from January succeeding their levy? 5th. If a person wishes to pay delinquent taxes for 1872 and previous years, must he pay charges and interest on the same, or simply the taxes and interest at 12 per cent.?

The first question must be answered in the negative. The mortgage is simply security for the debt, and the debt is satisfied by the foreclosure and sale. The title and the right of possession upon foreclosure rest in the purchaser, subject to defeasance by redemption. Claims and demands secured by deed or mortgage are "credits," and as such should be entered for taxation. When paid and satisfied, as they would be in the case proposed, they would no longer be taxable *as such*. See Minn. Reports.

In answer to the second, third, and fourth questions, I would say that only improvements made by persons upon lands held by them under the homestead laws of the United States (the fee of which lands is still vested in the United States) can be taxed, and any tax levied upon such lands would be improperly levied; and, under the authority given to the County Commissioners in section 164 of the new tax law, they might refund such tax if paid, and if not paid might abate the same, although

the authority to abate taxes is not so clearly given as under the old law, but may be implied. In this connection I desire to say that where parties have "proved up" under the homestead act, and are entitled to their patents from the government, the lands at once become taxable, although the patents may not have been issued.

The statute is very clear upon the point that all applications for relief against taxes improperly levied or paid by mistake, must be made within one year from the first day of January next ensuing the levy of such taxes. At the expiration of that time the authority of the board to refund or abate would cease.

I would say, in answer to the fifth and last question, that the language used in section 29, p. 94, Gen. Laws 1874, is too plain for interpretation. Simply the taxes, with 12 per cent. per annum, from the time they become delinquent, is asked, provided the payment is made on or before August 1, 1874.

ST. PAUL, July 28th, 1874. GEO. P. WILSON, Atty. Gen.

F. A. Elder, Esq.:

DEAR SIR: Your letter of the fourteenth inst., I suppose, came duly to hand, but on account of the neglect of the janitor, who distributes the mail, I did not receive it until to-day. I have no objection to indicating my views upon the matters contained in your letter, but am not authorized to give any official opinion. I suppose you will take the list as returned to you by the Auditor, and upon each description as therein given you will be entitled to the statutory fee. In some of the counties, in order to "make fat" for the *printer*, and possibly for the *clerk*, the Auditors have taken particular pains to subdivide property to the last degree. Such action is manifestly in conflict with the spirit of the act. By reference to section 4 you will see what is meant by the term "tract," or "lot," "piece," or "parcel," of land. If you should own a "government section," it should be assessed to you as a section, and not in forties. Blocks and half blocks, in cities and villages, owned by any person or corporation, should be assessed as such, and not subdivided into lots. The first case you put presents a very objectionable manner of assessing; that is to say, to name a number of lots in one block, and then put an aggregate value on the lots; If they have an aggregate value placed on them by the assessor they would constitute but one description, as it would be impossible to afterwards subdivide; but if a separate value was given to each lot, then each lot would constitute a description. In the second case you put, each tract must constitute a description, as no two of the pieces are contiguous. They could not be assessed nor sold in the way described by you. See cases in Minn. Reports. The last case put in your letter I am not certain about, but incline to the opinion that you could charge for only one description, with the tax for the several years charged against it. There would be but one judgment entered against the property covering the tax for the several years. As it is made the duty of the State Auditor, primarily, to interpret the new tax laws, you might communicate with him if you desire. He is now absent, otherwise I would confer with him.

ST. PAUL, July 28th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. Henry B. Wilson, Supt. Pub. Instruction:

DEAR SIR: You request my opinion upon the following: "Can the County Superintendent of Schools in either of the counties interested in a joint district lawfully examine and license a teacher for such district, or must it be done by the County Superintendent of Schools for the county in which the school-house is located; or must the Superintendents of all the interested counties join in the examination and licenses?" The jurisdiction of a County Superintendent of Schools is co-extensive with the limits of his county. In him belongs the duty of examining and licensing all teachers of common schools within his county, and of visiting and instructing such schools within his county. This jurisdiction is exclusive. In the case of joint districts, therefore, the location of the school-house must furnish

the test as to whom belongs the supervision of the school, and the licensing of the teacher for such school.

ST. PAUL, September 8th, 1874. GEO. P. WILSON, Atty. Gen.

Percy B. Smith, County Attorney, Washington Co.:

DEAR SIR: I have examined the questions submitted by you in your favor of the twelfth inst., and while I find the authorities not uniform, I am of the opinion that the weight of authority is decidedly against the jurisdiction of Washington county in the matter of the murder of Savison, the wound being inflicted in Washington county, Minnesota, and the death occurring in Pierce county, Wisconsin.

In 101 Mass. (Com. vs. Macloon) the position taken by Mr. Bishop in his criminal works, and the cases cited by him in support of his position, to the effect that in all cases an indictment would lie in the county or jurisdiction where the blow was given, is reviewed and overruled. There can be no doubt of the jurisdiction of the Wisconsin authorities; and, as a mattter of safety, I would recommend you to turn the accused over to them for prosecution, or, if they are unwilling to accept the trust, you can have the accused indicted in your county for assault with intent to murder.

ST. PAUL, September 16th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. H. B. Wilson, Supt. Public Instruction:

SIR: In your favor of October 29th, you state that in many of the counties of this State the money paid to the County Treasurers for licenses granted by the County Commissioners, pursuant to chapter 16 of the General Statutes, is appropriated and used for purposes other than the support of the common schools, and that likewise the license money paid to the authorities of the several incorporated cities of the State, for the privilege of vending intoxicating liquors, is applied to other purposes, and ask if these moneys do not belong to the school fund of the respective counties?

Section 2 of chapter 16 of the General Statutes provides that any person applying for license to sell intoxicating liquors shall, before the same is issued, pay the County Treasurer of the proper county a sum not greater than $100, nor less than $25, per annum, at the discretion of the Board of County Commissioners. Section 42 of the act of March 7, 1873, for the government and management of common schools, requires the County Treasurer of each county to set apart for the support of schools all moneys arising from the issuing of liquor licenses.

I can discover no other statutory provision appropriating to any purpose or fund the moneys arising from the issuing of licenses to sell intoxicating liquors by the Commissioners of the respective counties, and therefore am of the opinion that the said money should be credited to the fund for the support of schools. But while this is true of money paid for licenses granted by the County Commissioners of the several counties, I do not think that this rule will apply to the moneys paid to the authorities of incorporated cities for licenses to sell intoxicating liquors granted by such authorities, except it be by virtue of some special and unusual provision. The general act for the incorporation of cities confers upon the common council of incorporated cities the power to grant licenses to persons dealing in spirituous, vinous, or fermented liquors, and gives to such common council the management and control of the finances and all the property of the city.

The misappropriation of the moneys belonging to the school fund, complained of, can doubtless be remedied by directing the attention of the officers of the several counties to their duty in the premises.

ST. PAUL, November 9th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. H. B. Wilson, Superintendent Public Instruction:

SIR: It appears from your communication of this date that at the annual school meeting held in district No. 72, in Houston county, a site was designated for a school-house which the district contemplates building. After viewing the ground, two-thirds of the voters in the district were dissatisfied with it, for various reasons, and accordingly signed a petition to have a special meeting called to change the site. Legal notice of such special meeting was given; that at the time and place designated in the notice, 17 out of 20 legal voters residing in the district were present and voting. The meeting was duly organized and a vote taken upon the question of changing the site for the school-house; 13 out of the 17 legal voters present voted for the proposed change, and 4 against such change. One John Beach, a legal voter of the district, who signed the petition for the special meeting, was unable to be present at the meeting, but the next day after the meeting signed and delivered to the trustees of said district a written statement to the effect that he was in favor of the change of the site, and would have voted for it had he been present at the meeting. I am asked to decide, upon this statement of facts, whether the officers of the district would be warranted in purchasing the site designated at the special meeting, and in proceeding to build thereon a school-house for the district, having in their possession a fund for that purpose. I am of the opinion—*First*, that no legal effect can be given to the statement of Beach, namely, that he was in favor of the change of site, and would have voted in the affirmative had he been present; *second*, that to have effected the change in the site, it would have required an affirmative vote of 14 out of the 20 legal voters of the district. If I am correct in these conclusions, it would be unlawful for the officers of the district to build upon the site proposed at the special meeting.

ST. PAUL, November 10th, 1874. GEO. P. WILSON, Atty. Gen.

Benj. G. Reynolds:

DEAR SIR: Your favor of the twenty-sixth inst. received. Touching the question you submit, Dillon, in his work on Municipal Corporations, § 153, lays down the rule as follows: "Statutes requiring an oath of office and bond are usually directory in their nature, and unless the failure to take the oath or give the bond by the time prescribed is expressly declared *ipso facto* to vacate the office, the oath may be taken and bond given afterwards, *if no vacancy has been declared.*" I find the rulings in this department have been in accord with the foregoing. See Op. Attys. Gen. 268; citing 21 Pick. 75. In proceeding under section 3, *c.* 79, Gen. St., the summons and complaint would have to be signed by me in my official capacity.

ST. PAUL, November 25th, 1874. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

SIR: There can be no question but that it was intended that the tax certificates, assignments, and certificates of redemption which the County Auditors are authorized to execute under chapters 1 and 2 of the General Laws of 1874 are entitled to record without the customary attestation and acknowledgment required by law in the case of deeds, mortgages, etc. The law prescribes the form in which the State Auditor shall execute such certificates, and provides expressly that they may be recorded as other deeds of real estate. There is not necessarily any conflict between these acts upon this subject, and the general laws pertaining to the execution of instruments conveying an interest in real estate and the Register of Deeds' duty in recording such instruments. But if such conflict does exist, the general laws would have to yield to the specific provisions of the acts of 1874.

ST. PAUL, November 25th, 1874. GEO. P. WILSON, Atty. Gen.

R. M. Richardson, Register of Deeds, Stevens County:

DEAR SIR: In your favor of yesterday you state that you have been elected Register of Deeds, County Attorney, and Judge of Probate of Stevens county, and inquire whether you can lawfully hold the three offices at the same time. I find no statutory inhibition, but am inclined to regard the offices of County Attorney and Probate Judge as incompatible. The one is executive and the other judicial, and hence ought not to be held by the same person at the same time. I can see no objection to your holding the offices of Register and County Attorney, or Register and Judge of Probate; but would advise you not to attempt to hold the three offices at the same time.

ST. PAUL, December 1st, 1874. GEO. P. WILSON, Atty. Gen.

Hon. H. B. Wilson, Superintendent of Public Instruction:

DEAR SIR: My opinion is requested upon the following questions:

1st. Can a school-district dismiss from office a member of the school board who refuses to discharge the duties of his office, or who incites the scholars to violence or rebellion against the teacher?

2d. Is a director who refuses to sign a teacher's contract, or refuses to attest an order for the payment of teachers' wages, liable to suit under the section of the school act in relation to penalties?

3d. Is that provision of section 81, relating to the attendance of teachers upon teachers' institute, and the closing of schools for such purposes, to be construed as applying to institutes held by the County Superintendents, as well as to those held under the direction of the Superintendent of Public Instruction?

4th. If a teacher closes his school for the purpose of attending an institute, must he teach enough longer to make up this lost time; or may he deduct the same from the amount of his wages for the full time, and collect for the time actually taught?

I find that the authority to dismiss a trustee, or, in other words, to declare his office vacant, after such trustee has duly qualified and entered upon the duties of his office, is not given, except in the case of a clerk, and then only on account of absence, inability, or refusal to draw orders for the payment of money when authorized by a vote of a majority of the board to be paid. It is, perhaps, well that such authority does not exist. While the power, if so conferred, would in some instances be exercised judiciously and for the good of those concerned, I am satisfied that it would be more frequently abused, and would operate to the great detriment of the school generally. School-district quarrels, resulting often in protracted litigation, have done more to paralyze the schools and destroy their usefulness than all other causes combined. It might be well to amend the law by conferring upon a majority of the board the authority to dismiss for certain specified reasons, as in the case of the clerk, but not leaving it to the caprice or discretion of the majority to resolve that the director, treasurer, or clerk, as the case may be, has neglected his official duties, or produce a disturbance in the school by bad counsel, and therefore his office be declared vacant. I would say, in answer to the second question, that a majority of the trustees can hire a teacher for the district, and the contract so made will be as binding on the district as though all the trustees had united in making it. The refusal of the director to sign the contract would work no injury, and would not subject him to a penalty, even in case the law attached a penalty for the neglect of official duty on the part of the director. I do not find that the school law imposes any penalty upon a director who refuses to attest an order drawn for the payment of teachers' wages. It provides that every person duly elected to and accepting the office of director, treasurer, or clerk of any school-district, *who shall neglect or refuse to enter upon the duties of his office, and serve therein faithfully*, shall forfeit the sum of $10, etc. The section from which I have quoted is doubtless the one to which you refer, but I am of the opinion it could have no application to the case in hand. I think the third question submitted must be answered in the affirmative. Section 62 of the school law, in defining the duties of the

County Superintendent, requires that "he shall organize and conduct at least one institute for the instruction of teachers in each year, if he deems the same necessary." Section 81 of the same act makes it the duty of the Superintendent of Public Instruction to "hold annually, in the sparsely settled counties of the State, as many teachers' institutes as he shall find practicable."

It then provides that during the time of holding a teachers' institute in any county, it is the duty of all teachers to attend such institute or present to the County Superintendent satisfactory reasons for not so attending. The language used in this section is certainly broad enough to include the institutes held by County Superintendents, as well as those held by Superintendents of Public Instruction. I see no reason why the law should not be so construed. I am confirmed in this view by the fact that the law makes a distinction between teachers' institutes and what are termed normal training schools. The Superintendent of Public Instruction is authorized to hold the former in sparsely settled counties, and the latter in such thickly settled localities as he may deem advisable. The proviso to section 18 seems to refer only to teachers' institutes as distinguished from normal training schools. It is true, the law does not prohibit the Superintendent of Public Instruction from holding teachers' institutes anywhere in the State, but evidently the intention was to substitute normal training schools for the teachers' institutes in the older and more densely settled counties. While a teachers' institute is in progress, "any school that may be in session in the county may be closed at the request of the teacher, in order that he may attend the institute; but the district shall not be liable for the wages of such teacher while such school is closed." I think the last clause was not intended to relieve the teacher from the fulfillment of his contract with the district, but rather to negative the idea, that might otherwise prevail, that because the law made it the teacher's duty to attend the institute, the time so occupied should be counted the same as though he were actually engaged in teaching.

ST. PAUL, December 9th, 1874. GEO. P. WILSON, Atty. Gen.

N. McFadden, County Treasurer:

DEAR SIR: Your favor of the 15th inst. received. I am of the opinion that parties holding the orders of your county, which had been presented for payment, and payment refused, would be entitled to interest upon such orders when offered in payment of taxes due the county from the date of such demand. You are obliged to take the orders at their face value. By this is undoubtedly meant, not only what the order may call for on its face, but whatever may be legally due the holder as damages by reason of payment having been refused when the indebtedness matured. You state that on the thirtieth day of July last the County Commissioners for your county, passed a resolution that the general county poor, road, and general school taxes, should be paid in cash or orders drawn on each specific fund, and ask whether their action was legal.

If the County Commissioners intended by their resolution to instruct you not to accept in payment of taxes, due to any particular fund, orders payable out of other funds, then they were simply declaring that which is made your duty by law. County orders are receivable for county taxes only, and town orders for town taxes. In other words, one political subdivision cannot be made to pay the indebtedness of another.

In answer to your third question, I would state that your compensation as Treasurer being payable in the same manner that the County Attorney receives his salary, namely, upon the warrant of the County Auditor, I do not see but that you stand in exactly the same position, and will have to suffer to the extent of the depreciation of your county orders.

ST. PAUL, December 18th, 1874. GEO. P. WILSON, Atty. Gen.

J. M. Burlingame, County Attorney:

DEAR SIR: Section 67, tit. 8, p. 181, Bissell's Statutes, furnishes the rule that must govern your Commissioners in the matter submitted by you. I assume that the Commissioner who created the vacancy was selected to serve for the regular term of three years; that at the next annual election held after such vacancy occurred it was filled by the election of another resident of the district. Such person would hold only during the unexpired portion of the regular term, and until his successor was elected and qualified. Now if the regular term of the Commissioner creating the vacancy would have expired January 1, 1875, then it was the duty of the electors of his district to have elected a Commissioner for a regular term, beginning January 1, 1875, at the general election in November last, and the person so elected would be entitled to represent the district in the Board of County Commissioners. The duty of your Commissioners, as I view it, is to inform themselves from the official records as to the facts in the case; and if they find that the regular term of the Commissioner creating the vacancy expired January 1, 1875, and that the person now claiming to represent the district on the board was elected at the last annual election by the electors of said district, it would be their duty to recognize such person. He would have a right to qualify and claim his seat.

The returns made and certified to the County Auditor, together with his certificate of election from the proper officer, would be conclusive in his favor, except in the event of a direct proceeding to try the question of title to the office. If the present incumbent has another year to serve by virtue of his election to fill the unexpired portion of the regular term, then the election last November was a nullity.

ST. PAUL, January 2d, 1875. GEO. P. WILSON, Atty. Gen.

Benj. Soule, County Attorney, Princeton, Minn.:

DEAR SIR: The law requires that real estate shall be assessed to the owners thereof, but provides that an error in this particular shall not render the assessment illegal. The purpose is to close the account between the owner and the State when a sale is made; *secondly*, and more particularly, to secure the prompt payment of taxes, and at the same time have the land entered upon the tax-list in the name of the real owner. Where a piece of land stands upon the tax-list in the name of any person, company, or corporation, and a deed of conveyance is presented to the Auditor of the county from such person, company, or corporation of said land, he would have a right to assume that such person, company, or corporation owned the land in question, and it would be his duty to transfer the same upon his books, whenever the taxes due thereon were paid. But if it should occur, as in the case you put, that the property in question stood upon the list in the name of a person other than the grantor in the conveyance, it would be the duty of the Auditor, in my opinion, to first satisfy himself that a transfer had become necessary for the purposes of taxation by reason of a sale and conveyance thereof by some one having the right to convey. I am aware that this view is open to the same objections, but unless some such rule is observed by the Auditor, the purpose of the law will in a measure be frustrated. If the Auditor is to regard the law as imperative, and hence not competent for him to exercise any judgment or discretion in the matter, your property or mine may be conveyed by any unknown individual, and thereafter will stand upon the list in the name of a person having no claim or title to the same. A. may transfer land to B., and many years thereafter some defect is discovered, and a deed is obtained to perfect the same. Such deed, as is often the case may run to A. instead of B., inuring, however, to the benefit of B. Manifestly, in such case, it would not be the duty of the Auditor to make a transfer of the land upon his books, notwithstanding the law requires him to certify to a lie in order that the deed may be recorded. It often happens that patents from the government are brought in for record long after the title has passed from the grantee in the patent, but if the letter of the law is to be followed in such cases, the Auditor must make the transfer, notwithstanding he knows that the grantee has no interest in the

property. Until a change is made in the law in this particular, I think the Auditor must exercise his judgment as to whether a transfer on his books has become necessary for the purposes of taxation.

ST. PAUL, January 9th, 1875. GEO. P. WILSON, Atty. Gen.

Benj. Bursby:

DEAR SIR: Your favor of the first inst. received. The appointee of the board would unquestionably have a right to act until his successor was elected or appointed and qualified. If your newly-elected clerk failed to qualify in the time fixed by law, it would have been competent for the balance of the board to have declared a vacancy, and filled the same by appointment until the next annual meeting. But if the board failed to take such action, and the newly-elected clerk subsequently came in, qualified, and demanded the office, although two months and a half may have elapsed since his election, I think he would have been entitled to the office. You should have declared the office vacant, and filled the same by appointment, in case the officer-elect neglected to accept within 10 days after notice.

ST. PAUL, January 14th, 1875. GEO. P. WILSON, Atty. Gen.

Amasa Bowen, Register:

DEAR SIR: I think that you are entitled to recover from the county for your services in recording the official bonds of county officers. The law simply requires that the officers elected shall execute bonds in the amounts designated by law, with sureties, to be approved by the Board of County Commissioners. The officers have no further control over their bonds after they are approved or submitted to the board. It then becomes the duty of the board to place such bonds in the hands of the Register of Deeds for record, and should pay the statutory fee therefor.

The matter of forwarding the same to the Secretary of State is of small consequence in this case.

ST. PAUL, January 21st, 1875. GEO. P. WILSON, Atty. Gen.

H. H. Velie, County Attorney:

DEAR SIR: There is a conflict between section 180, *c.* 8, of the General Statutes and the act of March 3, 1869, but I am of the opinion that the act of 1869, being the last expression of the Legislature on that subject, and passed to meet just such cases as the one you suggest, should control.

I therefore concur with you in the opinion that the death of the person elected as County Attorney before he qualified did create a vacancy in the office at the expiration of the then incumbent's term, and that the Board of County Commissioners, at their first session thereafter, were authorized to fill the same by appointment.

ST. PAUL, January 21st, 1875. GEO. P. WILSON, Atty. Gen.

Hon. H. B. Wilson, Superintendent of Public Instruction:

DEAR SIR: It appears from the sworn statements submitted by you, that on the twenty-sixth of September, 1874, a vacancy existed in the office of clerk in school-district No. 15, in Sherburne county, and that the director and treasurer of the district on that day filled the vacancy by the appointment of Benjamin Bursby; that at the annual school meeting in October, W. O. Thompson was elected clerk, and was notified of his election; that Thompson having failed to file his acceptance and enter upon the discharge of the duties of his office, the remaining members of the board, on the twenty-third of December last, appointed one H. L. Babcock to act as clerk until the next annual meeting; that thereupon Babcock entered upon the

discharge of the duties of the office, and is now acting as clerk of said district. Upon the foregoing statement there can be no question but that Babcock is legally clerk of the district, and that his acts as such clerk, within the scope of the authority conferred upon clerks, will be binding upon the district. Thompson could not delegate to Bursby the authority to act for him as clerk until such time as he saw fit to assume the duties of the office.

ST. PAUL, February 1st, 1875. GEO. P. WILSON, Atty. Gen.

O. C. Gregg, Auditor Lyon County:

DEAR SIR: Your letters of February 4th and 5th received. You ask whether, after any piece or parcel of land has been bid in to the State, as provided in section 123, Gen. Laws 1874, can any assignment be made other than in fee? This question must be answered in the negative. There is no authority to assign for a term of years. The assignment, if made at all, must be absolute. The law does provide for the attaching of rents accruing on property bid in for the State, but does not authorize the rental of such property. The provisions in reference to attaching rents were intended to operate more particularly in the cities of the State, but are nevertheless applicable to farm property as well. In Dodge county, and others that I do not recall, the Commissioners fail to designate a paper in which to publish the lists, for the reason that but one paper was published at the county seat; but, so far as I know, the question has not been raised in the courts as to this omission being fatal to the sale.

ST. PAUL, February 11th, 1875. GEO. P. WILSON, Atty. Gen.

G. A. Ruckolt, County Auditor, Wright Co.:

DEAR SIR: The State Auditor has referred to me your letter of the tenth inst. to answer. You state that the N. W. ¼ and S. E. ¼, and lot 2, in section 16, township 121, range 23, (adjoining lands, and assessed together to one owner,) were delinquent for the years 1871 and 1872, and were sold to the State under the law of 1874; that a certain party, holding a Sheriff's certificate of sale of the first-described piece, desires to redeem the same, and has tendered you a sum *pro rata* per acre of the total amount due. You further state that the Assessor's returns show that there are improvements upon the land, but do not show upon which portion. The question then asked is, has the Auditor any authority to allow a party to redeem a part of the tract, as is proposed in this case? I think not. There is no doubt but that the manner in which the pieces were assessed is very objectionable. While they may be contiguous, and owned by one person, yet they are separate parcels of land, and cannot well come under one general description. But that is an objection that should have been urged at the proper time, and can have no particular bearing upon the question under consideration. The record does not disclose upon which tract the improvements are, and even if there were no improvements, the land may not be of uniform value, and you have no authority to assume anything of the kind, nor to accept the statements of parties as to the facts in the case. I would refer you to an opinion of the Supreme Court, (volume 10, p. 6.)

ST. PAUL, February 12th, 1875. GEO. P. WILSON, Atty. Gen.

Hon. H. B. Wilson, Superintendent of Public Instruction:

DEAR SIR: Where it becomes necessary for the teacher to temporarily suspend the school for the reason that no provision has been made for heating the schoolroom, he being ready and willing to teach, and thereby comply with his contract, I am of the opinion that he would not be required to make up for such lost time, but might recover upon his contract. If the director contracted with the district to

furnish wood for present use in heating the school-house, he would be bound to furnish wood sufficiently seasoned to answer the purpose for which it was purchased, even though the contract did not specify dry wood, and could not recover the contract price, nor any amount, for wood that would not answer the purpose intended. If the officers saw fit to accept the wood for use when it should become seasoned, (the voters of the district having made no other provision for fuel at the annual meeting,) of course, the district would be compelled to pay for it, whatever it might be reasonably worth. Where the voters neglect to provide for fuel at their annual meeting, or, having made the necessary arrangements for fuel, such arrangements should fail, it would then be the duty of the trustees to provide fuel, and any contract that a majority of such trustees would make would be binding upon the district.

ST. PAUL, February 16th, 1875. GEO. P. WILSON, Atty. Gen.

F. E. Cooper:

DEAR SIR: Your favor of the 17th inst. was duly received. I am of the opinion that under section 1, *c.* 16, Gen. St., as amended by the act of 1870, the 20 days' notice would have to be given in order to have the action of the town legal. If, however, the requisite notice was not given, and the County Commissioners should waive the objection and decline to grant licenses in the town, parties desiring licenses would have no remedy. Because a party can tender an acceptable bond and the requisite amount of money, is no reason why the Commissioners should grant a license to him.

The Supreme Court of this State has decided that it is left to the discretion of the Commissioners to decide who shall and who shall not have licenses; that, in view of the dangerous character of the business, the Commissioners should exercise great care in issuing licenses. I think it is intended that the license question should be voted upon at the town meeting.

ST. PAUL, March 23d, 1875. GEO. P. WILSON, Atty. Gen.

J. B. Le Blond, Superintendent of Schools, Houston County:

DEAR SIR: Your letter of the 8th inst. was received, and except for sickness on my part would have been answered before this. You ask two questions: *First*, when a district, at its annual meeting, votes to erect a log school-house, can it, at a special meeting, by a majority vote of those present, change it and erect a frame building? *Second*, can the money levied at the annual school meeting for general school purposes be transferred and used for building purposes?

In answer to the first question I would say that it was proper to make the change, provided, that in the call for a special meeting notice was given that that matter would be acted upon at such meeting; otherwise, I think not. I think the second question must be answered in the negative. The trustees could only use such funds as had been provided for that purpose, and the law specifies the manner in which such funds shall be raised.

ST. PAUL, March 24th, 1875. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: The salary of the County Auditors is determined by the amount of taxable property in the respective counties, as fixed by the State Board of Equalization for the preceding year. But in no event shall they receive to exceed $2,000 per annum, save in Winona county, which county was excepted from the operation of the act. The percentage fixed by law determines absolutely the salary to which the several County Auditors are entitled (save in Winona county) when such percentage does not exceed $2,000. There is no significance in the words "for his per-

sonal services." The proviso would mean the same were those words omitted. No portion of the $1,000 named for clerk hire can go to the Auditor. He cannot be Auditor and Deputy Auditor at the same time. The object was to allow a reasonable sum for clerk hire in offices where the amount of work was too great for the Auditor to perform personally. In some offices a small proportion of the $1,000 would employ the necessary assistance, and in others the whole amount would not be unreasonable, and in fact might be insufficient.

ST. PAUL, April 7th, 1875. GEO. P. WILSON, Atty. Gen.

James Fitzgerald, Town Clerk:

DEAR SIR: Your favor of recent date, addressed to the State Auditor, has been referred to me to answer. You state "that at the annual town meeting held in Orange town, Douglas county, on the tenth day of March, 1874, it was ordered that a tax of four mills on the dollar be levied on the taxable property of the town for the purpose of building a town hall. The tax was levied, and at the annual meeting held on the ninth day of March, 1875, it was voted that the tax levied for town hall purposes be transferred to the road fund, to be expended for road purposes." You inquire whether the action thus taken was legal or not.

As suggested by you, prior to the enactment of the tax law of 1874, moneys raised by taxation for a specific purpose or fund could not be used for any other purpose. The particular provision referred to (see section 77, *c.* 11, Gen. St.) seems to have been omitted in the new tax law, and I presume for a purpose. In the absence of such limitation upon the authority of the town, I am of the opinion that it was competent for the electors of the town of Orange, at their annual meeting in 1875, to appropriate the fund raised for the building of a town hall for the repair and construction of roads and bridges, or any other proper town charge.

Each town is declared by law to be a body corporate, with capacity to make such orders for the disposition, regulation, or use of its corporate property as may be deemed conducive to the interest of its own inhabitants. The money in the treasury of the town is as certainly corporate property, and under the control and disposition of the town, as would be the town hall when built. In my judgment the town should possess such authority. It sometimes occurs that by the time a fund has been levied and collected the necessity for such fund no longer exists. I assume that the Legislature, in omitting the prohibitory statute heretofore referred to, recognized the necessity of leaving the corporate property at the disposal of the town; subject, of course, to the general limitations contained in the law. The fund in question could not be used even by a unanimous vote of the town, except for a purpose for which the town might assess and collect taxes. It was the duty of the electors of the town to be present at the annual town meeting, and participate in the management of the affairs of the town. Hence, those who were not present cannot be heard now to object to the action taken by those present. However, I would suggest that if a majority of the town were absent, and are known to be opposed to the transfer in question, it might be well for the Supervisors to take into consideration the wish of the majority, and take no action until another expression can be had upon the subject.

ST. PAUL, April 9, 1875. GEO. P. WILSON, Atty. Gen.

Hon. D. Burt, Superintendent of Public Instruction:

DEAR SIR: I am in receipt of your favor of recent date, inclosing communication from the Superintendent of Goodhue county, asking my opinion upon the following questions: *First*, can a person not a citizen act as a district clerk? If not, would the proceedings of a district meeting called by such clerk be illegal? *Second*, can the funds not otherwise needed, and in the hands of the district treasurer, be used

to buy a site for a school-house, a motion to that effect having been sanctioned by the voters of the district? *Third*, if funds are not in hand, cannot the electors authorize the Board of Directors to borrow funds for said purpose or purposes?

Under our constitution and laws, aliens are not eligible to any office elective by the people. If, however, (referring to the case in hand,) an alien were elected to the office of district clerk of a school-district, or appointed to such office by the proper appointing power, and should assume such office by virtue of such election or appointment, and exercise the duties thereof, he would be an officer *de facto*, and his acts, though not those of a lawful officer, the law, upon principles of policy and justice, would hold them to be valid, so far as they involved the interests of the public and third parties. It follows that the proceedings of a district meeting, called by a clerk exercising the duties of that office by virtue of an election or appointment as aforesaid, would not be illegal though such clerk were ineligible to the office.

In answer to the second question, I would say that money in the district treasury, levied and collected for the payment of teachers' wages and the support of the school, or that may have come into the treasury for the same purpose from the apportionment of the common school fund, cannot be diverted by the vote of the district or otherwise to any other purpose. But this prohibition does not apply to any other fund which school-districts are authorized to raise, except money received by the district from the issue of its orders or bonds, as provided in section 36 of the school law, which must be used for the purposes named in the succeeding section.

The third question must be answered in the negative. No authority is given to school-districts to borrow money, save in the manner provided in section 36, aforesaid. When the mode of executing the powers granted to a corporation is expressly prescribed, no other mode can be adopted. When, however, the district has incurred the indebtedness for a purpose authorized by law, and the payment of such indebtedness is postponed to a future day, the district, in consideration of the forbearance, may contract to pay interest thereon, and for that purpose may execute and deliver promissory notes, or evidence of indebtedness in the form of promissory notes. See Daniel Rolling vs. District No. 1, Anoka Co. 10 Minn. 340.

ST. PAUL, April 13th, 1875. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: I am in receipt of your favor inclosing communication of Olds & Lord, of Afton, Minnesota, and would say, in answer to their inquiry, that all personal property of persons residing in this State, or doing business within this State, by themselves or agents, except such as is expressly exempted, is declared to be subject to taxation by the State, and must be assessed with reference to its value on the first day of May of each year. This general provision of our statute would, of course, cover logs and lumber owned and held within the State, without being expressly named, as they are, whether such logs were cut or lumber manufactured within this State or elsewhere. But our tax law, by virtue of an amendment made at the last session of the Legislature, provides that logs, the log-mark of which is recorded in this State, shall likewise be subject to taxation in this State, although the logs may not be within the State on the first day of May. I apprehend that this provision was intended to reach, and would reach, all logs in transit at that time, although beyond the boundaries of the State. But where logs cut within the State have, at the time stated, become subject to taxation in another State, I do not think the authorities of this State could enforce the tax by reason of the log-mark recorded here. Olds & Lord state that they cut their logs in Minnesota, and on the first day of May the logs are either in this State or are in transit to their mills on Lake St. Croix, in the State of Wisconsin. Their place of business is at Afton, in this State. By the laws of Wisconsin all personal property is assessed as of the first day of May in each year the assessment is made. Upon their statement

of the facts, I am of the opinion that their logs would be subject to taxation in this State, and not in Wisconsin.

ST. PAUL, April 14th, 1875. GEO. P. WILSON, Atty. Gen.

G. Hyser, County Treasurer:

DEAR SIR: I am in receipt of your favor of the thirteenth inst.

The St. Paul & Pacific Company entered into a contract with W. F. Davidson to build the necessary elevators and grain-houses along the line of their road. The company furnishes the necessary ground, side tracks, etc., and Davidson, at his own expense, erects the elevators, puts in the necessary machinery and men to operate the same, and transact the business with dispatch. The company agrees to furnish cars and carry off the grain as rapidly as required, and in the contract reserves the right to purchase the elevators after September 1, 1876. The company collects all charges, and pays to Davidson so much per bushel as elevator charges. Davidson, I understand, represents a company called the "Elevator Company," and whether our court would hold the elevator to be real or personal property I cannot say. The courts in the different States are widely at variance upon the question as to when an improvement becomes a fixture. Much depends upon the purpose for which the improvement is to be used—how it is attached to the realty—whether it could be removed without detriment to the realty, etc. Each case must be determined by and from its peculiar situation. If they are not personal property, then they should be assessed to Davidson as real property. You should endeavor to enforce the tax. Cannot you seize some of the machinery? If not, I would seize and sell the elevator, if you can find a purchaser. Davidson and his associates should not be allowed to claim the exemption granted to his company.

ST. PAUL, April 15th, 1875. GEO. P. WILSON, Atty. Gen.

Hon. P. McCracken:

DEAR SIR: I am in receipt of your favor of the nineteenth inst. As the law now stands, in order to change the site of a school-house it is necessary that two-thirds of the legal voters of the district should vote in favor of the change. Two-thirds of those present and voting will not answer. By reference to sections 10 and 26 of chapter 36 of General Statutes you will see that in this particular the school law has been changed. See subdivision 4, § 34, act of 1873.

ST. PAUL, April 22d, 1875. GEO. P. WILSON, Atty. Gen.

Hon. D. Burt, Supt. Pub. Instruction:

DEAR SIR: The special laws of our cities require them to take the scholastic census as the general school law directs. This law asks for the number of persons between the ages of 5 and 21 years, resident in a given district or city, on the thirtieth day of September in each year. At any time previous to that date it is impossible to determine what the law requires to be reported. Death and removals may occur on the twenty-ninth of September, so that a census taken before the 30th cannot be reliable. No officer could take oath, as the law requires that the report sets forth the scholastic population actually resident in a given district or city on the thirtieth of September. The law does not grant to city boards of education, or to any one, the right to decide that more than 10 days are necessary for the taking of the census. Nor does it require of city boards of education an impossibility, or even a difficult duty. If one man can take this census in a given city in 60 days, six men can take it in 10 days, and so on, at no greater cost, and with greater facility and accuracy, if in each ward, or part of a ward, the work be assigned to a person acquainted with the district to be canvassed. An apportionment of the public school

funds cannot, therefore, be legally made on a scholastic census, a part or all of which has been taken before the thirtieth day of September in any year.

ST. PAUL, April 28th, 1875. GEO. P. WILSON, Atty. Gen.

Hon. Ignatius Donnelly:

DEAR SIR: I am in receipt of your favor of recent date, in which you request my opinion upon the question as to whether the inhabitants of that portion of West St. Paul detached from Dakota county and annexed to Ramsey county by the act of 1874, will vote at the ensuing general election, to-wit, in the twentieth senatorial district or in Ramsey county?

In your communication you refer to section 23, art. 4 of the constitution, which requires that "the Legislature shall provide by law for an enumeration of the inhabitants of this State in the year 1865, and every tenth year thereafter; and that at the first session after each enumeration so made, and also at the first session after each enumeration made by the authority of the United States, the Legislature shall have the power to prescribe the bounds of congressional, senatorial, and representative districts, and to apportion anew the Senators and Representatives among the several districts according to the provisions of section second of this article."

Section 2 of article 4 provides that the Representatives of both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof. In 1871 the Legislature redistricted the State, and apportioned the Senators and Representatives among the several districts upon the basis of the enumeration made by the authority of the United States in the year 1870. Under the last-named act the twentieth senatorial and representative district was composed of Dakota county, and entitled to elect one Senator and five Representatives, and Ramsey county, as then bounded, composed the twenty-third and twenty-fourth districts.

Section 3 of the same act provides that, in the event of any change in the county and township lines affecting the districts provided in section 2, the senatorial and representative districts should not be affected thereby.

We are bound to presume that the act of 1874, enlarging the boundaries of Ramsey county, was passed by the Legislature with full knowledge of the constitutional provisions referred to, and of existing legislation enacted in pursuance of those provisions; and hence when, in the first section of the act of 1874, the territory detached from Dakota county is declared to be annexed to the county of Ramsey "for all purposes whatsoever," the last expression must be construed to mean for all purposes other than those incident to the election of Senators and Representatives and members of Congress. This qualification is necessary in order to preserve the integrity of the act. If it be insisted that the words referred to shall be interpreted literally, and that the subsequent section of the same act, repealing all acts and parts of acts inconsistent therewith, had the effect to repeal section 3 of the apportionment act of 1871, would not the whole act be invalid because of its repugnance to the constitutional provision quoted?

The representation in both houses shall be apportioned equally throughout the State in proportion to the population, and, in order to comply with the provisions of the constitution, it further provides for the enumeration of the inhabitants of the State, and then declares that the Legislature, at its first session after such enumeration, or after an enumeration made by the authority of the United States, shall have the power to prescribe the bounds of congressional, senatorial, and representative districts, and to make a new apportionment.

While in our constitution there is no express prohibition upon the exercise of this power by the Legislature at any other time, as is the case in the State of New York, yet it is evidently as clearly implied as though the very language of the New York constitution, to-wit, "the apportionment and districts so to be made shall remain unaltered until another enumeration shall be taken," etc., were incorporated therein. The express mention of one thing implies the exclusion of another, is a maxim of interpre-

tation that may be applied in this case. While the general authority of the Legislature to alter the boundary lines of counties, cities, and towns may be conceded, the framers of the constitution saw fit, and very wisely, too, to place this limitation upon the power in order that the equality of representation established between the several districts should not be disturbed. It cannot be claimed that the Legislature, having redistricted the State and appointed anew the Senators and Representatives, after an enumeration, could, before another enumeration, again redistrict the State and reappoint the members; and, if not, can the Legislature do by indirection that which cannot be done directly? If, during the time between two apportionments, the boundary lines of congressional, senatorial, and representative districts are subject to legislative interference, where shall such interference stop? Where is the limitation upon this power? Suppose that, instead of a fraction of Dakota county, with a comparatively small population, being annexed to Ramsey county, the territory upon which is situated the city of St. Paul had been detached from Ramsey county and annexed to Dakota county. On such an emergency Dakota county would have no greater representation, while Ramsey county, with a greatly diminished population, would have no less. Could such legislation be justified upon the plea that it was simply the exercise of an acknowledged power to alter the boundaries of counties, or because it does not appear that such legislation was for the specific purpose of changing the legislative districts, but, on the other hand, to accomplish some incidental purpose, and therefore the constitutional inhibition would not apply? To assume this position is to assert that the Legislature may, by indirection, evade the constitution, and, in effect, nullify its provisions. From what I have already said, it is scarcely necessary for me to state my conclusion, namely: that, in the matter of representation, the *status* of the inhabitants of the detached territory has not been changed by the act of 1874, and hence they must vote as they have hitherto voted until after the next census and apportionment made thereunder.

ST. PAUL, May 3d, 1875. GEO. P. WILSON, Atty. Gen.

His Excellency, Governor C. K. Davis:

SIR: I am in receipt of your favor of the twelfth inst., requesting my opinion—*First*, as to what interest vested in the Winona & St. Peter Railroad Company by virtue of the act of the Legislature approved March 2, 1875, entitled "An act to dispose of the lands granted, or to be granted, by the United States subsequent to March 3, 1857, to aid in the construction of a railroad from Winona westerly, by way of St. Peter, to a point on the Big Sioux river south of the forty-fifth parallel of north latitude;" *second*, what proceedings ought to be adopted by the actual settlers to obtain title to the lands comprised within the limits of the grant, and claimed by them under the terms of said act? and, *third*, what action should be taken by the Governor when an application for a relinquishment is made to you?

By the act of Congress approved March 3, 1857, (11 U. S. St. 195,) there was granted to the Territory of Minnesota, to aid in the construction of this road, every alternate section designated by old numbers, six sections in width on each side of the same, as definitely fixed, with the right on the part of the Territory or State to select indemnity lands (subject to the approval of the Secretary of the Interior) from alternate sections or parts of sections, within 15 miles from the line of the road as fixed, in case any of the lands within the six-mile limit had been previously sold or appropriated by the general government, or to which pre-emption rights had attached. I refer to the last-named act for the purpose of calling attention to a fact that otherwise might be overlooked, namely, that the provisions of the act of last winter has no reference to the grant of March 3, 1857, but simply applies to grants made since that date.

By the act of Congress approved March 3, 1865, (13 U. S. St. at Large, 526,) entitled "An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," the grant to this State to

aid in the construction of the Winona & St. Peter road was increased from six to ten sections per mile, with the right to select indemnity lands within twenty miles of the line of the road.

While the act of the Legislature approved March 2, 1875, does not in terms refer to the grant of Congress made in 1865, it was well understood at the time that said act was passed for the purpose of carrying out the trust created by said act of Congress, and at the same time to protect the interests of actual settlers upon the lands included in that grant. I believe it is a matter of record in the office of the Auditor of State, that, long prior to the passage of the act of last winter, the Winona & St. Peter road had been definitely located and in fact constructed upon the line designated by the act of Congress, from the eastern to the western boundary of the State; and hence, having, as I assume, complied with the conditions of the grant, the company was entitled to receive the lands from the State, the State holding the same in trust for that purpose and no other; that while the act of last winter provides that the Governor, acting for the State, shall convey to said railroad company, its successors or assigns, by deed or deeds in fee-simple, the lands so granted, nevertheless, I am of the opinion that the act does of itself pass to the Winona & St. Peter Company the title in fee to such lands as had theretofore been, or which may hereafter be, patented or certified to the State under the said act of Congress for the use of that road, subject to the conditions of said act of Congress, and acts supplementary thereto, and to the rights of actual settlers as defined by our Legislature. The deed or deeds would, therefore, as to such lands, serve to designate the particular lands granted, and furnish the evidence of title in the company to the same. To the act of our Legislature making the grant are appended the following provisos: "Provided, however, that this grant is upon the express condition that said railroad company shall relinquish to the United States the right and title of said railroad company in and to any of said lands occupied by actual settlers residing thereon, and claiming the same in good faith under pre-emption filings or homestead entries made prior to February 1, A. D. 1875, and who have in good faith complied with the requirements of the pre-emption or homestead laws as to settlement and cultivation, or any of said lands occupied by actual settlers who settled in good faith before survey, and who have since that time continued to reside thereon, and who have not since said settlement been permitted to make pre-emption filings or homestead entries on and for such land; and any land selected and granted to said company or the State, in lieu of these tracts relinquished, shall inure to and be conveyed to said company in the same manner and on the same terms as the lands hereinbefore referred to: provided, further, that application for such relinquishment shall be made to the company and to the Governor of the State within six months after the passage of this act."

I have given the provisos in full, for the reason that they disclose specifically the class or classes of settlers who are entitled to apply for relinquishments from the company.

It will be incumbent upon each settler to make application to the Governor and to the company on or before September 2, 1875. Much of the proof necessary to be made, as to homestead entries and pre-emption filings, can doubtless be obtained from the land-office for the district in which the lands are situated, while the proof as to settlement and cultivation should be such as is required under the acts of congress upon the same subject. This I understand to be the affidavit of the party, corroborated by the testimony of two credible witnesses. While the act is silent as to the Governor's duty in the premises, when application is made for a relinquishment, nevertheless, I think that it would be his duty to receive and consider the counter-proof offered by the company in contested cases, and while neither the applicant nor the company would be bound by the Governor's conclusion, he could decline to convey to the company such pieces as were claimed by settlers until such time as the rights of the respective parties could be determined by some court of competent jurisdiction. After relinquishment by the company, the settler would have to perfect his title under the land laws of the United States, as he could acquire none from the State. I herewith submit a communication from the Hon. H. W. Lamberton,

of Winona, the land commissioner of the Winona & St. Peter Railroad Company, in which he states the desire of the company to dispose of, as rapidly as may be, all cases of contest that may arise under the grant; and also that application for relinquishment may be served upon him at his office, in Winona, and that such service will be recognized by the company as sufficient service upon it.

ST. PAUL, May 21st, 1875. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb:

DEAR SIR: Your favor, inclosing the letter of Edward Murphy, of Hennepin county, received. Mr. M. asks two questions: *First*, does not the general law passed last winter, extending payment of delinquent taxes to August 1, 1875, apply as well to Hennepin county as any other county in the state, if by neglect or otherwise the former law had not been complied with? *Second*, when an erroneous assessment had been made year after year, until the County Commissioners corrected the valuation or reduced the tax fron 75 to 33⅓ per cent. on property, should the tax-payer be held for penalty for not paying the unjust tax during the term prior to the statement? *First*, the general law referred to in the first question is the act approved March 9, 1875, continuing in force certain provisions of chapter 2 of the General Laws of 1874 in those counties in which the officers neglected to comply therewith during that year; but that act has no application to Hennepin county, for the reason that a special act was passed and approved on the same day, to-wit, March 9, 1875, authorizing the officers of that county to enforce the payment of taxes which became delinquent in and prior to the year 1873, as provided in chapter 2, General Laws of 1874, but extending the time to May 15, 1875, within which such delinquent taxes might be settled by paying the amount of the tax for the several years, with interest at the rate of 12 per cent. per annum from the time when the taxes for each year became delinquent. The question assumes that the general law of 1875, referred to, allows until August 1, 1875, within which delinquent taxes may be settled by the payment of 12 per cent. interest, but I do not so understand the effect of the law. It simply, in my judgment, authorizes the officers of the respective counties affected by the act to enforce the payment of delinquent taxes according to the provisions of chapter 2, aforesaid, but was not intended to and does not continue in force the first clause of section 29 of said chapter. *Second*, when an erroneous assessment has been made, the law furnishes every opportunity for a correction. The aggrieved party can apply for relief, first, to the town or city Board of Equalization; and, finally, to the Board of County Commissioners.

By reference to section 164, c. 1, Gen. Laws 1874, it will be seen the County Commissioners were not authorized to abate taxes; that they were empowered to order taxes which had been improperly levied or paid by mistake to be refunded by the County Treasurer, provided application to them be made within a given time. Chapter 1 of said General Laws, as amended by the act of 1875, does confer upon the Board of County Commissioners the authority, upon proper cause shown by the aggrieved party, to abate taxes or penalties, or both, except state taxes, and also to refund taxes improperly assessed or paid by mistake, provided application be made within the time provided by statute. Their authority in the premises is almost unlimited. They have the proofs, and are supposed to decide according to the right of the case. If the whole tax be abated, such abatement must necessarily carry with it the penalty; but the abatement of only a portion of the tax would still leave the penalty upon the portion unabated, which would have to be enforced against the tax-payers. To this the tax-payer, in the great majority of cases, cannot complain, as he has been in fault in not seeking his remedy at the proper time and place.

ST. PAUL, June 9th, 1875. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb:

DEAR SIR: I am in receipt of your favor of yesterday, requesting my construction of the act approved March 8, 1875, entitled "An act to authorize the Board of County

Commissioners of certain counties to remit and refund portion of tax levied for the year A. D. 1874, within their respective limits." I concur in the opinion that it must be construed as imperative, and not directory. When the intent and purpose of the Legislature in passing an act is obvious, from the language employed, force and effect must be given to such intent. In this case the reason for the passage of the act is recited in the act itself; while the language used leaves no doubt as to what was intended. The object was to remedy an inequality in taxation. That would necessarily result from the increased valuation in those counties in which the percentage of taxation had been previously fixed. The rule is well settled that what the law requires to be done for the protection of the tax-payer is mandatory, and cannot be regarded as directory merely. Statutory directions are deemed directory only when they relate to some immaterial matter, where a compliance is a matter of convenience rather than of substance; where no advantage will be lost, or right destroyed, or benefit sacrificed, either to the public or to any individual, by holding the provision directory.

ST. PAUL, June 11th, 1875. GEO. P. WILSON, Atty. Gen.

Hon. William Mitchell:

DEAR SIR: I would say, in reply to your inquiry of recent date, that after examination I have arrived at the conclusion (although not entirely free from doubt as to its correctness) that the savings associations organized under chapter 23 of the General Laws of 1867 may continue to do business as such associations without conforming to the act as amended by the act approved March 9, 1875. There is no doubt of the correctness of the general principle that corporations organized under General Laws do so subject to such amendments and changes as may be rightfully made to such laws. I say rightfully made, as excluding such amendments or changes as would destroy or interfere with rights which have been acquired and become vested. It is now the well-settled law of the land that the charter of a private corporation is a contract, within the meaning of the constitution of the United States, and that any act of a State Legislature which violates any corporate rights secured by such charter, without the consent of the corporation, is void as against the constitution. It may be noted that in neither the act of 1867 nor in said act as amended, is the right of amendment, alteration, or repeal expressly reserved, nor is such power reserved in our constitution, as in some of the States. The repeal, therefore, of the act of 1867 would not have destroyed the existence of corporations organized under it. Their existence could no more be taken away by the repeal of said act than could that of one incorporated by private act, in which there was no provision to that effect by the repeal of such act. If the savings associations organized under the act of 1867 are subject to the amendment of last winter, it would, in effect, with such organizations, amount to a repeal of the original act, as it would involve a reorganization, with an increased number of trustees and a capital stock of $50,000, as well as a compliance with other terms and conditions somewhat onerous. But it is unnecessary to discuss the question as to whether such legislation is in violation of chartered rights, for it seems to me that associations organized under the act of 1867 are excepted from the operation thereof.

Section 4 provides that every association shall provide for the payment of not less than $50,000 for a capital stock, 25 per cent. of which shall be paid in before the association *shall commence business*, while by reference to sections 17, 18, and 20, it will be seen that associations incorporated under the act of 1867 are expressly excepted from the penalties of the act. Section 18, when taken in connection with the other provisions of the act, must be construed, in my opinion, as permissive, and not mandatory. In this connection it may be proper to say that the German-American and the Farmers' & Mechanics' Banks of St. Paul were not savings banks organized under the act of 1867, and hence their exemption from the operation of the act would not militate against my construction. Taking the language of this amended act, and interpreting it in the light of the well-known rule of construction that no statute, however positive in its terms, shall be construed to have a retro-

active operation, or be designed to interfere with existing contracts or rights, unless the intention that it shall so operate is expressly declared, I feel quite confident that I am right in the position I have assumed.

If the existing associations desire to avail themselves of any of the privileges of the amended act not contained in the original act, it would be necessary for them to comply in all respects with the new provisions.

ST. PAUL, June 15th, 1875. GEO. P. WILSON, Atty. Gen.

P. A. Sinclair, County Supt.:

DEAR SIR: Your communication addressed to Superintendent Burt has been handed to me to answer. From the sworn statement of facts submitted, I have no hesitation in deciding that the legal officers of school-district No. 6, in your county, are Nathaniel Drew, director, Simeon Prutsman, treasurer, and Otis Getchell, clerk. It would not be competent for the voters present at an annual meeting, held without the statutory notice, to act upon the matter of raising money for the building or the purchashing of a school-house, or fixing the site thereof, but for all other purposes the meeting would be legal without such notice. The fact that the acting clerk of the district may have failed or neglected to file in his office the bond and acceptance of the treasurer, the same having been delivered to him for that purpose, could not in the least affect his right to act as such officer. District officers are given 10 days after notice of election within which to file their acceptance, and Prutsman, not having been notified by the clerk of his election, had a right to qualify on November 15th, succeeding his election. No clerk having been elected at the annual meeting, October 3, 1874, the director and treasurer had a right to fill the vacancy by appointment until the next annual meeting. The action taken at the so-called special meeting, held November 12, 1874, was illegal and void.

ST. PAUL, June 20th, 1875. GEO. P. WILSON, Atty. Gen.

B. F. Webber, County Attorney:

DEAR SIR: I have examined the act of 1873 relative to the fee of Register for making entries in Tract Index. The law gives him 10 cents for indexing each transfer of real estate by deed or mortgage, and not 10 cents for each entry he may make in indexing such transfer. Each deed or mortgage is a transfer. The case you put is an argument in favor of my construction. You say a deed of two blocks in your city would require 28 entries in the Tract Index. Ten cents, in such a case, is hardly adequate compensation, but as an average compensation 10 cents is sufficient. To say that he should have 10 cents for each entry would give him, in the case you put, $2.80, which would be extravagant pay. The law will not admit of any such interpretation, in my judgment.

ST. PAUL, June 25th, 1875. GEO. P. WILSON, Atty. Gen.

J. Q. Ward:

DEAR SIR: I am in receipt of your favor of the twenty-sixth inst. You submit the question: "Can a township regularly organized, though composed of two congressional townships united for town purposes, be severed or divided without a majority of the legal voters of the township thus organized, petition." The question, in my judgment, must be answered in the affirmative. It seems to me that section 1, tit. 1, *c.* 12, of Bissell, (being section 1, *c.* 10, St. 1866,) very clearly confers such authority in cases like the one under consideration. And especially is this true when we construe section 1 aforesaid in connection with section 29 of chapter 11.

The limitations upon the power of the Commissioners to set off, organize, and divide towns have no application in this case. While the Commissioners ought to consider the effect such division might have on the remainder of the organization, still, no matter what the consequences might be, the validity of their action could

not be called in question on that account. The organization of more than one congressional township into a town must be regarded as merely temporary, inasmuch as it is the recognized policy in this State to make ultimately each congressional township a municipal organization.

ST. PAUL, June 30th, 1875. GEO. P. WILSON, Atty. Gen.

Louis Gottlief:

DEAR SIR: I am in receipt of your letter of the twelfth inst. In the light of decisions made in other States having a school system somewhat similar to ours, I am of the opinion that it was competent under the notice given, to vote to raise money by tax or by the issuing of bonds, for the building of a school-house. In the warning of a meeting of a school-district to be held for a special purpose, all that is required is that it should be so expressed as that the inhabitants of the district may fairly understand the purpose for which they are convened. In your case the meeting was convened, among other things, "to take action in relation to the building of a school-house" and "to procure a site for school-house." Though nothing was said in the notice about raising money, yet I think that could be fairly understood from the notice.

ST. PAUL, July 17th, 1875. GEO. P. WILSON, Atty. Gen.

A. R. Wiswell, County Auditor:

DEAR SIR: I have held, in a previous opinion, that the amendment to the school law (second proviso of chapter 20, Gen. Laws 1875) did not affect existing school-districts, but must be given a prospective operation, under the familiar rule of construction that no statute shall be construed as retroactive unless it is expressly stated, or very clearly appears from the act itself that such was the intention. The fiscal year begins March 1st of each year. The Auditor's salary is determined by the assessed valuation of the preceding year; that is, his salary from March 1, 1875, to March 1, 1876, would be determined by the amount of taxable property for the year 1874. The basis upon which his compensation is fixed cannot be changed during the year.

ST. PAUL, July 21st, 1875. GEO. P. WILSON, Atty. Gen.

H. S. Austin, Esq.:

DEAR SIR: Your favor of August 2d received. It is the business of the County Attorney, and not mine, to advise town officers in reference to their duty, but I will answer your letter out of courtesy. Every male inhabitant over 21 years of age, and under 50, excepting paupers, idiots, lunatics, firemen in cities, members of organized uniformed military companies, and disabled soldiers, are subject to poll-tax. Pensioners may be able to perform road labor, and hence may not be disabled soldiers in the sense in which those terms are used in the statute. I do not understand how an unorganized town can be attached to the road-district of which you are overseer, the same being also an unorganized town. If such authority is conferred by statute I have not found it, and would be glad to have you refer me to it. If I am correct in this, you cannot compel those residing in such unorganized town to come into your road-district and perform road labor. I understand the poll and road tax may be expended on the highways of an adjoining town, if those present at the annual town meeting so direct, and also the rule in reference to the dividing and working of town-line roads; but I can find no statute giving Supervisors authority to include territory outside of their town to road-districts established within such town for road purposes.

ST. PAUL, August 5th, 1875. GEO. P. WILSON, Atty. Gen.

David Brooks, Esq.:

DEAR SIR: In your favor of the fifth inst, you state that Monticello is a village, organized under the act of 1875, to-wit, chapter 139 of General Laws, and ask whether, in criminal cases arising under the ordinances of the village, the accused can demand a jury trial, and, if so, whether the jurors are to be selected from those competent to act residing within the incorporated village. Having examined the act under which you are incorporated, and the provisions of our constitution bearing upon the question, I am of the opinion that the accused would be entitled to a jury trial, and that the jurors must be selected from the inhabitants of the county, as in other criminal cases tried before justices of the peace. I have no doubt but what it would be competent for the Legislature to confer upon municipal courts authority to punish violations of ordinances—that is, acts not made criminal by statute—without a trial by jury, but I do not find such authority in chapter 139, aforesaid.

ST. PAUL, August 9th, 1875. GEO. P. WILSON, Atty. Gen.

Hon. C. A. Gilman:

DEAR SIR: Your favor of recent date, submitting the question of your eligibility to the office of Railroad Commissioner, received. I have examined the question somewhat, and will state my conclusion. Believing the present office of Railroad Commissioner to have been created by the last Legislature, of which you were a member, I am of opinion that your case comes fairly within the constitutional prohibition, namely: "That no Senator or Representative shall hold an office under the State which had been created or the emoluments of which had been increased during the session of the Legislature of which he was a member, until one year after the expiration of his term of office in the Legislature."

ST. PAUL, August 10th, 1875. GEO. P. WILSON, Atty. Gen.

Frank Burke, Jr., Auditor:

DEAR SIR: Your favor of August 3d received. If your County Commissioners neglected to meet and organize as a Board of Equalization at the time and place required by statute, nothing can be done now to remedy the matter. I am not sure that such omission would be fatal; in fact, think it would not, provided the Commissioners performed their duty as an equalizing board during the week commencing on the fourth Monday in July. While the neglect of your Commissioners is inexcusable, the Legislature, in enacting the tax law, tried to make provision for just such omission in section 119. But it is unnecessary to speculate upon the question as to how the Supreme Court would construe the present tax law; that is, whether it would treat the statute requiring the Commissioners to meet as an equalizing board on the fourth Monday in July as directory or peremptory. You cannot retrace your steps or in any manner supply the omission, and hence must take your chances on the question being raised and decided adversely to the county.

2d. If, in my examination, I have not overlooked some portions of the statute bearing upon your second question, namely, the right of the County Commissioners to levy a general county road tax, the law is very uncertain and unsatisfactory. Nevertheless, I think they have authority to levy such a tax, and, if so, it must be collected as any other county tax. By statute the County Commissioners have the general supervision of county roads, and a fund for that purpose is recognized and included in the ordinary expenses of the county, for which the Commissioners are authorized to levy a tax, or, rather, to determine the amount necessary to be levied. Roads and bridges being excepted from the four-mill tax for county expenses, where is the limitation upon a tax for roads and bridges? This, I think, must be found in the road law, (see section 56, c. 21, p. 523, 1st Bissell,) empowering the Commissioners to make certain appropriations for road purposes. Inasmuch as the four-mill tax is raised for other purposes, such appropriation cannot be made from that fund

properly, (although I am aware that they are generally,) but must be made from a fund raised for that purpose.

ST. PAUL, August 10th, 1875. GEO. P. WILSON, Atty. Gen.

W. J. Hahn, Esq.:

DEAR SIR: Your letter of the sixteenth inst. is received. I have been examining the question submitted by you, and, while upon a question of so much importance pertaining to a matter upon which the courts have held officers to a strict compliance with the law, I hesitate in advising or recognizing any departure from the very letter of the law. Still I am inclined to the opinion that if, during the three weeks' publication of the newspaper designated by the board, each paper issued contained a supplement on which was printed the delinquent tax-list, it would be held to be a three weeks' publication *in the* newspaper itself, and hence sufficient.

ST. PAUL, September 18th, 1875. GEO. P. WILSON, Atty. Gen.

D. A. Coley, Esq., Register of Deeds:

DEAR SIR: In your favor of a recent date you submit the following questions: 1st. Is an acknowledgment taken before a Deputy Clerk of the District Court a good and valid acknowledgment? 2d. If so, should he not sign himself as such, and not use the name of his principal?

By the Session Laws of 1874, page 99, the power to administer oaths and take acknowledgments is expressly conferred upon Deputy Clerks. This statute is simply declaratory of the common law, and confers no additional authority. Whatever power may be exercised by the principal may be performed by the deputy, and is equally valid. Clerks of the District Courts are authorized to take acknowledgments and also to appoint deputies. In answer to the second question I would say that it is immaterial whether the certificate of acknowledgment states that the grantor appeared before the principal or the deputy, or whether it is signed by the deputy in his own name only, or that of the principal by the deputy. If the person taking the acknowledgment has the power to do so, it is sufficient. The law looks at the substance and not the form, and it is the policy of the law to uphold such certificates, if possible.

ST. PAUL, October 5th, 1875. GEO. P. WILSON, Atty. Gen.

F. Y. Goulet, Auditor, Crow Wing County:

DEAR SIR: Your favor of recent date received. You state that a certain party was charged with the crime of attempting to commit murder in the county of Aitkin, which is attached to your county (Crow Wing) for judicial purposes, and that such person was delivered into the custody of the Sheriff of Crow Wing county, by whom he was boarded and kept awaiting his trial, and you submit the question as to whether Crow Wing or Aitkin county is responsible for the board of the prisoner, and the expenses, fees, etc. I am of opinion that it belongs to the county of Aitkin to foot the bill. The statute provides "that all prisoners committed for trial for any offenses, in any county within the jurisdiction of such county, shall be delivered to the keeper of the common jail of the county in which said court is holden for safe-keeping, and to be produced when called for in the said court." It next provides that the expenses of criminal actions and proceedings shall be charged to and be defrayed by the county in which the crime is charged to have been committed. Gen. Laws 1867, p. 156. By section 17 of chapter 120 of the General Statutes, it is provided that whenever any prisoner by the proper authority is directed to be confined in any other than that in which the offense was committed, the Sheriff of the county in which such prisoner is to be confined shall keep said pris-

oner at the expense of the county in which the offense was committed, and shall be allowed therefor four dollars per week. It is true that the section just quoted has special reference to such cases as are mentioned in section 3 of the same chapter, but with equal propriety, it seems to me, may be applied to the case in hand. It is but just and right, in my judgment, that Aitkin county should defray the expenses necessarily incurred in the detention and trial of the prisoner.

2d. I am not aware of any statute that would justify you in declining to receive the taxes for the current year, unless all delinquent taxes upon the same property were paid at the same time. By the time you mention, viz., December 1st, all delinquent taxes are supposed to be satisfied by judgment and sale.

3d. After the County Commissioners have determined, at their July session, the amount to be raised for the support of the poor, and the amount so determined has been reported to you and extended upon the tax-list, it would not be possible for them to either increase or decrease the amount or rate of such levy by any subsequent action.

ST. PAUL, October 6th, 1875. GEO. P. WILSON, Atty. Gen.

D. S. Hall:

DEAR SIR: Your favor of October 6th came duly to hand. The act of Congress approved August 4, 1866, "making an additional grant of lands to the State of Minnesota, to aid in the construction of railroads in said State," provides "that if said roads are not completed within ten years from the acceptance of the grant, the said lands hereby granted and not patented shall revert to the United States." The grant to the State of Minnesota, in this instance, is couched in the same language employed in the grants to the State of Wisconsin, (June 3, 1856, and May 5, 1864,) which were held by Justice Field, of the Supreme Court of the United States, to be grants *in præsenti*, and passed the title to the odd sections designated to be afterwards located. Justice Field held, in the case to which I have alluded, known as the *St. Croix Grant Case*, that although the road was not constructed within the period prescribed, the lands granted had not reverted to the United States, for the reason that no action had been taken either by legislation or by judicial proceedings to enforce a forfeiture. The decision of Justice Field, for aught that I can see, applied with equal force to the Hastings & Dakota road. The State cannot extend the time named in the act of Congress for the completion of the road until a forfeiture of the grant is declared by act of Congress, or by judicial proceedings authorized by law. Until the lands are restored to the United States, they will not, of course, be subject to homestead entry or pre-emption.

ST. PAUL, October 9th, 1875. GEO. P. WILSON, Atty. Gen.

A. F. Lashier, County Auditor:

DEAR SIR: Your favor of October 18th, addressed to the State Auditor, was handed to me this morning to answer. The amounts voted in the several towns of your county to be levied for town purposes, exceeding two mills on the dollar valuation, were unauthorized, and hence the levy, if made, would be illegal and could not be collected. Your County Commissioners, having met at the time designated by law and determined upon the amount to be raised for county purposes for the ensuing year, could not at any subsequent session of the board either increase or decrease the amount so fixed. Their jurisdiction would cease with the adjournment of the July session of the board. While I do not feel entirely confident that I am right in my conclusion, I am of the opinion that the County Commissioners have a right to levy a road and bridge tax beyond the five-mill tax for ordinary county purposes, and that the rate of such tax will be governed by section 56 of chapter 21 of 1 Bissell, viz., $1,000 of assessed valuation of real estate in the county. As to the levy of a tax for the support of the poor, I think they have a right to make such levy; but it would have to constitute a portion of the five-mill tax, and not in addi-

tion thereto. The statute is so blind and uncertain on the questions you raise that it will be necessary to have some amendments made by the ensuing Legislature. Until then we will have to guess at the meaning of the law. (See case decided since, arising in St. Louis county. 22 Minn. 356.)

ST. PAUL, November 5th, 1875. GEO. P. WILSON, Atty. Gen.

A. R. Wiswell, Esq.:

DEAR SIR: Your letter of the fourth inst. came duly to hand. In reference to your first question, the tax levied for the purpose of paying interest on the indebtedness of the county not being sufficient to pay the whole thereof, it seems to me the proper way would be to pay interest in full on the evidences of such indebtedness in the order in which they are presented until the fund for that purpose is exhausted. When payment of interest is made it should be indorsed on the order, or other evidence of indebtedness, and also record made of such payment by the Treasurer, giving date, amount, etc.

As to your second query, to-wit, Has the County Board any right to review, reopen, or reconsider a matter or bill which was passed upon and audited by a preceding board, when the party declines to receive his order as at first audited? (Supervisors vs. Ellis, 5 N. Y. 620,) I am of the opinion that they have not, although I am aware, as you suggest, that it is often done. The remedy of the party would be by appeal to the District Court, if dissatisfied with the amount allowed; and if such appeal was not taken within the time (30 days) allowed by statute he would be excluded.

ST. PAUL, November 12th, 1875. GEO. P. WILSON, Atty. Gen.

F. W. Frink, Esq.:

DEAR SIR: The State Auditor has referred to me your letter of the tenth instant to answer. While section 130 of the tax law would seem to give any person the privilege of redeeming lands sold for taxes, I am of opinion that such was not the intention of the Legislature, but, on the contrary, that only persons having an interest or lien can redeem. The reading of the subsequent sections (131 and 132) would confirm this view. To redeem, means to repurchase, to regain possession of property. Should a stranger or person who has lost all interest or title in the property be allowed the privilege? I think not. I do not think that such was the intention of the Legislature. You will have to act on the assumption that previous sales were valid, unless declared otherwise by some competent tribunal, or unless you are conscious of some omission which would invalidate such sale.

ST. PAUL, November 19th, 1875. GEO. P. WILSON, Atty. Gen.

Hon. David Burt, Superintendent Pub. Inst.:

DEAR SIR: You request my official opinion upon the following question: "Can County Commissioners legally appoint a County Superintendent of Schools, on a salary less than that fixed by the Legislature in section 6 of the school law, for the sake of saving money to the county? If not, when a person so appointed is held in the office by a Board of County Commissioners, to what means of redress can resort be had to rescue this educational office from such illegal barter?"

While the Commissioners are required by law to fix the compensation of County Superintendents, the same law prescribes what said compensation shall be, unless the number of districts in the county exceeds 100, in which event it is left discretionary with the Commissioners to fix such compensation at not less than $1,000 nor more than $1,250 per annum. They might fix such compensation at any sum between the two extremes named. This is all the discretionary power they have. No matter what the motive, they clearly have no authority to dispose of the office

to the lowest bidder. The statute defines what the qualifications of the appointee shall be, and a willingness to discharge the duties of the office for less compensation than that fixed by statute is not one of them. To barter away the office to the lowest bidder, is, in effect, to annul the statute. For the Commissioners to do that which is prohibited would render them guilty of malfeasance in office. Such practice, if tolerated, would inevitably result in the appointment of incompetent persons, and would degrade an office which, above all others, should be sacredly guarded. Any such contract would, in my judgment, be without consideration and illegal, because prohibited. The appointee, notwithstanding his agreement, could recover for his services the statutory compensation.

ST. PAUL, November 21st, 1875. GEO. P. WILSON, Atty. Gen.

Geo. F. Wescott:

DEAR SIR: Your favor of the second inst. at hand. You state that at your annual school meeting in October last, a director and clerk for school district No. 121, in Fillmore county, were elected; that the newly elected clerk refused to qualify; and the newly elected director being absent and not having qualified, yourself, as treasurer, and the old clerk appointed a clerk to fill the supposed vacancy in the clerk's office, and ask whether such appointment was legal? I decide that it was not. No vacancy existed in the office to fill by appointment. By the school law, school officers continue in office until their successors are elected and qualify. Upon the question as to when offices become vacant, see chapter in General Statutes upon resignations, vacancies, and removals.

ST. PAUL, December 6th, 1875. GEO. P. WILSON, Atty. Gen.

W. W. Griswold:

DEAR SIR: Your favor of the thirtieth ult. received. You state that in one of the Commissioner districts in your county, at the late election, there were three candidates for County Commissioners; that the candidate receiving the highest number of votes was ineligible, because a non-resident of the district at the time of his election, and ask—*First*, whether the candidate receiving the next highest number of votes, he being eligible to the office, would be legally elected; *second*, are you obliged to make out, on a canvass of the votes for County Commissioner, a certificate of election in accordance with section 12, p. 219, 1st Bissell? or, *third*, should you make it out on demand in accordance with section 30, p. 172? *fourth*, at what time does a failure to qualify leave the office of County Commissioner vacant?

In answer to the first question I would say, that if the person receiving the highest number of votes was ineligible, the votes cast for him would be ineffectual, so far as to prevent the opposing candidate being chosen, and the election must be considered as having failed. This is the doctrine as stated by Cooley in his work on Constitutional Limitations, and seems to be sustained by the weight of American authority. In a few of the States, however, it has been held that if the electors vote for a candidate, having notice of his disqualification, their votes would be thrown away, and the next highest eligible candidate would be elected.

As to the second and third questions, if you comply with either provision you will have discharged your duty. In order, however, to reconcile the apparent discrepancy between the two statutes or sections, section 12 aforesaid should be read and understood the same as though the words "upon demand" were incorporated therein.

As to your last question, viz., at what time does the failure of a County Commissioner to qualify leave the office vacant? The regular term of office of county officers commences on the first day of January next succeeding their election, except as otherwise provided by law. (Section, 66, p. 181, 1 Bissell.) No other provision is made in reference to County Commissioners. They should, therefore, qualify on or before January 1st succeeding their election. Section 2, c. 8, 1 Bissell, reads as fol-

lows: "Every office shall become vacant on the happening of either of the following events: * * * 6th. His refusal or neglect to take the oath of office * * * within the time prescribed by law." Statutes requiring an oath of office and bond are usually considered as directory; and unless the failure to take the oath or give the bond by the time prescribed, is expressly declared to vacate the office, the oath may be taken or bond given afterwards, if no vacancy has been declared. Section 153, Dill. Mun. Corp.

While the statute quoted last above seems to be imperative in its terms, it has never been so construed in this department. If a Commissioner elect should neglect or refuse to qualify within a reasonable time after the commencement of the term for which he was elected, say by the expiration of the January session of the board, in my judgment it would be competent for the board to declare the office vacant, and request that the vacancy be filled by the officers having authority to appoint, and if, in their judgment, the interests of the county required such appointment to be made, it should be done forthwith. And especially would the Commissioners be justified in acting promptly in the case of a refusal to qualify. On the other hand there might be extenuating circumstances, and time should be allowed the party elect to qualify and take his seat as a member of the board. In the case of some of the county officers, the statute fixes a definite time within which they must qualify, but not in the case of County Commissioners; and hence the matter is somewhat in doubt.

ST. PAUL, December 6th, 1875. GEO. P. WILSON, Atty. Gen.

Gov. Cushman K. Davis:

DEAR SIR: I have the honor of acknowledging the receipt of your favor of the third inst., asking my opinion upon the following statement: "Mr. Pusey resigned the office of Insurance Commissioner, December 13, 1873. On the same day Governor Austin appointed A. R. McGill to that position, and his appointment was confirmed by the Senate at the session of 1874. On February 27, 1875, I appointed Mr. McGill Commissioner for two years from March 1, 1876, and sent his name to the Senate. The Senate took no action upon the appointment made by me, for reasons of which I am not officially advised. Please advise me what is the tenure of Mr. McGill upon these facts, and when will his term end?"

By section 9, title 2, of the act of February 29, 1872, creating the office of Insurance Commissioner, it was made the duty of the Governor, by and with the advice and consent of the Senate, to appoint such officer. When appointed it was provided that the appointee should hold the said office for two years, and until his successor was appointed and qualified; and in case of a vacancy by death, removal, resignation, or otherwise, the Governor was authorized to fill the same by appointment. The act not designating the time when such term of office should commence, and there being no general law applicable to such cases, the term would run from the date of the appointment. The appointment when made would vest the office for the full term, subject to be defeated by the non-concurrence of the Senate. In the case of a vacancy, however, the appointee, under such circumstances, would hold the office until such time as it could be regularly supplied: that is, by the appointment of the Governor and confirmation of the Senate. 25 Ohio St. 588. I am led to this conclusion by reading the section of the insurance law to which reference has been made, in connection with sections 4 and 5 of chapter 8 of 1 Biss. p. 208. This construction, too, would seem to harmonize with the general policy of our law in reference to elective offices, except those wherein the term is prescribed by the constitution. Mr. McGill, therefore, under his first appointment, could have held the office only until such time as the place could be regularly supplied by and with the advice and consent of the Senate. The statute recognizes the appointment as merely temporary, but at most it could not extend beyond the unexpired portion of the regular time,—that is, the term made vacant by Mr. Pusey,—unless the Governor neglected to make any appointment whatever, or, having made an appointment, the Senate refused to concur therein. The Senate having neglected to

act upon your appointment of date February 27, 1875, it left Mr. McGill in office, but simply holding over until his successor was appointed and qualified.

ST. PAUL, December 7th, 1875. GEO. P. WILSON, Atty. Gen.

P. A. Getchell, Esq., County Auditor:

DEAR SIR: I am in receipt of your favor of recent date, in which you state that in 1874 one T. A. came before the County Board of Equalization, and on oath stated that he had money in bank in England subject to his order or control. He qualified the statement by saying he expected it, or a portion of it, was on the way here. The amount stated was $3,000. *Question:* As a citizen of Wadena county, was the money in bank in England subject to his draft (or in transit) liable to levy and taxation in Wadena county, where the owner resided? You state that the State Auditor decided that it was. I see no reason for dissenting from the State Auditor's conclusion.

First. All personal property of persons residing in this State, unless expressly exempted, is subject to taxation.

Second. Personal property must be listed and assessed in the county * * * where the owner resides, except, etc. This case is not covered by any of the exceptions.

Third. Personal property, for the purposes of taxation, shall be construed to include * * * moneys, credits, and effects, wherever they may be; * * * all moneys at interest, either within or without this State, due the person to be taxed, more than he pays interest for, and all other debts due such person more than their indebtedness; all public stocks and securities * * * out of this State owned by inhabitants of this State.

Fourth. The term "money" or "moneys," wherever used in the law, is defined to mean gold and silver coin, bank notes, and every deposit which any person owning the same or holding in trust and residing in this State is entitled to withdraw in money on demand.

Fifth. Every person * * * shall list all his moneys, credits, * * * moneys loaned and invested, * * * and all moneys deposited subject to his order, check, or draft, etc.

To these general provisions of our law we add the theory of the law as to the *situs* of personal property of the description under consideration, to-wit, that it is situated where the owner is situated. To this general principle there are certain exceptions made in the tax law, but none that would apply in this case. It was not claimed that the money was under the control or management of an agent residing elsewhere with a view to its being invested, loaned, or used for pecuniary profit by such agent, or that the same was taxed or subject to taxation elsewhere. If in the hands of an agent residing elsewhere, for the purposes named, it would raise the question as to whether the *situs* of the property was not at the domicile of the agent, and hence subject to taxation there. That the money was in bank in England would not put the case in any different attitude than if in bank in Wisconsin, as the several States are as much foreign to each other with respect to their municipal law as America and any other nation.

ST. PAUL, December 10th, 1875. GEO. P. WILSON, Atty. Gen.

E. Cronkhite, Esq., County Auditor:

DEAR SIR: The State Auditor has referred to me your letter of the seventh inst. to answer. Referring to the act of March 10, 1873, providing for the deposit in banks of county funds, you state the two banks here gave in their assessments under the head of money and credits. They are not assessed for "capital stock" by that name. "Can the Board of Auditors designate either one as a place of deposit, provided other conditions are satisfactory?" It is provided in the act aforesaid that

the amount deposited in any bank or banking-house shall not exceed the assessed capital stock of said bank or banking-house as shall appear upon the duplicate tax-list. In view of the manner in which banks other than national banks and bankers are required by the tax law to list personal property for the purposes of taxation, it does not seem to me that it was the design of the Legislature to limit the discretion of the Board of Auditors to the designation of banks making return to the assessor of capital stock under that particular description. All banks and bankers under the law are permitted to compete for the deposits, but if we are to give to the words "capital stock" a technical meaning, it would or might exclude all competition. Furthermore, the act prescribes the kind and amount of security the board shall take, and, if careful in this regard, the purpose of the proviso would seem to be well subserved. Under either interpretation of the words "capital stock" the Board of Auditors will have no trouble, I take it, in complying with the proviso; that is, determining the amount of the capital stock as shall appear upon the tax duplicate, whether returned as capital stock *eo nomine* or as money and credits, etc., and limit the amount deposited or to be deposited accordingly.

ST. PAUL, December 14th, 1875. GEO. P. WILSON, Atty. Gen.

Henry Knudson, County Treasurer, Jackson County:

DEAR SIR: I am in receipt of your favor of the twenty-first inst., inquiring at what time the County Treasurer should file a verified list of delinquent personal taxes in those counties in which the time for payment of personal taxes has been extended until November 1st, (chap. 6, Gen. Laws 1874, and chap. 11, Gen. Laws 1875,) and also inquiring whether County Treasurers in such counties would have the right to distrain for personal taxes delinquent after November 1st, or whether such right of distraint would cease to exist after July 1st. Section 97, c. 1, Gen. Laws 1874. It is impossible for me to say how the courts would answer your questions in case they should ever come up for adjudication, but I am of the opinion that the acts extending the time within which payment of personal taxes might be made were not designed to and would not destroy the right to enforce the payment of such taxes after they should become delinquent. In other words, the Treasurers of the several counties included in the act of 1874 and 1875 could proceed by distraint to collect such taxes as were delinquent after November 1st, and file the list required to be filed by section 97, aforesaid, within a reasonable time after November 1st. If such list were filed and laid before the Board of Commissioners at their regular January session for their action, it seems to me that it would be sufficient. In regard to the provisions of the tax laws in reference to the time within which the Treasurer is required to do certain things pertaining to the collection of delinquent personal taxes, they are not to be taken as mandatory, but as directory; that is, I do not consider it essential, in order that the District Court might acquire jurisdiction to render judgment, that the Treasurer should file with the County Auditor a list of such taxes as he was unable to collect by distress or otherwise on or before the first day of July. To show to the court that such list was not filed within the dates specified in the act would not, in my judgment, constitute a good defense if such list were filed within a reasonable time thereafter, so that the same could be laid before the County Commissioners at their July session.

"What the law requires to be done for the protection of the tax-payer is mandatory." "But many regulations are made by statute designed for the information of assessors and officers, and intended to promote method, system, and uniformity in the modes of proceeding, the compliance or non-compliance with which does in no respect affect the rights of tax-paying citizens; these may be considered as directory." "Generally, the rule is, when the statute specifies the time within which a public officer is to perform an act regarding the rights and duties of others, it will be directory merely, unless the nature of the act to be performed or the language of the statute shows that the designation of the time was intended as a limitation of power." As is quite usual, the Legislature passed the act of 1874–5, referred to,

without any reference to the provisions of the general law, and lest I may be mistaken in my conclusions, and to obviate all doubt, I would suggest that the next Legislature pass a special act to remedy the difficulties which you suggest. In answer to your last question, viz., Is there any penalty attached to the personal property tax after February 1, 1876? I would say that the 2 per centum per month, provided for in section 96, Gen. Laws 1874, is the only penalty except the costs of distress and sale in cases where distraint and sale are made.

ST. PAUL, December 28th, 1875. GEO. P. WILSON, Atty. Gen.

Jonas Johnson, Esq., Chairman of Board of County Commissioners, Wright County:

DEAR SIR: I am in receipt of your favor of recent date, requesting my opinion with reference to the tenure of office of certain members of your body.

It appears by your communication that prior to September 22, 1875, your county was divided into five Commissioner districts, and on said last-named date the county was redistricted pursuant to section 85, c. 8, of the General Statutes, whereby the boundaries of the several districts were changed. Assuming that the action of the board in redistricting the county operated to vacate the seats of the several members of the board, the people, at the general election held November 18, 1875, elected a County Commissioner in each of the newly-formed districts. Upon a similar state of facts coming up from Sibley county, it was decided by my predecessor in this office that such would not be the effect of redistricting in counties which hitherto had five Commissioner districts; that such action would operate to vacate the seats of only such members of the board as under the new arrangement would cease to be inhabitants of the district for which they were elected. This is my understanding of Attorney General Cornell's opinion, and I believe it to be correct in principle.

If this view of the law be correct, your board will be composed of the newly-elected member in district No. 1, W. Tubbs in district No. 2, J. Johnson in district No. 3, the newly-elected member in district No. 4, R. O. Mostertergan in district No. 5. In the first district the regular term of the present incumbent will expire January 1, 1876, and hence it was necessary to elect his successor at the last general election. In district No. 4, French Lake, the town in which the present incumbent resides, has been made a part of district No. 1, of which Commissioner district he is not a resident. He was, therefore, legislated out of office.

ST. PAUL, December 29th, 1875. GEO. P. WILSON, Atty. Gen

To Thomas Carter and others:

GENTLEMEN: Assuming the facts to be as given in your sworn statement, I am of opinion that the meeting held on the second day of October last, in school-district No. 6, in Sherburne county, was a legal meeting, and that the officers elected at that meeting are entitled to the offices to which they were elected respectively. It appears that the meeting was legally called at the hour of 7 o'clock P. M., at which time four legal voters of the district assembled at the place of meeting, and remained there until half past 7 o'clock, and then left the school-house without organizing or taking any action; that about quarter before 8 o'clock other legal voters of the district assembled at the school-house for the purpose of attending the school meeting, pursuant to the notice given, and, finding the school-house locked, went and found the treasurer of the district, in whose care the key was, and that he came and unlocked the door, all this occurring prior to 8 o'clock; that from the last-named hour until the final adjournment, at about 11 o'clock, five or more legal voters of the district were present, and participated in the organization, election of officers, etc. It further appears that all those who assembled at 7 o'clock, and afterwards disbanded, were personally notified to be present at the subsequent meeting, except one, and sufficient time allowed them to appear before the meeting was organized;

that such organization was effected about 15 minutes before 9 o'clock, and officers for the district elected for the ensuing year. The meeting having been called at the hour fixed by law, if five or more legal voters had been present they could have organized and elected officers, and those who came after such proceedings were had would not be heard; but, a sufficient number to transact business not being present, it seems to me those who did assemble should have waited a reasonable time for others to come in before closing the school-house and separating. In my judgment they should have remained until 8 o'clock, unless the requisite number came before that time, thus giving the time ordinarily allowed for persons to appear.

There is nothing in the statement of facts submitted tendering to show that those who assembled subsequently had delayed attending the meeting by reason of any prearrangement or for any fraudulent purpose; but, on the contrary, it appears that they made every effort to secure the attendance of all those who had assembled in the first instance; that one of the original number was present throughout the meeting, and that one other was present a portion of the time, but left prior to the organization. I cannot see there was any concealment, or any attempt to deceive or mislead any one, and in my opinion the meeting was legal, and the officers elected are entitled to the books and papers pertaining to the office to which they were respectively elected.

ST. PAUL, January 7th, 1876. GEO. P. WILSON, Atty. Gen.

His Excellency, Governor John S. Pillsbury:

SIR: Under the extradition act of Congress the executive authority of any State or Territory may demand any person as a fugitive from justice of the executive of any State or Territory, when such person is charged with having committed treason, felony, or other crime in the State from which such person has fled. The term "other crime," used in the clause of the constitution of the United States relative to the surrender of fugitives from justice, has been held to mean an offense indictable by the laws of the State demanding the surrender. Bastardy, so called, is not an indictable offense under the laws of this State, and therefore the application from Freeborn county for a requisition in such case should be rejected.

ST. PAUL, January 19th, 1876. GEO. P. WILSON, Atty. Gen.

His Excellency, John S. Pillsbury, Governor:

SIR: I have examined and herewith return the papers submitted to me in the matter of the application for a requisition upon the Governor of Texas for the delivery to the authorities of this State of one Alonzo S. Booth, charged with the crime of polygamy. I see no reason why there should be a departure in this case from the rules heretofore adopted and enforced in the executive department of this State with reference to applications for requisitions. Like rules have been adopted in other States, and it is important that they should be observed. The application in its present form should be denied, and the rules of the department inclosed to the County Attorney for his guidance. It has been held in this department, upon authority, that under the constitutional provision for the extradition of fugitives, and the act of Congress passed in pursuance thereof, one of the essential facts to be established in order to authorize the executive of the State, where the crime is charged to have been committed, to make the demand, is that the party so charged has fled from that State; that he is a fugitive from the justice of the State whose laws have been violated; that this fact must be made to appear by affidavits of some competent legal evidence presented to the Governor making the demand, as the foundation for his action; that he has no power to determine the fact except upon some competent evidence. There is an entire absence of such evidence in this case. Again, under the act of Congress referred to, your Excellency must verify the affidavits made before the magistrate charging the fugitives with having committed the crime

to be duly authenticated. Therefore, the official character and signature of the magistrate should be certified to by the proper officer, to-wit, the Clerk of the District Court.

ST. PAUL, January 19th, 1876. GEO. P. WILSON, Atty. Gen.

Hon. Geo. L. Bryant, Treas. of School-dist. No. 5:

SIR: Your favor of recent date received. You state that your district passed a resolution that thereafter all contracts involving a disbursement on behalf of the district exceeding $10 should be let to the lowest responsible bidder; that the director of the district, since such resolution was passed, has let the contract for wood for the district for a greater price than it can now be had for. Query: Shall the treasurer of the district pay the orders issued in payment of the wood, or should he refuse? It does not appear from your statement that there was not a compliance with the resolution, but simply, that wood can be purchased at a less figure now than when the contract was made. But assuming that the trustees disregarded the wish of the district as expressed in the resolution referred to, and let the contract without inviting bids, still I am of the opinion that you cannot refuse to pay the orders for that reason. If the district at its annual meeting makes no provision for fuel, it is made the duty of the trustees to provide fuel; and inasmuch as there is no such duty imposed upon them by law as was sought to be imposed by the resolution, it would be discretionary with them whether they obey or not.

ST. PAUL, January 24th, 1876. GEO. P. WILSON, Atty. Gen.

W. W. Griswold, County Auditor:

DEAR SIR: Your letter of the 18th inst., addressed to the State Auditor, has been handed to me to answer. You state that a question has arisen in your county as to whether the improvements upon homesteads taken under the act of Congress to encourage the growth of timber upon western prairies are taxable or not. All improvements made by persons upon lands held by them under the homestead laws of the United States are declared to be personal property, and taxable as such by the laws of this State. Similar laws exist in other States in reference to the taxation of such improvements. I cannot see how any discrimination can be made in favor of persons taking homesteads under the act above named, as against other homestead settlers. The terms and conditions upon which they became entitled to patents are very different from those imposed in other cases; but that is no argument why such settlers should escape the burden of taxation, while others less favorably situated must bear their proportion. The timber act is essentially a homestead act, and as such is included and covered by our tax law.

ST. PAUL, January 28th, 1876. GEO. P. WILSON, Atty. Gen.

Hon. William Pfaender, State Treasurer:

DEAR SIR: I am in receipt of your favor of the 26th inst., in which you state that a controversy has arisen between you, as State Treasurer, and the officers of the Chicago, Milwaukee & St. Paul Railway Company, relative to the percentage that company should pay upon the gross earnings of its several lines of road in this State, and requesting my opinion upon the matters in dispute. It appears from your communication that you have come to an understanding with reference to the central division, and hence reference to that will be unnecessary. The charter of the Hastings & Dakota Railroad Company provides that "that company shall, during the first three years after 30 miles of said road shall be completed and in operation, on or before the first day of March in each year, pay into the treasury of the State one per cent. of the gross earnings of the said road,—the first payment to be made on the

first day of March next after 30 miles of said railroad shall be completed and in operation,—and shall during the seven years next ensuing, after the expiration of the three years aforesaid, pay into the treasury of the State two per cent. of its gross earnings, and annually thereafter three per cent." There is no dispute as to the proper construction of the charter, but upon the question of fact as to the date when that company became liable to taxation by reason of having 30 miles of its road completed and in operation. We have no way of determining this fact definitely, but it appears from the files of the Railroad Commissioner's office that in the year 1869 this company had 28 miles of its road completed and in operation, and it further appears from the returns of said company on file in the State Treasurer's office that it paid to the State 1 per cent. upon its gross earnings for the year 1870. In January, 1872, the Treasurer and Secretary of the Milwaukee & St. Paul Railway Company furnished to the State Treasurer an abstract, duly verified, of the (monthly) gross earnings of the Hastings & Dakota Railroad for the year 1871, commencing with the month of January, and in March following paid to the State 1 per cent. upon the amount so returned. Thus, by its own confession, the liability of that company to pay 1 per cent. upon its gross earnings attached as early as January 1, 1871, if not before that time, and hence for the year 1874 it should have paid 2 per cent. upon its gross earnings. The fact that your predecessor in office required the company to pay but 1 per cent. upon its gross earnings for the year 1874, will not estop the State from claiming that which justly belongs to it. It is well settled in the courts of the United States that the debtors of the government will not be discharged by the neglect or omission of its officers to perform the duties which the law imposes upon them. The government and its officers are considered the same, and the general principle is adopted that laches is not imputable to the government; and the principle is founded, not on the extraordinary prerogative, but upon considerations of public policy.

The State can only act through its officers, and great losses would result if it should be maintained that it was liable for the negligence or omissions of those to whom it is compelled to confide the management of its pecuniary concerns. Seymour vs. Van Slyck, 8 Wend. 422; Ray Co. vs. Bentley, 49 Mo. 243.

The State might ratify the act of your predecessor, but this could only be done by act or resolution of its Legislature, and, no such ratification having been made, nothing stands in the way of the State demanding and recovering the additional 1 per cent. for the year 1874. The percentage that the Chicago, Milwaukee & St. Paul Railway Company should pay upon the gross earnings of the river division is not an open question in the department which I have the honor to represent. This company derives its corporate rights and franchises from the charter of the Minnesota & Pacific Railroad Company, which rights and franchises were subsequently, to-wit, by act of March 10, 1862, transferred and granted to the St. Paul & Pacific Railroad Company. This company was authorized and empowered to survey, locate, construct, maintain, and operate a railroad from Stillwater, by the way of St. Paul, to Breckenridge, now known as the "main line" of the First Division of the St. Paul & Pacific Railroad Company; also a branch from St. Anthony to St. Vincent, known as the "Branch Line" of the First Division of the St. Paul & Pacific Company; also a branch line from Winona to St. Paul. On the seventh of November, 1864, 30 miles of said branch line had been completed and was in operation. During the year 1868, 30 miles of the said main line were completed and in operation. The company, in making return of its gross earnings for the year 1869 to the State Treasurer, treated its two lines of road as separate and distinct lines, and made return accordingly. The question was then submitted to my predecessor, Gen. Cornell, who, in quite an elaborate opinion, decided that the company must pay 2 per cent. of the gross earnings on both its lines of road. After citing certain portions of the company's charter, Gen. Cornell says:

"It is clear from these provisions that the railroad, upon the earnings of which the company undertakes to pay a percentage, is the same one which is exempted from taxation and assessment, and upon which the State holds a lien. It also seems equally clear that the railroad thus exempted and covered by the lien includes not only the

main line, but all the branch lines of road which the company was then authorized by law to build. The correctness of the construction is placed beyond all cavil by the provisions of the charter, wherein the main line crossing the Mississippi at St. Anthony, the branch from St. Anthony to St. Vincent, and the branch from St. Paul to Winona, are expressly designated as respective portions of the line of railroad of said company and as constituting but one road. A true construction of this act, then, requires that all the lines and branches of road which the St. Paul & Pacific Railroad Company were then authorized to construct must be regarded as one entire railroad, the gross earnings of which entire road are liable to the payment of 1 per cent. for the three years next after the completion of the first 30 miles thereof, then 2 per cent. for seven years, and thereafter 3 per cent.; and no act or transfer of the company of any part or branch of such road can in any way affect the liability to the state."

This decision, as I understand, was at once acquiesced in by the company. It covers fully the case in hand. It appears by the report of the Railroad Commissioner of this State for the year 1872 (page 32) that the question had been raised, and was then under discussion between the Commissioner and the Milwaukee & St. Paul Company. It further appears by the report of the Commissioner for the year 1873, (pages 12 and 13,) and also by the files and volumes in your office, that the Milwaukee & St. Paul Company accepted the Commissioner's interpretation of the law, and had paid into the treasury the difference between 1 and 2 per cent. upon the gross earnings of the company for the previous year.

I have also in my possession a letter from the general manager of the Milwaukee & St. Paul Company, dated November 29, 1873, addressed to the Hon. A. J. Edgerton, Railroad Commissioner, in which the general manager says that he had referred this question, viz., the rate of taxation the company was liable to pay. to the general solicitor of that company, and that his conclusion was that the Attorney General's views were correct, evidently referring to the opinion from which I have quoted. Therefore, instead of your construction being novel, it is the only construction that has ever been given to the act, (except it be by your predecessor,) and was considered fully settled. The only novel features of the matter is how it ever became unsettled, and should now be a subject of controversy between the State and the company.

ST. PAUL, February 28th, 1876. GEO. P. WILSON, Atty. Gen.

E. B. Jewett, Judge of Probate:

DEAR SIR: I am in receipt of your favor of the third inst., in which you refer to the act of 1875 fixing the compensation of Judges of Probate, and inquire, "Is the salary for 1875, after April 1st, based upon the census of 1875?" I am clearly of the opinion that it would not be. The compensation, from and after April 1, 1875, when the act took effect, until January 1, 1876, would be determined upon the basis of the United States census for the year 1870, adding thereto the additional 5 per cent. for subsequent years, as provided in the act. The census of 1875 was taken after this act took effect, and could not, in my judgment, furnish the basis of compensation for the period named. The Auditor would inquire what was the measure of compensation when the officer entered upon his duties under this act; and, being determined, such measure would not be changed by reason of a subsequent census, but would remain as determined until the close of the current year.

ST. PAUL, March 8th, 1876. GEO. P. WILSON, Atty. Gen.

A. M. Crowell, County Auditor, Todd County:

DEAR SIR: I am in receipt of your favor of the tenth inst., in which you inquire whether executors, administrators, and guardians are obliged to pay the expense of serving and publishing notices in proceedings had for the settlement of estates, etc.,

where the value of the estate is less than $1,000, referring to chapter 37 of the Laws of 1875. My understanding of this law has been, and is, that in all cases the executor or administrator must pay all sums necessarily expended in serving or publishing the notices required by the law to be served or published, but estates less than $1,000 are not obliged to contribute anything towards the salary of the Probate Judge. The purpose of the act is to fix the compensation of Judges of Probate, and to provide a fund for the payment of the same. It certainly was not intended that the county should pay the costs incurred in advertising, or do more than provide the services of the Judge of Probate, without cost, to the estate when such estate is of less value than $1,000.

ST. PAUL, April 20th, 1876. GEO. P. WILSON, Atty. Gen.

Hon. W. L. Wilson, Pres. of the Board of Directors of the Minnesota Inebriate Asylum:

SIR: I am in receipt of your communication of the twenty-fifth inst., requesting my opinion upon the question as to whether chapter 10 of the General Laws of 1875, taken in connection with chapter 99 of the General Laws of 1875, constitutes such an "appropriation by law" of the fund which has accumulated in the treasury, or shall hereafter be paid into the treasury of the State pursuant to section 1 of chapter 10 aforesaid, as to place such fund at the disposition of the Board of Directors of the Inebriate Asylum, for the purposes named in the said acts, without further legislation? The question is asked, I presume, in view of the following constitutional provisions: "No money shall be appropriated except by bill." Section 12, art. 4, Const. "No money shall ever be paid out of the treasury of this State, except in pursuance of an appropriation by law." Section 9, art 9, Const.

The last provision embodies the first, and hence reference will only be made to it. We inquire, first, what is the object of the constitutional provision? Justice Hogeboom, in the case of People vs. Burrows, 27 Barb. 93, in commenting upon a similar provision in the constitution of the State of New York, said: "It is designed as an absolute and compulsory restriction upon every disbursement from the treasury, except under the sanction of a legislative appropriation, specifying distinctly the object to which it is to be applied, thus imposing a salutary and needed check upon the disbursement of the public funds." An "appropriation by law" is the setting aside by legislative act of a certain amount or portion of the public money for a definite purpose, such amount to be drawn upon to the extent authorized for such purpose. State vs. Medbury, 7 Ohio St. 322; Webst. Dict. tit. "Appropriation."

It is not necessary, I take it, that such appropriations should be couched in the phraseology of ordinary appropriation bills, but simply that the intention to appropriate should clearly appear from the language employed. The question recurs, then, are these requirements of the constitution fully met by the acts referred to? To this question I think an affirmative answer must be given. The acts of 1873 and 1875 are *in pari materia*, and hence must be taken together. Chapter 10, Laws 1873, is entitled "An act to establish a fund for the foundation and maintenance of an asylum for inebriates." Section 1 of this act imposes the obligations from which the fund is to be derived. Section 3 requires the State Treasurer to place all moneys so derived in a fund separate and apart from the other funds of the State, "to be known as the State Inebriate Asylum Fund," and also provides for the investment of the same. Section 4 provides that said fund shall be permitted to accumulate until there shall be in the treasury, to the credit of the fund, the sum of $20,000, whereupon it is made the duty of the Governor, by and with the advice and consent of the Senate, to appoint five commissioners, under whose charge and directions the State should proceed to locate and erect a State asylum for inebriates. In this act we have a specific appropriation of a particular fund for a particular purpose, namely, for the foundation and maintenance of an asylum for inebriates. The only inhibition contained in the act concerning the use of this fund is that restraining its use for any purpose until it should reach the sum of $20,000.

We next inquire, in what respects is the act of 1875 inconsistent with the act of 1873? Section 1 establishes the asylum at Rochester, and to that extent limits the authority conferred upon the commissioners by section 4 of the act of 1873. Section 2 modifies the provisions of section 4 of the act of 1873 in this: that it increases the number of directors or commissioners, and provides for their immediate appointment. Sections 3, 4, 5, 6, and 7 concern the organization and duties of the board of directors. Section 8 provides the manner in which the fund appropriated by the act of 1873 may be drawn from the treasury, and also when the same may be drawn, to-wit, "at any time." The obvious intention of this section, taken in connection with section 2, providing for the immediate appointment of directors, was to remove the inhibition heretofore mentioned, and to permit the immediate use of this fund. It would, therefore, have been competent for the directors to enter at once upon the discharge of the duties imposed upon them by these acts, if the Legislature had not imposed the further condition contained in the proviso to section 11, to-wit: that no expenditure should be made, at least for building purposes, until such time as the Supreme Court should approve the constitutionality of the act of 1873. This proviso clearly implies that as soon as this condition was met the directors might proceed to erect the asylum, and to that end to expend the money raised and appropriated for that purpose. Section 4 of the act of 1875 is, in effect, a legislative interpretation of the act of 1873 in this: that it clearly implies that an appropriation has been made, and restricts the expenditures of the board to that fund. All the customary safeguards have been thrown around this appropriation, and I do not see any legal objection to the board proceeding without further delay to definitely locate and erect an asylum as contemplated by the said acts.

ST. PAUL, April 27th, 1876. GEO. P. WILSON, Atty. Gen.

W. A. Anderson, Clerk:

SIR: It appears, from your communication of the 28th ult., that your annual town election, held in March last, resulted in an equal or tie vote for the respective candidates for Justice of the Peace; that you were not aware of the act of 1876, which makes provision for such cases, and allowed the matter to pass. A tie vote does not, under our statute, create a vacancy, (unless it be in the case of town assessors,) and hence it would not be competent for the town board to declare a vacancy in such case and undertake to fill the same by appointment. The incumbent of the office at the time of the election would continue to hold until his successor was elected and qualified.

ST. PAUL, April 28th, 1876. GEO. P. WILSON, Atty. Gen.

A. J. Whiting, Deputy Sheriff, Dodge County:

SIR: Your favor of the eighth inst. just received. You say that you are Deputy Sheriff of Dodge county, and inquire, "Can I do business as Sheriff and Notary Public both at the same time?" This would seem to be a physical impossibility, and therefore I should say you could not. But I suppose you intended to ask whether you could hold the two offices at the same time. A Notary Public holds his office under the authority of the State, and is, therefore, a civil officer of the State. Section 103, c. 11, Biss., provides: "Nor shall any Sheriff or Deputy Sheriff be elegible to any other civil office except town or city marshal." Your case would fall under this prohibition, and would compel you to elect.

ST. PAUL, May 9th, 1876. GEO. P. WILSON, Atty. Gen.

J. R. Cleveland, Inspector of State Prison:

SIR: I am in receipt of your favor of recent date, requesting, on behalf of the Board of Inspectors, my opinion upon the following questions:

1st. One year ago the Inspectors made a contract with Messrs. Seymour, Sabin & Co. to build an addition to the cell building, for which an appropriation had previously been made; they to receive their pay (as the work progressed) monthly, on the estimate of the supervising architect. After several monthly payments had been made, the State Treasurer declined to pay our orders, for the reason that there were no funds in the treasury to meet them. The contractor, needing money, deposited our orders (and by this I suppose is meant the State Auditor's warrants) in the First National Bank at St. Paul, and hired the money until such time as the State Treasurer could pay them, in the mean time paying the bank interest as per inclosed voucher. The contractors now present the inclosed bill for the amount of interest paid to the bank. Can we order the payment of the bill; and, if so, from what fund?

2nd. An urgent necessity exists for the piping of the shop buildings for the extinguishment of fires. An appropriation of $200 was made for that purpose by the last Legislature, but was vetoed by the Governor, for the reason it was included in an appropriation for other purposes for which there were no funds in the treasury to meet. Now, without that appropriation, and under the existing necessity for the work being done, can we have the work done and give a certificate of the State's indebtedness, drawing 10 per cent. interest until paid, in payment of the same?

The first inquiry raises the question as to whether the State is liable to pay interest upon warrants drawn by the State Auditor upon the State Treasurer, when the State Treasurer is unable to cash such warrants. It is well understood that the State does not pay interest upon its indebtedness except in cases where it has specially contracted to do so, and in such cases funds are set apart for that purpose. The State cannot be sued by a citizen, and therefore cannot be compelled to pay interest. The Legislature each session makes large appropriations, and at a time when there is not, probably, a dollar in the treasury to meet such appropriations. The State, as is well understood, is dependent upon its resources to meet such appropriations, and agrees to pay when the money comes into the treasury. Persons, therefore, taking the warrants of the State, take them with the understanding that they will be cashed by the Treasurer when there is money in the treasury to meet them, and not before. The State stands in a very different position to that of an individual. The law does not impute laches to the State. It will be presumed it has done everything in its power to meet its obligations. In this case I am informed by the State Auditor the warrants were taken by the contractors with a full knowledge of the fact that there was no money in the treasury to pay them. I do not wish to be understood, however, that the contractors are not, in good conscience, entitled to the amount they were obliged to pay out as interest, but simply that for obvious reasons the State cannot adopt the policy of paying interest upon its past-due obligations. A special appropriation for the purpose would be necessary, and none has ever been made. It would be useless, therefore, for the Board of Inspectors to draw warrants upon the State Auditor in payment of this claim. No money has been placed at the disposition of the board for any such purpose. The contractors must seek relief at the hands of the Legislature.

The answer to the first question substantially answers the second. If you were to issue the proposed certificate your action would create no legal liability on the part of the State. The board would be acting beyond its authority. However, in view of the fact that so much valuable property of the State is endangered on account of the absence of proper facilities for extinguishing fires, I think the Inspectors would be justified in stretching their authority, and could depend upon the Legislature indorsing any reasonable arrangement they might make.

ST. PAUL, May 10th, 1876. GEO. P. WILSON, Atty. Gen.

J. A. Bowman, Esq.:

SIR: Your favor of the sixth inst. received. School-district orders may be made to bear interest at any rate not exceeding 12 per cent., by vote of two-thirds of the legal voters present, and voting at any legally called meeting of the district. Sec-

tion 35, School Law, (Pamphlet Edition.) Section 207 provides that "if any order drawn for the payment of a teacher is presented to the treasurer for payment, and is not paid for the want of funds, the treasurer shall make a written statement over his signature, by undersigning such order, with date showing such presentation and non-payment, and shall make and keep a record of such indorsement. Such order shall thereafter draw interest at the rate of 10 per cent. per annum, until the treasurer shall notify the clerk in writing that he is prepared to pay such order."

Except, therefore, in the case of orders drawn for the payment of teachers' wages, the trustees cannot make school-district orders bear any rate of interest unless empowered and directed as provided in section 35 aforesaid. Such orders, however, after maturity or demand of payment, as the case may be, would bear interest at the rate of 7 per cent., as in all other cases where there has been a breach of a money contract. This principle has been held to apply in the case of county orders, and with equal propriety may be held to apply to school-district orders. You state that a school-district order was presented to you as treasurer for payment, in the body of which appeared the words "with added, at twelve per cent;" that you paid the face of the order, but declined to pay any interest because it did not read "with interest added, at twelve per cent." I do not think your objection would be sustained. In construing contracts the courts, as a primary principle, seek to give effect to the intention of the parties. In this case, I take it, if the order is otherwise regular the court would supply the omission; *i. e.*, it would construe it to mean the same as though it read "with interest added, at twelve per cent." Unless this be done, the words "with added, at twelve per cent." would have no significance whatever. Orders bearing such rate of interest would have to be expressly authorized, as hereinbefore stated.

ST. PAUL, May 17th, 1876. GEO. P. WILSON, Atty. Gen.

Hon. William Pfaender, State Treasurer:

SIR: I am in receipt of your favor of the sixteenth instant. While the act to which you refer (chapter 90, Gen. Laws 1876) provides that County Auditors may draw orders in payment of wolf bounties directly upon the State treasury, it is evident that it was not the intention that such order should be presented for payment at the State Treasurer's office. Furthermore, if such were the intention, effect could not be given to the act, because no appropriation has been made for that purpose. It is provided in said act that such orders shall be received in payment of State taxes. Whether by this it was intended that such orders should be received by County Treasurers in payment of State taxes, as county and town orders are now received in payment of county and town taxes, and be transmitted in part payment of the drafts of the State Auditor in favor of the State Treasurer, or should be cashed by the county and transmitted as aforesaid, is not entirely clear; but in either event I do not see how you can refuse to receive them in payment of taxes due the State when they come to you through the proper channel.

ST. PAUL, May 24th, 1876. GEO. P. WILSON, Atty. Gen.

J. A. Reed, Esq., Warden, etc.:

DEAR SIR: Your favor of the 26th received. The statute defining the duties of grand juries makes it incumbent upon them to inquire into the condition and management of the public prisons in the county. This is broad enough to cover the State Prison, but inasmuch as that institution is managed and controlled by officers appointed by the State, I do not think the grand jury of Washington county has any control over it, or any duty to perform with reference to it. But at the same time I can see no objection to the grand jury of that county visiting and inspecting the prison grounds, etc,, if that should be its pleasure.

ST. PAUL, May 31st, 1876. GEO. P. WILSON, Atty. Gen.

S. Batchelder, County Auditor, Freeborn County:

SIR: Auditor Whitcomb has referred to me your letter of May 27th to answer. You state that your understanding of section 64, *c.* 11, Rev. St. 1866, has always been that the Auditor's certificate of "taxes paid" cuts off all previous tax liens, even deeds, and inquire what effect an Auditor's certificate of "taxes paid" would have under the section referred to. I do not understand that such certificate would have the effect claimed by you. Gen. Cole, when Attorney General, decided that a sale of land for taxes or a forfeiture to the State would not constitute a payment of taxes, and hence it would not be proper for a County Auditor to certify "taxes paid" in such cases, as such certificate would have the effect to entrap innocent purchasers. See Op. Attys. Gen. 508. My recollection is, although I have not the record here to refer to, that Gen. Cornell subsequently held that a sale constituted a payment, and that it would be proper in such case to certify the tax to have been paid. While such certificate might have the effect to mislead a purchaser from the original owner, it has never been claimed, and could not be claimed, that such certificate would destroy any right the purchasers at the tax sale would acquire by reason of his purchases. If, when said statute was in force, the Auditor should have certified that the taxes for any particular year, or for all previous years, are paid, which would be the effect of the certificate "taxes paid," or that the land in question had not been assessed, no subsequent sale for taxes covered by the certificate would be valid, but such certificate would not affect sales already made. This is my understanding of the section to which you refer. We differ simply as to the construction of the last clause of the section, viz: "And no sale made of lands with reference to which such certificate that the taxes are paid, or have not been assessed, or receipt has been given, shall be valid or of any effect, and if such sale is made the Auditor," etc. You construe it as though it read, "and no sale, theretofore, made,"—give the words a retrospective operation; while I would substitute the word "thereafter," for theretofore, making the statute apply only to subsequent sales for taxes certified to have been paid.

WINONA, June 1st, 1876. GEO. P. WILSON, Atty. Gen.

O. C. Gregg, County Auditor, Lyon County:

SIR: Your recent letters to the State Auditor have been referred to me to answer. You inquire, "Will an abstract of tax-list in hands of the County Auditor, and the entry in the Auditor's journal and ledger, constitute a sufficient and proper charge against a County Treasurer, that will hold him responsible for such tax-list, and lay him liable to a judgment for the amount unaccounted for, by collections and delinquent taxes reported credit?" When the tax-lists are delivered to the Treasurer, he is charged with the total amount of taxes due upon the said lists at the settlement in May. When the lists are returned to the County Auditor, he must account for the amount so charged to him.

This he does by marking "paid" against each tax which the duplicate receipts on file in the Auditor's office showed to have been paid, and returning as delinquent all tracts and lots not so marked. This would balance his account, except in the case of abatements, for which, if any, he would be entitled to credit, and the account balanced. I do not well see how any discrepancy could arise in the accounts. If the Treasurer has returned any taxes as delinquent, upon which the taxes have been paid, the receipts are conclusive against him, and he and his bondsmen are responsible for the amount.

As to your second question, I am of opinion that it would not be legally proper for you to carry out upon your books so much of the tax voted to be raised as the town authorities were empowered to vote. If they exceeded the limit imposed by law, you would not be justified in making the levy in accordance with the return to your office, but could extend upon your books so much of the same as the law

permitted. While this clause is in some degree irregular, yet in some instances it is quite unavoidable.

ST. PAUL, June 13th, 1876. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

SIR: I am in receipt of your favor of the twenty-sixth inst., including communication from the City Assessor of Northfield, and also opinion of Hon. Chas. Taylor, City Attorney. Three questions are presented upon which my opinion is requested: *First*, are funds loaned by "Carleton College" on mortgage drawing interest taxable? *Second*, whether a dwelling-house, standing upon land otherwise occupied by the college for educational purposes, from which dwelling-house the college authorities receive a rental, is taxable. *Third*, whether parsonages belonging to religious denominations, and occupied as residences by the local ministers are taxable. To all these, it appears, the City Attorney gave an affirmative answer. I concur in his opinion except as to the first question. Carleton College, as I am informed, is a public institution of learning, supported entirely by voluntary contributions, which contributions constitute its endowment fund. The fund is invested by the college authorities, so far as is practicable, in interest-bearing securities, including mortgages upon real property, for the sole use and support of the college. An institution so endowed and sustained is an institution of purely public charity, (see Gerke vs. Purcell, 25 Ohio St. 226;) and as such falls within subdivision 6, § 5, *c.* 1, Laws 1874, which reads as follows: "All buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustaining, and belonging exclusively to, such institutions." The term "credits" is defined in the tax law to mean and include "every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due, and all claims and demands secured by deed or mortgage, due or to become due." These provisions of the tax law, in my judgment, clearly exempt the funds of the institution from taxation, whether the same are invested and drawing interest or not. Any other conclusion, it seems to me, would be at variance, not only with the letter, but the intent and spirit of the act. Conceding the provisions of the Ohio tax law to be substantially the same as our own, I cannot concur with the reasoning of the court upon this point in 19 Ohio, 115. As to the second question, the dwelling-house, although situated upon the grounds occupied and used by the college, having been leased for rental, nominal or otherwise, would be taxable.

As to the third question, it has been held by the Supreme Court of this State, under a law identical with the one now in existence upon the same subject, that a parsonage owned by a church is not exempt from taxation. See St. Peter's Church vs. Board of County Commissioners for Scott county, 12 Minn. 395.

ST. PAUL, June 28th, 1876. GEO. P. WILSON, Atty. Gen.

O. C. Gregg, Esq., County Auditor, Lyon County:

DEAR SIR: Your favor of the eighteenth inst., addressed to the State Auditor, has been handed to me to answer. You inquire whether the Clerk of the District Court is entitled to a fee for filing bonds and oaths of office of the Justices of the Peace. You refer to the statute fixing the Clerk's fees, giving him ten cents for "filing every paper."

His being a fee office, he might, under this statute, make a charge to the county in the case referred to, but certainly could make none to the justices themselves. They could leave their bonds and oaths with the Clerk, as the statute directs, and it would be his duty to file them in his office.

ST. PAUL, July 20th, 1876. GEO. P. WILSON, Atty. Gen.

Hans Knudson, Esq.:

DEAR SIR: Your favor of the fourteenth inst. received. The judges of election have no authority to deputize an outsider to carry election returns to the County Auditor. The person performing this duty must be one of the judges, selected by lot, or otherwise agreed upon. Section 17, *c.* 1, Gen. St. Section 38 of the same chapter must be construed in connection with section 17, and "the person" mentioned in section 38 held to mean the judge chosen by lot, or otherwise agreed on. Hence a third party, although deputized by the judges to convey the returns to the County Auditor, would not be entitled to any compensation from the county.

ST. PAUL, August 17th, 1876. GEO. P. WILSON, Atty. Gen.

Hon. D. Burt, Superintendent Public Instruction:

I am in receipt of your favor of recent date, and to the several questions therein contained I respectfully submit the following answers:

First. The minor children of any parent duly naturalized, and who, at the time of such naturalization of the parent, reside within the United States, become citizens and entitled to all the privileges of citizens immediately upon their arriving at the age of 21 years.

Second. A foreign woman becomes a citizen by marriage to a citizen, or when an alien to whom she is married becomes a citizen.

Third. Foreign-born women who have not been naturalized by marriage or by the naturalization of their parents while they were minors, in order to vote in school matters and for school-district officers, must have taken the same steps towards becoming citizens that are required of foreign males.

Fourth. The right of women to vote in school matters is restricted by the terms of the law to the school-district of which they shall at the time have been for 10 days resident.

The law contemplates voting only in school-district meetings and in incorporated cities and villages "for the election of public school officers within such city or village"—that is, to serve within it. Hence women cannot vote for a County Superintendent of Schools in the counties where that officer is to be elected by popular vote.

Fifth. The prerogative of women to vote extends to "any measure relating to schools." The site of a school-house, the question of building a school-house, of purchasing apparatus, and of levying taxes, as well as the election of local school officers, must all come within the intention and scope of the law on this point.

Sixth. A married woman is not a freeholder because her husband is such, nor is the husband a freeholder because the wife is such. Estates of inheritance and for life are denominated estates of freehold. Upon the death of the husband or wife, and not until then, does the survivor take either a life estate in the homestead of the deceased, or an estate of inheritance in such other lands as the deceased may at any time have been seized or possessed of during coverture, and to the disposition of which, by deed or otherwise, the survivor shall not have assented in writing.

Seventh. A woman who is entitled to vote and is also a freeholder, can sign petitions and remonstrances respecting the formation and alteration of school-districts.

ST. PAUL, August 17th, 1876. GEO. P. WILSON, Atty. Gen.

M. Thoeny, Esq., Auditor of McLeod Co.:

SIR: Your letters addressed to the State Auditor have been handed to me to answer. It appears therefrom that the Commissioners of your county have entered into a contract with certain parties for the erection of a court-house; that at the time such contract was made certain members of the board were appointed as a building committee to superintend the construction of the court-house. By resolu-

tion of the board, the County Auditor was directed to issue to the contractor county orders to the amount of estimate made and filed by the building committee, on the fifth day of each month, or as soon thereafter as might be practicable. By the terms of the contract the building committee are to make out and file estimates of labor performed and materials furnished, on the fifth of each month, and 9 per cent. of such estimate is required to be paid at once, and remainder when the building is completed.

You inquire whether you would be justified in issuing county orders as directed by the resolution of the board. This question is asked, I presume, with reference to the statute, which provides that "no claims against the county shall be paid otherwise than upon the allowance of the County Commissioners." While the manner in which your Commissioners have proceeded has the sanction of custom, and is business-like, I think they exceeded their authority in directing the payment of claims thereafter to accrue against the county. The making of the contract created no claim against the county. None might ever have accrued against the county under the contract. I do not think the Commissioners can approve and direct the payment of prospective claims against the county. Nor can they delegate the authority given them by statute to any other person or persons. If I am correct in the position that the Commissioners can only allow and order the payment of existing claims against the county, it would follow that you would not be justified in issuing orders upon claims arising under the contract, but never, as a matter of fact, passed upon and allowed by the Board of Commissioners. The statute further provides that "when a claim of any person against the county is allowed in whole or in part by the Board of County Commissioners, no order shall be issued in payment of such claim, or any part thereof, until the expiration of thirty days from the date of the decision"—that is, the decision of the board allowing the claim. This statute is generally disregarded, but it should be observed, in order that an appeal from the decision of the board may be taken if desired. This statute is inconsistent with the resolution of the board, and fully justifies the position I have taken. The appeal, if taken, is required to be taken within 30 days from the date of the decision of the board. In this case the allowance is made possibly months before any claim has arisen, and therefore, if the resolution or action of the board can be sustained, the right of appeal is barred.

To give force and effect to this statute the allowance must be made after the claim has matured against the county. I dislike to render an opinion calculated in any way to embarrass your county officials or other interested parties in so laudable an enterprise, but consider it unavoidable in this case. You further inquire, when lands have been sold for tax of 1873, October 1, 1874, and for taxes of 1872, and prior years, February 1, 1875, and on both sales bid in for the State, which sale should certificates of assignment be based upon? For aught that I can discover in the law, certificates of assignment should be so made in each case. Section 160, c. 1, Laws 1875, as amended by act of 1875, would not be applicable in such case.

ST. PAUL, August 17th, 1876. GEO. P. WILSON, Atty Gen.

W. W. Braden, Esq., Co. Treasurer, Fillmore Co.:

DEAR SIR: I am in receipt of your favor of the twelfth inst. I have had occasion to consider the act of 1873, relative to the depositing of county funds, and concluded, in view of the manner in which banks other than national are required to return their property for taxation, that the words "capital stock," in the act of 1873, referred to, should not be construed technically,—that is, for a bank to participate in the deposits of the county, it would not be necessary that it should return for taxation its capital stock *eo nomine;* that a return of moneys, credits, bills receivable, etc., constituting its capital, would be sufficient. In view of the situation in some of the counties of the State, it seemed necessary to construe the act liberally, in order that the county might receive interest upon deposits. No harm can result from this construction if the Board of Audit is careful in taking the security required by

the fourth subdivision of the act of 1873. The purpose of the proviso to subdivision 2 was to limit the deposits to banks having capital stock in one form or another, and only to the amount of such capital stock. The duty of the Treasurer is to see that his deposits of county funds do not exceed the amount of capital stock in the banks designated by the Board of Audit. The board designates banks of deposit in its discretion, but that discretion is limited to such banks as make return of capital stock. The amount of such capital stock cuts no important figure, as the deposits cannot exceed such amount. The bond that is taken as security—and this, it seems to me, must be the chief reliance of the county—has direct reference to the capital stock of the bank; that is, the deposits are limited to the amount of such capital stock, and the bond must be in an amount at least double the amount that the Treasurer is authorized to deposit. The duplicate tax-list referred to in the second subdivision is the duplicate tax-list for the current year. It cannot refer to a duplicate tax-list not yet in existence. Reference should be had to the assessor's returns, but the action of the Board of Audit and Treasurer, as well, would be based upon the existing tax duplicate.

ST. PAUL, August 21st, 1876. GEO. P. WILSON, Atty. Gen.

C. Didia, Esq., County Treasurer, Sibley County:

DEAR SIR: Your letter of the twenty-eighth inst. has been referred to me to answer. You inquire, "Have the County Commissioners a right to abate taxes or costs on lands against which judgment is entered and sold for tax?" They have not. The judgments are canceled and sales annulled only by redemption or judgment of court. The purchaser, or assignee of the State, as the case may be, is entitled to the amount paid, with interest at the statutory rate, and the Commissioners cannot interfere. You further inquire "whether, in cases where deeds were transferred and certified by the Auditor 'taxes paid,' it afterwards appeared that it was a mistake of the Auditor, that there were taxes due at the date of this certificate, and the land was sold for such taxes, who is responsible for the same,—the land, the county, or the Auditor who made the transfer?" Such certificate being untrue would not discharge the taxes, and the subsequent sale would be valid. Section 64 of chapter 11 of the General Statutes was repealed by the act of 1874. The officer so certifying would be answerable to the party injured thereby.

ST. PAUL, September 1st, 1876. GEO. P. WILSON, Atty. Gen.

J. K. Miller, Esq., County Attorney, Montevideo, Minn.:

DEAR SIR: Your postal addressed to the State Auditor has been referred to me to answer. You inquire "whether any county officials have the power to appropriate the surplus of any particular county fund to the payment of orders on the county funds." Our understanding is as provided by statute in reference to taxes levied for debts already contracted, and to pay interest upon the floating indebtedness of the county, that in all cases the taxes levied and collected must be applied exclusively to the purpose for which it was levied and collected; but when such purpose is accomplished, and a surplus remains, that it would be competent for the County Commissioners, who, by statute, have the management of the county funds, to transfer such surplus to any other county fund. Such surplus cannot be refunded, and hence should be used.

ST. PAUL, September 12th, 1876. GEO. P. WILSON, Atty. Gen.

W. V. King, Esq., County Auditor, Jackson, Minn.:

DEAR SIR: You state in your letter of the eleventh inst. that "several claims for timber bounty have been presented to the County Commissioners by persons

who have recently purchased farms in this county. The previous owners would have been entitled to bounty under the laws of 1871, (1873.) It is claimed that the transfer of the land carries with it the right to draw the bounty by the purchaser, and Commissioners are so inclined to regard it. Is this correct?" I am of opinion that such claim should be allowed. The purpose of the act is to encourage the planting and growing of trees. It is a matter of no concern to the State *to whom* this bounty is paid, provided the conditions are fully complied with. It seems to me that it is a privilege that attaches to the estate, and would pass to the vendee or purchaser, and in case of the decease of the person planting, his widow and children would avail themselves of the benefit of the act. To construe the act as conferring a personal privilege, would, in some instances, or might, defeat the purpose of the act and work a hardship. The State can afford to be just, if not generous.

ST. PAUL, September 13th, 1876. GEO. P. WILSON, Atty. Gen.

F. Y. Goulet, Esq., County Auditor, Brainerd, Minn.:

DEAR SIR: I am in receipt of your favor of the tenth inst., submitting the following inquiry: "Is the printer entitled to extra pay for publishing notices and certificate required with the list of delinquent taxes, besides the 15 cents per description as fixed by law?" Section 136 of the tax law provides that "the county commissioners shall let the advertising provided for in section 112 * * * for the lowest sum not exceeding 15 cents for each description," etc. The advertising provided for in section 112 includes the notice as well as the list. The intention was, in my judgment, that the rate per description should cover everything required by law to accompany the list. That may have been the understanding of your board and the printer doing the work at the time the contract was made. I, of course, have no means of knowing; but whatever it may have been, as I view the law, it would be immaterial. If the printer is entitled to extra pay for notice accompanying list, why is he not entitled to extra pay for the amount set opposite descriptions as well as for head-lines? This would be a strict construction, and would lead to an absurdity.

ST. PAUL, September 16th, 1876. GEO. P. WILSON, Atty. Gen.

E. G. Holmes, Esq.:

DEAR SIR: Judge Dillon decided, in a case arising in Nebraska, that the ordinary State laws relating to schools, marriage, divorce, administration of estates, etc., did not extend to Indians residing in a body and maintaining their tribal organization under the superintendence of agents appointed by the United States Government; that in all their internal concerns they were governed and regulated by the laws and customs of the tribe. It has been frequently held, I think, that where the crime of murder was committed on the reservation, that the United States Government would have jurisdiction, and not the State, in each case. The statute found in 1 Biss. 582 would seem to comport with this doctrine.

ST. PAUL, September 22d, 1876. GEO. P. WILSON, Atty. Gen.

Charles Porter, Esq.:

DEAR SIR: Your letter of the twenty-fifth ult. came duly to hand, but on account of my absence from the capital on official business has remained unanswered. By reference to the statute defining my duties, you will see that in this case I cannot give an official opinion that would be binding upon any one. Without stating your questions I will answer them generally.

Boards of Commissioners have the authority to rescind such action as may have been previously taken by them, excepting cases where the rights of other parties have attached. For illustration, the County Commissioners have the power to appoint a Superintendent of the county schools. When they have exercised that power—

that is, performed the last act required to be done to make the appointment complete—they cannot, in such case, rescind their action. I do not understand that in order to rescind their action it would be necessary, especially in a case such as you put, to pass a resolution solely for that purpose. I mean by this that a resolution passed which is decidedly opposed to one already in existence, although not naming such prior resolution, would have the effect to annul such prior resolution. In legislation, repeals by implication are not favored; and yet the courts are constantly recognizing and enforcing such legislation. I do not see why this doctrine cannot be applied to action of the County Commissioners.

You ask, "Can a committee of three of the five Commissioners perform any acts required by law to be done by the County Commissioners?"

This question must be answered in the affirmative. By chapter 4 of the Revised Statutes it is laid down as a rule of construction that words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such persons or officers. By section 77, tit. 2, c. 8, it is provided that the power of the county as a body politic and corporate can only be exercised by the Board of Commissioners thereof, *or in pursuance of a resolution by them adopted.* You again ask: "Can three of the board lawfully exclude the other two from the performance of any duty imposed by law upon the County Commissioners?" The Board of Commissioners acts by majorities, and the majority may act in opposition to the wishes of the minority, and in that sense exclude the minority. Then, again, I suppose, it would be proper for the board to impose certain duties upon a committee of the board, such as to investigate and report to the board, and to do certain things authorized as directed by the board. This is often done when the county is building. The board will appoint a building committee from its number to supervise the work and report to the Commissioners in session. The special act of 1874, (chapter 61,) authorizing your county to issue bonds upon certain conditions, requires that the bonds issued by the county thereunder shall be "signed by the County Commissioners" and attested by the signature of the County Auditor. I am of opinion that the bonds would be good if signed by a majority of the board. In view of the provisions quoted herein from chapter 4 of the Revised Statutes, it is very probable that if signed by the chairman by direction of the board, and attested by the County Auditor, in accordance with the general statute upon this subject, that it would be held a sufficient compliance with the law. But inasmuch as the Commissioners in this case are acting under a special power, it may be that the courts would require a strict compliance with the act. I am not free from doubt upon this question. It would be the duty of the board, subject to the restrictions and limitations named in the act, to fix the amount of the bond; also time, place, and manner of payment. This authority could not be delegated to a committee. The act provides that the railroad company shall not be entitled to any of the bonds until completed and cars running thereon. This presupposes that the bonds will have been executed and ready for delivery at that time. It is very customary in such cases to place the bonds in the hands of a third party for delivery whenever the conditions thereof have been fulfilled and proper evidence produced.

ST. PAUL, October 2d, 1876. GEO. P. WILSON, Atty. Gen.

W. J. Blackstock, Esq.:

DEAR SIR: Your letter of the seventh inst. received. I am of the opinion that the people of Kanabec county would have no votes in the election of a Clerk of the District Court for Pine county, by reason of the former being attached to the latter for judicial purposes.

The constitution (section 13, art. 6) provides there shall be elected in each county where a District Court shall be held one Clerk of said court. I am not aware of any general law in conflict with this provision, purporting to give the right to vote for said officer to persons residing out of the county.

ST. PAUL, October 9th, 1876. GEO. P. WILSON, Atty. Gen.

T. C. White, County Auditor, Isanti County:

DEAR SIR: The State Auditor being absent, your letter of the eleventh inst. has been referred to me to answer. You ask:

1st. Cannot a piece of land be redeemed from a tax sale by paying the amount due for the particular year for which the sale was made, although all the taxes subsequently assessed and due upon the same tract are left unpaid?

2d. When a piece of land has been bid in for the State at a tax sale, does not that amount, and all taxes subsequently assessed upon it, bear interest at 24 per cent. per annum until the two years' redemption expires?

3d. Can the Board of Commissioners make any abatement of tax or interest and costs, or both, upon any tract against which judgment has been obtained?

4th. Does section 157 of the tax law of 1874, as amended by section 48, Laws of 1875, apply to both real and personal property? and if it does so apply, is the first proviso, that all applications for such relief shall be made during the year after the levy of such tax, to be construed as prohibiting the entertaining of any application made after the year has expired?

The first question must be answered in the negative. Whether bid in for the State, assigned by the State, or sold to a purchaser, the statute requires of the person proposing to redeem that he settle all unpaid taxes, interest, and penalties accruing subsequent to the sale from which he offers to redeem. 2d. When a piece of land has been bid in for the State, the amount due, for which it was bid in, would bear interest at 24 per cent. per annum, as stated by you; but subsequent taxes would not bear any interest until the same became delinquent. If, however, the State should assign its rights, and the assignee should pay subsequent taxes, although not yet delinquent, he would be entitled to 24 per cent. per annum thereon from the date of payment. With reference to your third question, I have heretofore held that after judgment the power of the County Commissioners to abate no longer exists. In other words, the Commissioners cannot change or interfere with the judgment record. By redemption the sale is annulled and judgment canceled. Then, again, the sale may be declared void by judgment of the court. The State Auditor has held that section 157, to which you refer, applies to both real and personal property, and that application for relief thereunder must be made during the year next after the levy of the taxes.

ST. PAUL, October 16th, 1876. GEO. P. WILSON, Atty. Gen.

G. D. Caster, Esq.:

DEAR SIR: Your favor of the seventeenth inst. received. You inquire, "Can a man hold both the offices of County Auditor and Clerk of the District Court at the same time?" I think not. I find no statutory prohibition, but when we consider the duties imposed upon those officers, especially under the new tax law, it is quite clear that the two offices are incompatible.

"Incompatibility in offices exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both."

ST. PAUL, October 19th, 1876. GEO. P. WILSON, Atty. Gen.

John P. Williams, Esq., Co. Attorney, Fergus Falls:

DEAR SIR: I do not think that the certificate of the County Auditor of "taxes paid and transfer made" would have the effect to discharge taxes which were actually unpaid at the time, nor would his successor in office be bound by such entry, when the records of the office disprove the correctness of the entry, or, in other words, showed that it was false. That is not the evidence upon which he acts in making his indorsement. He consults the books and records in his office, "and if there are delinquent taxes due he shall certify to the same, and when the receipt of the County Treasurer shall be produced for the said delinquent taxes, and for the taxes that may

be in the hands of the County Treasurer for collection, the County Auditor shall enter taxes paid and transfer made." Sections 146 and 147, Tax Law of 1874. I suppose an officer falsely certifying would be responsible to any one injured thereby.

ST. PAUL, November 1st, 1876. GEO. P. WILSON, Atty. Gen.

P. T. McIntyre, Esq., Co. Auditor, Austin, Minn.:

SIR: Your letter of the twenty-sixth ult., addressed to the State Auditor, has been handed to me to answer. You state that for several years past a certain piece of land in your county has been sold for taxes, and that the period of redemption has expired upon the sale for the tax of 1873 and previous years; that it now transpires that the party to whom the land had been assessed deceased some years ago; and that the land is owned by his heirs, three of whom are of age, and the remaining two are minors. The question you present is, can the minor heirs redeem the whole, or simply their undivided interest in the land in question, it appearing that the five heirs have each an undivided interest in the land? By statute, minors having an estate in or lien on lands sold for taxes may redeem the same within two years after such disability shall cease, in the manner provided in section 131 of the tax law. It follows that at any time during such disability the right to redeem exists. The statute extends this special favor to minors. Hence, during such disability, they stand in precisely the same position that adults do during the two years allowed for redemption in all cases. If this be true, as we think it is, it would follow that minors owning an undivided estate could redeem not only that interest, but the whole. Section 132 of the act of 1874 confers the privilege upon those owning an undivided estate in any piece or parcel of land sold for taxes, of redeeming such estate by paying a proportionate part of the amount required to redeem the whole. Under this, of course, the minor heirs could redeem their interest in the estate. While it confers this privilege, it does not curtail their right, during their minority, to redeem the whole, although such redemption may inure to the benefit of others. The authorities all seem to point in this direction. I have found none, however, deciding the precise point at issue in this case.

ST. PAUL, November 3d, 1876. GEO. P. WILSON, Atty. Gen.

M. B. Wilcox, Esq., Clerk of the District Court:

DEAR SIR: I am in receipt of your favor of the second inst., in which you ask the following questions: 1st. Can a tax judgment be satisfied in part and at different times? 2d. When a description is given wrong by a former County Auditor, can the present County Auditor change the copy of that tax judgment? 3d. When a man pays his tax, and the receipt does not cover his land, what is his redress?

Except in cases falling under section 132 of chapter 1, Laws 1874, and section 22, *c.* 2, same year, there is no authority for a partial redemption. Except for the said provisions, a party owning an undivided interest could only redeem by paying the whole redemption money.

I do not know as I fully understand your second question. By section 82, *c.* 1, Laws 1874, County Auditors are given authority to correct certain errors, but certainly, after the delinquent list has passed into the hands of the Clerk of the District Court, and judgment rendered, the County Auditor could not correct errors of description, or anything else. He must, then, sell by the description given in the judgment.

With reference to your last question, I have no doubt that the County Commissioners would refund the tax paid by mistake under the authority given in section 157 of the tax law, as amended in 1875, and this whether the mistake was that of the individual offering to pay, or officer, or both.

ST. PAUL, November 9th, 1876. GEO. P. WILSON, Atty. Gen.

W. W. Griswold, Esq., County Auditor:

SIR: Your favor of the thirteenth inst. received. The rule is that when a person is appointed to fill a vacancy he will hold until the next general election, and until his successor is elected and qualified, and the person so selected will hold during the balance of the regular term, and until his successor is elected and qualified. This rule, however, would not apply to officers whose term of office is designated in the constitution. The person elected Sheriff in your county, in November, 1875, was therefore elected to serve during the unexpired term of his predecessor, and until his successor should be elected and qualified. This is upon the presumption that the regular term commenced in January, 1874, which would appear to be the fact, as the first election was held in November, 1872, and hence the regular term of that officer in your county would date from January 1, 1873.

ST. PAUL, November 14th, 1876. GEO. P. WILSON, Atty. Gen.

Hon. D. Burt, Supt. of Pub. Instruction:

DEAR SIR: In your favor of the tenth inst. you request my opinion upon the question as to the manner in which school-district officers are required to be elected. In other words, whether an election by *viva voce* vote is a compliance with the law, or must the election be had by ballot?

I am of opinion that the election of school officers should be by ballot. The law with reference to common schools is silent as to the manner in which the election of school-district officers should be conducted. But the constitution, § 6, art. 7, requires that all elections shall be had by ballot, except such town officers as may be directed by law to be chosen otherwise.

The only question is, then, does this provision of our constitution apply to school-district officers? That it does seems evident. The language is broad enough to cover school, as well as state, county, and town elections.

The exception in the case of town officers only, serves to make certain that the provision was intended to apply to local as well as general elections. The same reason exists for voting by ballot in the case of school elections as in the other cases. Cooley, in his work on Constitutional Limitations, says that the distinguishing feature of this mode of voting is that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy in regard to the persons for whom he votes, and thus escape the influences which, under the system of oral suffrages, may be brought to bear upon him with a view to overbear and intimidate him, and thus prevent the real expression of public sentiment.

In the case of state, county, town, and independent school-district officers, the law requires in terms that said officers shall be elected by ballot. In these cases the Legislature simply re-enacted the constitutional provision. The Legislature is powerless to prescribe a different method, except in the case of town officers; and hence there is no significance in the fact that nothing is said in the common-school law as to how the school officers should be elected.

An election, therefore, of school-district officers by *viva voce* vote would be irregular and invalid. A person elected in this way to office would have no title that he could assert against a regular incumbent of the office holding over after the expiration of his term. And yet a person elected by *viva voce* vote, having qualified and assumed the duties of the office to which he was so elected, would be an officer *de facto*, and his acts as to third persons would be valid.

ST. PAUL, November 15th, 1876. GEO. P. WILSON, Atty. Gen.

John D. Wilcox, Esq., County Attorney:

SIR: Your favor of the fifth inst. came duly to hand. You submit the following questions: 1st. Can the State of Minnesota sustain an action for trespass and

damages for cutting timber on lands sold to the State by the act of 1873–4, and not redeemed within two years? If so, who is to collect the stumpage? Has the County Attorney anything to do with it? 2d. When the State transfers and assigns all her right, title, and interest derived by virtue of such sale, can the assignee sustain an action for trespass and damages on said lands while it belongs to the State, and before the transfer? At the expiration of two years from the date of the sale the State acquires absolute title. The State could undoubtedly maintain an action for trespass committed after the title vests. Lands so acquired by the State would become subject to the provisions of chapter 38 of the General Statutes. Your duties with reference to the lands owned and held in trust by the State are defined by that chapter. You will see that the interests of the State are protected, and thereto prosecute all parties committing trespass upon said lands. If you meant by your first question to ask my opinion upon the question as to whether, after the State acquires title, it can maintain an action for trespass committed within the two years allowed for redemption, I would say that it is very clear that the technical action of trespass could not be maintained, for the reason that the State has neither title nor possession, such as would enable it to maintain such action. At the same time I am of the opinion that the certificate of sale conveys to the State such an interest as would enable the State, as in the case of a mortgage, to protect itself against the wrongful acts of the owner; that is, it would, during the period of its redemption, have a right to protect its security, and to that end, as stated by Blackwell, could sustain a bill to enjoin the owner or those acting under his license from the commission of acts of waste or destruction. This remedy it is entitled to, because a redemption is uncertain; and if it never takes place, it has a right to the estate as it was at the time of the purchase. As against a stranger, the State could undoubtedly maintain an action for injuries done to the estate within the period of redemption. Such action would have to be in the form of an action upon the case under the common law, as distinquished from an action in trespass. I am of opinion, however, that this right of action would not pass to the assignee of the State, especially under the statutory form of assignment.

ST. PAUL, January 17th, 1877. GEO. P. WILSON, Atty. Gen.

Hon. D. Burt:

SIR: In your favor of yesterday you request my opinion upon the following: A party gave a school-district a bond for a deed for a school-site, to be executed when he should obtain his title from the United States. A school-house was built on a site upon such land selected by the district in expectation of a deed according to conditions of the bond. When the party obtained his deed from the United States he mortgaged his farm, and no deed has been issued to the district.

Can said party now execute a valid deed to the district in spite of the mortgage? If not, can the district move the school-house from its present site? If, at the time the mortgage was taken, the bond was upon record, the party can now deed to the district free from the lien of the mortgage; likewise, if the mortgagee had actual notice of the existence of the bond, or if at the time the mortgage was taken the school-house had been erected and was occupied as such, that circumstance would be sufficient to put the mortgagee upon inquiry and preserve the rights of the district under its contract. In the absence of all these conditions, the mortgagee would doubtless have a lien under his mortgage upon the site, and school-house, if attached to the realty. In this event, if the mortgagee be a good citizen, he, upon proper application, would either release his lien or permit the district to remove the school-house. If he should decline to do either, and the district is desirous of acquiring title to a school-house site at once, I should advise those interested to remove the school-house, unless enjoined and prevented from so doing. If the school-house is not so attached as to become part of the realty, the mortgagee can have nothing to say about the matter, as the school-house in that event would not be covered by his mortgage. Until after foreclosure, at least, the mortgagee cannot interfere with the free use and enjoyment of the site and school-house by the dis-

trict. The school-district officers are doubtless posted as to the probabilities of the land including the site being redeemed by the mortgagor, in case a foreclosure has taken place. I would state that the mortgagee has a right to protect his security, but in this case the security may be abundant without the house, and in the worst aspect of the case the mortgagee, if entitled to recover damages at all, could simply recover nominal damages.

ST. PAUL, January 20th, 1877. GEO. P. WILSON, Atty. Gen.

Hon. D. Burt, Superintendent of Public Instruction:

SIR: Your favor of recent date, inclosing communication and accompanying documents from the clerk and treasurer of school-district No. 33, Le Sueur county, received. It appears from said communication and documents that at the annual school meeting in said district, held October 3, 1874, the trustees were authorized to build an addition to the district school-house, to be used for a primary graded department; that such addition was built and primary department organized; that no change in the organization of said school-house has taken place since; that since that date, with the exception of the summer term in the year 1874, and during about one month of the winter term commencing in November, 1876, the trustees have employed two teachers,—one for the primary department and one in the higher department. A difference of opinion having arisen among the officers of the district concerning their authority to employ more than one teacher, the matter has been referred to me for my opinion upon the statement of facts submitted. It further appears that the size of the school, in the opinion of the trustees, demanded the services of more than one teacher, in order that justice might be done to the pupils in attendance, and that two teachers were employed, as hereinbefore stated, without objection, until January 3, 1877, when a special school meeting was called and held "for the purpose of deciding whether the legal voters of the district wanted to hire another teacher in addition to the one already employed." At such meeting a resolution was passed repudiating the action of the trustees in employing two teachers. It is the special business of the trustees to employ teachers. The voters of the district may, in their individual or collective capacity, advise the trustees as to their wishes, but cannot control their action. If the trustees disregard their wishes, or do not, in their judgment, consult the best interests of the schools or district, they can make a change as soon as their respective terms expire. In this case, in my judgment, the action of the trustees was clearly within the spirit of the law governing their duty in the premises. The district had established a graded school, which made the employment of two teachers a necessity, at least in the judgment of the trustees. In the absence of such action on the part of the district, if the members in attendance upon the district school, in the opinion of the trustees, demanded the services of more than one teacher, I am not certain that the trustees would not be justified in employing an additional teacher. To them is committed the general charge of the interests of the school, and this certainly confers some authority, especially in the matter under consideration. The statute does not limit their authority to the employment of one teacher. The trustees, in levying a tax for the support of the district school for three months, and the district in voting a tax for an additional term, should do so with reference to the necessities of the district. The proper instruction of the children should be the leading consideration. On the other hand, officers should not abuse their authority, or go beyond the means provided and under their control. The further question submitted, as to whether the special meeting held January 3d was a legally called and legally conducted meeting, it is unnecessary for me to decide, or give an opinion upon, in view of my answer to the first question.

ST. PAUL, January 20th, 1877. GEO. P. WILSON, Atty. Gen.

C. W. Sanford, Esq.:

DEAR SIR: Your favor of recent date received. It appears from your statement that at the time the trustees purchased for the district the "maps and globe" there were no funds in the district treasury to pay for the same, and that the trustees gave an order on the treasurer of the district "for the amount, when in his hands for that purpose, payable in November, with interest." The articles were tendered at the next annual meeting of the district, but were not received by the district, and I infer that the district refused to vote or appropriate any amount to pay for the same. The question you ask is, "Can the district be held for the amount?"

It is made the duty of school trustees to furnish all things necessary for the school-house during the time a school shall be taught therein. They are, therefore, invested with certain discretionary powers, and if, in this case, the trustees were of opinion that a map and globe were necessary, and there had been money enough in the treasury to pay for the same, I should say that the treasurer could not have declined to cash the order of the director and clerk. But there was no money in the treasury for that purpose, and the agreement was to pay when there should be. I suppose it was assumed that there would be money in the treasury by November following. Under these circumstances, the district declining to vote any money for that purpose, I am of opinion that suit cannot be successfully maintained against the district to recover the purchase price. The articles which, as I understand, were left with the district should be returned, of course.

ST. PAUL, February 20th, 1877. GEO. P. WILSON, Atty. Gen.

Geo. R. Moore, Esq.:

DEAR SIR: Your favor of the fifth inst., asking whether Court Commissioners have authority to solemnize marriages, received. It is true that a Court Commissioner has the power of a judge at chambers, but the power conferred upon judges of courts of record to solemnize marriages is a special power conferred by statute. I have not examined the authorities,—in fact, I doubt whether any could be found,—but am of the opinion that Court Commissioners in this State are not authorized to marry people. If you have exercised the power by virtue of your office as Court Commissioner, it would be better for the parties interested to have the ceremony performed by some one whose authority to act is unquestioned.

ST. PAUL, April 7th, 1877. GEO. P. WILSON, Atty. Gen.

W. C. Lincoln, Esq., County Auditor:

DEAR SIR: Your favor of the fourth inst. received. You inquire whether the law of last winter, extending the time of redemption upon tax sales to three years, would affect tax sales upon which the time of redemption had expired previous to the passage of the act? Whether it was the intention of the Legislature that the law should apply to such cases does not clearly appear. If such was the intention I am of opinion that the Legislature attempted to do a thing beyond its power. Cooley, in his work on Taxation, page 370, says upon this subject: "If the time to redeem has already expired before the passage of the statute, it is manifest the statute can have no effect upon the sale; the title has now become absolute, and the Legislatnre can no more create rights in land in favor of the former owner than in favor of any other person. But if the time has not expired, and redemption is still open to the owner, the want of power is entirely beyond dispute." Where lands have been struck off to the State and no assignment made, I understand the State Auditor has directed that redemption be allowed any time within three years from the date of the sale. The State wants the money, and not the land, but it is otherwise with purchasers; that is, as a general rule. Purchasers would doubtless decline to receive the money if you were to receive it by way of redemption; but if they did receive it, by so doing they would waive their rights under the sale.

ST. PAUL, May 10th, 1877. GEO. P. WILSON, Atty. Gen.

Wm. McAboy, Esq.:

DEAR SIR: I have your letter of the seventh inst. Statement: A criminal case is brought before Justice A. A change of venue is taken. A. transfers the action to Justice B., who refuses to try the case, and the officer returns the papers to A., who then transfers the action to C., in an adjoining election precinct. *Question.* Can Justice A. legally make the second transfer, and can Justice C. legally try the case? When A. transferred the case to B. he lost jurisdiction of the case, and the return of the papers to him would not give him jurisdiction for any purpose. It would follow that the transfer to C. was not valid, and would not confer jurisdiction upon him. B. could not decline to take jurisdiction in such case, and could be compelled to act. In case B. was absent or seriously ill, so that it would be physically impossible for him to act, the parties would have to abide their time. I can see that contingencies might arise for which the statute has made no provision, but under the present statute I cannot see how A. could regain jurisdiction. In case of a dismissal the costs would be charged to the county.

ST. PAUL, June 12th, 1877. GEO. P. WILSON, Atty. Gen.

John B. Wilcox, Esq.:

DEAR SIR: I am in receipt of your letter of the 16th inst. I am obliged to differ with you in your conclusion that the County Treasurer cannot receive county orders in payment of county taxes except in the order in which they have been presented to the Treasurer for payment. If a resident or non-resident of your county has county taxes to pay, and has the orders of the county, either issued to him or purchased by him for that purpose, he can use those orders to the extent of the county tax. If he should have more than sufficient for that purpose they could only be cashed in their turn, or in the order of their presentation. Section 90, *c.* 13, Biss. was repealed by chapter 1, Laws 1874. See section 168. Section 90, however, was re-enacted in chapter 1 aforesaid, (*vide* section 92 of that chapter,) and section 92 was amended by section 20 of chapter 4 of the Laws of 1875. Just what was intended by the words "except when otherwise provided by law" I do not understand, unless it was intended to meet cases, if any, where the law required payment in cash. Orders have never been paid according to the priority of their number; such a rule would be impracticable. This decision may work a hardship in your county, but it is unavoidable, in my judgment, as the law now stands.

ST. PAUL, July 18th, 1877. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb:

DEAR SIR: Your favor submitting the communication of the Hon. D. Morrison, pertaining to the taxation of certain lands purchased by him from the Northern Pacific Railroad, received. The lands so purchased have been placed upon the tax-lists, and a tax levied thereon in the several counties in which the same are situated. You are requested to direct, or at least advise, the local officers to cancel the taxes upon the ground the lands have never been patented to the company, and are therefore not taxable; that the reason the lands have not been patented is because the costs of the survey have not been paid; and that such payment is a condition precedent to the right of the company to demand a patent from the government; citing as authority the Union Pacific R. Co. vs. McShane, 22 Wall. 444. Whether taxable or not is a question that you cannot determine upon an *ex parte* statement of the facts. If they are not taxable, Mr. Morrison will have to make his defense when the lands are advertised as delinquent. The authority referred to is not an authority in this case. In the Union Pacific Case the act of Congress expressly provided that the Union Pacific Railroad Company should pay the expense of the survey, selection, and conveyance of the lands as a condition precedent to the receiving of a patent; and the costs of survey, etc., not having been paid, the government had a right to withhold a patent as a security for such payment. There is no such provision in the charter of the Northern Pacific Company. Whenever the Commissioners appointed by the

President of the United States reported 25 consecutive miles of road completed in a good, substantial, and workmanlike manner, as required by the act, it is provided that patents should issue for the lands coterminous with the completed section. There is no other condition precedent. By act approved March 4, 1870, the lands of the Northern Pacific Company became taxable upon the same conditions as those of the Lake Superior & Mississippi Company, viz., as soon as sold, contracted to be sold, conveyed, or leased by the company. That the company is entitled to a patent for lands situate in this State cannot be disputed, as the road, as I am informed, has long since been accepted. If entitled to a patent, whether the same has heen issued or not is unimportant.

In conclusion, therefore, you have no authority to direct the taxes assessed upon the land to be canceled, although you might be of opinion that they were exempt; and, *secondly*, from the *data* in your possession, submitted to me, it would appear that the lands are subject to taxation.

ST. PAUL, July 19th, 1877. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

SIR: It appears that in several of the counties, in the proceedings to enforce the collection of taxes, the clerks, in the notice attached to the delinquent list delivered to the County Auditor, gave to delinquents but 10 days within which to answer, instead of 20, as provided in the act as enrolled and signed by the Govenor, but not as published. Inasmuch as the time is now fixed by law when the sale of lands for delinquent taxes shall commence, it is now too late to correct the notice and republish; but one of two courses can be pursued, viz.: Either to abandon the proceedings entirely and procure the necessary legislation at the next session of the Legislature to authorize the sale in 1878, or else to allow the delinquent 20 days' time within which to answer, notwithstanding the notice, and proceed to sell. The latter course was followed in some of the counties last year, in which the same mistake was made; but whether the validity of the judgments entered up under such notices has been passed upon by any of our courts, I am not informed. Under the strict rules of construction followed by the courts in proceedings to enforce the collection of taxes, I am inclined to the opinion that the judgment would not be sustained. See Cooley, Tax'n, 361 *et seq.*, and authorities cited.

ST. PAUL, July 28th, 1877. GEO. P. WILSON, Atty. Gen.

I. Ingmundson, Esq., County Treasurer, Mower County:

SIR: I am in receipt of your favor of the 6th inst., in which you ask my opinion upon the following questions: 1st. Is it lawful for a County Treasurer at any time to cash a town order on the order of the town treasurer, provided there are funds in the hands of the County Treasurer collected for that particular fund on which the order is drawn? 2d. Is it lawful for a County Treasurer at any time to cash a school-district order on the order of a school-district treasuer, provided there are funds in the hands of the County Treasurer collected for the district on which the order is drawn? 3d. Is it lawful for the County Treasurer to receive town orders to the amount of the town tax after the tax has become delinquent?

I will answer your questions by referring to those sections of the statute which prescribe the duty of the County Treasurer in the premises. Section 109 of chapter 1 of the General Laws of 1874, as amended by section 24 of chapter 5 of the General Laws of 1875, provides that the County Treasurer "shall, after each settlement, * * * immediately pay over to the treasurer of * * * any organized township or other body politic, on the order of the proper officers, all moneys received by him for such organized township or other body politic, and deliver up all orders or other evidence of indebtedness for such townships or other body politic, and take duplicate receipts therefor," etc. The County Treasurer pays to the town and school-

district treasurers upon the order of the County Auditor. Section 108 of said chapter 1, §§ 77, 78, 79, 80, and 81 of the township organization act, prescribe the duties of the town treasurers in the matter of receiving and disbursing township funds. "The town treasurer shall receive and take charge of all moneys belonging to the town." Section 77. "The town treasurer shall from time to time draw from the County Treasurer such moneys as have been received by the County Treasurer for the use of the town." Section 79.

The statute with reference to school-district treasurers is quite as specific. Section 18 of chapter 2 of the School Code provides that "the treasurer of each district shall receive and pay out all moneys appropriated to or belonging to his district." See, also, section 27 of the same chapter. Section 9 of chapter 5 of the same act provides that the County Treasurer, upon the order of the County Auditor, shall pay to the treasurer of any school-district, and to him only or to his written order, any money in his hands belonging to the district. But this does not fall within the scope of your second question.

The payment in this case is made upon the order of the County Auditor to the school-district treasurer, or to some one authorized by his written order to receive it for him. Section 92 of the tax law provides that the County Treasurer shall receive, in payment of taxes, orders on the several funds for which taxes may be levied to the amount of the tax for such fund. There is no conflict between this provision and those previously cited, as those refer solely to money received by the County Treasurer for the use of towns, school-districts, etc. Orders taken in payment of taxes are the orders and other evidences of indebtedness referred to in said section 109, which the County Treasurer is required to deliver up. While I am aware it is now and always has been the practice with County Treasurers to cash town and school-district orders at the request of town and school-district treasurers, for their accommodation and that of the holders of the orders, I am of opinion that it cannot be done lawfully.

With reference to your last question, I am of opinion that it would be proper to receive town orders in payment of town taxes after the same have become delinquent and before sale, and after sale where the lands have been bid off for the State and the right of the State has not been assigned, but not when the sale has been to an actual purchaser, as in that case the money has been paid into the treasury and been distributed.

ST. PAUL, August 10th, 1877. GEO. P. WILSON, Atty. Gen.

D. F. Ingraham:

DEAR SIR: Your favor of recent date received. You inquire whether women have a right to vote in any school-district for the locating of a school-house site, and the building or removal of a school-house upon said site. Also, whether women of foreign birth must become naturalized before voting. By the act of 1876, being chapter 14 of the General Laws, women of the age of 21 years and upwards, having the qualifications named in the act, are permitted to vote upon all measures relating to schools. This was evidently intended to cover, and does cover, the fixing of sites for school-houses, and the building or removal of school-houses upon such sites. Women of foreign birth, to be entitled to vote for school officers, and measures relating to schools, must have declared their intention to become citizens. The act conferring upon women the right to vote follows very closely the language of the constitution, and limits this right—*First*, to citizens of the United States; *second*, to persons of foreign birth who shall have declared their intentions to become citizens conformably to the laws of the United States on the subject of naturalization. It is not necessary to mention the two other classes named in the constitution. An alien is defined to be a person born out of the jurisdiction and allegiance of the United States. No distinction is made on account of sex. It was certainly not intended to place women of foreign birth in any better position than men of foreign birth in the matter of voting. In this connection it may be well to remember that the children of persons who have been duly naturalized under any law of the United

States, being under the age of 21 years at the time of the naturalization of their parents, if dwelling in the United States at the time of such naturalization, become citizens thereof upon arriving at the age of 21 years; and further, that the citizenship of the wife follows that of the husband, without the necessity of any application for naturalization on her part. These are exceptions to the general rule herein stated.

ST. PAUL, August 12th, 1877. GEO. P. WILSON, Atty. Gen.

E. H. & C. H. Foster:

GENTLEMEN: I would state, in answer to the question submitted by you in your letter of the sixth inst., that I have heretofore held that the publisher's contract at so much per description would include the clerk's notice as well as the tax-list, and that no independent charge, therefore, could be made for publication of the notice. Under section 136 of the tax law the County Commissioners let the advertising provided for in section 112 at so much per description. The advertising provided for in section 112 is the clerk's notice and tax-list. The notice is attached to and inseparable from the list. The publisher must make his bid with reference to that fact. You speak of the Register of Deeds' and the County Auditor's notice and signatures at the end of the tax-list, and inquire whether you can charge for the same. The law makes no provision for any such notice, as I understand it, and if not, such notice would not be covered by your contract, and you should be compensated for your work. Under the provisions of section 41 of the tax law, as amended by chapter 6 of section 9 of the Laws of 1877, pertaining to the assessment of real property, and of the provisions of section 4, *c.* 1, Laws 1874, defining the terms "tract," "lot," "piece," or "parcel" of land, I am of the opinion that the N. W. ¼ of the N. W. ¼, and N. E. ¼ of the N. E. ¼, and lots 3, 5, and 7, of section 27, etc., $10, would constitute but one description, provided the said lots are contiguous to the quarters described, and belong to the same person. Nor would the fact that two years' tax followed the description, as $\frac{1875}{10.20}$ $\frac{1876}{7.75}$, serve to double the description. By referring to section 110 of the tax law you will notice that it is the duty of the Auditor, in making up the delinquent list, to state the "amount of tax delinquent for each year opposite such description."

ST. PAUL, August 14th, 1877. GEO. P. WILSON, Atty. Gen.

W. W. Hartley, Esq.:

DEAR SIR: The State Auditor has handed to me your letter of the ninth inst., and requested me to answer it. I am much pleased with your argument, and think the law should be as you have construed it; but I am of opinion that your construction would not be sustained by the court. Section 41 of the tax law must be construed in connection with that portion of section 4 which defines what is meant by "piece or parcel" of land, wherever used in the act. In order to be grouped into one description the land must be contiguous and belong to one person. In this view, No. 3 in printed list would not constitute one description; the assessment in that case could not be sustained; but inasmuch as these tracts (No. 3) have been assessed together on one tax against the whole, but one judgment can be rendered, and the sale must be made by that description. Touching at a common corner (Nos. 5 and 6) would not make the land contiguous. See Kresin vs. Mau, 15 Minn. 118. Applying the foregoing rule, you can determine upon what you, as publisher, would be entitled to.

If A. should own a farm consisting of the E. ½ N. W. ¼ and W. ½ N. E. ¼ of a given section, it would be proper to assess them as one tract, but not if he owned the E. ½ N. W. ¼ and E. ½ N. E. ¼, or E. ½ N. W. ¼, and W. ½ of the S. E. ¼, as in either case the lands would not be contiguous, and would not constitute one tract. It is unnecessary to say more.

ST. PAUL, August 15th, 1877. GEO. P. WILSON, Atty. Gen.

H. M. Atkins, Esq., County Auditor, Sherburne County:

STATEMENT.

"The tax judgment sale of this county for taxes of 1873 was held September 29, 1874, and the two-years' redemption, therefore, expired September 29, 1876, on that sale. The tax judgment sale for taxes of 1872 and prior years was held March 22, 1875, and the two-years' redemption from that, therefore, expired March 22, 1877. Referring now to chapter 134 of Laws of 1877, I find that that act was approved March 2, 1877, and thus after lands in the list for 1873 that remained unsold and unassigned had become forfeited to the State, and the time for redemption had expired, but prior to the time that lands in the 1872 list—and in most cases the descriptions of lands in the two lists are identical—had passed into the same condition as those in 1873. Referring now further to chapter 6, Laws 1877, I find that that act was approved March 6, 1877. As you are aware, this act extends the time for redemption of all such lands as those I have referred to, to three years. Please advise me whether I should have a sale under the provisions of chapter 134 this coming September; and, if I should, what year's taxes should I include in making up the amounts due on the various tracts, and what rate of interest should I charge on each year's tax?"

Your letter of the sixteenth inst. has been referred to me by the State Auditor. Substantially the same questions contained in your letter have been presented to me from other counties, and I have advised that no sale can be made under the provisions of chapter 134, Gen. Laws 1877; that the same, except as to the provisions contained in section 1, was rendered inoperative by the subsequent amendments to the general tax law, extending the time of redemption to three years. I refer particularly to section 25 of chapter 6, Laws 1877, amending section 130 of the general tax law: "If at said sale any piece or parcel of land shall be sold to a purchaser, or the piece or parcel bid in for the State, the same may be redeemed at any time within three years from the date of sale." The proviso to said section 25 reads as follows: "Provided, that the provisions of said section, *except as to the time allowed for redemption*, shall not apply to any lands heretofore sold or assigned to any person, or bid in for the State; but the redemption of all such lands shall be made in the manner and upon the terms now by law required." This proviso leaves no doubt that it was the intention of the Legislature to extend the time of redemption upon past sales; in other words, to make the statute retrospective in that particular. Although the time of redemption had expired before the said acts were passed and approved, I am of the opinion that it was competent for the Legislature, *as to those lands bid in for the State, and to which the right of the State had not been assigned*, to waive the forfeiture and extend the time of redemption. The sale for taxes of 1872, referred to in your letter, was doubtless made under chapter 2, Gen. Laws 1874.

By section 2, c. 58, Laws 1877, the time of redemption from sales under that chapter was extended to four years. That chapter was approved February 26, 1877, and therefore the time of redemption had not expired at the date of the approval of chapter 134 aforesaid. Your inquiries pertain only to lands forfeited to the State and held by the State.

I do not wish to be understood that the Legislature could extend the time of redemption in other cases, and especially when the period of redemption had already expired. If the amendments referred to should be held to be void in the case of actual purchasers, it would not necessarily follow that the same ruling would be made with reference to lands forfeited to the State. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed wholly independent of that which was rejected, it must be sustained. Cooley, Const. Lim. 177, 178.

The position I have taken renders it unnecessary to answer your last question.

ST. PAUL, August 20th, 1877. GEO. P. WILSON, Atty. Gen.

H. W. Mowbray, Esq., Clerk of School-District No. 17:

DEAR SIR: I am in receipt of your favor of the thirteenth inst., in which you state that in October, 1873, the school-district bonds of your district were issued for $3,000 for the purpose of building a new school-house; that $2,000 thereof remains unpaid; that during the past summer the County Commissioners had formed two new school-districts, taking a part of the territory from your district in each case; that the trustees of your district returned the tax assessment to the County Auditor, and requested that the levy be made on the territory composing the district at the time the bonds were issued, which the Auditor has declined to do. Upon this statement you request my opinion as to the Auditor's duty in the premises. It has always been held in this department that where no provision has been made by statute for a division of the property, funds, and liabilities when a district is divided, and a new corporation is created, that portion bearing the old name constitutes the old corporation, retains all its property, powers, rights, and privileges, *and remains* subject to all its obligations. See opinions of the Attorney General attached to school law. In giving the opinion referred to in the school law, I simply in substance reiterated an opinion of Atty. Gen. Cole's, given some years ago.

Upon the point that the old district would retain all the property, I apprehend the opinion would have to be modified; for if, in the division the school-house should happen to fall within the new district, it would, I think, acquire title to the same. Taken as a whole, the opinion is correct and is supported by authority. In the case of Town of De Pere vs. Town of Belleview, reported in 31 Wis. 120, which was an action brought by the plaintiff against defendant, to enforce contribution on account of moneys paid by plaintiff upon an indebtedness incurred by the original town of De Pere, when the defendant constituted a part of it. The court held: "If a part of a territory and inhabitants of a town are separated from it by annexation to another, or by the creation of a new corporation, the remaining part of the town, or the former corporation, *retains* all its property and franchises, and *remains subject to all its obligations, unless some express provision to the contrary is made by the act authorizing the separation.*" The Legislature of Dakota created the counties of Albany and Carbon out of the county of Laramie. At the time, Laramie county was badly in debt, and by the division it was reduced to less than one-third its original size, and fully two-thirds of the wealth and taxable property of the county were withdrawn from its jurisdiction. Suit was brought to compel the new counties to contribute their proportion towards such indebtedness. The case was carried to the Supreme Court of the United States, and at the October term, 1875, of that court it was held that there could be no recovery; holding the same as in the Wisconsin case cited above. The following cases are to the same effect: Hemstead vs. Hemstead, 2 Wend. 109–138; Hartford Bridge Co. vs. East Hartford, 16 Conn. 129–171; Windham vs. Portland, 4 Mass. 384–390; Hampshire vs. Franklin, 16 Mass. 76–85; Montpelier vs. East Montpelier, 29 Vt. 12–20, etc.

If, before the separation or creation of the new districts, the tax had been voted and assessed, you would undoubtedly have the right to collect from the whole territory, and possibly, if the new tax was simply voted, the result would be the same.

The following cases go to that extent: Morgan Co. vs. Hendricks Co. 32 Ind. 234; Moss vs. Shaw, 25 Cal. 38. The fact that your indebtedness was in the shape of bonds, I do not think would make any difference. Some of the cases cited were of that character. The rule seems to be a very harsh one, and might be carried to an extent to become extremely so. We have no such statute as referred to in the opinions cited. The nearest approach to it is found in section 18 of chapter 1 of the school law. I would like very much to see the question raised in this State, and it might be well for you to attempt to compel the Auditor to levy the tax as requested.

ST. PAUL, September 15th, 1877. GEO. P. WILSON, Atty. Gen.

M. A. Warren, Esq.:

DEAR SIR: Your favor received. If the voters of the district make no provision for fuel at their annual meeting, then it is the duty of the trustees to provide fuel. In providing fuel considerable must be left to the judgment and discretion of the trustees, and I do not think that the mere fact that they provided more than will be necessary for immediate use, or possibly more than can be consumed before the time of the next annual meeting, would excuse the district in repudiating, or attempting to repudiate, any purchase they may have made.

ST. PAUL, September 17th, 1877. GEO. P. WILSON, Atty. Gen.

H. Sanderson, Esq., County Treasurer:

DEAR SIR: In your favor of the first inst. you inquire whether a candidate for a county office, in pledging himself to donate a portion of his salary to the county poor fund, would not be offering a money consideration as a means of procuring votes, and therefore guilty of bribery? I beg leave to refer you to the case of State *ex rel.* Newell vs. Purdy, 36 Wis. 204. Under the laws of Wisconsin, the Board of Supervisors had authority to fix the salary of the County Judge. Newell, the relator, for the purpose of inducing the electors to vote for him, published, and caused to be extensively circulated through the county before the election, circulars in which he pledged himself to do the work of the office if elected for the sum of $600 per year, that sum being $400 per annum less than the amount fixed by the Supervisors. At the election Newell received a majority of the votes. The opposing candidate, who was the then incumbent of the office, declined to surrender the office, and Newell thereupon began an action, in the nature of a *quo warranto*, to determine which of the parties was entitled to the office. It appeared that a sufficient number of voters were induced by Newell's pledge to vote for him to give him a majority. The court, after reviewing the authorities, in conclusion states: "The doctrine which we think is established by the foregoing authorities, and which we believe to be sound in principle, is that a vote given for a candidate for a public office in consideration of his promise, in case he should be elected, to donate a sum of money or other valuable thing to a third party, whether such party be an individual, a county, or any other corporation, is void." The court says that free, unbiased, and indifferent elections are absolutely essential to the existence of free institutions. This is the broad ground upon which the decision is based, and is certainly applicable to your case. Candidates taking such pledges could repudiate them at any time, and recover the full amount to which they would be entitled under the law. This, of course, is upon the theory that the title to their office was not disputed.

ST. PAUL, October 3d, 1877. GEO. P. WILSON, Atty. Gen.

W. C. Lincoln, Esq., County Auditor:

DEAR SIR: I am in receipt of your letter of the 6th inst., with inclosure. It appears, from statements inclosed, that in 1866 one Ellen Bullis was the owner of a certain piece of land in your county, upon which she paid taxes regularly until 1870, when one Cargill purchased it at Auditor's sale for that year. It was also struck off to him in 1871. For 1872 and 1873 Ellen Bullis paid the taxes. The land was sold for taxes of 1874, 1875, and 1876 to Cargill. Whether sold or assigned to Cargill would make no practical difference.

Before the period of redemption expired, Ellen Bullis offered to redeem from sale for tax of 1874 and subsequent sales, and all unpaid taxes, interest, penalties, etc. You ask whether she has a right to redeem or not. This question is asked in view of the fact that there has been no redemption from sales made in 1870 and 1871. If she has a right to redeem from sale for tax of 1874 and subsequent years, the Auditor certainly cannot impose the condition that she shall first remove the cloud

cast upon her title by the sale for taxes of 1870 and 1871. That is a matter, as you well state, beyond the control of the Auditor, and with which he has nothing to do. If, by the sales for taxes of 1870 and 1871, title passed to Cargill, and the title still remaining in him, can Ellen Bullis redeem from sale for tax of 1870 and subsequent years? The statute provides that "any person may redeem who will pay into the treasury," etc. I construed the statute to mean, any person having an interest in or lien upon the property should have a right to redeem, upon the theory that a stranger would have no right to thus defeat the title of a purchaser at a tax sale. An amendment was introduced into the Legislature to that effect, to-wit, that only those having an interest could redeem, and it came before the tax committee, many of whom assisted in the passage of the act in 1874. The committee reported unanimously against the amendment, insisting that the law was right, and that *any person who* saw fit could redeem; that the law should be construed liberally; that any other construction was in the interest of tax-title sharks, etc. I have since advised in conformity to the opinion of the committee and legislators. Upon that construction of the law Ellen Bullis can redeem from sales for 1874 and subsequent years. I cannot concur in your opinion that if one party held the 1874 certificate, and another the 1875 and 1876, that a redemption can be made from the 1874 sale, and let the balance run. I do not so understand the third proviso to section 130, Laws 1874.

ST. PAUL, October 9th, 1877. GEO. P. WILSON, Atty. Gen.

L. O. Thorpe, Esq.:

DEAR SIR: I am in receipt of your letter in which you inquire: "Can a quitclaim deed be recorded without having the Auditor's certificate that the taxes have been paid, when we know that taxes are due and unpaid?" (2) Is a quitclaim deed or other instrument of conveyance entitled to record, when, in place of the usual acknowledgment, there is simply "Sworn and subscribed to before me this day," etc. As explained by one of my predecessors, there seem to have been two objects for requiring, in the case of the transfer of property, the Auditor's certificate of taxes paid and transfer made.

1st. As the theory of the tax law requires all lands to be taxed in the name of the real owner, whenever any land is transferred, to prevent confusion, the account of the public with the owner is to be settled and balanced, and a new account opened with the purchaser. But another and perhaps more important object was to secure the prompt payment of taxes. Inasmuch as title may be transferred by quitclaim deed as well as by any other form of deed, it would seem that the only safe rule for the register to follow would be to decline to receive any deed for record without the Auditor's certificate of taxes paid and transfer entered, or taxes paid by sale, as the case might be, unless the instrument showed on its face that it was given to correct some error or omission in some former deed. The object of the deed might not be to correct an error, but heal a real or fancied imperfection in the title, leaving the title in the person in whom the Auditor's as well as the Register's records showed the title to be, and no transfer would be necessary. But how is the Register to know this? He cannot be required to make up an abstract of title in order to satisfy himself of the fact, or to examine the Auditor's records for that purpose. If such a deed should be presented for record, and there should be delinquent taxes upon the property, why not require that the taxes should be paid as a condition precedent to the recording of a deed, as well as in any other case. The statute (section 147 of the tax law) is not clear by any means that the Auditor's certificate is only required in cases where there is an actual transfer made, and to avoid practical difficulties and evasions of the law, it seems to me the rule should be as hereinbefore stated.

2d. The statute requires that any officer taking the acknowledgment of a deed shall indorse upon or append to such deed a certificate of such acknowledgment thereof, and the true date of such acknowledgment, and shall date and sign such certificate. The statute does not prescribe the form of the certificate, but I apprehend a mere jurat will not answer the purpose, and would not entitle a deed or

other instrument requiring acknowledgment to record. It is entirely too informal to meet the requirements of the statute. It is not a certificate of acknowledgment.

ST. PAUL, October 23d, 1877. GEO. P. WILSON, Atty. Gen.

Mahlon Black, Esq.:

DEAR SIR: The State Auditor has referred to me, to answer, your letter of recent date, in which you state: "A party holding a certificate of sale of a piece of land sold for the taxes of 1875, paid the taxes for 1876 before they became delinquent, and proposed to pay the taxes of 1877 as soon as they became due. Is the party holding the certificate entitled to 2 per cent. per month on the amounts paid on account of the taxes of 1876 and 1877, from the date of payment to the date of redemption?" As the law stood prior to the amendment of 1877, the holders of tax certificates, whether by purchase or assignment, could pay subsequent taxes assessed against the property, although not delinquent, and have the same included in the amount necessary to redeem. Upon the whole amount the holders were entitled to 2 per cent. per month from date of payment to the date of redemption. By the amendments of 1877 the rate of interest was reduced to 1⅓ per cent. per month, and the right of certificate holders to pay subsequent taxes, and have the same noted as an additional lien upon the property, limited to such subsequent taxes as were delinquent. "Do either of these amendments affect or change the *status* of those holding tax certificates at the time the amendments were enacted?" I think not. The amendment to section 139 of the tax law, fixing the rate of interest, is so worded as to apply only to taxes becoming delinquent thereafter. In the ordinary course of business the rate therein specified would not go into effect until June 1, 1877. Section 130, relating to redemption, is amended so as to limit the payment of subsequent taxes to such as "shall become delinquent." This section specifies no rate of interest, but refers to section 139, as amended. To this section, (130,) however, is added a proviso in words following: "Provided, that the provisions of this section, except as to the time allowed for redemption, shall not apply to any lands heretofore sold or assigned to any person, or bid in for the State, but the redemption of all such lands shall be made in the manner and upon the terms now by law required."

Under the proviso I see no escape from the conclusion that persons holding certificates when the anendments were enacted were not affected by them, and hence could pay subsequent taxes although not delinquent, and recover interest at the rate of 2 per cent. per month.

ST. PAUL, December 4th, 1877. GEO. P. WILSON, Atty. Gen.

C. S. Mills, Esq.:

DEAR SIR: The State Auditor has handed me your letter of recent date, in which you inquire if homesteads on which parties have lived five years, but have not proved up, are subject to taxation. Judge Miller, of the Supreme Court of the United States, in Railway Co. v. Prescott, 16 Wall. 603, said: "While we recognize the doctrine heretofore laid down by this court, that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the right to a patent is complete, and the equitable title is fully vested in the party, without anything more to be paid or any act to be done going to the foundation of his right." This is the settled doctrine of the court, and is decisive of the question. Until final proof has been made, and the settler has become entitled to a patent, the land would not be taxable—only the improvements upon the same. As soon as the final proof and entry is made, the Register of the local land-office should certify the land to the County Auditor for the purpose of taxation.

ST. PAUL, December 19th, 1877. GEO. P. WILSON, Atty. Gen.

O. C. Grigg, Esq.:

DEAR SIR: Your letter of the twentieth inst. received. You desire my opinion on the question whether a County Attorney can hold the office of Deputy County Treasurer? It seems to me that he should not. For some reason deemed sufficient by the Legislature, a County Attorney is declared ineligible to the office of County Treasurer. For like reason he would not be eligible to the office of Deputy. Their duties are commensurate. He is the official adviser of the County Treasurer. This has been held to create an incompatibility. In case of a breach of the Treasurer's bond it would be the duty of the County Attorney to prosecute the same. Likewise, to prosecute the bond of the Deputy Treasurer in case of a default. If the Treasurer or Deputy were guilty of embezzling public funds, it would be the duty of the County Attorney to present the case to the grand jury, and, if an indictment were found, to prosecute the same. Who would discharge this delicate duty for the County Attorney in case he was the guilty individual? It is true, I might, as Attorney General, but should not the County Attorney be in position to discharge the full duty as County Attorney? I think so.

ST. PAUL, December 25th, 1877. GEO. P. WILSON, Atty. Gen.

J. A. Elder, Esq.:

DEAR SIR: Your favor of the twenty-first inst., inquiring with reference to the duties of the Auditing Board, provided for in chapter 37 of the Laws of 1873, received. I will answer your questions without repeating them, upon the supposition that you have retained a copy.

The Auditing Board is required to examine and audit the accounts, books, and vouchers of the Treasurer, and to count and ascertain the kind, description, and amount of funds in the treasury or belonging thereto. You state that it is claimed by able counsel that the words "kind" and "description" mean that the Board shall ascertain the amount of the different funds separately; that is, the amount on hand belonging to the State, county, town, school-district, road, bridge, poor, and to all other funds. This, as you state, would be equivalent to making an apportionment; and, conceding that it *might* be done, it is not, in my judgment, required to be done. After an examination of the books and vouchers, the board proceeds to count the funds to ascertain the kind and amount; that is, how much in money, how much in orders, vouchers, etc. The word "description" adds nothing to the meaning of the statute. It would be next to impossible for the Auditing Board to make an apportionment of the funds on hand, and no good could result therefrom if it were done. That is a duty required to be performed at stated periods and by other officers. The Treasurer is required to keep an accurate account of his receipts and disbursements, and to balance his books at the close of each business day.

Is the money, or its equivalent in orders, vouchers, etc., on hand to answer to these balances? If so, does the duty of the Auditing Board end there? I think so. Referring to your third question, whether the board first count the funds and then examine the books, or *vice versa*, is a matter of small importance, and at the discretion of the board. Referring to your second question, the board would have the right to require the production of the money for the purpose of counting the same. Whether this should be done or not would depend upon circumstances. If the money were deposited in bank, in pursuance of chapter 37, the certificate of the officers of the bank that such balance was on deposit to the credit of the county, would be satisfactory. If the funds were not deposited in designated banks, the safer and therefore the better rule would be to require that the money be produced. If, however, the Treasurer kept an official account, so that the officers of the bank could certify that there was a given amount on hand to the credit of the Treasurer's official account, that would be satisfactory. But where the Treasurer kept an indiscriminate account, the officers' certificate that he had a given amount in bank to his credit would not be satisfactory. If the funds of the county are not deposited in designated banks, in pursuance of chapter 37 aforesaid, because of no bids or for any reason,

the obligation of the Treasurer is to safely keep and pay over acccording to law all moneys which come into his hands for county, State, and all other purposes. Whether he will keep the money in the vault of the Treasurer, or in some bank or safe, is for him to decide.

ST. PAUL, December 26th, 1877. GEO. P. WILSON, Atty. Gen.

Lars O. Hamre, Esq., Register of Deeds, etc.:

DEAR SIR: Your favor of the third inst. came duly to hand, but on account of my absence from the capitol on official business it has remained unanswered. I am of opinion that patents from the United States should be admitted to record without the Auditor's certificate provided for in section 147 of chapter 1 of the General Laws of 1874. They do not transfer title; they are simply evidence of title in those who have complied with the acts of Congress with reference to acquiring public lands, and always run to the original parties, or, perhaps, to the heirs at law. Patents often cover a number of tracts, which, upon receipt of the patent, may be held by as many different parties; upon some of which the taxes are delinquent, upon others not. Hence it would hardly be practicable to enforce the statutory rule against patents.

Second. When a deed is presented for record which recites that it is made for the express purpose of correcting an error, omission, or mistake in a former deed between the same parties, and which deed is recorded, in such case no certificate would be required. But suppose a deed is presented containing no such recitations, and without the Auditor's indorsement, is the Register to accept the statement of the individual presenting it that the deed is simply to perfect title and admit the same to record? I apprehend not; nor could he be required to examine his records or those of the Auditor to ascertain the fact. The individual may have no title except that which the deed in hand gives him, and if so it would be a deed of transfer and should be on the Auditor's certificate. Why not be compelled to pay delinquent taxes in that case as well as any other? Registers should not, therefore, except upon the most satisfactory evidence, admit to record deeds which are intended to perfect title, or so represented, but upon their face and in form, original deeds.

ST. PAUL, January 14th, 1878. GEO. P. WILSON, Atty. Gen.

John McCarthy, Clerk, District No. 5:

DEAR SIR: I have your letter of the twenty-first inst. Although your district, at a special meeting, designated a site for a school-house, and voted to raise the necessary funds to build a school-house, and in pursuance of such action of the district the officers of the district may have advertised for bids for the construction of a school-house, and actually let the contract, nevertheless it would be competent for the electors of the district, at a lawful meeting, by a sufficient vote, to change the site, and to rescind or modify the proceedings of the former meeting; the district being liable, however, to the contractors for any damage that they may have suffered by reason of such subsequent action of the district. The officer in this case not having let the contract, and another meeting having been called for the avowed purpose of rescinding the action of the former meeting, my advice to the officer would be to postpone action until your matters are definitely settled, rather than involve your district in litigation.

As to your second question, "Who are the judges of the special school meeting to receive the vote, and to decide who are voters?" the school law is silent. I suppose the same course would have to be pursued as at the annual meeting. The moderator would have to decide all questions, subject to the right of appeal.

Third. "Is a person born in a foreign land, who came to this country before of age, a voter, who has not declared his intention to become a citizen of the United

States, but whose father declared his intention before the son became of age, but is not now a full citizen?" This question I would answer in the negative. The law upon this question is that the minor children of any parent *duly* naturalized,—that is, fully naturalized,—who, at the time of such naturalization of the parent, reside within the United States, become citizens immediately upon their arriving at the age of 21 years.

ST. PAUL, February 26th, 1878. GEO. P. WILSON, Atty. Gen.

Hiram Bellinger:

DEAR SIR: Your letter of the twenty-second inst. received. Your district voted to raise annually by taxation a certain amount for teachers' wages. It was so levied, and hence it is unimportant what the understanding may have been in case more money accrued from such taxation than was necessary for the payment of teachers' wages. The records cannot be changed. Funds arising from a taxation for a specific purpose can only be used for that purpose. But where a surplus remains after that purpose has been satisfied, then it is competent for those having authority, as in the case of a board of county commissioners, and in this case, the electors of the district, when lawfully assembled, to appropriate such surplus to some other lawful purpose. In this case, if the fund that you have raised is more than sufficient to fully satisfy the purposes for which it was raised, I think it would be proper and legal for the district to appropriate whatever surplus there may be to the building of a school-house, if the demands of the district require it.

With reference to your second question, we have no property qualifications in this state as a condition precedent to the exercise of the elective franchise. Any one has a right to vote at a school meeting who is of age, and a resident of the district.

ST. PAUL, February, 27th, 1878. GEO. P. WILSON, Atty. Gen.

Hon. John A. Smith:

DEAR SIR: I have just received your letter asking my opinion as to whether the bonds issued by your school-district in September, 1873, are valid and binding upon the district. You state the acts under which your district was organized, the date of the issue of the bonds, a copy of the same, and that they were negotiated for less than par. Upon this *data* I am asked to give an opinion. I must decline to do so. It is not within my province to decide such questions. If I did make a decision it would be binding upon no one. It is a proper matter for the courts, upon full presentation of the facts. I would be warranted in inferring from your statement that the district resists payment upon the grounds that the bonds were sold for less than par. This might or might not constitute a good defense, depending upon whether the bonds were in the hands of the original purchaser, or some one having notice, or in the hands of a *bona fide* holder without notice. See Woods vs. Lawrence Co. 1 Black, 386; Mercer Co. vs. Hacket, 1 Wall. 83; Dillon's work on Municipal Corporations, subject, "Contracts;" and Judge Dillon's article in Southern Law Review for October, 1876, on the Law of Municipal Bonds.

ST. PAUL, March 15th, 1878. GEO. P. WILSON, Atty. Gen.

Hon. D. Burt, Superintendent of Public Instruction:

SIR: I am in receipt of your favor of the sixteenth inst., asking my opinion upon the question: "Are independent school-districts subject to the 'Merrill law?'" The act to provide uniform and cheap text-books—the "Merrill law"—was approved February 23, 1877. It is compulsory in its terms upon all school-districts in the State, except those organized under special charters. The general school law was approved February 28, 1877. Under the latter act, Boards of Education in independent school-districts are given authority to prescribe text-books, and a course

of study for the schools in such districts. Upon this point it is claimed that the two statutes are repugnant, and, being repugnant, that the latest act must prevail. This would relieve independent school-districts from the operation of the Merrill law. On the other hand, the friends of the Merrill law claim that force and effect can be given to both statutes; that the purpose of independent school-districts is to provide instruction in the higher branches,—that is, studies more advanced than those taught in the common schools; that the power given to Boards of Education in independent districts to prescribe text-books, refers to text-books other than those covered by the Merrill law; that in this way the two acts can be reconciled. I am not impressed by the force of this argument. At the same time I have no doubt but that it was the intention of the Legislature that the Merrill law should apply to independent districts. Both acts were under consideration in the Legislature at the same time. If the Merrill law had been approved last, this question could not have arisen. The general school law of 1873 was re-enacted in 1877, with some amendments. That portion of it pertaining to independent districts was re-enacted with slight alterations. I suppose the truth is, the inconsistency referred to was unobserved. The primary question is, what was the intention of the Legislature? This is clearly shown by subsequent legislation. At the last session of the Legislature an act was passed supplemental to the act approved February 23, 1877, which contains the following proviso: "This act shall not be construed to apply to, or be obligatory upon, Boards of Education acting under special charters." It contains no other exceptions. This was equivalent to saying "the provisions of this act shall apply to all school-districts except those organized under special charters." This being the last expression of the legislative will, it must prevail. Upon this ground I decide that independent districts are subject to the Merrill law.

ST. PAUL, March 20th, 1878. GEO. P. WILSON, Atty. Gen.

J. A. Everett, Esq.:

DEAR SIR: Your letter of the twentieth inst. received. *Question.* Are villages organized under the general act of 1875 independent of the town? As I understand it, there is no connection between the village organization and the township from which the territory was taken. It is an independent municipal corporation, having the powers conferred in express words, and those necessarily or fairly implied in, or incident to, the powers expressly granted. The law (act of 1875) providing for the organization of villages, is, as you say, very ambiguous and incomplete. Possibly it may have been amended last winter. It does not provide for an assessor *in terms*, and yet it provides for the levying, assessing, and collecting of taxes for village purposes. The township assessor would not have authority to act within the corporate limits of the village. The village council would have to do the assessing. But that seems hardly practicable, as it would be difficult for the council to comply with the general law; that is, give bond, etc. Perhaps authority to appoint an assessor might be implied. To hold an office it is necessary that the officer should be an inhabitant of the district within which his duties are required to be discharged. Therefore, residents of the territory comprising the village could not act as officers of the township, and *vice versa*. Although the act prescribes that the territory comprised within the prescribed limits of the village shall constitute one election district for the election of village officers, it seems to me that it must necessarily constitute an election precinct for all purposes, and that the village council would be the judges of election. Electors must vote in the election precinct in which they reside. Each organized township or town constitutes an election precinct. But the territory embraced in the village limits is no longer a part of the township or town; it is set off, but the inhabitants thereof are endowed with all the rights, powers, and duties incident to a municipal corporation at common law. See section 1. The act leaves entirely too much to be implied; it requires too much guessing.

ST. PAUL, March 25th, 1878. GEO. P. WILSON, Atty. Gen.

Hon. D. Burt, Superintendent Public Instruction:

SIR: My opinion is requested as to the duty of County Treasurers with reference to paying over to school-district treasurers money belonging to the districts arising from taxation under the apparently conflicting provisions of the act to provide uniform and cheap text-books, approved February 23, 1877, the acts supplementary thereto, approved March 8, 1878, and section 68 of the general tax law, approved March 11, 1878. Except possibly as to the provisions of section 11 of the act first referred to, and under which no question can arise for the two years, there is not necessarily any conflict between these acts with reference to the matter under consideration. The duty of the Treasurer, under section 68 aforesaid, is to pay over to the school-district treasurer, after each settlement, all money received by him arising from taxes levied and collected belonging to the district, and deliver up all orders and other evidences of indebtedness of such districts. Money withheld by the County Treasurer to reimburse the county for moneys advanced by the county to the State to the use of the school-district in the county, does not belong to the district. The districts have incurred a debt for which the county is responsible to the State, and instead of the money retained by the Treasurer the districts have its equivalent in text-books. The money so retained is taken into acconnt in the settlement, and the balance, after deducting this amount, is paid over to the district treasurer.

ST. PAUL, March 26th, 1878. GEO. P. WILSON, Atty. Gen.

J. A. Armstrong, Esq., Auditor of Martin Co.:

DEAR SIR: I have your favor of the twenty-eighth inst. Without deciding the question whether a school-district can in any event exceed the 2 per cent. limitation fixed by section 49 of the general tax law, I am of opinion that no district can exceed a levy of nine mills in any year for the purpose of erecting a school-house. The section referred to fixes the limit at nine mills for that specific purpose, and then, in conclusion, repeals all acts and parts of acts inconsistent therewith. This general law is certainly inconsistent with the first proviso to section 1, *c.* 2, of the general school law, and being the later law must prevail.

ST. PAUL, April 2d, 1878. GEO. P. WILSON, Atty. Gen.

Wm. E. Harris, Esq.:

DEAR SIR: I have your letter of yesterday, with reference to hiring a teacher in District No. 34, Mower county. The authority to hire teachers is delegated by law to the Board of Trustees absolutely. The electors of the district, whether assembled in special meeting or otherwise, cannot assume the authority. A contract executed by a majority of the board is just as binding upon the district as if signed by all.

ST. PAUL, April 13th, 1878. GEO. P. WILSON, Atty. Gen.

Hon. L. Z. Rogers:

DEAR SIR: I have your favor of the sixteenth inst., inquiring whether a person arrested for violation of a village ordinance would be entitled to a jury trial, your charter being silent upon the question. The constitution, art. 1, provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the same shall have been committed. The whole question depends upon what is meant in the constitution by criminal prosecutions.

Upon review of the authorities, Dillon, in his work upon Municipal Corporations, section 361, lays down this rule: "Offenses against ordinances properly made, in virtue of the implied or incidental power of a corporation, or in the exercise of its legitimate police authority for the preservation of the peace, good order, safety, and

health of the place, and which *relate to minor acts and matters not embraced in the public criminal statutes of the State*, are not usually or properly regarded as criminal, and hence need not necessarily be prosecuted by indictment or *tried by a jury*."

ST. PAUL, April 17th, 1878. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: I have your favor of this date requesting my opinion upon the constitutionality of the act of last winter, appropriating to John Phelps the sum of $38.95, out of the general school fund of the State, to reimburse him for excess of interest paid into the State treasury. This question is asked in view of the provisions contained in section 2, art. 8, of the constitution, providing the manner in which the income arising from the sale of school lands shall be distributed. If this were a case where too much interest had been paid and received by mistake, as both the title and the body of the act above referred to would indicate, it might be claimed that the excess never properly belonged to the school fund, and that it was competent for the Legislature to direct that such excess be refunded out of the general school fund. But it must be conceded that even in such case the Legislature would be establishing a dangerous precedent,—one that might lead to the serious impairment of the permanent and general school funds. If an error should occur, such as suggested in this act, the party should be reimbursed, but this should be done out of the general revenue fund of the State. In the case under consideration it appears from the records that on the sixth day of June, 1877, Phelps paid to the treasurer of Houston county $44.80, being the annual interest then due on certain school lands purchased by Phelps. That sum was subsequently remitted to the State Treasurer, and was credited to the general school fund. On the twenty-third of July, 1877, Phelps paid to the treasurer of Houston county the principal, to-wit, the sum of $640, due upon his said purchase. This payment was made voluntarily, and with full knowledge that no allowance could be made to him on account of interest paid in advance. Having paid the interest for the ensuing year, he was at liberty to retain the principal sum until the June following. In this case, therefore, there was no mistake or error. The $44.80 was properly paid, and having gone into the general school fund it must be disposed of as directed by the constitution. I hold, therefore, that the Legislature had no right to make the appropriation that it attempted to in this case.

ST. PAUL, April 30th, 1878. GEO. P. WILSON, Atty. Gen.

Christ. Didra, Esq., County Auditor:

DEAR SIR: I have your letter of May 4th, in which you state that school-district No. 10, in your county, hired a teacher for three months; soon after the school-house was destroyed by fire. *Query.* Can the teacher claim her wages as per contract? You further state that the trustees tried to secure another room in the district in which to hold school, but were unable. In 1862 Atty. Gen. Cole decided: "When a teacher is employed to teach a specified time, and the school is interrupted necessarily, but by no fault of the teacher, who is always ready to fulfill the contract, the teacher, after the expiration of the time, may maintain an action against the district for the entire amount of wages. If, however, the district can show that during the whole or a portion of the time the teacher was engaged in similar employment, or was offered such and refused it, the damages may be reduced;" citing, as authority for the opinion, Costigan vs. M. & H. R. Co. 2 Denio, 609. The case cited is in point, and has been affirmed many times in New York, and has never been overruled or denied, to my knowledge. That opinion is in point in this case, and would entitle the teacher to her wages upon the condition named, viz., that she was always ready to keep and perform her contract. If, however, the school-house was destroyed by the act of God, for instance, by lightning, and it should appear

that it was impossible for the trustees to secure other quarters for the school, in such case, I think, the district would have a good defense.

ST. PAUL, May 7th, 1878. GEO. P. WILSON, Atty. Gen.

W. C. Lincoln, Esq., County Auditor:

DEAR SIR: The State Auditor has referred to me your letter of the seventeenth ult. The question you submit, viz., as to the effect of an Auditor's certificate on a deed, of "Taxes paid and transfer entered," when such certificate is false, is important, and a proper one for the courts to determine. No opinion that the State Auditor or myself might express could avail either of the parties to this controversy. We can grant no relief. Section 64 of chapter 11 of the General Statutes was not incorporated in the law of 1874, nor does it form a part of the present tax law. If it did, the question would not be a doubtful one. As the law stands, I am quite certain that the courts would hold that the Auditor's certificate of taxes paid, if untrue, would not operate to discharge the taxes, or, in this case, make void the sale; that the party injured by such false certificate would have the remedy by action against the officer. As the time had run within which redemption could be made, when application for that purpose was made in this case, it was properly denied. If permitted by you, it would have been of no avail unless the assignee of the State saw fit to accept the money.

ST. PAUL, May 8th, 1878. GEO. P. WILSON, Atty. Gen.

A. W. White, Esq.:

DEAR SIR: I have your favor of the twenty-eighth inst. The Legislature can neither shorten nor lengthen the term of an officer whose term of office is fixed by the constitution. Keys vs. Mason, 3 Sneed, 6–10; Brown vs. Davis, 9 Humph. 208. Our constitution fixes the term of Justices of the Peace at two years, and assuming that you were eligible, and was lawfully elected a Justice of the Peace for the town of Albert Lea, at the annual election in March last, your right to hold and exercise that office for the constitutional term cannot be questioned.

ST. PAUL, May 29th, 1878. GEO. P. WILSON, Atty. Gen.

F. B. Chapin, Esq.:

DEAR SIR: I have your letter of May 28th. I do not understand that the County Commissioners have anything to do with independent school-districts. They can neither add to nor take from such districts. Their authority pertains alone to common-school districts.

ST. PAUL, May 30th, 1878. GEO. P. WILSON, Atty. Gen.

E. M. Webster, Esq.:

DEAR SIR: Your letter of the eighth inst., I suppose, came duly to hand, but on account of my absence in Fillmore county until to-day, has remained unanswered. Sections 72 and 110, c. 11, Gen. St., must be construed together. The letting, if by the County Commissioners, must be either at the January or March meeting, and the paper designated by the Commissioners must have been published and circulated for at least three months prior to the time of letting. But if the County Commissioners have failed to designate a paper at either of the meetings named, then the Auditor may designate a paper, and if the paper so designated by the Auditor has been regularly published for three months (and otherwise meets the requirements of the law) previous to such designation or letting, it would be sufficient. The Auditor should let to the paper offering to do the work for the lowest sum.

ST. PAUL, June 14th, 1878. GEO. P. WILSON, Atty. Gen.

Thos. P. Mackey, Esq.:

DEAR SIR: I have your favor of the seventh inst. Inasmuch as the treasurer of your district was elected at the annual meeting in 1876, for a full term, and not to fill a vacancy or unexpired term, the clerk could not shorten said term by an erroneous entry upon the record. The treasurer would have a right to hold and exercise the office for the statutory term, notwithstanding the record. I understand, of course, that the meeting held in 1876 was not for the organization of the district, for, if so, the treasurer's term would be but two years, and the clerk's entry correct. With reference to your second question I have to say that I had a communication from your director, from whom I gathered that he came to this State in 1877 for the purpose of making it his home, and remained in the State several months; that he then returned to Michigan to settle up his business there, and removed his family to Minnesota; that he was absent several months, but, during all the time, fully intended to return to this State as soon as he could adjust his business; that is, he never abandoned his intention of making this State his home. If this be true, his residence would date from 1877, and not from his return in 1878. In the matter of residence very much depends upon the intention, and the intention can only be gathered from the acts and avowed purposes of the party. It is impossible to give to you any definite instructions upon this point.

ST. PAUL, June 14th, 1878. GEO. P. WILSON, Atty. Gen.

Frederick A. Fogg, County Superintendent of Schools, Ramsey County:

SIR: I am in receipt of your favor of the eighth inst., submitting the following questions respecting the act to provide uniform and cheap text-books: *First.* With respect to the ordering of the State books by clerks of common school and independent school districts, does the law leave it to the opinion of said clerks, or does it enjoin it upon them as a body? *Second.* If said clerks fail to order books by March 15th, is it their duty to order as soon thereafter as possible? *Third.* Is it the duty of said clerks, in making requisitions for books, to order a quantity sufficient to supply the pupils of their districts for the full school year?

That portion of section 4 of the act approved February 23, 1877, hereinafter quoted, it seems to me contains a definite answer to your first and third questions: "Sec. 4. It shall be the *duty* of each district clerk of the several school-districts of the State of Minnesota to make out an estimate of the number of school books required *for one year's supply of his school-district*, designating the number of books of each kind wanted, and forward the same on or before the fifteenth day of March of each year. * * * It shall be a misdemeanor for the clerk to refuse or neglect to perform the duties above designated, punishable by a fine not to exceed $25, or imprisonment not to exceed 30 days." The proviso to section 6 of supplementary act, approved March 8, 1878, answers in the affirmative your second inquiry.

ST. PAUL, June 14th, 1878. GEO. P. WILSON, Atty. Gen.

A. E. Randall, Esq., County Treasurer, etc.:

SIR: I have your favor of June 13th, asking whether you can collect personal property taxes by distraint after June 1st, and, if not, how you will proceed. Section 58 and subsequent sections of the new tax law define your duty in the premises. Personal property taxes become delinquent on March 1st. It is enacted that after that date the County Treasurer shall proceed immediately to collect all delinquent personal property taxes, and, if not paid upon demand, he shall distrain sufficient goods and chattels belonging to the person charged with such taxes to pay the same, with penalty and costs, and shall proceed *immediately* to advertise and sell the same, etc. Three months are allowed the Treasurer within which to collect personal property taxes delinquent on the first day of March. If the Treasurer should not be able to find personal property of the delinquent until within less than 10 days

of the time (June 1st) he is required to file his list with the Auditor, I have no doubt that he might distrain and complete the sale after June 1st; but I do not think it would be competent for him to make distraint after that date. The Treasurer is supposed to do his duty, and especially under the stimulus contained in section 62, and therefore it is fair to presume that if he has made no levy prior to June 1st, it is because, after diligent search, he has been unable to find any property of delinquents whereon to levy, and he is required to so certify in his return to the Auditor, June 1st. After filing the delinquent list and affidavit, it becomes the duty of the County Commissioners, at the first meeting thereafter, to cancel such taxes as they are satisfied cannot be collected; such revised list then goes into the hands of the clerk of the court, and the statute specifies how judgment shall be obtained and the taxes collected. Your duty and responsibility in the matter ends with filing your list and affidavit with the Auditor. I cannot advise you with reference to your liability as Treasurer upon the pending suit in case it should go against the county, because I do not know anything about the case. You will, I suppose, avail yourself of the provisions of section 117, c. 11, Gen. St. 1878.

ST. PAUL, June 18th, 1878. GEO. P. WILSON, Atty. Gen.

D. N. Byrud, Esq.:

DEAR SIR: Section 4, c. 3, (Booth's Township Manual,) of the road law, gives to town supervisors authority to divide their respective towns into as many road districts as they may deem convenient; that such division may be made annually, but in all cases shall be made *within* at least 20 days before the annual town meeting. The statute under which Atty. Gen. Berry made his decision read very differently, and such decision was strictly correct. The statutes of 1858 read: "Such division shall be made at least 10 days before the annual town meeting." Under the statute a division could have been made at any time during the year, not within 10 days of the annual town meeting. Now the division must be made *within* 20 days of the annual town meeting.

ST. PAUL, June 25th, 1878. GEO. P. WILSON, Atty. Gen.

R. O. Sweeny, Esq.:

DEAR SIR: I have your favor of the twenty-fourth inst., with inclosures, asking me to give you a form of a notice to be served on mill-owners, under the act of March 1, 1878, providing for the construction of fish-ways. It is necessary that the written notice to be served by the Fish Commissioners should specify—*First*, the form and capacities of the fish-way required to be built; *second*, the location of such fish-way as determined upon by the Fish Commissioners; and, *lastly*, the time within which such fish-ways shall be built. The form and capacity of the fish-way would be indicated by a reference in the notice to the lithograph plan and specifications annexed to the notice. Whether it is practicable to make or require all fish-ways to be of uniform size, I am not advised. With reference to the location of the fish-way, the statute would seem to require that the Commissioners, or a majority of them, should view the artificial obstruction and determine upon the location of the fish-way to be constructed. If such be the correct construction, it would not do to notify a mill-owner to construct a fish-way of the form and capacity indicated in the annexed plan and specification, in his mill-dam across, say Root river, at Rushford, in the county of Fillmore and State of Minnesota. Nor would it answer, even, if you were more definite than this, by giving the subdivision of the section, town, and range upon which the mill is situated, so that there could be no mistake as to the particular dam the Commissioners had in mind. It may not be necessary that the Commissioners should view the obstruction, although such course would seem to be contemplated by the statute, but in any event would not the Commissioners be required to determine (under the statute) *in which portion of the dam* the fish-way shall be constructed? Or if I am mistaken in the idea that the fish-way is built in the dam, and it is built in the embankment adjoining the dam, then must not (and

with more force in this case than the other) the Commissioners clearly indicate the embankment or *location*? The construction of fish-ways will necessarily be somewhat expensive, and the law, on that account, will be resisted. In such case, in any attempt to impose the penalty for refusal on the part of mill-owners to comply with the law, it will be necessary to show that the Commissioners have complied with the law, at any rate, with reasonable exactness. Hence the above suggestions. Upon any theory, no uniform (printed) notice would answer the purpose. The notice should be made in duplicate, so that in the event of a suit proof could be made of the notice served. Service can be made upon one or more of the owners or occupants of the obstructions over which such fish-way is to be built. The service should be personal, and whoever may make the service should be authorized by your board to make the service.

With these suggestions, I would prefer that you draw up a form of notice.

ST. PAUL, June 26th, 1878. GEO. P. WILSON, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

SIR: I am in receipt of your letters of recent date, and in answer to your questions would say: The official bonds of County Auditors and Treasurers should be executed in the same manner that deeds of real estate are required to be executed; that is, duly signed, sealed, witnessed, and acknowledged. In addition to this, the sureties should be required to justify in the amount of the penalty in the bond, as fixed by the County Commissioners. Sureties cannot be held in an amount exceeding the penalty expressed in the bond executed by them. Care should be taken, therefore, and especially in the case of County Treasurers, to fix the penalty high enough to cover the highest amount likely to come into their hands officially, during the term for which such bond was given. While the matters hereinbefore mentioned are essential to the proper and orderly execution of the bond, I do not mean to say that the surety would not be held if such conditions were not complied with. In fact, I think if a bond were accepted by the Commissioners, which was signed by the principal and sureties, but not witnessed or acknowledged, or containing any justifying clause, nevertheless the sureties would be bound; admitting that they had signed the instrument as the official bond of the officer, that their signatures were not witnessed, or that they had not acknowledged the execution of the instrument before an officer competent to take acknowledgments, or that they had not justified. These are matters required for the better security of the public, and not for the benefit of the principal or his sureties. In some counties, to my personal knowledge, County Commissioners have been notoriously lax in not insisting upon the due execution of official bonds, and thereby large amounts of public money have been placed at great hazards. I would refer you to a case quite recently decided by the Supreme Court, viz., State vs. Henry Young, late Treasurer of Sibley county. In that case the bond was executed in blank as to the penalty, and the penalty was afterwards filled in, in the absence of the principal and his sureties. This was only one of many objections made to the bond on the trial. The State was successful in that instance, but by the "merest scratch."

I think that you should call attention to all irregularities in the execution of official bonds, and insist upon their correction. Official bonds, except where otherwise expressly provided, should run to the State of Minnesota. An official bond running to the Board of County Commissioners would not be a statutory bond, but, if otherwise regular, I think it would be held a good common-law bond, and recovery could be had on it. This rule rests on the principle that although the instrument may not conform to the special provisions of the statute, nevertheless it is a contract voluntarily entered into, upon a sufficient consideration, for a purpose not contrary to law, and therefore it is obligatory on the parties to it, in like manner as any other contract or agreement is valid at common law. The defects in the bonds of the Treasurer of Swift county are so numerous that a new bond ought to be required. If the Treasurer is a proper and competent person to hold the office, he cer-

tainly can, without much trouble, furnish a new bond. If a new bond is required, it had better be required by the County Commissioners, they assigning a statutory reason for requiring a new bond. In case of default upon the present bond, and suit brought, we doubtless could show that Andrew Peterson and Ole A. Peterson are the same person; that Nels B. Nelson and Nels N. Brakke are the same person. H. W. Stone would probably insist that the authority to sign a sealed instrument must be by an instrument of like solemnity. If, however, he were now to acknowledge and adopt the signature, he would be estopped from making that defense. Whether the firm name of Olney & Lifgrew were signed to the bond with the knowledge and consent of all the parties does not appear, and probably would not appear in case of suit upon the bond. One partner could not sign the name of the firm to an official bond and bind his firm, without the express consent of all. The signing of a firm name does not meet the requirement of the law, which calls for two or more sureties, although the firm may be composed of two or more persons. I will answer the further question, viz., the proper construction of the clause "except in those cases in which the amount due is fixed by law," very soon. Have not had time to examine it yet.

ST. PAUL, June 26th, 1878. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: I am in receipt of your favor inclosing communication of the Auditor of Ramsey county, containing the following inquiries: *First.* What interest should be charged upon taxes of 1876 and 1877, which were paid by the purchaser subsequent to the sale for taxes of 1875, and before the expiration of redemption? *Second.* Is the purchaser entitled to interest upon the amount of taxes paid by him before the same becomes delinquent, or should interest be charged only from date of delinquency, *i. e.*, June 1st?

Prior to the amendments of the tax law made in 1877 the holders of tax certificates, whether by purchase or assignment, could pay subsequent taxes, although not delinquent, and have the same included in the amount necessary to redeem. Upon the whole amount thus paid they were entitled to 2 per cent. a month from date of payment to date of redemption. By the act of 1877 the rate of interest was reduced to 1⅛ per cent. per month, and the right of certificate holders to pay subsequent taxes limited to such as had become delinquent. But this limitation, as well as reduction, of the rate of interest did not accomplish much in the interest of property owners.

In view of the proviso of section 130 of the tax law, as amended by the act of 1877, § 25, which reads as follows: "Provided, that the provisions of this section, except as to the time allowed for redemption, shall not apply to any lands heretofore sold or assigned to any person, or bid in for the State, *but the redemption of all such lands shall be made in the manner and upon the terms* now by law required,"—it is conceded that the Legislature could not extend the time of redemption except in those cases in which the State became the purchaser, and therefore, with this exception, the law with reference to redemption remained the same as it stood prior to the amendments of 1877. This entitled purchasers to pay subsequent taxes, although not delinquent, and to receive 2 per cent. per month from date of payment. This condition of things remained until the passage of the law of 1878, which did away with the above proviso. Since the date of the last-named act, purchasers can pay only such subsequent taxes as are delinquent, and are entitled to receive, upon amount paid, 1⅛ per cent. per month from date of payment.

ST. PAUL, July 5th, 1878. GEO. P. WILSON, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

DEAR SIR: I have your letter of recent date, asking my construction of the clause, "except in those cases in which the amount due is fixed by law," found in section 123, *c.* 8, of the General Statutes.

Your conclusion, that it refers to only those cases in which the specific amount is fixed by law, is, perhaps, the only safe construction; but, as you are aware, such has not been the popular interpretation of that statute. It has been understood to include all cases in which the rate of compensation is fixed by law. This is a liberal construction, and in most instances a safe one, but it opens the door for those so disposed to take more than properly belongs to them. In your brief experience you state that you have found instances in which officers have drawn their compensation as such officers, not only at irregular times and in irregular amounts, but in excess of the amount due them. A late officer of Winona county overdrew an amount exceeding the penalty of his bond. He assumed that the Commissioners had nothing to do with auditing and allowing his claims upon the county for personal services. A suit is now pending to recover the amount overdrawn. A portion of the amount was overdrawn under a mistaken view of the law. The Auditor's salary is based upon the valuation of the property in the county, as fixed by the State Board of Equalization for the *preceding year*. As a rule, of course, the valuation for the current year shows a decided increase. As soon as such valuation was known, the officer referred to would adopt such valuation as the basis of his compensation; but, even allowing for this, the officer still overdrew quite a large amount. I mention this case as a justification for insisting upon a strict construction of the clause referred to as the only safe construction. As the salary of the Auditor is based upon the valuation of the property in his county for the preceding year, and that of the Treasurer upon his receipts, as ascertained at the settlements, each receiving a certain percentage, there can be no diffiulty in arriving at the exact amount each is entitled to. As the Auditor and Treasurer are as competent as the members of the Board of Commissioners to figure the percentage due them, there would be no necessity for examining and allowing their accounts, provided strict reliance could be placed upon their infallibility in figures and integrity. In most instances such reliance is not misplaced. It is the exceptional cases that call for this ruling. I am aware that outside of Ramsey and Hennepin counties the County Commissioners, with the exception of the two regular meetings, sit only at irregular times, and this ruling, if observed, will occasion some inconvenience to such officers as are now in the habit of drawing their compensation monthly; but this is unavoidable. The fees of Sheriffs, Justices of the Peace, Clerks of the Court, Constables, etc., are fixed by law, and yet the practice with reference to those officers has been to require them to submit their accounts for services performed to the Commissioners for examination, and are only paid after allowance by the board. The object is to ascertain whether the services were actually performed, whether the fees claimed are such as are allowed by law, etc. Why should not the same rule apply to all officers? For those services the law fixes the rate of compensation and not the specific amount. To my mind there is no good reason.

ST. PAUL, July 5th, 1878. GEO. P. WILSON, Atty. Gen.

A. J. Underwood, Esq.:

DEAR SIR: Your favor of the twentieth inst. received. Although our present system of enforcing the collection of taxes has been in existence four years, I am not aware of any decision throwing any light upon the question you submit, whether the omission of the dollar-mark at the head of the amount column is fatal or not, and some other similar questions, are now before his honor, Judge McKelvey, for decision. In this case, the list, as delivered to you, contained the sign "¼" after the abbreviations describing parts of sections, but instead of publishing the same in the form delivered to you, you inserted a notice at the head of the list as follows: "*Printer's Notice.* In the following list after the customary abreviations of N. E., N. W., S. E., and S. W., the fraction ¼, or quarter, is understood." My judgment

is that you are obliged to publish the list in the exact form in which it is delivered to you. Possibly the word "exact" may be too strong, but if there be a departure from the list so delivered for publication, it at once sets everybody, including the courts, to guessing whether such departure is material, and therefore fatal or not.

The courts in tax matters are in the habit of construing the law strictly, and this, too, notwithstanding the saving clauses in the law. Hence, in such matters, I always advise a strict compliance with the law. If the list, as delivered to you, had not contained the sign "¼" you would have been relieved, of course, and the only question would have been as to the sufficiency of the description. In that case, I am inclined to think, the description would have been held to be sufficient under the provisions of sections 70 and 109.

I am quite sure that in the absence of the dollar-mark the courts would say that the "amount" meant so many dollars and cents; that no one could be misled by the omission. The same with reference to the word "of" between abbreviations. For instance, N. E. ¼ of N. E. ¼, the word "of" would be understood, if not expressed. The same reasoning would supply the sign "¼," although it is usual to express it. In the description N. E. N. E., the word or sign "quarter" would have to be understood, or else the description held to be altogether meaningless; that is, no description at all. But this does not help you, as I have already stated. Your duty was to publish the list in the form it came into your hands. Possibly the courts might hold that the variation was not such as to mislead or prejudice any one, and hence not to constitute a good defense. This, I think, would be a sensible conclusion. Section 73 provides that the jurisdiction of the court shall not be affected by any mistake in copying the list for publication, nor by any mistake in publishing such list. If yours can be called a mistake it might be held that the statute covers the case.

There are many indefinite, and therefore insufficient, descriptions in the list you inclose to me. For instance, "balance of w hf nw," "part nw sw," "in sw sw." A judgment cannot be predicated upon such descriptions. But this does not concern you.

In conclusion, I would say that there is no remedy for your omission, and that, notwithstanding your omission, judgment had better be entered against all pieces wherein no answer is filed. In such case the court would not permit parties who failed to answer within the 20 days to come in and defend, unless other grounds of defense were shown. [See 26 Minn. 201, 212; 29 Minn. 135; 30 Minn. 435.]

WINONA, July 24th, 1878. GEO. P. WILSON, Atty. Gen.

P. T. McIntyre, Esq., Co. Auditor:

DEAR SIR: I am in receipt of your favor of the thirty-first ult., raising the question as to whether sheriffs' certificates of foreclosure and sale are taxable as personal property. I am of opinion that they are not taxable, but I must say that I do not feel entirely free from doubt. In this case the mortgage was foreclosed and the property covered by it was struck off to the mortgagee for the amount due. This extinguished the debt. Until the period of redemption expired, the possession and legal title to the property remained in the mortgagor and was taxable in his name. The mortgagee received a certificate of sale witnessed and executed in the same manner as deeds are required to be executed for the conveyance of real estate, but conveying no present title. Under the statute such certificate operates as a conveyance at the expiration of the period of redemption. It might be termed an inchoate deed. Is such an instrument covered by the tax law, defining the classes of personal property subject to taxation? I think not. As I have said, by the sale and purchase the mortgage debt was satisfied. The mortgagee no longer had a claim or demand against the mortgagor,—nothing that he could enforce by action or otherwise. The mortgagor may or he may not redeem. If it were certain in all cases that the mortgagor or his assigns would redeem, then the statute, if it does not, should be made to cover sheriffs' certificates of sale; but we know as a fact that title is often ac-

quired upon mortgage foreclosures. In such cases it would clearly be wrong to list the certificate as personal property, for the result would be double taxation, to-wit, upon the land and upon the certificate of sale. The mortgagee might, under the statute, pay the taxes upon the land and include the amount in his bid at the sale. If so, he should not be taxed upon taxes paid by him. These are some of the reasons that occur to me why your question should be answered in the negative.

ST. PAUL, August 12th, 1878. GEO. P. WILSON, Atty. Gen.

Hon. Henry M. Knox, Pub. Examiner:

DEAR SIR: I have your favor of the nineteenth inst., inquiring whether, "under the act providing for the appointment of Public Examiner, that officer can be called upon to examine the accounts of the Board of Education of one of our cities?" Certainly not; the act nowhere imposes any such duty upon you. Section 2 of the act makes it your duty to examine the accounts of the several public institutions belonging to the State; section 3 prescribes your duty with reference to State and county officers; and section 4 gives you authority to examine into the affairs, and to ascertain the financial standing, of banking, savings, and other money corporations, created under the laws of the State or Territory of Minnesota. Your duty ends with these three classes. The field is broad enough for one man to cover without including *by implication* more territory.

ST. PAUL, August 28th, 1878. GEO. P. WILSON, Atty. Gen.

O. Syverson, Esq.:

DEAR SIR: I have your letter of the twenty-eighth inst. You refer to section 58 and subsequent sections of the general tax law, and to chapter 79 of the Laws of 1878. It is only when the County Treasurer refuses or neglects to collect any tax assessed upon personal property when the same is collectible, or to file the delinquent list and affidavit, that he shall be held liable for the whole amount uncollected in the next statement with the Auditor, Section 62. I agree with you that inasmuch as your county was ravaged by grasshoppers in 1876 and 1877, it fell within the provisions of chapter 79 referred to, and that, therefore, it would have been useless to have attempted to enforce the payment of personal taxes, between March 1st and June 1st, *against those who suffered from the loss of crops* by grasshoppers, the act giving such persons until June 1st to file their applications. But you must have a great many merchants and business men, *not engaged in farming*, against whom the taxes should have been enforced. Chapter 79 applies only to those who lost their crops by the ravages of grasshoppers. The last section of said act, chapter 79, provides that after December 1, 1878, the costs, interest, and penalties provided by law shall attach to and be charged against the taxes levied on such real and personal property. It should have gone further, and empowered the Treasurer to enforce the collection of such taxes and penalties by distraint, after that date. In my judgment such power cannot be implied. If exercised, it must be by virtue of express authority. You can, after that date, make demands upon, and, if need be, threaten delinquents, but I would not attempt to distrain and sell until further authority is given. Possibly I may have overlooked some statute which has some bearing upon the questions discussed. If so, I would be glad to have you call my attention to it.

ST. PAUL, August 30th, 1878. GEO. P. WILSON, Atty. Gen.

Christ. Didra, Esq.:

DEAR SIR: The State Auditor has referred to me your letter of recent date inquiring by what authority taxes can be refunded to purchasers at tax sales of lands contracted by railroad corporations, when such corporations declare such contracts forfeited. There seems to be no express authority to refund taxes in any

case, except when the sale is declared void by judgment of court. See section 97, Laws 1878. Reference is had in your letter to the charter of the St. Paul & Sioux City Railroad, whose charter provides that "whenever any lands heretofore or hereafter granted to said railroad company * * * shall be contracted to be sold, conveyed, or leased by said company, the same shall be placed upon the tax-list by the proper officer for taxation, as other real estate, for the year succeeding that in which such contract * * * shall be made, but in enforcing the collection of taxes thereon the title or interest of said company * * * shall be in nowise impaired or affected thereby, but the improvements thereon, and all the interest of the purchaser or lessees therein, may and shall, in case of default in payment of taxes upon such land, be sold to satisfy the same." Section 27 of the tax law provides "that property held under a lease for a term of three years or more, or a contract for the purchase thereof, * * * belonging to any railroad company, * * * shall be considered, for all purposes of taxation, as the property of the person so holding the same." Section 118 of the Laws of 1878 provides that "the Auditor of the State shall, on or before the first day of April of each year, obtain from the local land-officers in the State, and from the several land-grant railroad companies, lists of lands sold or contracted to be sold during the previous year, and certify them for taxation * * * to the Auditors of the counties in which such lands may be situated. He shall also at the same time obtain lists of lands reverting to the railroad companies each year, by reason of the forfeitures of contracts, and certify the same to the respective County Auditors for cancellation of taxes, and it shall be the duty of the railroad companies to report such sales or forfeitures, on or before the first day of April each year, to the Auditor of State; provided, that all forfeited lands not so reported shall be held for all taxes accruing thereon." Thus, it will be seen, the charter of the company and the tax law both provide for the listing and taxation of land leased for a term of three years or more, or purchased from the railroad company as the property of the lessee or purchaser, and such tax is levied against the land and not against the improvements. This is well enough, provided the purchasers perform their contracts; but clearly the State cannot, by sale or otherwise, impair the title of the ralroad company, and when forfeiture has been declared by the railroad company, and evidence of such forfeiture is furnished to the County Auditor, the taxes should be canceled. The only proper evidence of such forfeiture would be the certificate of the State Auditor, as provided in section 118 of the tax law. If the taxes are canceled, the money paid by the purchaser or assignee of the State should be refunded, and in such cases the authority to refund would be implied; but there being no express authority to refund, the Auditor should act in the premises by direction of the Board of Commissioners.

ST. PAUL, September 26th, 1878. GEO. P. WILSON, Atty. Gen.

Hon. P. McGovern:

DEAR SIR: Your favor of the thirtieth inst. came duly to hand. You ask: "Has the County Treasurer any right to loan out the county money to private individuals at a per cent.?" Section 95, *c.* 54, 2 Biss., makes it embezzlement for a County Treasurer to loan county funds (or any funds coming into his hands as such officer) with or without interest. But if, notwithstanding the penal statute, he should loan the county funds and receive interest upon such loans, he could take no benefit from his unlawful act, and an action would lie against him to recover whatever amount he may have received. The money loaned is the money of the county, and the county is entitled to the increase; the interest following the principal.

ST. PAUL, October 23d, 1878. GEO. P. WILSON, Atty. Gen.

Syver Thompson, Esq.:

DEAR SIR: I have your favor of the twenty-first inst., in which you state that you have nominated in your county a candidate for County Auditor who will not attain his majority until the twenty-third day of February, 1879, and inquiring—

First, whether his election would be good; *second*, whether his opponent could contest his election; and, *third*, whether, if elected, he could qualify? The first question necessarily includes the other two, and is asked in view of section 7, art. 8, of the constitution, which provides that "every person who by the provisions of this article shall be entitled to vote at any election shall be elegible to any office * * * elective by the people," etc. The converse of this would be that any person who by the provisions of this article is not entitled to vote shall not be elegible to any office elective by the people. The elegibility referred to in the constitution is to any election, as well as to holding an office; that is, the candidate must be qualified at the time of his election. Parker vs. Smith, 3 Minn. 240. Votes cast for a minor would be declared void by the court in the case of a contest.

ST. PAUL, October 23d, 1878. GEO. P. WILSON, Atty. Gen.

W. W. Griswold, Esq.:

DEAR SIR: I have your favor of the twenty-sixth inst., inquiring to whom the election returns in Big Stone and Traverse counties should be made, said counties being unorganized. Section 17, *c.* 1, Gen. St., provides that the returns of election in unorganized counties shall be made to the Auditor of the county to which they are attached for elective purposes. This is the only statute throwing any light upon the subject of your inquiry, except sections 30, 31, and 32 of the same chapter, which refer exclusively to the returns for members of the Legislature. Big Stone and Traverse are attached to Stevens county for record and judicial purposes, but not for elective purposes. Under the apportionment act of 1871 Big Stone may be said to be attached to Douglas county, the senior county in the district, for certain elective purposes, and likewise Traverse to Otter Tail; and if attached for some elective purposes, for instance, for the election of Senators and Representatives, and nothing being said about the election of State officers, Congressmen, etc., the reasonable conclusion would be, under the statute first quoted, that all returns other than for local officers, if they have any, should be made to such senior county. I can see no grounds upon which the returns should be made to Stevens.

ST. PAUL, October 29th, 1878. GEO. P. WILSON, Atty. Gen.

Ole O. Simonson, Esq., Register of Deeds:

DEAR SIR: I have your favor of recent date, asking whether you, as Register, can at this time correct an error in recording a deed in the year 1859, the evidence being sufficient to convince you that it was a mere clerical error. I am very sure that you cannot. The deed may be re-recorded and the error corrected in that way. This will answer every purpose, unless the grantor in the deed, taking advantage of the officer's mistake, conveys the property to other parties, who now claim adversely, and in such case a proceeding will have to be instituted in court to have the record corrected. If you made the change no one would be bound by it.

ST. PAUL, October 30th, 1878. GEO. P. WILSON, Atty. Gen.

S. C. White, Esq., Auditor of Isanti County:

DEAR SIR: The State Auditor has referred to me your letter of the seventh inst. The question you present is this: You, as County Auditor, have been temporarily incapacitated for work by sickness, and under section 117, *c.* 8, of the General Statutes, the County Commissioners appointed a suitable person to discharge the duties of the office during your disability. Now, shall the compensation of such appointee be deducted from the Auditor's salary, or paid by the county out of the general revenue funds, and the County Auditor be allowed to draw his salary without diminution?

The statute is silent, so far as the same pertains to County Auditors, but I can see no reason why the same rule should not obtain in the case of County Auditors that does in the case of County Attorneys under like circumstances. See section 83 of same chapter. No matter what may be the cause of the County Attorney's absence, the compensation of the County Attorney *pro tem.* is deducted from his salary. In the absence of any statute, I should think this would be the rule. The appointee must be paid, and the county should not pay twice for the same services.

ST. PAUL, December 12th, 1878. GEO. P. WILSON, Atty. Gen.

J. Ingmunson, Esq.:

DEAR SIR: I have your favor of the twenty-third ult., in which you inquire: "Are not County Treasurers entitled to pay for actual expenses incurred while collecting personal taxes, according to law, away from the county seat, in the month of January?" I have examined the tax law, and also the law fixing the salary of County Treasurers, and, while the tax law imposes the duty mentioned by you upon the Treasurer, there is no provision for reimbursing the County Treasurer for his actual and necessary expenses while engaged in that duty, or of those whom he may deputize to perform the duty. As a matter of law, therefore, he is not entitled to recover his expenses from the county.

ST. PAUL, January 23d, 1879. GEO. P. WILSON, Atty. Gen.

G. L. Larson, Esq.:

DEAR SIR: I have your letter of the twentieth inst. All claims against the county must first be audited and allowed by Commissioners, except in those cases in which the amount is fixed by law, or is authorized to be fixed by some other person or tribunal. The per centum of the Auditor's compensation is fixed by law, but the amount he is entitled to in the aggregate is not fixed. That is a matter of computation and adjustment, and as a matter of safety the Public Examiner and myself have concluded to advise that all such matters should be under the direct supervision of the Board of Commissioners.

ST. PAUL, January 23d, 1879. GEO. P. WILSON, Atty. Gen.

Hon. E. W. Trask, County Auditor, Houston Co.:

DEAR SIR: The State Auditor has referred to me your letter of January 23d to answer. You state that "certificates of sale were issued in 1877 for tax of 1876, (time of redemption not yet out,) which have been assigned. They have been presented to me for the purpose of entering assignment on copy judgment-book, and for my certificate. Shall I certify under section 110 of 1878 tax law, or under section 141 of 1874 tax law? If under the latter section, how shall I again certify after the time of redemption has expired under section 100, Laws 1878? Again: I have certificates left with me which have been assigned, and where the time of redemption has already expired; what shall I certify on them?" Prior to the amendments made in 1877, tax certificates and assignments were recordable at any time, but in 1877 the law was changed so as to provide for their record after the redemption had expired. All that is required now to entitle tax certificates to record is the County Auditor's certificate indorsed thereon that the lands described therein remain unredeemed, "and no such certificate or assignment shall be recorded by the Register of Deeds unless such indorsement is made." This indorsement is necessary, therefore, no matter when the sale was made.

Section 141 of the tax law of 1874 has been superseded by section 100 of the Laws of 1878. Instead of this, section 141 ought to have been incorporated into section 100 of the new law, and notwithstanding the repeal of said section 141, I am of opinion that even now all assignments should be noted in the judgment-book. The only record of title from the date of the sale and purchase to the recording of the certifi-

cate, after the period of redemption has expired, is kept in the Auditor's office, and this record should show each assignment, in order that it may appear to whom the redemption money belongs in case of a redemption, and for the purpose of subsequent taxation. Although the said section 141 is not to be found in the Laws of 1878, it can and ought to be observed in order to keep the record straight. If the holder of a tax certificate, under the act of 1874 or 1875, desires the Auditor to indorse his certificate as provided in section 141, as it originally stood or as amended, he should do so, and also certify the property to stand unredeemed, if such be the fact. Referring to your last question, as the purchaser at a tax sale receives a deed in fee-simple, subject only to redemption, I have no question but that he may convey all the interest he has by quitclaim, which is in substance an assignment of his interest; but there is not now, and never has been, any provision of law for noting such conveyances upon the copy judgment-book. The same reason does not exist in such cases for keeping the record of such conveyances in the Auditor's office as in the case of assignments, because they are entitled to record elsewhere. Redemption money is paid in for the use of the person thereto entitled. How shall the Auditor determine who such person is? Manifestly, by reference to his judgment record, the certificate, and indorsements thereon. This would be sufficient if nothing more appear. But if it should appear by presentation of the deed or record thereof, or by actual notice to the Auditor that the certificate holder has conveyed his interest in one or more of the pieces of land described in the certificate, it would be proper, and within the province of the Auditor, to determine to whom the money belonged, or, in other words, to say that the grantee is estopped by his deed from claiming his money. Where the certificates are on record, and the County Commissioners propose to refund on account of lands not being taxable, (if the Commissioners have such power,) I am not aware of any way in which such record can be canceled. If the judgment and sale were set aside by decree of court, the record of such decree would accomplish the purpose.

ST. PAUL, January 25th, 1879. GEO. P. WILSON, Atty. Gen.

Hon. D. Burt:

DEAR SIR: I am in receipt of your favor of the twenty-ninth ult., inclosing communication from the Auditor of Stearns County. It appears from said communication that the Commissioners of Stearns County, at their July session of 1878, distributed all territory in said county, not embraced in any school-districts, to adjoining districts having schools, in pursuance of section 17 of chapter 1 of the school law. This having been done, the Auditor entered the territory so attached upon the tax-lists of the respective districts for 1878, and levied special school tax thereon. To this objection was made, upon the ground that no special school taxes can be levied or collected upon any real estate situated more than five miles distant, or upon any personal property taxed to any person residing in such school-district, and more than five miles distant from the school-house, etc. See chapter 20, Laws 1875. This objection is well taken by those residing outside of the limit, provided the act of 1875 is still in force. I am of opinion that it is not in force, and hence the objection is untenable. The act of 1877, "to establish and maintain a system of public schools in the State of Minnesota," was designed to supersede all other acts upon that subject. It expressly repeals all acts and parts of acts inconsistent with it. It was provided in the act of 1875 that no school-district should include a larger territory than thirty-six square miles. That act I construed at the time to be prospective in its operation; that is, as not affecting existing districts. But, for the purposes of this decision, it is immaterial whether such construction was correct or not. The second proviso to section 17, *c.* 1, act of 1877, clearly authorizes the annexation of additional territory in the cases therein provided. In such cases the limitation contained in the section proper does not apply. When territory attaches by virtue of that proviso, it becomes incorporated into and a part of the district to which it is attached for all purposes. The general scope of the act of 1877 is in direct conflict with that portion of the act of 1875 un-

der which exemption is claimed in this case. The legal voters of school-districts, lawfully assembled, shall have power, by a majority of the votes of those present, to vote an amount of money to be raised by a tax on the *taxable property* of the *district*. The tax so voted must be reported by the District Clerk to the Auditor, and he must levy the same upon the *real and personal property* of the *district*, not in part of the district. If the law as it stands is likely to work a hardship, then it should be amended.

ST. PAUL, February 3d, 1879. GEO. P. WILSON, Atty. Gen.

O. C. Gregg, Esq.:

DEAR SIR: The State Auditor has handed to me your letter of February 1st, in which you state that "A. purchased at tax sale lots 1 and 2, for years 1873 and 1874. B. purchased same lots for 1875. B. then redeemed from A., and C., the owner, redeemed from B.; that is, from sale for tax of 1875. *Question.* Does B. lose the amount paid A. for redemption from 1873 and 1874 sales?" B. doubtless redeemed to protect his subsequent purchase, and did so at his peril. He has no remedy. C. had a right to redeem from sale for 1875 tax by paying amount of said sale and interest, and subsequent taxes. You, as Auditor, could not impose the condition that he pay the amount paid by B. to A. If, instead of B., a stranger—that is, one having no interest—had redeemed from A. to prevent his (A.'s) tax title from maturing, the case would have stood in no different light from what it does now.

ST. PAUL, February 10th, 1879. GEO. P. WILSON, Atty. Gen.

S. J. Willard, Esq., County Auditor:

DEAR SIR: The State Auditor has requested me to write to you concerning the provisions of section 37, *c.* 6, Laws 1877. This section has been considered of doubtful validity, and for that reason it has been generally ignored by certificate holders. A purchase at a tax sale is clearly a contract. Cooley, Tax'n, 370. No subsequent statute can impart new terms into the contract, or add to those before expressed. Cooley, Tax'n, 370; Robinson vs. Howe, 13 Wis. 341. These reasons for ignoring the statute in question would not apply, of course, to sales made in 1877. But was not this section repealed—not in express terms, but by implication—by chapter 1, Laws 1878? It is not necessarily inconsistent with the law of 1878; but I understand the rule to be that even when two acts are not in express terms repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions showing that it was intended as a substitute for the old act, it will operate as a repeal of that act. Goodno vs. Oshkosh, 13 Wis. 127, 130; U. S. vs. Lynen, 11 Wall. 88, 92; Norris vs. Coweller, 13 How. 427–429; Blakeman vs. Dolan, 50 Ind. 194.

Chapter 1, Laws 1878, was intended as a revision of the whole subject, and as a substitute for all other acts upon that subject. Some provisions of the old law are omitted, and some new provisions are added. Now, if those old provisions are still in force, except wherein there is a clear conflict between the old and the new, we have a pretty jumble, and perpetual litigation will follow. I am not aware that the section referred to has been before the courts, or has been passed upon by any one in authority. I do know that it has been generally ignored.

ST. PAUL, February 10th, 1879. GEO. P. WILSON, Atty. Gen.

B. Sampson, Esq.:

DEAR SIR: In your favor of the sixteenth ult. you state that you were elected Clerk of District Court of Polk county at the general election of 1878; that until the act of last winter, providing for a term of court in Polk county, it was attached to Clay county for judicial purposes; that there is a question raised now as to the legality of your election. In 1873 Polk county was declared to be a duly or-

ganized county, with all the rights, powers, etc., of other legally organized counties of the State. Being a duly organized county, the people of that county had a right to elect a full complement of county officers, which would include the Clerk of the District Court, unless, under the circumstances, the election of the last-named officer was prohibited by the constitution, to-wit, section 10 of article 6, which reads as follows: "There shall be elected in each county where District Courts shall be held, one Clerk of said court, whose qualification, duties, and compensation shall be prescribed by law, and whose term of office shall be four years." This provision enjoins a duty. It contains no negative terms, and is prohibitory. It would therefore be competent for the Legislature to provide for the election of Clerks in organized counties, although the same may be attached to other counties for judicial purposes. This provision is made in the General Statute pertaining to county officers. When we come to consult subsequent statutes relating to this matter, we find certain statutes which seem to confirm the view I have taken, and others apparently against it. Those supporting my view are section 32, tit. 3, *c.* 64, Gen. St.; the proviso to section 33, same chapter, being chapter 81, Laws 1873; sections 2, 4, 5, *c.* 112, Gen. Laws 1867. And those *contra* are section 33 aforesaid, proper; section 1, *c.* 112, aforesaid; and chapter 82 of the General Laws of 1873. See, also, 16 Minn. 518. To my mind it is difficult to reconcile the several sections and acts referred to. I have not seen the act detaching your county from Clay, but suppose it is in the usual form. In view of the provision of chapter 82, Laws 1873, and to relieve you from doubt, I would suggest that Judge Stearns supplement your election by appointing you as Clerk of Polk county, under the last-named act. Then, however, the question would arise as to the tenure of your office. If you hold by virtue of your election, your term is four years; if by virtue of your appointment, then only until your successor is elected and qualified.

ST. PAUL, March 19th, 1879. GEO. P. WILSON, Atty. Gen.

John Little, Esq.:

DEAR SIR: Yours received. You state that at your annual meeting in 1878 the legal voters of your district voted to have five months' winter school, and for that purpose you raised by special tax the sum of $300; that the trustees refuse to let you have a school. By section 24 of the school law it is provided that the trustees "shall provide a school in each year for the entire term for which a school was ordered and funds provided by the district." Section 31 provides that the trustees shall provide all things necessary for the school-house during all the time a school shall be taught therein, etc. If the district furnished the necessary means, the duty of the trustees in the premises was plain, and they brought themselves within the penalty provided in section 86 of the school law. I refer to the language in said section, "and serve therein faithfully." This is not very specific, but it is the only section providing a penalty that approaches the case. A County Attorney is charged with the prosecution of such cases, (section 93,) and complaint must be made to him. No one has authority to remove the officers.

ST. PAUL, March 26th, 1879. GEO. P. WILSON, Atty. Gen.

J. W. Servius, Esq.:

DEAR SIR: In your favor of the twenty-first inst. you request my opinion as to the manner in which costs in criminal cases before Justices of the Peace should be presented to the county for payment. Under the provisions of chapter 27, Laws 1869, each person preferring a claim against the county for fees should file an itemized bill, duly verified; that is, verified in the manner prescribed in said chapter. With reference to the fees of Town Clerks for returning births and deaths, the law fixes their compensation at 25 cents for each death reported, but does not, as I can find, provide for the Clerk of the District Court certifying the amount due to Town Clerks to the County Auditor. Their claims should therefore be presented and allowed as other claims are presented and allowed, in which the *precise* amount is not fixed by law, or

authorized to be fixed by some other person or tribunal. Section 123 of chapter 8 of the General Statutes was amended last winter by incorporating the word "precise" in the section before the word "amount," in fourth line of section. As the precise amount of the County Superintendent's salary is fixed by the County Board, the County Auditor can draw his warrant for the amount due him, without further allowance.

ST. PAUL, March 26th, 1879. GEO. P. WILSON, Atty. Gen.

G. L. Larson, Esq.:

DEAR SIR: I have your favor of the twenty-second inst. It has been held by our supreme court (6 Minn. 204) that the provisions of section 101, *c.* 8, Gen. St., (amended 1870, *c.* 44; 1873, *c.* 75,) confer authority upon Boards of County Commissioners to issue bonds for the erection of court-houses; or, at least, the provisions of this section, in connection with the general authority in county matters, finances, etc., given to County Boards by the provisions of said chapter 8, confer such authority. I speak of bonds instead of county warrants, for the reason that under the limitations in the tax law of 1878, §§ 49 and 114, (especially the latter,) it might be necessary to extend the time of payment several years, and thus keep within such limitations. You would have to levy sufficient each year to meet a proportionate part of the principal, and the annual interest on the bonds. If the bonds run 10 years, you would have to, or ought, at least, to levy a tax each year equal to one-tenth of the principal, (besides the annual interest,) thus creating a sinking fund sufficient to take up the bonds when due. The Board should first decide upon plans and specifications, and then let the contract to the lowest responsible bidder. The bonds would be negotiable, drawing probably 10 per cent. interest. These could easily be disposed of if issued according to law. The salary of the County Auditor is regulated by the value of the property in the county, as fixed by the State Board of Equalization for the preceding year, but the provisions of the entire section fixing salary shows that only taxable property is here meant, and therefore exempt property should be excluded.

ST. PAUL, March 27th, 1879. GEO. P. WILSON, Atty. Gen.

J. R. Kirby, Esq., Judge of Probate:

DEAR SIR: I have yours of the twenty-ninth inst., in which you inquire: *First*, are Judges of Probate entitled to any fees for examining and sending insane persons to hospitals for insane; and, *second*, are County Auditors entitled to fees while on Board of Audit and Canvassing Board?

The salaries of Judges of Probate are fixed on basis of population by chapter 37, Gen. Laws 1875, as amended by chapter 60, Gen. Laws 1877. The salary as so fixed covers his entire compensation in the line of his official duty. He is allowed to charge for acknowledgment, and oaths administered outside his probate duties. By reference to the law relative to committing insane it will be seen the Judge of Probate is expressly excluded from receiving any fees for his services in that behalf.

With reference to your second question, the law does provide for fees to the County Auditor for his acting on the County Canvassing Board, and also upon the County Board of Audit; but his compensation is fixed by chapter 120, § 1, Gen. Laws 1877, wherein it is expressly provided that all moneys received by the Auditor as fees in excess of the amounts allowed by that act shall be paid into the revenue fund of the county at the end of each year.

ST. PAUL, March 31st, 1879. GEO. P. WILSON, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

DEAR SIR: I have the honor to acknowledge the receipt of your favor of the twenty-ninth ult. You ask: "What constitutes a loan of the public funds prohibited under Bissell, p. 230, § 69; p. 998, § 95?" Subdivision 1 of section 1 of chapter 4 of the General Statutes provides that "words and phrases shall be construed according to the common and approved usage of the language." The term "loan" is not used in the sections referred to in any technical sense, but must be construed by the statutory rule just quoted. Any attempt on my part to define the term "loan," as commonly understood, (for your benefit,) would be time and labor wasted. In connection, however, with said query, you inquire: "Would the following items, *if found in a County Treasurer's hands and claimed as part of his cash*, be sufficient evidence of loaning the public funds, viz.:

Memorandum receipts of private parties or firms.				
Due-bills	"	"	"	"
Tax receipts,	"	"	"	"
Checks and drafts	"	"	"	"
Wheat tickets	"	"	"	"

1st. Memorandum receipts. The term "memorandum" is used, I suppose, to distinguish the receipts referred to from receipts which the Treasurer is authorized and required to take in disbursing public funds, and if taken by the Treasurer as an evidence of indebtedness from private parties or firms, and claimed as a part of his cash, would furnish conclusive proof against the Treasurer upon a charge of unlawfully loaning the public funds.

2d. Due bills. The same may be said of these. The law makes no provision for Treasurers taking due-bills from private parties or firms, or anybody, and if found in his hands and claimed as cash, would be very strong evidence against him of improper disposition of the public funds in his hands.

3d. Tax receipts. The Treasurer is accountable for the money evidenced by the tax receipts, and his refusal or inability to account for the same upon proper demand would be evidence against him of a conversion of such funds to his own use.

4th. Checks and drafts. These might or might not be evidence against the Treasurer of a loan of the public funds, depending upon circumstances. The Treasurer has no right to receive anything in payment of taxes save lawful money, and orders drawn upon funds in accordance with section 57 of the tax law. And yet resident and non-resident tax-payers often pay their taxes in drafts and checks. The Treasurer takes them in payment, but at his own risk. He is accountable for the cash; he can not claim such checks and drafts as a part of his cash.

5th. Wheat tickets. I cannot conceive what the Treasurer has to do with wheat tickets in his official capacity; or, rather, how he can have anything to do with them in such capacity. To invest public money in wheat would be an act of embezzlement. To loan public money on wheat tickets, as collateral, would be an act of embezzlement. The presence of such tickets and claim by the Treasurer as a part of his cash, would be strong evidence that he had done one or the other of the acts named. Instead of the funds, he produces the wheat tickets, and the presumption would be that he had converted the money to his own use. Certificates of deposit in the individual name of the Treasurer, or deposited by other parties to their own credit or order, or to that of any other person or firm, and indorsed in blank, or to the order of any other person than the Treasurer officially, cannot be considered as public funds, and cannot be so counted unless the public money is deposited in accordance with the law upon that subject, (to-wit, the Law of 1873.) Treasurers, when called to account by those having authority in that behalf, must produce the money, if required, and for that purpose should have what would be a reasonable time, under the circumstances. It cannot be expected that they will carry the money about with them, or have it where they can produce it at a moment's notice. If they have deposited the same as the money of the county, or in the name of the Treasurer, as such officer, and have a certificate of deposit to that effect, such certificate might or might not be satisfactory, and the production of the money waived,

depending altogether upon the standing and responsibility of the person or corporation making the certificate. A Treasurer has no right to loan or deposit money upon interest, except it be done in pursuance of the act heretofore referred to; but, if he shall do so, I have no doubt the interest accruing would belong to the county, and not to the Treasurer. In other words, he cannot profit by his own wrong. To convert such interest to his own use would be embezzlement. A credit of interest to a Treasurer's account on the books of a bank, with no corresponding credit to the county on the Treasurer's books, would be evidence of embezzlement; so, likewise, would a certificate of deposit, drawn with interest, and not afterwards found in the Treasury, and no interest credited to the county. 10 Mich. 54.

ST. PAUL, April 1st, 1879. GEO. P. WILSON, Atty. Gen.

W. T. Lambert, Esq.:

DEAR SIR: I have your favor of yesterday, in which you inquire whether there is a county road fund as distinguished from the general county fund. There is not. The appropriations by County Commissioners for road purposes are made out of the general fund. See section 56 of the road law, and section 49 of the tax law. See, also, Board of Com'rs vs. Nettleton, 22 Minn. 356.

ST. PAUL, April 8th, 1879. GEO. P. WILSON, Atty. Gen.

C. C. Kinsman, Esq., Co. Atty.:

DEAR SIR: I am in receipt of your letter of the seventh inst., in which you ask "whether County Commissioners can take for their services, while employed in transacting county business, a greater fee than three dollars a day, or for more than 20 days in any one year, with travel, as provided." The compensation of County Commissioners, if fixed by section 92 of chapter 8 of the General Statutes, as amended by section 1 of chapter 44 of the General Laws of 1873, and is limited as indicated by your question. While the road law and the law for the relief of the poor impose certain duties upon the Commissioners, neither act makes any provision for compensation for such services, nor is there any provision for compensation to the Commissioners made anywhere that I can find for the official services, except in section 92, aforesaid. Their *compensation*, therefore, cannot exceed $60 in any one year, and mileage, as fixed by said section 92. I believe it is customary to audit and allow necessary disbursements in and about the public business.

ST. PAUL, April 8th, 1879. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb:

DEAR SIR: Referring to the communication of W. E. Hale, Esq., County Attorney of Hennepin county, of date April 21st, inquiring whether certain property therein described, and used for school purposes, is exempt from taxation under section 5 of the tax law. I am of opinion that the same is not exempt from taxation. If within the letter, it is not within the spirit of the law. But I am of opinion that it is not within the letter. The school referred to is a private school. It is supported by tuition fees, and is not open to all (of the same class) upon equal terms. The person in charge, so far as appears, can say who shall and who shall not be admitted to the school, and the terms of such admission. It was designed, evidently, for a select school, and is a select or private school, and not a public school, in the statutory sense. It is not, to be sure, operated for pecuniary profit, but was and is designed to be self-supporting. After paying expenses, whatever profit there may be goes to the person in charge. The fact that the building in which the school is held, and the ground upon which the same is situated, is the property of a corporation formed under the General Statutes, would not make said property public school property, or the school held therein a public school. If owned by the person in charge, instead of a corporation, such person

might, with equal propriety, claim such property to be exempt. If the claim be good in this case, there are hundreds of private and select schools in the State, in all of which the same claim can be made. In my judgment there is no ground for considering this school an institution of purely public charity. It is not supported by voluntary contributions or donations, but by tuition fees paid by those patronizing the school. I think you should decide the property in question to be taxable, and if we have misconstrued the law those interested can have a speedy remedy.

ST. PAUL, April 8th, 1879. GEO. P. WILSON, Atty. Gen.

A. W. Kimball, Esq., Clerk of District Court:

I am in receipt of your favor of the twenty-fourth inst., in which you inquire, "At what stage in the proceedings for the enforcement of delinquent taxes upon real estate should the Clerk's and printer's fees be charged?" These charges are formally made and entered by the Clerk at the time of the entry of judgment, under section 76 of the tax law. But these may attach and become proper charges against delinquents desiring to pay prior to that date. For instance, the printer's fee would be a proper charge at any time after the list had gone into the hands of the printer for publication. In any event, after the first publication. The Clerk's fee would be a proper charge at any time after the return of the list, as provided in section 71 of the tax law. He is entitled to 12 cents per description for all his services to and including the entry of judgment. The fee cannot be prorated—cannot be divided. He is entitled to all or none. Having made the list and notice, returned the same to the Auditor, he has a proper charge against the county, and the measure of such compensation is 12 cents per description. The county should be reimbursed.

ST. PAUL, April 26th, 1879. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb:

DEAR SIR: I have your letter of recent date, inclosing communication of C. E. Clark, of Granite Falls, who inquires: 1st. Whether real estate assessed by the acre last year, and subsequently divided into town lots, platted, and plat put on record, can be reassessed this year, etc. I am of opinion that this question should be answered in the negative. The tax law (section 6) provides that all real property shall be assessed every even-numbered year, with reference to its value on the first day of May preceding the assessment, and all real estate becoming taxable any intervening year, shall be listed and assessed with reference to its value on the first day of May of that year. Hence, real estate, whether in acres or town lots, listed and assessed in 1878, cannot be reassessed this year. The fact that certain real property assessed in government subdivisions has since been platted and laid out as a town, does not necessarily increase the value of such property; and, if it did, there is no authority for reassessing it this year. Such platting is not an improvement susceptible of taxation.

ST. PAUL, May 3d, 1879. GEO. P. WILSON, Atty. Gen.

D. B. Searle, Esq.:

DEAR SIR: Your favor of the tenth inst. received, and in reply would say that my understanding is that all judgments under the law of 1874, and prior to the amendment made in 1877, reducing the rate of interest to 1½ per cent., would bear interest at 2 per cent. per month; that is, in all cases of sale to actual purchasers, or where the right of the State was assigned. I have so ruled on the strength of Judge Mitchell's decision, "that a purchase at a tax sale is clearly a contract made under the law as it then existed, and upon the terms prescribed by law; that no subsequent statute can import new terms into the contract, and any statute attempting to do so would be in violation of section 10 of article 5 of the Federal Consti-

tution, and section 11 of article 1 of the State Constitution; its effect being to impair the obligation of contracts."

With reference to your last question, tax-payers have all of the thirty-first of May to pay their taxes in. But if lists were returned on the 31st, and payment should be made that day, such pieces could be stricken off, and the Auditor could file with the Clerk the list of such lands as were actually delinquent on June 1, 1879.

ST. PAUL, May 12th, 1879. GEO. P. WILSON, Atty. Gen.

To the Honorable the High School Board:

GENTLEMEN: I have the honor to acknowledge the receipt of your favor of this date, referring to the act for the encouragement of higher education, approved March 9, 1878, as amended by act approved March 8, 1879, and requesting my opinion upon the following questions, to-wit: *First.* Have the High School Board any discretion in selecting the schools to be aided, or must they, beginning at the top of the list of schools applying, accept those schools which have complied with section 3 of said act? *Second.* Can the Board lawfully divide the $20,000 appropriated, using one-half this year and one-half next year?

Sections 2, 3, and 5 of the act referred to read as follows:

"Sec. 2. Any public, graded school in any city or incorporated village, or township organized into a district under the so-called township system, which school shall give preparatory instruction according to the terms and provisions of this act, and shall admit students of either sex from any part of the State without charge for tuition, shall be entitled to receive pecuniary aid as hereinafter specified: provided, however, that no such school shall be required to admit non-resident pupils unless they shall pass an examination in all the branches prescribed by law as a requisite to a third-grade county certificate, except algebra, plane geometry, and the theory and practice of teaching.

"Sec. 3. The said Board shall require of schools applying for such pecuniary aid as prerequisite to receiving such aid, compliance to the following conditions, to-wit: *First.* That there be regular and orderly courses of study, embracing all the branches prescribed as prerequisite for admission to the collegiate department of the University of Minnesota, not lower than the third or sub-freshman class. *Second.* That the said schools receiving pecuniary aid under this act shall at all times permit the said Board of Commissioners, or any of them, to visit and examine the classes pursuing the said preparatory courses."

"Sec. 5. That said Board shall receive applications from such schools for aid as herein provided, which applications shall be received and acted upon in the order of their reception. The said Board shall apportion to each of said schools which shall have fully complied with the provision of this act, and whose application shall have been approved by the Board, the sum of four hundred dollars ($400) in each year: provided, that the total amount of apportionments and expenses under this act shall not exceed twenty thousand dollars ($20,000) in any one year, and no apportionment shall be paid to any school under this act prior to the close of the school year in one thousand eight hundred and seventy-nine, (1879.) The sum of twenty thousand dollars ($20,000) is hereby appropriated, to be paid out of any moneys in the treasury not otherwise appropriated, for the purpose of this act, which amount, or so much thereof as shall be necessary, shall be paid upon the warrants of said Board upon the State Auditor."

It will be observed that *all public graded schools*, of the class described in section 2, shall be entitled to pecuniary aid, as specified in section 5, provided such schools have regular and orderly courses of study, embracing all the branches prescribed as prerequisite for admission to the collegiate department of the University of Minnesota, not lower than the third or sub-freshman class. Section 5 then prescribes that the Board shall receive applications from *such* schools for aid; and that said applications *shall be received,* and acted upon, in the order of their reception; and the Board shall apportion to each of said schools, whose applications are ap-

proved, the sum of $400 in each year. The State, by this act, offers pecuniary aid to a certain class of schools in the State. It does not discriminate between schools in said class, except to say that they shall be served in the order of their application. In my judgment, the act does not invest the Board with any discretionary powers in the respect named. They must "receive and act upon applications in the order of their reception." If the Board can depart from this order on account of location, or for any other reason, then the portion of the statute just quoted has no significance. It is a well-settled rule of construction of statutes, that force and effect must be given to every part of the statute, if possible. It would have been wise, doubtless, to have given the Board the power to make selections, provided the appropriation is insufficient to grant the prescribed aid in all cases, (which does not appear to be the case,) in order to better subserve the cause of higher education; but very clearly such power has not been granted. To receive and act upon applications in the order of their reception, means something more than simply to indorse the approval of the Board on such applications. It means pecuniary aid shall be granted on said order. The indorsement of such approval carries with it the right to such aid, provided the appropriation has not been exhausted by previous applications.

Referring to the second question: If the Board cannot discriminate in the respect heretofore named, it seems to me it cannot discriminate by dividing the fund and granting aid to only a certain number of schools, to the exclusion of the balance, in order to cover the year 1880, for which year, by an omission, the Legislature failed to make an appropriation. This act was designed to supplement our State educational system, and, doubtless, intended to be perpetual. Hence, I say, by an omission the Legislature failed to make an annual appropriation. This is apparent, also, from the context. Whoever drew the act in question evidently forgot that we have now, or will have hereafter, only biennial sessions of the Legislature. But this omission, in my judgment, will not justify the Board in dividing the fund in order to bridge the chasm, and thereby exclude certain schools, otherwise entitled to the same, from participating in the $20,000 appropriated. The omission named will not dissolve the Board or abolish the system, and it may be (but upon this I express no opinion) the duty of the Board would be to receive applications and draw its warrants upon the Treasury, although there should be no funds appropriated to meet such warrants, on the assumption that in due time the Legislature will supply the omission.

ST. PAUL, May 12th, 1879. GEO. P. WILSON, Atty. Gen.

Geo. D. Green, Esq.:

DEAR SIR: Your favor of the seventeenth inst. came to hand in my absence. Women are not eligible to the office of County Superintendent. With reference to your second question, section 73 of the road law provides as follows: "In all townships in this State in which no public roads have been laid out, or which have not been organized, the congressional section line shall be considered public roads to be open to the width of two rods on each side of said section line, upon the order of the Board of Supervisors, without any survey being had, except where it may be necessary on account of variations caused by natural obstacles; subject, however, to all the provisions of this chapter in relation to the assessment of damages." There is no other statute on the subject.

ST. PAUL, May 24th, 1879. GEO. P. WILSON, Atty. Gen.

R. C. Moore, Esq.:

DEAR SIR: Your favor, inclosing the proceedings of school district No. 1, in Stevens county, Minnesota, received and considered. You desire my opinion as to whether such proceedings were conducted according to law. Five or more freeholders and legal voters of the district petition to the Clerk of the district in due form to call a special meeting of the district "for the purpose of raising money by

issuing the bonds of the district to purchase the site for the erection of, and the completing and furnishing of, a school-house in and for said district; said bonds not to exceed in amount the sum of five thousand dollars." Legal notice of such meeting was given for October 5, 1878, specifying the purpose of said meeting as in the petition. At such meeting it was moved that the meeting vote by ballot on the proposition contained in the call, which was carried. Upon such vote being taken, 28 votes were cast, viz.: 19 in favor of the proposition, 8 votes against the proposition, and 1 vote blank. The necessary two-thirds vote was in favor of the proposition, (see section 8, *c.* 2, Sess. Laws,) and it was declared carried. It is objected that the motion was indefinite and uncertain, as the notice contained more than one proposition; but this objection I think untenable. The proposition was to raise money by issuing the bonds of the district in a sum not exceeding $5,000, for certain purposes named in the notice. This was a single, distinct proposition. At this meeting the electors present determined the rate of interest at which said bonds could be negotiated. This question was a mere incident to the main proposition, and properly determinable by the meeting under the notice. (Id. § 8.) At this point an adjournment was had to October 19, 1878. Section 1, *c.* 2, of school law provides that the legal voters of school-districts, when lawfully assembled, not less than five being present, shall have power, by majority of the votes of those present, to adjourn from time to time. This statute disposes of the objection to the right of the meeting to adjourn. At such adjourned meeting it was moved and carried that the district pay 20 per cent. of the principal each year, beginning six years from the time when the bonds shall be issued. Section 8 of chapter 2 of the school law authorizes the issuing of the orders or bonds upon certain conditions, and one of those conditions is that said orders or bonds shall be payable in such amounts and at such times, not exceeding 10 years, as the legal voters shall determine.

It is contended that the motion referred to carried the payment of the bonds beyond the statutory time—10 years. I am of opinion that this objection is not well taken. If the bonds were issued of date September 1, 1879, the first payment of 20 per cent. would be due and payable September 1, 1885, and the last, September 1, 1889; that the language, "beginning six years from the time when the bonds shall be issued," does not exclude the date of the issue, and therefore carry the payment one day beyond the ten years. But, conceding this to be so, I am of opinion that, as a defense, it would amount to nothing. At said meeting it was moved and carried that the meeting select a school-house site. This question was not properly before the meeting, and the vote went for naught. No selection was, in fact, made, but a committee was appointed to select a site and report to a subsequent adjourned meeting. At an adjourned meeting, held November 2, 1878, the said committee asked for further time to make their report. This closed the adjourned meetings. On July 18, 1879, a special meeting of the district was called, upon the petition of more than five freeholders of the district, "to hear the report of the committee appointed at the special meeting, held October 19, 1878, and to select and authorize the purchase of a site for a school-house, if thought necessary, or to vote upon the proposition to build the new school-house upon the site of the present one, and to authorize the purchase of land adjoining, and to order the district board to negotiate the bonds voted, and to proceed forthwith to build the school-house." At this meeting the committee referred to in the notice reported three locations eligible. This committee, of course, had no power to purchase or select a site, but was properly appointed to collect information to be submitted to the meeting. At the meeting it was determined by ballot, 27 voting for and 22 against, to purchase four lots, adjoining the present school-house site, upon which to construct the new school building.

At this point it is contended that to select or designate a site, or to enlarge the present site, of the district, it was necessary that a majority of all the legal votes of the district should have been cast in favor of such selection. In connection with this objection my attention is called to the apparently conflicting provisions of sections 1, 2, and 5, of chapter 2, of the school law, upon the point in question. Section 1 provides that a majority of those present and voting may designate a site,

and raise money to purchase or lease a site for the school-house. Section 5 provides that the Board of Trustees shall lease or purchase such site as shall be designated by *a majority of the legal voters of the district.* I answer this objection by saying that the law presumes every citizen will do his duty; that it was the duty of the electors of your district to be present at the said special meeting; that in the eye of the law those present and voting at said meeting constituted the electors of the district; and refer to Taylor vs. Taylor, 10 Minn. 108, as an authority in point. Any other rule would lead to interminable confusion.

In my opinion the proceedings of your meeting were legal.

ST. PAUL, August 5th, 1879. GEO. P. WILSON, Atty. Gen.

To the Honorable the High School Board:

I am in receipt of your favor of the eighth inst., in which you call my attention to the act for the encouragement of higher education in this State, and submitting the following question: "Can the High School Board apportion to schools or use for its expenses, after the close of the present school year, the unexpended balance of appropriation of twenty thousand dollars, made by the Legislature of last winter?" I have examined the act referred to carefully, and am of opinion that the appropriation is absolute, and therefore at the disposal of the Board for the purposes named in your question. My reasons for this conclusion are briefly these: By the act approved March 9, 1878, the Legislature appropriated $9,000 to cover the expenses of your Board, and to give to each school within the State, complying with the conditions of said act, the sum of $400 in each year. The language of said appropriation is in the words following: "The sum of nine thousand dollars is hereby appropriated, to be paid out of any moneys in the treasury, not otherwise appropriated, for the purposes of this act, which amount, or so much thereof as shall be necessary, shall be paid upon the warrants of said Board upon the State Auditor." This form is the same as has been used by our Legislature for a great many years in the case of absolute appropriations. It is not an appropriation for the current year, nor for any year, but is a specific appropriation for specific purposes. The act instituted a new departure in the educational system of the State. It created a permanent Board, and imposed duties upon said Board that are, by the terms of the act, perpetual. For instance, section 40 of said act provides that the said Board shall cause each school receiving aid under the act to be visited at least once in each school year. It was not known, and could not have been known, to the Legislature, at the time of the appropriation, how many schools in the State could or would be able to comply with the conditions of the act as a prerequisite to receiving State aid. The examinations made during the year 1878 probably demonstrated that the original appropriation was insufficient, and hence, by act approved March 8, 1879, the appropriation was increased to $20,000, but no change was made in the form of the appropriation. This I regard as significant. The declared purpose of the act is to encourage higher education. The primary duty imposed upon the Board is to encourage schools to adopt "regular and orderly courses of study, embracing all the branches prescribed as prerequisite for admission to the collegiate department of the University of Minnesota." To bring the schools up to this standard would require time. It might have been reasonably supposed that during the year 1878, few, if any, of the schools would be in position to claim State aid. That this may have been in the minds of the members may be inferred from the fact that the act provides that "no apportionment should be paid to any school prior to the close of the school year in 1879." But suppose it had been found by inspection that none of the schools in the State had fully complied with the conditions of the act in the year 1879, and were, therefore, not entitled to aid. The fund appropriated, less expenses, is covered into the treasury at the end of the school year in 1879. This would necessarily defeat the very purpose of the act. It will be observed that there is no limitation of time within which schools shall make their application to the State Board for aid. And, further, that the act fixes the term of the Secretary of the

Board at three years, and his compensation at three dollars per day for each day actually and necessarily employed.

It seems very improbable, in view of these provisions, that the Legislature could have intended that portion of the fund unexpended at the end of the present school year to lapse, thus leaving during that year the organization of the High School Board complete, but without any funds to defray the expenses of the Board, or for any other purpose. If the appropriation made in 1879 was for the current year only, then for a like reason the appropriation made in 1878 was also for the current year. But this would not be contended, because at that time the Board had just fairly commenced its work, and had not used, or had occasion to use, but very little of said appropriation, and was prohibited by the act from paying over to the schools any portion of the fund during that year, or at any time prior to August 31, 1879. But the act contained no prohibition as to the expenses of the Board during the time intervening the appropriation and August 31, 1879, or at any time. With this fund unappropriated, the Legislature steps in and increases the amount by substituting the word "twenty" for the word "nine," but imposing no new restrictions upon the Board. There are certain provisions of the act that would justify the inference that it was the intention of the Legislature to have made an annual appropriation of $20,000, but the language in which the appropriation is made is so positive that we are obliged to follow the letter of the law, and assume that the Legislature supposed that $20,000 would be sufficient to meet the requirements of the act until such time as a further appropriation should be made. The fact that the conditions of the act are so easy, and the applications for aid so numerous, that the fund is now quite exhausted, and it would therefore be folly to continue receiving applications for aid, when such aid cannot be given, does not militate against my construction of the act; but in this condition of the fund I am of opinion that the expense of the Board should be reduced to the *minimum*.

ST. PAUL, August 13th, 1879. GEO. P. WILSON, Atty. Gen.

T. C. Flynn, Esq.:

DEAR SIR: I have your favor of the twelfth inst., submitting the question as to when the term of directors elected under the act for the formation of independent school-districts commences; namely, from the time they qualify by filing their oaths, or from the date of the organization of the Board, which organization the act provides shall take place annually on the third Saturday in September. It is impossible to fully reconcile all the provisions of sections 4 and 6, but I am of opinion that the directors chosen at the annual meeting become members of the Board as soon as they qualify. Section 4 provides that on the first Saturday in September there shall be chosen two directors, who shall serve *for three years, and until their successors are elected and qualified.* As soon, therefore, as the newly-elected members qualify, they succeed to all the rights and privileges of the retiring members. And this would be true, although it might have the effect to retire certain officers of the organization before the term for which they were elected had expired. To that extent, in my judgment, the provisions of section 6 will have to yield to the provisions of section 4, the two being inconsistent.

Referring to your last question, although the person referred to may not have been eligible to a seat in the Board, at the time he was chosen, still he would be held to be, I think, a *de facto* officer, and his acts as such officer valid. It was not necessary that he should be a full citizen to be qualified or eligible to an election.

ST. PAUL, September 13th, 1879. GEO. P. WILSON, Atty. Gen.

E. H. Couse and Edward Watson:

GENTLEMEN: The Superintendent of Public Instruction has referred to me your favor of the second inst., with accompanying documents. It appears from said documents that the Board of Education in your district deemed it necessary to

erect a school-house in the district, and to that end called a meeting of the legal voters of the district; that said meeting determined by a majority vote to erect a school-house, and also determine the amount necessary to be raised for that purpose; that the amount so voted was thereupon certified to the County Auditor, to be levied upon the taxable property of the district in accordance with the statute. Thereafter the Board of Education entered into a contract for the erection of said school-house, whereby the contractor agreed to furnish all the material and complete the building by a given time, in accordance with certain plans and specifications, in consideration of which the Board agreed to pay the contractors the agreed price as fast as the money could be collected, in pursuance of law. In addition to this, the Board agreed to furnish vouchers for the work done and material furnished, as the work should progress. What the form of said vouchers or orders may be I am not informed, but I apprehend that they will be orders upon the fund voted and certified to the Auditor. Clearly, the Board could not issue orders bearing interest without the authority from the district. But ordinary orders, payable on demand,—the usual form,—would bear interest at the legal rate after demand and non-payment. But that question does not arise in this case, because the Board, by its contract, only agrees to pay when the money has been collected pursuant to law. The contractor, therefore, takes the orders or vouchers subject to the terms of his contract, and would have no claim against the district for interest.

ST. PAUL, September 13th, 1879. GEO. P. WILSON, Atty. Gen.

John W. Arctander, Esq.:

DEAR SIR: It appears, from your favor of the twenty-seventh inst., that on September 8, 1879, the Board of County Commissioners of Kandiyohi county, by resolution duly adopted, required Hugh Sanderson, County Treasurer, to give an additional bond, the Board deeming the sureties on his original bond insufficient. On the same day a certified copy of said resolution was served upon the County Treasurer; that your Board did not meet again until September 19, 1879, at 9 A. M.; that up to this time no additional bond had been filed with the County Auditor; that the Board was in session from 9 A. M. until 12 o'clock M. on the nineteenth inst., and was in session, also, during the afternoon of said day; that during the afternoon session of the Board, and before any action had been taken on the failure of the Treasurer to give a new bond, he presented an additional bond in the amount required by the Board. Upon the foregoing statement of facts, you state that you advised the Board that the new bond came too late; that under the statute it should have been filed upon the eighteenth inst.; that, not having been so filed, the office became vacant, and it was the duty of the Board to fill the vacancy by appointment. You request my opinion as to whether your advice was correct. I have no hesitation in concurring in your view of the law. Section 141, *c.* 8, confers authority upon Boards of County Commissioners to require County Treasurers to give new bonds whenever, in the opinion of the majority of said Commissioners, the sureties, or any of them, on the original bond are deemed insufficient. Section 142 then provides that if any County Treasurer fails or refuses to give such additional bond for and during the time of 10 days from and after the day on which said Commissioners required said Treasurer so to do, his office shall be considered vacant, and another Treasurer shall be appointed. This statute is specific as to time, and must be construed as imperative. Although the Board was not in session on the eighteenth inst., the new bond should have been filed with the County Auditor, who is *ex officio* Clerk of the Board of Commissioners, and custodian of all the records of the Board. Not having done so, he lost all right to the office.

In addition to the foregoing statute, section 2 of chapter 9 of the General Statutes provides that every office shall become vacant on the happening of either of the following events before the expiration of the term of such office: "6th. His refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit or file such oath or bond within the time prescribed by law." This stat-

ute, while not directly applicable to this case, declares the policy of the law as to incumbents, as distinguished from newly-elected officers, who, although required to qualify within a certain time, or before a certain date, may qualify afterwards if no vacancy has been declared. In other words, a statute limiting the time within which a newly-elected officer shall qualify, may be construed as simply directory, but not so as to incumbents. Our statute makes this distinction, and the principle is applicable to this case. See Dill. Mun. Corp. § 153, and Balcom vs. Winona School Board, per Judge Mitchell. An incumbent is a person in the present possession of an office. State ex rel. Benedict, 15 Minn. 192. In this case the Treasurer's term had not expired, and he was in actual discharge of the duties of his office at the time the Board required a new bond. In my judgment it was not discretionary with the Board to accept the new bond.

ST. PAUL, September 29th, 1879. GEO. P. WILSON, Atty. Gen.

H. M. Knox, Esq., Public Examiner:

DEAR SIR: I have your favor of the thirteenth inst. All funds in the hands of County Treasurers, awaiting distribution according to law, are in some sense county funds. The county could maintain an action on the Treasurer's bond for conversion, and in such action could recover the whole amount converted, although some of the funds were collected for the State; or the State may maintain an action for funds converted belonging to it, and the county for its proportion. But, according to Judge McDonald's decision in the McLeod County cases, the State cannot recover beyond the amount actually collected for its use in a suit by it upon a Treasurer's bond. I understand Chief Justice Gilfillan, in his opinion in the case of First Nat. Bank vs. Shepard, 22 Minn. 196, to hold, in effect, that all funds in the process of collection, or in the County Treasuries, and which have not been distributed, to be county funds, and that the provisions of article 9, § 12, are not applicable to such funds. The act of 1873, providing for the deposit of public funds, seems to regard all funds in the treasury as the funds of the county. In this view of the law, County Treasurers will be relieved from great embarrassment in the matter of depositing public funds for safe-keeping. If the public funds are deposited in accordance with the provisions of the act of 1873, Treasurers and their sureties are exempt from all liability in case of loss. If, for any reason, no bank of deposit be designated, in accordance with said act, Treasurers and their sureties are absolutely liable for funds collected. Hennepin Co. vs. Jones, 18 Minn. 199. This being the case, Treasurers may deposit (not on time, or for hire or loan) the funds in their possession wherever, in their judgment, the same will be safest, and, at the same time, be subject to the purposes and uses for which they were raised or collected. The necessities of the case demand this, and no public officer would ask or demand a conviction under the constitution, even if the same be applicable to the case.

ST. PAUL, October 17th, 1879. GEO. P. WILSON, Atty. Gen.

Hon. O. P. Whitcomb:

DEAR SIR: Referring to the inclosed application of the Harmonia Society, of Minneapolis, for abatement of taxes upon lot and building of said society, such abatement is asked upon the ground that schools for physical and intellectual culture are regularly maintained in said building, and such being the case the property is exempt, under the law, from taxation. The word "public," as used in the Constitution (section 3, art. 9) and in the tax law, (section 5,) sometimes refers to the ownership and sometimes to the uses the property is put to; but when applied to school-houses it means such school-houses as are owned and maintained by the public, as distinguished from school-houses owned by private individuals or corporations or societies. This exemption is claimed on the score that the building is a public school-house. I am of opinion that it does not fall within the statute.

ST. PAUL, November 17th, 1879. GEO. P. WILSON, Atty. Gen.

M. R. Driesbach, Esq.:

DEAR SIR: I have your favor of the ninth inst. Those entitled to admission to your school without express permission of the board are: 1st, the children of the actual residents in the district; and, 2d, all other persons between the same ages who may be in good faith living in the district, *and have not come into the same for the purpose of attending school.* The parents in the cases referred to are, no doubt, in good faith living in the district, although temporarily, and the children would be entitled to admission to the schools unless the parents have taken up their residence in your village for the purpose of schooling their children, and in that case the children would stand in the same position as children of non-residents.

ST. PAUL, November 17th, 1879. GEO. P. WILSON, Atty. Gen.

Hon. D. Burt, Superintendent Public Instruction:

DEAR SIR: It appears from your communication of the fourth inst. that school-district 19, Steele county, was organized in 1872, as provided by law. The Treasurer's term expired in 1874, but he was permitted to hold over, no successor being elected in said year. In 1875 a successor was elected, who qualified and took possession of the office. This election, under the statutory rule, was only for the unexpired portion of the regular term, but the officer-elect was permitted to hold over in consequence of no successor to him being elected in 1877. The Treasurer elected in 1878, following the same rule, was elected for balance of the regular term, and hence an election for the regular term of three years will be in order in 1880. It further appears that in 1874 the district elected a new Clerk, when, according to law, the term of the Clerk elected in 1872 did not expire until the year following. But, notwithstanding this, the then incumbent surrendered the office to the newly-elected Clerk, who continued to serve until September, 1877, when a successor to him was elected, as was then supposed, for the term of three years. At the annual meeting in 1879 it was discovered that a Clerk should not have been in elected in 1874, as the regular term of that officer did not expire until 1875, and the electors present at said meeting proceeded to elect, and did elect, a Clerk for the regular term, who now claims the office. The Clerk elected in 1877 claims the right to serve until 1880. Query: Which of these parties, as a matter of law, is entitled to the office? This case and that of the Treasurer do not stand exactly upon the same footing. In the case of the Treasurer there was what was deemed in law a vacancy, which the district had a right to fill. In this case there never has been a vacancy. But as it seems to be the policy of the law that, after the first election, no two of the officers should be elected the same year, but, on the contrary, be elected in alternate years, I am constrained to decide, though not without misgivings as to correctness, that it was competent for the district to elect a Clerk in 1879, and that the officer so elected in 1879 is entitled to the office.

ST. PAUL, November 18th, 1879. GEO. P. WILSON, Atty. Gen.

James Hurley, Esq.:

DEAR SIR: Yours received. There is no statute prohibiting the County Treasurer from holding the office of Clerk of the Court, but I am of opinion that the duties of the two offices are incompatible, therefore ought not to be held by the same person. For instance, he, as Clerk, would, as a member of the Board of Audit, have to audit his accounts as Treasurer, and other like inconsistencies might be mentioned.

ST. PAUL, December 8th, 1879. GEO. P. WILSON, Atty. Gen.

J. M. Van Schaak, Esq.:

DEAR SIR: Your favor of the tenth inst. at hand. Section 1, *c.* 120, Laws 1877, fixes the salary of the County Auditors, and then provides that all moneys received

as fees or percentages in excess of the amount provided for in the act shall be paid by the Auditor at the end of each year into the revenue fund of the county. The statute makes no exceptions, and must be taken to cover every fee received by the Auditor for acts done or services rendered in the line of his official duty; that is, by virtue of his office. County Auditors are required by statute to make statements of taxes for certain purposes, but I am not aware of any statute requiring them to certify to abstracts of title. County Auditors are not entitled to compensation (other than salary) for services while acting upon the County Board of Equalization. Section 2 of chapter 25, Laws 1870, does provide compensation for County Auditors for services rendered the Commissioner of Statistics, and it seems to me the compiling and abstracting of assessors' returns would fall within the statute.

ST. PAUL, December 16th, 1879. GEO. P. WILSON, Atty. Gen.

Hon. Wm. R. Marshall, Railroad Commissioner:

SIR: I have your favor of recent date, in which you submit the question "whether the Southern Minnesota Extension Railway Company, organized under the General Laws of this State, and recognized by the act of the Legislature approved March 6, 1878, being chapter 257 of the Special Laws of that year, is so distinct and separate a corporation from the Southern Minnesota Railway Company, notwithstanding it is substantially owned and operated by the latter company, or the two operated as one, to entitle the former company to avail itself of the provisions of the act of 1873 (chapter 111, Sp. Laws) in regard to taxation."

Section 1 of the said act of 1873 provides for the exemption of all the property of the St. Paul, Stillwater & Taylors Falls Railroad Company, upon condition that said company should pay into the State treasury, on or before March 1st in each year, 1 per cent. on its gross earnings for the three years next ensuing January 1, 1872; 2 per cent. during the seven years next ensuing; and 3 per cent. thereafter.

"Section 2 of said act provides, that any railroad company owning or operating, or which may hereafter own or operate, any line or lines of railroad in this State, may, by resolution of its Board of Directors, attested by the Secretary and filed with the Secretary of State, accept and become subject to the provisions of this act, and in such case the payment of such percentage in lieu of taxes shall commence from and after the first day of March next after the date of completion of thirty miles of such line thereafter built, or of the entire line, if the same be less than thirty miles in length."

The Southern Minnesota Railway Extension Company seeks to avail itself of the provisions of said act. I find by reference to the records in the office of Secretary of State that the Southern Minnesota Railway Extension Company was organized as a railroad corporation under the General Laws of this State in January, 1878, and that in the month of February, 1879, said Extension Company, by resolution of its Board of Directors, attested by its Secretary, accepted the provisions of the said act of 1873 in reference to taxation and during said month filed a proper certificate of such acceptance in the office of the Secretary of State. By the act of March 6, 1878, the residuum of the congressional land grant of July 4, 1866, relating to the Southern Minnesota Railway Company, was regranted to the said Extension Company. Chapter 257, Sp. Laws 1878. By this act a legal *status* of the extension is recognized, and I know of no reason to question the due organization of said Extension Company. It is, however, a matter of common notoriety that the said Extension Company was projected and organized by the friends and parties in interest of the Southern Minnesota Railway Company, and it is admitted that the last-named company owns a controlling amount of the capital stock of the Extension Company, and this fact, together with the further fact that the two roads are substantially operated as one, doubtless suggested the inquiry submitted by you. The two roads connect at Winnebago City, and form a continuous line between the east and west boundaries of this State, and hence, under the provisions of section 39 of chapter 34 of the General Statutes of 1866, the said railway company might, as it is conceded it did, aid in

the construction of the Extension Company's line, and to that end subscribe to the capital stock of the Extension Company. But the rendering of such aid, and the further fact that the entire line is practically under one management and operated as one road, would not merge the two corporations, or in any respect affect the legal *status* of either corporation. In law they would remain distinct and separate corporations; and, such being the case, I can see no reason why the Extension Company may not avail itself of the provisions of the act of 1873 in reference to taxation.

ST. PAUL, January 6th, 1880. GEO. P. WILSON, Atty. Gen.

CHARLES M. START, ATTY. GEN.—JAN. 10, 1880, TO MARCH 11, 1881.

Hon. Charles Kittelson, State Treasurer:

DEAR SIR: Yours of the twelfth inst. received. You ask "whether, in the selection of depositories of State funds, you are limited to State and National Banks." No. The original act (chapter 34, Laws 1873) limited the selection to National Banks. This act was repealed by chapter 11, Laws 1874, which provides "that all the funds of the State shall be deposited in one or more banks located in the capital of the State. * * * Such *bank* or *banker* shall be selected by the Treasurer, and shall be required * * * to give such Treasurer, for the use of the State of Minnesota, a personal bond * * * as security for the amount so to be deposited with such *bank* or *banker*." Gen. St. 1878, p. 89, § 2. The words "*bank* or *banker*" are to be construed according to the common and approved usage of the terms. So construing them, they include both corporate and private banks.

January 12th, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: I am in receipt of yours of the tenth inst., referring to me the request of the Trustees of Minnesota Hospital for Insane for the payment of a deficiency in the appropriation of 1879, for the enlargement and improvement of the Second Hospital for Insane out of the appropriation for the current expenses of the hospital for 1880. You have no authority to grant the request. Money cannot be appropriated for one purpose and used for another. The constitution of the State speaks with no uncertain sound on the question: "No money shall ever be paid out of the treasury of this State except in pursuance of an appropriation by law." State Const. art. 9, § 9.

January 12th, 1880. CHAS. M. START, Atty. Gen.

W. R. Wilcox, Esq., Clerk of the Dist. Ct. Sibley Co., Henderson:

DEAR SIR: Your favor of the eighth inst., asking an opinion from this office in regard to your fees for "filing and recording" oaths and bonds of town and county officers in your office. Such oaths and bonds are not required to be recorded in your office, but simply filed, for which you are entitled to a fee of five cents for each paper filed. Permit me to call your attention to the provisions of our statutes which limit the duties of this office to official advice to State officers and officers in charge of State institutions. Gen. St. 1878, c. 6, tit. 5, § 51. For reasons that are apparent the rule must be observed, and hereafter questions from county offi-

cers (except in special cases) will be referred to County Attorneys, whose duty it is to advise county officers in relation to their official duties. Gen. St. 1878, *c.* 8, tit. 8, § 212.

January 13th, 1880. CHAS. M. START, Atty. Gen.

Hon. H. M. Knox, Esq., Public Examiner:

DEAR SIR: Your favor of the tenth inst. is received, asking "on what basis the salary and fees of the County Auditor of Crow Wing county are to be reckoned,—on that of the combined valuation of Crow Wing county, and the counties attached to it for record and judicial purposes, or on the separate valuation of each county, or on the valuation of Crow Wing county alone." I think the computation should be made on the combined or aggregate valuation of all the counties. I am very clear on the point that the fees and salary ought not to be reckoned on the separate valuations of the counties, but have found considerable difficulty on account of the uncertainty of some of the provisions of the statute in settling on the proper basis; but the rule which I have finally settled upon is the one above indicated. I do not think chapter 6 of the Laws of 1876 makes provisions for fees of county officers of counties to which unorganized counties are attached. The provisions of this chapter, that a reasonable sum per annum *as compensation for the county* to which an unorganized county is attached may be levied as a tax on such unorganized county, is for the benefit of the organized county, to indemnify it for the entire fees and salaries it has to pay to its officers on account of having to collect the state tax in the unorganized county. The result of the rule adopted will entitle the Auditor to clerk hire in case the combined valuation exceeds $1,000,000. Under chapter 208, Sp. Laws 1876, the Auditor and Treasurer are entitled to 5 per cent. and 3 per cent. for collecting the taxes of Cass county that were unpaid at the date of its disorganization, and upon no others.

January 13th, 1880. CHAS. M. START, Atty. Gen.

John A. Senn, Esq., County Atty., Benton Co., Sauk Rapids, Minn.:

DEAR SIR: Yours of seventh inst. is at hand. The state of facts on which an opinion is desired are, in brief, as follows: Wright, who had been duly elected to the office of County Commissioner for the term of three years from January 1, 1877, and qualified on that day, resigned in the fall of that year too late to hold an election, and Beatty was duly appointed, qualifying in January, 1878. At the ensuing general election Fothergill was elected, and qualified January 1, 1879. Demules was elected at the general election in the fall of that year, and now claims the office for the full term of three years from January 1, 1880, while Fothergill claims it for the full time from January 1, 1879, the day he qualified. The question is, does he hold it for the full term, as claimed, of three years, or only for the unexpired term of Wright? I am decidedly of opinion that he holds for the unexpired term only, which terminated January 1, 1880. Beatty could only hold under his appointment "until the next annual election, and until the Commissioner then elected is qualified, and no longer." Gen. St. 1878, p. 137, *c.* 8, § 104, (section 95, Gen. St. 1866.) "The Commissioner then elected and qualified" must be elected for the remaining "unexpired term" of the Commissioner who resigned. Chapter 1, § 46, Gen. St. 1878. Any other construction would defeat the object and purpose of the law, which is to provide for a gradual change in the composition of the board, and prevent them from all going out of office at the same time. If Fothergill's view should obtain it might, in time, happen that the term of every member of the board would expire at the same time, and thus defeat the true intent and meaning of the law.

This is the view uniformily taken by this office heretofore, and is sustained by

the state courts. The case of Tate vs. Cravatt, decided in Olmsted county, by Judge Mitchell, in June, 1877, was an identical case. That learned judge there cited and approved the opinions of the Attorney General, holding this view of the law, and held that the provisions of section 88, *c.* 8, Gen. St. 1866, (Gen. St. 1878, § 96,) fixing the term for which County Commissioners shall be elected at three years, must be held to apply to those elected at the expiration of a *full term*, and not to those elected to "fill a vacancy" caused by resignation or otherwise. The previous appointment was held to "fill the vacancy" only for the time being,—a temporary expedient only, to avoid the inconvenience of a special election; that a vacancy for the remaining part of the unexpired term still existed, to be filled at the annual election; that, if not, there was *no authority for the election*, and it would be void. The election, therefore, of Fothergill, if valid at all, could only be for the "unexpired term," terminating January 1, 1880. Section 43, *c.* 1, Gen. St. 1866; Gen. St. 1878, p. 48, § 46.

January 14th, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: I am in receipt of the communication of the Treasurer of Anoka county, referred to me from your office, stating "that three road orders drawn in favor of parties holding certificates for school lands, viz., sections 16–34, for damages for laying out a highway over the land, had been deposited with him," and asking what disposition should be made of the orders. I think the orders should be delivered to the persons in whose favor they are drawn. Upon the Treasurer's statement I fail to see what the State has to do with the orders. If damages had been allowed to the State it might present a different question. Yet, as a general rule, in cases where highways are laid over the school lands of the State that have been contracted to be sold, and certificates assigned, and the purchasers are not in default in the payment of taxes or interest, the damages should be paid to the purchaser. For the purpose of petitioning for the laying out of a highway, the purchaser is deemed to be the owner. St. 1878, § 33, c. 13. It is true that under the statutes of this State the fee of school lands sold remains in the State until fully paid for, but the purchaser is to be regarded (when not in default) as the equitable owner of the land. Wilder vs. Haughey, 21 Minn. 106. The correct practice in cases of this kind would be to apportion the damages equitably between the purchaser and the State. It would be equitable, as a rule, to give the purchaser the actual damages and the State nominal damages.

January 15th, 1880. CHAS. M. START, Atty. Gen.

J. Schubert, Esq., Co. Treasurer, Brown Co.:

DEAR SIR: Yours of 13th inst. received. County Treasurers are not entitled to traveling expenses while away from the county seat collecting taxes, when directed by the board of County Commissioners. Neither the tax law nor the law relating to Treasurers' fees seem to make provision for compensation for such duties, and it is a well-settled rule of law that public officers accept their offices with all the burdens and duties imposed thereon by law, and for the compensation provided by law. This question was so decided by Attorney General Wilson in January, 1879. I concur in that decision.

January 16th, 1880. CHAS. M. START, Atty. Gen.

Hon. D. Burt, Superintendent of Public Instruction:

DEAR SIR: In answer to the question, is a notice posted on the second day of the month for an annual or special school-district meeting, to be held on the twelfth

day of the same month, a legal notice? I think not. The law does not regard fractional parts of a day, and the usual rule in the computation of time is to exclude the first day and include the last; but a different rule must be applied in regard to notices of school-district meetings, under provisions of law applicable thereto, and in view of the decision of our Supreme Court in a similar case. The statute provides that *at least* 10 days' notice of each annual or special school-district meeting shall be given. Laws 1877, *c.* 74, *subc.* 2, § 20. To make *at least* 10 days' notice, neither the day of posting the notice nor the day on which the meeting is to be held can be counted. Railroad Co. vs. Greve, 4 N. W. Rep. 52.

Prior to the decision above referred to, I was under the impression that the first day should be excluded and the last included. In view of this decision, I advise that, in giving notices of school meetings, neither the day of posting or of the meeting should be counted.

January 16th, 1880. CHAS. M. START, Atty. Gen.

W. H. Harris, Esq., County Attorney, Houston County, Caledonia:

DEAR SIR: Yours of the twelfth inst. received, asking "whether foreclosure certificates, after foreclosure and before redemption, are taxable." They are when owned by residents of this state. After the foreclosure of a mortgage, and before redemption, the party holding the certificate is not the owner of the land, nor entitled to the possession thereof. Until the time of redemption expires the purchaser at the sale has only a chattel and equitable interest. The character of his interest is the same as that of a mortgagee before foreclosure sale. Donnelly vs. Simonton, 7 Minn. 110; Horton vs. Maffitt, 14 Minn. 290; Loy vs. Ins. Co. 24 Minn. 315. This being the character of the purchaser's interest, it follows that it is taxable as personal property. These certificates come within the meaning of credits as defined by the statute. Gen. St. 1878, § 4. In practice, the certificates should be assessed at their actual value. I can conceive of cases where it would be unjust to assess at their face value; thus, where the land was bid in for more than its value, and it was morally certain that the purchaser would have to pay the taxes on the land. But this does not change the rule.

January 17th, 1880. CHAS. M. START, Atty. Gen.

E. P. Freeman, Esq., County Atty. of Blue Earth Co.:

DEAR SIR: Yours of the sixteenth inst., in regard to fees of the County Commissioners of your county, is received. I fully appreciate the amount of labor which a County Commissioner, charged with looking after the poor of his county, has to perform if he does his duty faithfully, and that the compensation provided by law is inadequate, yet I feel constrained to hold strictly to the rule, which is, as I understand it, this: That "public officers are deemed to have accepted their offices with all their burdens, and with knowledge of and with reference to the statute relating to the services which they may be called upon to render, and for the compensation provided therefor." Dill. Mun. Corp. § 169; Warner vs. Grace, 14 Minn. 487; Gen. St. p. 511, § 80.

Applying this rule, and the limit of the fees of your County Commissioners would be as follows: Under Gen. St., $60 per year and mileage; under Sp. Laws 1878, $30 per year and mileage; under Sp. Laws 1879, $30 per year and mileage; total fees per year, $120 and mileage. This I regard as the limit, except in the case of the Commissioner charged with the duty of looking after the poor, who may receive $30 more and mileage, under the Special Laws of 1878. See Laws 1873, p. 164; Sp. Laws 1878, p. 424; Sp. Laws. 1879, p. 186. The mileage for attending sessions of the board is limited, of course, to six sessions.

January 19th, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: I am in receipt of the communication (referred to me from your office on the thirteenth inst.) of the Land Commissioner of the Southern Minnesota Railway Company, together with the blank form of "permit" of said company to proposed purchasers to enter on the lands of the company and become the absolute owners thereof on certain conditions, and asking whether lands for which such "permits" have or may be given should be returned to the State Railroad Commissioner. In reply I have to say that all railroad companies that have received land from the State or United States are required to make and return to the Railroad Commissioner full and complete lists of all lands sold or *contracted to be sold*. Laws 1877, p. 197, § 3. Does this permit amount to a contract for the sale of the land, is the pivotal question. In form, if it does not in substance, I think it amounts to a conditional contract for the sale of the land, within the meaning and intent of the statute. The party taking this form of contract pays a moneyed consideration, and binds himself absolutely to make certain stipulated improvements on the land, in consideration of the agreement of the company to sell to him. If he fails to enter and make the improvements on the land within the time limited, he would obtain no rights in the premises; but in case he enters and makes improvements within the specified time, he must be treated as having elected to purchase, and would obtain interests in the land that would be protected from forfeiture, provided he brought himself within the rules of equity jurisprudence applicable to such cases.

I therefore advise that a list of all land disposed of under this form of contract should be returned to the Railroad Commissioner, to the end that it may be assessed for taxation. This is the only way to insure the taxation of all land that ought to be taxed. In those exceptional cases where the purchaser fails to complete his contract, it will not be difficult to abate the taxes and strike the lands from tax lists.

January 19th, 1880. CHAS. M. START, Atty. Gen.

O. Syverson, Esq., County Treasurer Swift County, Benson:

DEAR SIR: Yours of the seventeenth received. I assume, *for this time*, that there is some good reason why you did not get the opinion of your County Attorney, whose duty it is to advise you in regard to your official duties, *not mine*. The village of Benson is organized with the powers and privileges granted in chapter 139, Gen. Laws 1875. Section 8, p. 173, Laws 1875, provides that "all fines and penalties imposed under or by virtue of the provisions of this act shall belong to the village." Assaults and batteries are prosecuted under the General Laws of the State, and the fines imposed for punishment of this offense should be paid to the County Treasurer, as they are not imposed by virtue of the general village charter. There are, however, many villages in the State that have special charters providing that *all* fines imposed by the village Justice for offenses commited within the corporate limits shall belong to the village. In all cases where villages have charters of this kind, the County Treasurer would have nothing to do with the fines imposed by the village Justice for offenses committed within the limits of the village.

January 21st, 1880. CHAS. M. START, Atty. Gen.

Martin Webber, Co. Atty., Rock Co., Luverne:

DEAR SIR: I have your favor of the twenty-first inst., asking the opinion of this office on the following state of facts, viz.: "In 1874 the Board of County Commissioners of Rock county passed a resolution that all county orders presented for payment and not paid for want of funds should draw interest at the rate of ten per cent. per annum until paid; the resolution to be in force until revoked by the Board. Can parties holding county orders, issued while this resolution was in force,

collect interest at the rate of ten per cent. per annum thereon until they are paid?"

It is unnecessary to the determination of the question to decide whether, under any circumstances, the Board have authority to cause to be issued interest-bearing orders of the county. I infer from your statement that no interest-bearing orders were issued or authorized to be issued, but that you have reference to the usual demand orders drawn on the Treasurer to pay salaries, current expenses of the county, and other legal claims allowed by the Board. It is only by such warrants or orders that these claims can be paid and the orders will draw interest from maturity—that is, after demand—until paid, at the rate of 7 per cent. per annum, and no more. On their face there is no provision for the payment of interest; they are evidence of an indebtedness, liquidated and due, against the county, and the holder could sue the county at once if not paid, and the law, not the Board of County Commissioners, fixes the measure of damages. The law fixes the legal rate of interest at 7 per cent. per annum, unless a different rate is contracted for in writing, and where the orders do not call for interest there is no contract in writing for any interest. It cannot be claimed that the resolution of the Board is such a contract; and if it were, it would be without consideration. There is no contract on the part of the person taking the order to forbear to give time on the claim in consideration of the contract to pay interest; but, on the contrary, he takes a demand order for his claim, upon which he may bring suit at once, if not paid on demand. And it is to this order that we are to look for the purpose of determining the rate of interest or measure of damages for the non-payment thereof. And it seems very clear to me that under the statutes of this State regulating interest, an instrument that provides for no interest before maturity cannot bear interest after maturity at a greater rate than 7 per cent. per annum.

I am of the opinion that your County Treasurer is not justified in paying 10 per cent. per annum interest on the orders referred to.

January 22d, 1880. CHAS. M. START, Atty. Gen.

Fred. V. Hotchkiss, Esq., Ch. Board County Com'rs, Redwood County:

DEAR SIR: Your favor of January 12th this day received. The question you ask is one which it is the duty of your County Attorney to advise in regard to. There is a manifest impropriety in my interfering unless requested so to do by him. I assume in this instance there is some good reason why the matter was not submitted to him. The cases you put are extreme cases, and it would seem that there had been a misuse of the process of the courts. I cannot decide any particular cases, but give you the general rule: 1st. The law giving a bounty for the conviction of horse-thieves does not repeal the statute in regard to the fees of the Sheriff. 2d. That when a warrant, regular on its face, for the arrest of a party is delivered to the Sheriff, it is his duty to make all reasonable efforts to serve it. 3d. That his fees for such service are not contingent upon success. 4th. That he is entitled to receive, in case he does not make the arrest, mileage (without traveling expenses) for the distance actually and necessarily traveled by him in good faith while engaged in an honest effort to catch the thief. 5th. If the Board of County Commissioners are satisfied that the Sheriff has not acted within the above rule they should disallow his bill, or reduce it to such sum as he is legally entitled to under this rule.

January 22d, 1880. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

DEAR SIR: In reply to the communication of James B. Hoit and others, (referred to me from your office,) asking for the appointment of Nathaniel R. Spure to the office of Judge of Probate for Benton county, I have the honor to advise you that there is no vacancy in that office. It appears, from the statement of the auditor ac-

companying the petition, that on January, 1878, the Rev. Mr. Hall qualified and entered on the duties of the office, having been duly elected at the November election previous; that in August, 1879, Hall died; that in November, 1879, Joseph Coats was duly elected, and has qualified and entered on the duties of his office, claiming that he was elected for two years. In this he is acting in accordance with the Constitution of the State. The Constitution of the State fixes the term at two years, and "a person elected Judge of Probate, upon a vacancy happening, holds for the full constitutional term of *two years*, and not merely for the unexpired portion of his predecessor's term." Crowell vs. Lampert, 9 Minn. 283.

January 27th, 1880. CHAS. M. START, Atty. Gen.

His Excellency John S. Pillsbury, Governor of Minnesota:

SIR: In answer to the questions referred to me by your Excellency in the matter of settlers' claims for land on the St. Vincent Extension, St. Paul, Minneapolis & Manitoba Railroad, under chapter 201, Sp. Laws 1877, I have the honor to submit for your consideration the following conclusions:

First. I assume (without examination) the above-named act is a valid exercise of legislative power.

Second. The act has no application to that portion of the railroad that had been completed prior to March 1, 1877; it is only the *uncompleted* portions of the line that it has reference to. This is clearly apparent from the whole structure of the act. Section 6 reads: "The time for the completion of the *uncompleted* portions of the line of railroad extending from St. Cloud to St. Vincent, * * * is hereby extended as follows: * * * Provided, however, that such extensions are made subject to all the provisions of this and of the succeeding sections of this act." That is, the extension of time relates to the uncompleted portions of the road; hence it is to these uncompleted portions alone that the provisions and conditions of the act apply.

Third. The act has no application to that portion of the line from St. Cloud to Melrose, nor from *Glyndon to Crookston;* consequently the lands properly accruing to the company for the building of these sections of their road are not within the provisions of the act, and you would not be authorized to relinquish any portion of such lands to the United States. This is so without reference to the deed hereinafter mentioned. These sections of the line (if no more) were recognized and treated as completed by this act at the time of its passage, on March 1, 1877. In other words, the line in question, as finally located, extends from St. Cloud via Melrose, Sauk Centre, Alexandria, Fergus Falls, Glyndon, and Crookston to St. Vincent. By section 6 of the act, the time for the completion of the whole of the "uncompleted portions of the line" is extended as follows: From Melrose to Sauk Centre, until July 1, 1878; from Sauk Centre to Alexandria, until January 1, 1879; from Alexandria to Fergus Falls, until January 1, 1880; from Fergus Falls to Glyndon, January, 1, 1881; from Crookston to St. Vincent, until January 1, 1880; from St. Cloud to Melrose and from *Glyndon to Crookston* the balance of the lines were omitted from the act as already completed, and therefore not within its provisions.

Fourth. It appears that prior to March 1, 1877, and sometime in November, 1873, the then Executive of the State, Gov. Austin, certified to the Secretary of the Interior that the railroad company had completed, in accordance with the terms of the grant, 110 miles of the line of road in question,—that is, from Barnesville to a point 28 miles north of Crookston,—whereupon a patent for the lands supposed to have been earned by the company in the building of this portion of the road was issued to the State, and on the twenty-second day of February, 1877, a deed was made by the Governor of the State for these lands, and (it would appear) some other tracts, not properly accruing to the company, on account of the construction of the above portion of these lines. The deed was not actually delivered to the company until January, 1878. There are, and were, settlers on some of these lands on March 1, 1877. It is claimed on their behalf, by counsel, that the deed, as to the land set-

tled on, is absolutely void. If this was so it could not affect the lands belonging to the line from Glyndon to Crookston. As I have already attempted to show, this portion of the line, at least, is not within the provisions of the act. But I am of the opinion that the deed cannot be treated as void, even if it is a fact that the road had not been completed from Barnesville to a point 28 miles north of Crookston on March 1, 1877. It had been so represented and acted upon. Where there is an absolute want of authority or power on the part of an officer to do a particular act,—for example, to grant certain lands,—a deed of the lands made by the officer would be absolutely void. It would not require the decree of a court of competent jurisdiction to make a deed executed under such circumstances void, but the want of power on the part of the officer to make it may be shown whenever the deed is called in question. Sherman vs. Buick, 93 U. S. 209. This case is a leading one, of those cited by the counsel for the settlers to show that the Governor's deed is absolutely void. All the cases cited for this purpose may be classified as supporting the above proposition, and apply only to those patents and deeds where there was no power on the part of the officer or tribunal to make the grant *under any circumstances, or for any purpose.* Where an officer has power to do a particular act under certain circumstances,—for example, to deed certain lands to a railroad company, upon ascertaining that the road has been constructed in accordance with the conditions of its grants, and that there are no settlers on the land,—a deed made by the officer claiming to act under the power is not void, and must be treated as valid in all collateral proceedings, although it may afterwards appear that through mistake, or other cause, the conditions entitling the company to the deed had not been complied with. Moore vs. Robbins, 96 U. S. 530. This case, and others cited by counsel for the railroad company in regard to the validity of the Governor's deed, support fully the above proposition. There is no conflict in the cases cited by the respective counsel; they may be classified in accordance with the foregoing propositions. Those relied on by the counsel for settlers belong to the first class; that is, where there was no power, under any circumstances, to make the deed or issue the patent. Those relied on by the counsel for the railroad to the second class; that is, where the grantor had power, for some purposes and under some circumstances, to make the deed or issue the patent. In the former case the deed or patent is void; in the latter, valid, until set aside by the judgment of a court of competent jurisdiction. The acts of the Governors of the State in certifying to the completion of the road, and the delivery of the deed to the railroad company, fall within the latter class of cases, for they had power to do these acts under some circumstances. I think, therefore, your Excellency is required to treat the line of road in question as completed from Barnesville to a point 28 miles north of Crookston on the first day of March, and no part of lands properly accruing to the company for the construction of this portion of the line, and included in the deed referred to, could be relinquished to the United States.

Fifth. Under the provisions of the act of March 1, 1877, I do not think a settler on an even section, where all his improvements are limited to the even section, could be regarded as in the actual possession of an adjoining 80 acres, more or less, in an odd section; but I am of opinion that where a settler, although his house may be on an even section, yet has, in good faith, claimed and made some improvements on an adjoining 80 acres in an odd section, and was, on the first day of March, 1877, using the entire tract as one farm, he would be a settler on that portion of his claim in the odd section, within the meaning of the act.

Sixth. The act of March 1, 1877 (section 10) fixes the meaning of the word "settlers" as therein used, viz., those who *actually occupied* the lands claimed.

January 28th, 1880. CHAS. M. START, Atty Gen.

In the Matter of the Application of Edward P. Barnum for the Official Name and Sanction of the Attorney General to an Information in Nature of Quo Warranto against Charles A. Gilman.

The facts proper to be considered in the determination of this application are as follows: Charles A. Gilman, at the general election of this State, held in November, 1878, was duly elected a Representative in the Legislature of this State for the term ending January, 1881; that he accepted said office, entered upon the discharge of its duties, and continued so to do until he resigned his said office, prior to the general election of the State, held in November, 1879; that during the campaign preceding said election the proposed relator and respondent were the nominees of their respective parties for the office of Lieutenant Governor of this State. It was claimed on the one hand that Mr. Gilman was ineligible to the office for which he was a candidate, for the reason that section 9, art. 4, of the State Constitution disqualified him from holding any other office during the time for which he was elected a representative. On the other hand, it was claimed that he was eligible to the office. The question challenged considerable public attention; it was discussed fully and ably *pro* and *con* by the press of the State prior to the election; the attention of the electors was specially called to the fact that the decisions of the Attorney General's office were in favor of his eligibility, and that the practical construction given to this section of the Constitution by the Legislature and all the departments of the State government was, and had been for many years, in accord with the rulings of the Attorney General's office. At the election both parties received a large number of votes, but Mr. Gilman received (in round numbers) 20,000 more votes than his opponent, Mr. Barnum. The votes were duly canvassed, and Gilman was declared elected, and a certificate of election was duly made, delivered to, and accepted by him, notwithstanding Barnum duly protested against it. On the thirtieth day of December, 1879, Barnum took the oath of office as Lieutenant Governor of the State, and caused it to be filed in the proper office; on January 23, 1880, Gilman did the same. Both parties claim the office. Neither of them, as yet, have discharged any of the active duties of the office, which seem to be, until the State Senate meets, entirely of a negative character, viz., waiting for his Excellency, the Governor, to die, resign, or remove from the State. No claim is made that either party has interfered with the other in the discharge of these duties. In determining the application three questions must be considered: *First*, what rules should govern this office in the decision of matters of this character? *Second*, has Mr. Barnum such an interest in the question of Gilman's eligibility as to entitle him to have an action to test it, commenced on his relation? *Third*, if he has no such interest, but my attention having been called to the matter, ought the action to be commenced on my own relation as Attorney General?

First. Applications of this character should not be granted as a matter of course; they call for the exercise of a sound discretion on the part of the Attorney General. They should be, as a rule, denied, unless he has reason to believe that the proposed respondent has usurped, intruded into, or unlawfully holds or exercises any public office within the State. In no case should the action be commenced on the relation of a party who has no direct interest in the question. If it is a question of public interest alone, then the Attorney General should act on his own relation, if he is of the opinion that public justice requires it. The statute interposes the discretion of the Attorney General between an incumbent of an office and his prosecution by a disappointed opponent. If it was not so, public officers would have no protection from vexatious litigation, except the sense of justice and magnanimity of their defeated rivals. For the Attorney General to permit the use of his name and give his official sanction to an information in the nature of *quo warranto*, as a matter of course, whenever called upon, is to reduce his office to a mere machine, and invite every one who has any curiosity or malice to gratify, to turn the crank and set it in motion, which would result in many cases in an imposition upon the courts, a waste of public money, and in gross injustice to officers. Every incumbent of an office is entitled to have the charge of usurpation of office examined on its merits by the Attorney General; the law im-

poses this duty, and it must be observed. Gen. St. p. 552, §§ 3, 5; Com. vs. Jones, 12 Pa. St. 365; Com. vs. Cluley, 56 Pa. St. 270; 2 Dill. Mun. Corp. § 722. This discretion of the Attorney General should never be exercised arbitrarily, and in all cases where the proposed relator has a direct interest in the case, (that is, where he would be entitled to the office in case it was decided that the incumbent was not,) I should feel bound to bring or consent to the bringing of the action, unless it clearly appeared that the incumbent was entitled to the office. In all other cases I should be governed by the demands of public justice. This brings us to an examination of Mr. Barnum's claim.

Second. Conceding that Mr. Gilman was not elected to the office, has Mr. Barnum such a direct interest in the question as to require the Attorney General to act on his relation? The answer turns upon the question, was he elected? It would seem to be a common-sense view of the case that, no matter whom the electors of the State wanted for Lieutenant Governor,—no matter whom they failed to elect,—one thing is certain, they neither wanted nor elected Mr. Barnum, and so declared by a very emphatic majority. The common sense and legal view of the question are in perfect harmony, according to the great weight of American authority. "The fact that the candidate having the highest number of votes at an election by the people is ineligible, does not give the office to the next highest on the list. It is fairer, more just, and more consistent with the theory of our institutions, to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject." Saunders vs. Haynes, 13 Cal. 145; State vs. Giles, 1 Chand. 112; State vs. Smith, 14 Wis. 497; In re Corliss, 11 R. I. 368; People vs. Chute, 50 N. Y. 451; 1 Dill. Mun. Corp. § 135; Cooley, Const. Lim. 620. The case of People vs. Chute qualifies the rule to the extent that if voters have such direct and actual knowledge of the fact which disqualifies, and of the law that makes the facts to operate to disqualify the candidate voted for, so that to give their votes for him indicates an intent to waste them, votes so given will not count against the minority candidate. But this notice and knowledge must be brought home to the electors so closely and clearly (they will not be presumed to know the law in such a case) as to show an intention, wantonly, to throw away their votes. Mr. Barnum's claim cannot be brought within even this exception to the rule, (if we accept it as law,) it cannot be presumed that fifty odd thousand voters of this State intended wantonly to throw away their votes for Lieutenant Governor at the last election. I am clearly of the opinion that Mr. Barnum has no claim to the office of Lieutenant Governor, and no such interest in the question as entitles him to have the action brought on his relation.

Third. Should the Attorney General, on his own relation, institute an action to test Mr. Gilman's right to the office? The construction of section 9, art. 4, of the State Constitution is *res judicata* in the Attorney General's office, having been settled by an unbroken current of opinions in favor of the eligibility of Gilman. The first decision was by Attorney General Cole, who held that the words of the Constitution, "No Senator or Representative shall, during the time for which he is elected, hold any office under the authority of the United States or the State of Minnesota, except that of Postmaster," were not to be construed to inhibit the election or appointment of a Senator or Representative to any other office during the full time for which he was elected, in case he should see fit to resign as Senator or Representative, and accept the more important or desirable office tendered him; that it was the intention of the Constitution to prohibit a Senator or Representative from holding any other office during the time he was actually a member of the Legislature, and no longer. Op. Atty. Gen. 360.

In 1872 Sherman Page was a member of the State Senate for the term ending January, 1874. At the November election of 1872, he was elected judge of the Tenth Judicial District, took his official oath, and entered on the duties of his office in January, 1873. Application was made by the opposing candidate to the then Attorney General, Cornell, (now one of the Justices of the Supreme Court,) to institute proceedings in the nature of *quo warranto* to oust Judge Page from office.

The application was fully argued on both sides by some of the most eminent lawyers in the State. The precise questions involved in the present application were involved in the Page Case. The decision was in accordance with the previous rulings of this office. The opinion fully and ably discusses every question mooted in the Gilman-Barnum controversy, and holds that Page was eligible and that the application should be denied. I must admit that the reasoning of my predecessors on this question does not wholly satisfy my judgment,—an infirmity of the latter rather than any defect in the logic of the former,—and prior to examining the records of my office I was impressed with the idea that Mr. Gilman was ineligible to the office of Lieutenant Governor. I proceeded on the theory that the framers of the Constitution meant just what the language used naturally imports, and that a member could not be elected to or hold any other office during the time for which he was elected; that the object of the Constitution was to take away from members all temptation to convert the Legislature into a hot-bed of political intrigue. Nevertheless, I feel bound by the decisions of the very able gentlemen who have preceded me in this office. I am the more ready to do so because I feel that it would be unjust to single out Mr. Gilman, and harass and annoy him with vexatious and expensive litigation, when the people of this State, and all the departments of the State government, have acquiesced in and acted upon (for nearly 20 years) this construction. One Governor, three Lieutenant Governors, one Secretary of State, one Attorney General, one Judge of the Supreme Court, and two District Court Judges have been elected to their respective offices during the time for which they had been elected members of the Legislature. I do not think the cause of public justice requires that I should reverse the rulings of this office, disregard the practical construction of the question, and seek on my own motion to reverse the popular verdict so emphatically declared. To do so would, in view of all the circumstances, be little short of official persecution on my part.

I thereby decline to grant the application, or to commence the action on my own motion.

ST. PAUL, January 28th, 1880. CHAS. M. START, Atty. Gen.

J. D. Emery, Esq., County Atty., Le Sueur Co., Le Sueur:

DEAR SIR: Yours of second inst, referring to questions asked in letter of Mr. Cadwell of fourteenth ult., and asking my opinion thereon, is at hand.

1st. "After the Board of County Commissioners has authorized the Judge of the District Court to appoint a short-hand reporter, under the provisions of section 38, c. 64, Gen. St. 1878, and the judge has appointed one, can the Commissioners revoke the authority so granted?" I think not. The statute contains no provision giving such power of revocation, and in the absence of it the power would not be implied, where, as in this case, the rights of the appointee have attached. The power of removal of the reporter is expressly given to the judge, and he may exercise it in his discretion and without cause shown. By section 39, Id., "the judge may at any time discharge such reporter, and employ and appoint another." The sole right to discharge the officer being thus committed to the judge, no other officer or board of officers have that power; and a resolution of the board to the effect that the authority to appoint is revoked, would have no effect. The matter has passed entirely from the control of the Board after having first given the authority to appoint the reporter, which authority has been duly exercised and acted upon. My predecessor, Mr. Attorney General Wilson, held, in accordance with this view, in 1876, using as an illustration the case of the appointment of a County Superintendent of Schools by the Board, and holding that the Board could not revoke the appointment after the acceptance thereof. Attorney General Colville also held the same view in a like case.

In answer to the second question, viz., "Does an appeal lie to the District Court from an allowance made by the Board to a person whom the Board decides to be entitled to relief under the provisions of section 12, c. 15, p. 282, Gen. St. 1878?"

I reply, no. The matter of relief of the poor is committed by the law entirely to the judgment and discretion of the County Commissioners, and within the limits fixed by the statute they have full power to absolutely appropriate money for relief of persons in extreme want, when, after inquiry, they find them proper cases. And their decision would be final on the subject of whether relief is necessary or not. Any other construction would defeat the very object and purpose of the law, *i. e.*, to provide a means of affording immediate and adequate relief to suffering unfortunates. The intention was not that these should be left to starve to death pending an appeal from an allowance for their relief.

February 4th, 1880. CHAS. M. START, Atty. Gen.

G. W. Holland, Esq., County Attorney, Crow Wing and Attached Counties, Brainerd, Minn.:

DEAR SIR: I am under obligations to you for your prompt and full report of the twenty-sixth ult. in regard to the complaint against the Treasurer of Aitkin county for refusing to pay over money to School-district Treasurer on the order of the County Auditor. From your statement of the case, I fully concur in your conclusion that there is no good reason why the County Treasurer should not pay the order of the County Auditor.

The whole difficulty arises from the countersigning by the director of the school-district of the notice of the election of each of the claimants to the school-district treasurership. There was but one legally elected. Both their notices having been countersigned, and filed in the office of the County Auditor, it gave both the claimants a *prima facie* right to the office. The Auditor would have been justified, under such circumstances, in declining to recognize either until the question had been settled by the courts. But he has assumed to decide the question, and if he has decided erroneously and given the order to the wrong person,—the one not actually the Treasurer of the school-district,—he would, perhaps, be liable on his official bond; but the evidence of who is Treasurer being required by law to be filed in the Auditor's office, and not the Treasurer's, the latter would be fully protected in paying the order of the Auditor to the person therein designated as Treasurer of the school-district. Gen. St. 1878, p. 484, § 83.

If this view of the matter meets your approbation, you may so advise the Treasurer, and that it is his duty to pay the order. This, under the circumstances, is all either of us is required to do in the premises. It seems to be a school-district quarrel, and if the County Treasurer will not accept or act upon your advice in the premises, I do not feel called upon to interfere unless it is made to appear that the Treasurer is acting willfully corrupt in the matter. As his refusal seems to be based upon a claim that he is not legally authorized to pay the order, he would not be guilty of any such misbehavior in office as to call for his prosecution. The School-district Treasurer holding the order can, and if the refusal is persisted in longer should, employ an attorney to compel the payment of the order by *mandamus*. This will bring the matter before the court for a decision and settle it.

February 5th, 1880. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: I am in receipt of your favor of the fourth inst., in the matter of settlers' claims for land on St. Vincent Extension, St. Paul, Minneapolis & Manitoba Railroad, under chapter 201 of the Special Laws of 1877, and in reply thereto I have the honor to submit for your consideration, that, assuming the validity of the act in question, and the acceptance of its conditions, as well as its benefits, by the railroad company, (questions I have not examined,) I am of the opinion that your Excellency would be authorized to relinquish, in accordance with the provisions of said act, such lands properly pertaining to that portion of the road between Melrose and

Barnesville as you find were occupied on March 1, 1877, by actual settlers within the meaning of section 10 of said act, although they may have been included in the deed referred to. The railroad company were not authorized to acquire title to land in advance of the actual construction of its road, except as hereinafter stated. The act of Congress approved March 3, 1865, increases the grant of lands to the State, to aid in construction of her land-grant railroads, to 10 sections per mile of road to be built. Section 2 of this act extends the limit to 20 miles from the line of the road. By section 6 of this act it is provided that as often as 10 consecutive miles of the road are completed, the company are entitled to 10 sections for each mile situated opposite to and within the 20-mile limit of the line of said section of road *thus completed* along the whole length of said completed section of road, and *no further*. By this section 6, for every division of 10 miles of road to be constructed, 100 odd sections of land are set apart to aid in its completion, to be taken opposite and along the whole length of said division, if there is that amount within the 20-mile limit; but if there is not, it can extend no further along the line of the road except as hereinafter stated. In other words, the uncompleted portions of the road could not be robbed of its full quota of 10 sections of land per mile to make up any deficiency on the completed portions of the road, otherwise it might happen that the uncompleted portions of the road having no land left coterminous with it, there would be no sufficient inducement to build it, and the object of the grant as to this part of the road be defeated.

By the act of Congress approved July 13, 1866, indemnity lands, for those sold or disposed of by the United States before *the withdrawal of the lands at the local land-office*, were granted to the State to aid in the construction of these railroads, to be selected from the odd sections within 20 miles of the line of the road. By section 4 of this act it is specially provided that the lands specifically lying in place on any division of 10 miles of the road *shall not be disposed of* (that is, by the State to the railroad company) *until the road shall be completed through and coterminous with the same.* A proviso is added that this provision shall not extend to any lands authorized to be taken to make up deficiencies; that is, the indemnity lands granted by section 1 of the act. This proviso must be construed with reference to all the other provisions of the acts of March 5, 1865, and July 13, 1866, referred to. So construing it, it means just this and no more: that indemnity lands to make up the deficiency of 10 sections per mile on the completed portions of the road may be acquired in advance of construction, if they can be found within the 20-mile limit, and leave the full complement of 100 sections to each division of 10 miles of unconstructed road lying in place through and coterminous with the same. If there are no more than this full complement of 100 sections for every 10 miles, no indemnity lands could be taken from these 100 sections, and the company could not acquire title to them in advance of construction of the 10-mile division. Edgerton's Railroad Laws, pp. 85–87, §§ 1, 2, 6; Id. pp. 89, 90, §§ 1, 4.

To recapitulate: 1st. Every division of 10 miles of the railroad has set apart for its construction 100 sections of land coterminous with it, no part of which the company can acquire title to in advance of construction, and no part of which can be taken for deficiencies. 2d. That if there is a deficiency in the 100 sections properly belonging to any completed division of 10 miles, the company can acquire title to indemnity lands in advance of construction along other divisions of the line, if they can be had outside of the 100 sections set apart for the construction of such division, and not otherwise. 3d. If there was included in the deed to the company any lands belonging to the 100 sections so set apart for the uncompleted divisions of the road, the company did not acquire title to the same in advance of the completion of the road, and your Excellency would be authorized to relinquish the same to the United States, if you are satisfied they were occupied by settlers on the first day of March, 1877.

February 5th, 1880. CHAS. M. START, Atty. Gen.

Gust. A. Schulze, Esq., Co. Treas. Lake Co., Beaver Bay, Minn.:

DEAR SIR: Yours of 3d inst. received. As you have no County Attorney, I am pleased to advise you, in answer to your questions, that if there are no banks or bankers in your county, it is exempt from the provisions of section 131, Gen. St., as amended by chapter 38, Gen. Laws 1873, p. 158; and the County Commissioners or Board of Audit have no right to require you to deposit county funds with private individuals or a firm not a bank or bankers. In such case the law holds the Treasurer and the sureties on his bond liable and responsible for all the funds coming to his hands belonging to the public; and he would have the right to select his own depository, in or out of the county, provided these funds are within easy call when demanded by the state, county, towns, etc., to whom they belong. Hence, whereever deposited, the Treasurer is responsible, whether the board makes any order in the premises or not. I would therefore advise you to select the safest and best place which you and your sureties deem accessible in which to deposit all moneys, drafts, checks, etc., received by you as treasurer.

February 6th, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, Auditor of Minnesota:

DEAR SIR: I am in receipt of a communication from S. Lee Davis, Esq., County Auditor of Ramsey county, making the inquiry hereinafter stated. The communication should have been addressed to you, as it relates to the duties of county officers with reference to the tax laws of the State. By section 119, *c.* 11, Gen. St. 1878, p. 245, it is the decision of the State Auditor, in accordance with the advice of the Attorney General, that is to have force and effect, until annulled by the judgment or decree of the court; hence, I think, all questions relating to taxes, tax laws, and the duties of all officers with reference thereto, should be sent to your office for a decision thereon. In this manner uniformity of practice throughout the State will be obtained. Auditor Davis says that some of the school-districts of Ramsey county have never made any requisition for the State text-books, and have therefore neglected or failed to introduce said books into the schools of their respective districts, although two years have expired since the County Auditor received the number of text-books required by the school-districts of his county, and asks what is his duty in the premises at the coming spring settlement. An answer to this question requires a consideration of the following provisions of the General Statutes of 1878: *First*, section 67, *c.* 11, p. 230; *second*, section 83, *c.* 36, p. 484; *third*, section 166, *c.* 36, p. 500.

By the first section above referred to, the County Auditor is required to keep an account with each school-district of his county, and, immediately after each settlement with the County Treasurer, to credit each district with the collection belonging to it, and give to the Treasurer thereof, on demand, an order on the County Treasurer for the amount to the credit of the district. This provision of the statute is substantially section 56, Gen. St. 1866, p. 171, re-enacted March 11, 1878, and was the law of the State at the time of the passage of the text-book law.

By the second section referred to, the County Treasurer is required, upon the order of the County Auditor, to pay to the Treasurer of any school-district any money in his hands belonging to such school-district.

By the third section referred to it is provided that after two years from the time the County Auditor of any county has received the number of text-books required for the school-districts of his county, the Treasurer of such county shall pay no part of the State school tax fund belonging to a district in his county to the Treasurer thereof, until he produces the certificate of the Superintendent of Public Schools of his county to the fact that the State text-books have been introduced into the schools of such district, and are used to the exclusion of any other series of text-books.

Are these several provisions of the statute conflicting and inconsistent with each

other, so that the later enactment would repeal *pro tanto* the others? is the real question to be determined. Ordinarily, express language is used where a repeal is intended, and a repeal by implication is not favored; and where the acts are upon different subjects, the rule as to implied repeals applies more forcibly. When different provisions of the statute can be harmonized by a fair and liberal construction, it must be done. One statute is not to be considered as a repeal of another, if it be possible to reconcile the two together. McCool vs. Smith, 1 Blackf. 459. I see no difficulty in harmonizing all the several provisions under consideration, and giving effect to all of them. There is no such repugnancy between the provisions of the statutes referred to that all may not stand together. Curryer vs. Merrill, 3 N. W. Rep. 3.

Section 166, *c.* 36, Gen. St. 1878, is simply a limitation of the duty of the Treasurer to pay as required by section 83, *c.* 36, and forbids the payment of any part of the school-tax fund to a school-district Treasurer unless certain conditions are complied with, viz., furnishing proof that the State text-books are in use in his district. This prohibition of the payment by the County Treasurer of any part of the State school-tax fund to a school-district without the production of the County Superintendent's certificate, is one of the measures selected by the Legislature to effect one of the objects of the law, viz., to secure a uniform series of text-books in the public schools. Whether it is wise or not, is a question exclusively within the judgment of the Legislature, with which executive officers charged with carrying out the law have no concern. It should be liberally construed and faithfully executed until the courts or the people determine to the contrary. I am of the opinion that the County Auditor should, upon making settlement with the County Treasurer, credit each school-district of his county with its share of the collections and school funds; but where two years have elapsed since he received the number of text-books required for the district schools of his county, the order on the County Treasurer for the school-tax fund belonging to any district should be payable on condition that the school-district Treasurer produces to the County Treasurer the certificate of the County Superintendent of Public Schools, showing that the text-books are in use in his district, and that the County Treasurer should not pay the order unless the condition is complied with. The term "State school-tax fund" is defined by Gen. Laws 1878, p. 68, § 3, "to mean and apply to school funds arising from taxation."

February 9th, 1880. CHAS. M. START, Atty. Gen.

A. E. Flint, Esq., County Attorney, Marshall County:

DEAR SIR: In your favor of the third inst. you state that your County Treasurer elect was, at the time of his election in November last, one of the County Commissioners of your county for the term ending January 1, 1880. After the expiration of his term, and after his successor had qualified, and within the required time, he qualified as County Treasurer, and you ask if he is eligible to the office of County Treasurer. The answer depends upon what construction shall be given to the proviso of section 147, *c.* 8, Gen. St. 1878, which reads: "Provided, that no person who holds the office of County Attorney, Sheriff, Register of Deeds, County Auditor, or County Commissioner, *at the time of said election*, shall be eligible to said office of County Treasurer."

While this language is susceptible of the construction that no person holding the office of County Commissioner at the time of his election can be elected to the office of County Treasurer to fill a vacancy, but could be elected for the full term, I do not think this is the fair import of the proviso, for the Legislature could not have intended that a person who was ineligible for a part of the term was eligible to the whole term. The same reasons for excluding a County Commissioner from the office when elected to fill a vacancy, would apply with equal force when he is elected for the full term. I am of the opinion that the words "at the time of said election" have reference to the election of a County Treasurer, whether to fill a vacancy or

for the full term. It might often happen that the person appointed to fill a vacancy would be succeeded by the person elected for the regular term; and a person holding the office of County Commissioner at the time of his election would not be eligible to the office of County Treasurer. This is upon the assumption that the proviso under consideration is constitutional. It is entirely competent for the Legislature to provide that a person, while he is actually County Commissioner, shall not be County Treasurer, as the offices are incompatible. The Commissioners are intrusted with the supervision of the public funds; they may call the Treasurer to account and remove him from office in certain cases; but the Legislature have no power to impose disabilities upon the citizens of the State and render them ineligible to offices when elected by the people, unless the disqualification is sanctioned by the constitution of the State. Section 7 of article 7 of the Constitution declares: "Every person who, by the provisions of this article, shall be entitled to vote at any election, shall be eligible to any office which now is or hereafter shall be elective by the people, * * * except as otherwise provided in this Constitution." It is not otherwise provided in the Constitution in regard to County Treasurers. By the provision of the Constitution the right of every elector to the office, and the right to select him for the office, is conferred in the most positive and direct terms. And if the statute in question is construed as making an elector ineligible to the office of County Treasurer, whether to fill a vacancy or for the full term, it is clearly unauthorized by the constitution. Such a construction is so "clearly, plainly, and palpably" opposed to the spirit and intent of the constitutional provision referred to, that I feel justified in the conclusion that unless some other construction can be given to the statute it must be held unconstitutional. Op. Attys. Gen. 395.

It follows that, whatever construction shall be given to the proviso in question, the fact that your County Treasurer held the office of County Commissioner at the time of his election does not render him ineligible to the office of County Treasurer.

February 9th, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: I have your favor of the sixth inst., referring to me the communication of the County Auditor of Redwood county, asking whether there is any law authorizing any further extension of time for payment of the seed-grain tax. It seems, from the Auditor's statement, that all of the unpaid portions of the seed-grain loans for the years 1877 and 1878 have been levied on the tax-list of 1879, and included in the total taxes for that year, against the party (receiving the loan) and his real property. The misfortunes of the parties, as represented by the County Auditor, call for a liberal construction of this seed-grain tax, and, if compatible with the laws of the State, that the relief should be granted. I have examined the law with this view, but can come to no other conclusion except that there are no provisions of the statute authorizing a further extension of the time of payment where the tax has already been levied and in the hands of the County Treasurer for collection. Under the provisions of section 8, c. 156, Gen. Laws 1877, p. 247, the payment of the tax provided for by said chapter in case of failure of crops should be extended from year to year, without interest or penalty, until the person receiving it had raised a crop; but chapter 80 of the General Laws of 1878, p. 127, supersedes the section above referred to, and provides that on application to the Board of County Commissioners of their respective counties, persons who have received aid under the provisions of the statute of 1877 might have the time for the payment of taxes levied for seed grain extended for a period of one year. Persons receiving aid under chapter 94, Gen. Laws 1878, p. 157, in case of loss of crops, might have obtained an extension of time in which to pay their indebtedness for seed grain by making the proper affidavit and filing the same with the County Auditor before the first day of October, who was required to omit from the tax levy the amount due for the seed grain from all persons filing with him such affidavit.

From the foregoing provisions of the several statutes on the subject, I think it is

clear that the payment of seed-grain tax under the law of 1877 can only be extended by the Board of County Commissioners, and for one year only; and that, under the law of 1878, if parties failed to apply to the County Auditor and make the necessary proof of loss of crop before October 1st, and the Auditor has levied the tax for seed grain, there is no authority for extending the time of payment of the same.

ST. PAUL, February 10th, 1880. CHAS. M. START, Atty. Gen.

Henry M. Knox, Esq., Public Examiner:

DEAR SIR: I have retained your communication in regard to the St. Croix Valley Savings Bank without an answer until this time, for the reason that I have found considerable difficulty in determining the "legal *status*" of savings banks organized under chapter 23, Gen. Laws 1867, p. 33, since the amendment of chapter 84, Gen. Laws 1875, p. 110. It must be conceded that the latter act is a substitute for the former, and entirely supersedes it as to all savings banks organized subsequent to the act of 1875, and prior to the passage of the savings-bank act of 1879, (chapter 109, Gen. Laws 1879.) I do not think, however, that savings banks organized under the act of 1867 are subject to the liabilities and restrictions of the act of 1875, unless they have reorganized under the latter act. A charter or act of incorporation for private purposes becomes a contract between the parties accepting it and the state, and cannot be annulled by the state without the consent of the corporation. When there is a general law providing for the organizing of corporations, with certain specified rights, privileges, and franchises, by any person adopting and signing preliminary articles of association, a compliance with the law in this respect would be deemed an acceptance of the proposed grant and the conditions of it, and would constitute a contract to the same extent as though the corporation was created by special legislation. We must examine the act of 1875 in the light of this proposition.

Section 18 provides that any savings association which has been heretofore incorporated and is now doing business, may avail itself of the privileges of this act, and shall be subject to all the liabilities prescribed therein. In view of the radical changes made by the act, I think this section must be construed as permissive, and not mandatory; that it is only when the existing association has elected to reorganize and avail itself of the privileges of the act of 1875 that it is subject to the restrictions of the act. The proviso to section 1 does not bring it within the maxim, "The express mention of one thing implies exclusion of others," for the banks there excepted are not savings banks organized under the act of 1867. Section 20 of the act of 1875 expressly recognizes the continued corporate existence of banks organized under the act of 1867. It provides that "any person or association of persons who shall * * * hold themselves out to the public as a savings bank or association, and who shall not have been duly organized under this act, or *the act of which this is amendatory*, shall be deemed guilty of violating the provisions of this act;" or, in other words, an association organized under the act of 1867 may hold itself out as a savings bank, and not be guilty of violating the provisions of the act of 1875. The St. Croix Valley Savings Bank having been organized under the act of 1867, and thereby accepted all the conditions and restrictions, as well as the privileges, of that act, it must continue to conform to this act in all particulars, unless it desires to reorganize under the act of 1879. It cannot enjoy the privileges and the immunities of the act under which it was organized without a full compliance with all its conditions,—the contract between it and the state is not unilateral. The specific questions asked by the bank should be answered as follows: *First*, it should have been not less than five trustees, (chapter 23, Gen. Laws 1867, §§ 1, 5;) *second*, 6 per cent. interest per annum must be allowed depositors before the Trustees receive any pay or profit, (section 7;) *third*, the Board of Trustees must report to the State Auditor on the first day of December of each year, (section 15.)

I have examined the statement of the condition of the bank in question, fur-

nished by you. From the statement it clearly appears that the bank is not complying with the law, particularly with section 8, as amended by Gen. Laws 1868, p. 21. While there is no question of the solvency of this institution, the experience of other States with their savings banks admonishes us that all the requirements of the statute intended for the protection of depositors should be strictly complied with.

ST. PAUL, February 11th, 1880. CHAS. M. START, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: In reply to your favor of the tenth inst., asking "if the Board of Auditors of a county can entertain proposals for the county deposits from banks outside of the county," I have the honor to submit for your consideration that there is no statute prohibiting it, and there might be cases where it would be for the public interests to do so,—*e. g.*, where the local banks combine to reduce the interest to a nominal amount,—but as a rule it ought not to be done.

ST. PAUL, February 11th, 1880. CHAS. M. START, Atty Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: In the matter of the petition of George P. Folsom and others for the appointment of County Commissioners for the county of Traverse, I have the honor to submit for your consideration: *First*, that the county of Traverse is unorganized; *second*, our Supreme Court has decided, in the case, State of Minnesota on the Relation of Lindholm vs. Parker, 3 N. W. Rep. 155, that "the establishing and organizing of counties is left (with some restrictions as to boundaries) wholly with the Legislature, and, until some act of the Legislature authorizing it, the people of a district have no right to act as an organized county." In accordance with this rule, the court hold in express terms that unorganized counties are not entitled to a County Auditor or Clerk of the District Court, and the conclusion to be drawn from the opinion of the court is, that unorganized counties are not entitled to have any county officers except a Board of County Commissioners; *third*, in view of this decision, and the practice which has sometimes obtained of County Commissioners appointed for unorganized counties, to proceed to attempt to organize the county and appoint county officers, I would respectfully suggest that, in case your Excellency shall grant the prayer of the petitioners, that the attention of the appointees be specially called to the fact that they have no authority to organize the county or to appoint county officers.

February 14th, 1880. CHAS. M. START, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: In answer to your question in regard to the proper method of computing the salaries of Judges of Probate under section 2, *c.* 37, Gen. Laws 1875, I have the honor to advise you that to determine the population of any county for such purpose, add 5 per cent. of the population of the county, as shown by the last census, (which, for the present time, would be the State census of 1875,) for each year *expiring after* the year in which said census was taken. Nothing should be added for the year 1875. Neither should the percentage be compounded. Formulated, the rule would be: Add 25 per cent. to the population of a county, as shown by the census of 1875, and you will have the population for 1880 for the purpose of computing the Judge of Probate's salary for that year.

February 14th, 1880. CHAS. M. START, Atty. Gen.

A. N. Bentley, Co. Atty., Winona:

DEAR SIR: I hereby return requisition papers for correction. Judge Wilkin has recently held that in order to give the Governor jurisdiction to demand a fugitive, it must affirmatively and directly appear that the defendant was in the State at the time the offense was committed, and has since fled. It appears argumentatively from the papers that such is the fact, but we had better not take any chances on it. I have penciled in the words required in one of the copies. It should read: "That said Stephen A. Powers was in the State of Minnesota at the time of the commission of the alleged offense in said complaint set forth, and he has since fled from this State and is a fugitive from the justice of the State of Minnesota." Otherwise, the papers are correct, and upon their return, corrected as indicated, the Governor will be so advised.

February 20th, 1880. CHAS. M. START, Atty. Gen.

R. Clark, Esq., Co. Treasurer, Pipe Stone Co., Minn.:

DEAR SIR: Yours of sixteenth inst. is received. In reply to the first question, "How shall I treat town and district orders when paid in on taxes?" I would refer you to section 57 of the tax law (Gen. St. 1878, p. 228, or Sess. Laws 1878, *c.* 1) as to the Treasurer receiving and canceling such orders, and to section 68 as to turning them over on settlements.

As to the second question, "Can I collect pay for fuel, rent, stationery, etc., where I furnish my own office?" I refer you to section 10, Gen. St. 1878, p. 138, which provides that it shall be the duty of the County Board to provide offices and necessary books, stationery, fuel, safes, desks, and other suitable furniture for county offices at the county seat; and to section 111, which provides that the county officers of recently organized counties may, until the board provides offices at the county seat, (which they may do any time within three years,) hold their offices at their places of abode. Under this last section I think that the duty of furnishing an office to the county officers named in recently organized counties is not absolute on the part of the Board until after three years have elapsed since the organization of the county, and if they do not sooner furnish you with an office you cannot charge the county with rent of an office. The Board should furnish you with the necessary stationery and books for the use of your office.

I have answered your questions, but I beg to call your attention to the provisions of law relating to the duties of Attorney General, and to state that it is no part of his duty to advise county officers, except, perhaps, county attorneys; that it is the latter officer's duty so to do; and hereafter your application must be to him for advice as to your rights and duties, except, perhaps, those relating to duties under the tax law, which may properly be addressed to the State Auditor, who is the officer, under section 119, tax law, (Laws 1878,) whose decision on the construction of the tax law is binding until set aside by the courts,

February 20th, 1880. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: In the matter of the extradition of Hiram A. Clark upon the requisition of his Excellency, the Governor of Wisconsin, I have the honor to advise you that under section 2, art. 4, of the Constitution of the United States, one of the essential facts to be established, in order to authorize the Executive of the State, where the crime is charged to have been committed, to make the demand, is that the party so charged has fled from that State; that he is a fugitive from the justice of the State whose laws have been violated. Ex parte Joseph Smith, 3 McLean, 121. In the Case of the Extradition of Garvie, the then Attorney General (Cornell) held that this fact must be made to appear by affidavit or other compe-

tent evidence presented to the Governor of the State making the demand as the foundation of his action; that the recitals in the Governor's requisition and certificate were not evidence of the fact. 3 Op. Attys. Gen. 570. This rule has been recently followed and approved by Judge Wilkin, of the District Court, Ramsey county, in the Frink Case, where the defendant was discharged on *habeas corpus*. It does not appear from the papers accompanying the requisition in question that there was any competent evidence before the Governor of Wisconsin that the alleged fugitive was in that State at the time the crime was claimed to have been committed, and that he has since fled from the State of Wisconsin and is now a fugitive from the justice thereof. These facts, it is true, appear inferentially from the certificate of the District Attorney annexed to the requisition. His certificate is not sworn to, and is not competent evidence of the facts. I therefore advise your Excellency to decline to issue your warrant for the arrest and delivery of the alleged fugitive until the requisition is accompanied by an affidavit or other competent evidence that the alleged fugitive was in the State of Wisconsin at the time the offense is alleged to have been committed; that he has since fled from the State of Wisconsin and is now a fugitive from the justice thereof, and has taken refuge in the State of Minnesota. I am aware of the desire of your Excellency to avoid anything that could be construed as discourteous to the Governor of another State; yet, in view of the ruling of the court in discharging the defendant in the case referred to, I think the ends of justice will be best subserved by declining to issue your warrant until the omission indicated is supplied.

February 21st, 1880. CHAS. M. START, Atty. Gen.

Hon. D. Burt, Supt. Public Instruction:

SIR: I am in receipt of your favor of recent date, asking if school-districts can levy a tax in excess of nine mills on the dollar, in case it is necessary, in order to support a school for the length of time required by law to entitle the district to public money. The question is not free from doubt. By section 49, p. 226, Gen. St. 1878, the rate of taxation for current expenses is limited to nine mills, without exception or condition. By section 19, subd. 5, p. 470, Gen. St. 1878, school-districts have power to vote a tax sufficient to meet the condition upon which the district is entitled to share in the public school money of the State, viz., to maintain a school for three months. By section 24, p. 472, Gen. St. 1878, the Board of Trustees of a school-district have the power, and it is made their duty, to levy a tax, in case the district neglects to vote it, sufficient to support a school for the time in each year necessary to secure apportionments from the state school fund.

These several statutes must be construed together, and with reference to the intention of the Legislature in the premises. The intention of the first provision is to guard against extravagant and excessive taxation by school-districts, and where the taxable property of a district amounts to a sum sufficient so that a nine-mill tax will support a school for three months, no greater rate can be levied; and it seems to proceed upon the theory that a nine-mill rate of taxation will, in every case, be sufficient for this purpose. The intention of the other provisions referred to is to secure at least three months' school each year in every school-district in the State, and makes it the duty of the Board of Trustees of the school-district to provide, by taxation, the means whereby such school may be maintained. The State has a direct and important interest in the maintenance of her public schools, and a construction of the statute which would result practically in depriving a school-district of any school whatever, until it has sufficient taxable property so that a nine-mill tax will support a school for three months in each year, and thereby enable it to share in the public money, is to be avoided if possible. I therefore give the school children the benefit of the doubt, and hold that the limitation in the general tax law (section 49, Id.) is subject to the condition that school-districts may raise by taxation sufficient to support a school for three months in each year, and thereby obtain its share of the public money, although the rate may exceed nine mills; but in all

cases of this kind no more should be levied than is actually required for a three-months' school, and a special return of the amount levied should be made to the County Auditor; that the nine-mill rate is insufficient to enable the district to comply with the law, and stating the amount necessary for that purpose. In the absence of such special return the Auditor would be justified in refusing to extend more than the nine-mill rate.

February 21st, 1880. CHAS. M. START, Atty. Gen.

F. W. Pearsall, Esq., County Attorney, Lac Qui Parle:

DEAR SIR: Yours of the 12th inst., asking if County Auditors could hold the office of County Superintendent of schools, is received. In reply I have to say that there is no statute prohibiting it, but it is an elementary principle that the acceptance of an office by a person already holding an office, when the duties of the two offices are incompatible,—that is, where the duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both,—will be deemed a resignation of the office previously held. 1 Dill. Mun. Corp. § 164.

Are the duties of the offices of County Auditor and County Superintendent incompatible within the above rule? is the question. I think they are; that this clearly appears from an examination of the sections refered to by you, viz., 40, 41, 60, 61, 70, 72, 79, 90, and 92, *c.* 36, Gen. St. 1878.

February 21st, 1880. CHAS. M. START, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: I am in receipt of yours of recent date, inclosing classified lists of claims allowed by the Board of County Commissioners of Ramsey, and paid to certain county officers of said county in addition to the salaries allowed by law, and asking if the claims so allowed were legal demands against the county of Ramsey. In reply, I have to say that it is a well-settled rule that a person accepting a public office, with a fixed salary, is bound to perform all the duties of the office for the salary. Nor is the rule changed, although the labor and duties of the office are subsequently increased. If the law imposing the additional labor and duties does not give compensation in express terms, none can be recovered for the additional services. Whether the pay shall be increased with the burden, is a question for the Legislature. 1 Dill. Mun. Corp. § 169; Warner vs. Grace, 14 Minn. 487. This general rule is subject to the exception that if a public officer, at the request of a municipal corporation, performs for it services which are no part of the duties of his office, and which could as appropriately have been performed by any other person, he may, in a proper case, recover compensation for such services. This exception has no application to those cases where the services could only be performed by the officer, or where the party or officer making the request had no authority to bind the corporation for the payment of the services rendered. The necessity of enforcing the rule and limiting the exception is forcibly stated by Judge Dillon. He says: "The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may be properly attached to an office, to lay the foundation for extra compensation, would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the Legislature and the ordinances of municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official, and if these distinctions are much favored by courts of justice it may lead to great abuse." 1 Dill. Mun. Corp. § 172.

It is in the light of the foregoing elementary principles that the several statutes

regulating the salaries and compensation of the officers of the county of Ramsey are to be construed, and the claims in question examined. The compensation of the Auditor and Treasurer of the county of Ramsey, from April 1, 1872, to May 1, 1876, was regulated by chapter 197, Sp. Laws 1872. Section 1 of this act provided that all fees, costs, allowances, and perquisites, of whatever kind, which the Auditor or Treasurer was allowed by any law to collect or receive for any official service, should be received and collected for the sole use of the county treasury as public moneys belonging to said county, and not otherwise. Section 5 fixes the salary of the County Auditor at $3,000 per year. Under this act the claims allowed and paid to the Auditor for making the financial statement of the county for the years 1874 and 1875, and as Clerk of the Board of Equalization, (items 1, 2, and 3, p. 1, of your list,) were clearly unauthorized. I am not aware of any statute, general or special, allowing him compensation for such services. It may be claimed that the services charged for in these three items were no part of his official duties, and therefore fall within the exception to the rule above stated. I think not. We are not to entertain "any nice distinctions as to what are or what are not official duties" for the purpose of laying the foundation for extra compensation by a public officer. The Auditor, by law, is made a member of the Board of Equalization. He is also Clerk of the Board of County Commissioners, and required to keep a record of all their proceedings, and keep all the records, books, and papers belonging to his office; and no other person could so appropriately discharge the duties of Clerk of the Board of Equalization as he. The financial statement is required to be made by the Board of County Commissioners of the county. Gen. St. 1866, p. 117, § 103. The Auditor is Clerk of that Board, and has charge of the records, books, and papers from which the statement is to be made, and it is his official duty to assist in making it. The Board could not delegate the entire duty of making it to their Clerk, and bind the county for the payment of the services as extra-official.

Item 4, p. 1, of your list was properly allowed. New duties as a member of the Board of Audit were imposed on the Auditor by Gen. Laws 1873, *c.* 38, and compensation for such services expressly provided for.

Item 6 was authorized by chapter 91, Sp. Laws 1875. From May 1, 1876, to March 5, 1878, the salary of the Auditor and Treasurer of Ramsey county was fixed by chapter 207, Sp. Laws 1876; by section 2 the salary of the Auditor is fixed at $4,000 per year, and the Treasurer at $4,500; and by section 1 no other or greater compensation could be allowed as additional compensation, or for deputies, clerk hire, or otherwise. I do not think this act should be construed as depriving the Auditor of the compensation of three dollars per day as a member of the Board of Equalization of Ramsey county, as provided for by section 4, *c.* 212, Sp. Laws 1876. Section 1 of the latter act designates who shall constitute the board. Sections 2 and 3 define their powers and duties. The members of the board are to meet on the first day of September in each year, (unless it should be Sunday, in which case they are to meet on the second day of the month,) and complete their labors on or before the *twenty-eighth day of the same month*. Section 4 provides that each member of the board—the Auditor to be a member—"shall be paid the sum of three dollars per day for every day's actual *services aforesaid;* that is, for the services mentioned in sections 2 and 3. It will be observed that all the duties of the board must be completed in 28 days, (excluding Sundays,) and this would be the limit for which the Auditor could receive three dollars per day for services as a member of the board. The duties imposed on the Auditor by section 5 of the act are made a part of his official duties as Auditor, and no compensation having been given by the law imposing the new duties, he is not entitled to any in addition to the salary fixed by law.

If the view that I have taken of these statutes is correct, it follows that the Auditor was entitled to three dollars per day for services as a member of the Board of Equalization, not exceeding 28 days (excluding Sundays) in each year; that he is not entitled to extra compensation as Clerk of the Board of Equalization, nor as a member of the tax committee; that items 7, 10, and 12, (page 1 of your list,) so far as they are for services as a member of the Board of Equalization, within the above

limit, and for necessary disbursements for postage, express charges, etc., were properly allowed and paid.

Items 13 and 14, for making financial statement for the years 1876 and 1878, were not legal claims against the county. Item 16 is not sufficiently definite to enable me to determine under what statute the charge is claimed to have been made. Item 17 is authorized by General Laws 1877, *c.* 82, to the extent of three dollars for each day's service rendered according to the statute, and actual traveling expenses. All items for disbursements on account of postage, etc., are proper claims to be allowed. Items for payments to the Auditor, as purchasing agent for the county, seem to have been illegally paid, whether made to him direct or to a clerk. It was the duty of the Board of County Commissioners to furnish county officers with stationery and books for the use of their offices at the expense of the county. The board was the proper party to contract for the furnishing supplies of this character to the county officers. They could not delegate the duty to the Auditor, and add $500 a year to the compensation allowed him by law. Section 1, *c.* 207, Sp. Laws 1876. The amount paid the Clerk of the District Court seem to have been for services rendered under the general tax law of the State, which imposes upon the several Clerks of the District Courts of the State new duties, and fixes their compensation therefor in express terms. If such was the character of the services, I see no reason why the allowance and payment of the claims were not proper. The amounts allowed by the County Commissioners and paid by the county for the collection of personal property taxes were, I think, improperly allowed and paid. It was the duty of the County Treasurer to collect the taxes in his county, and he must pay his own Deputies, Clerks, and Assistants. Section 1, *c.* 216, Sp. Laws 1878.

March 3d, 1880. CHAS. M. START, Atty. Gen.

J. L. Higgins, Esq., Co. Attorney, Martin Co.:

DEAR SIR: Yours of the twenty-eighth of February received. I have not time to give the question a full examination, without delaying an answer for such a length of time as would inconvenience you. I think, from the attention I have given the question, that you are correct; that each Treasurer is entitled to compute his commissions on the amount collected by him, without reference to the amount collected by his predecessor. It is true that by so doing the county, where there has been a vacancy, has to pay the larger percentage twice, but that is their misfortune. On the other hand, if the former incumbent had collected taxes enough, so that he had already received the full limit fixed by law for a year's salary,—say $1,200,—it could not be claimed that the person appointed to fill the vacancy should serve without pay, and turn over all commissions to the general revenue fund of the county, for the reason that his predecessor had received the full $1,200. We must give such construction to the statute as will be reasonable, and enable the taxes to be collected. No Treasurer would accept the duties and responsibilities of the office, by appointment, unless there were reasonable fees allowed for the same, independent of any act of his predecessor. The statute ought to provide that County Treasurers should be allowed, at each settlement, only a *pro rata* amount of their fees, in proportion to the time served. In this way the Treasurer would get pay only for the time he actually serves. Then there would be something left for his successor, in case of a vacancy, without additional expense to the county.

March 3d, 1880. CHAS. M. START, Atty. Gen.

Frank C. Field, Esq., County Auditor, Wadena Co.:

DEAR SIR: Yours of second inst. is received. Your statement is that the County Commissioners have contracted for a building to be built at the county seat for the county offices, to cost about $400, and your sureties have notified you not to issue warrants on account thereof without further authority, as they question the right to build a building without submitting the question to the vote of the people of the county, and you ask whether you are safe in issuing or drawing the warrants. Knowing your County Attorney to be absent, (whose duty it is to advise you on your duties,) I will answer. You are certainly *not safe in refusing* to issue warrants on the claims duly allowed by the Board of Commissioners. They have authority to contract for such buildings without the questions being submitted to vote. There is no provision for the latter. It is the duty of the Board of County Commissioners to provide offices for county officers. Gen. St. 1878, p. 138, § 110. And $400 is not an extravagant expenditure for such purposes.

March 4th, 1880. CHAS. M. START, Atty. Gen.

T. J. Graves, Esq.:

DEAR SIR: Your favor received. In reply, would say Gen. Wilson held that independent school-districts were required to conform to the provisions of the school text-book law, and such, I understand, is the ruling of the Superintendent of Public Instruction. I have handed your letter to him. I can only add that I concur in the opinion of Gen. Wilson.

March 5th, 1880. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: In the matter of the extradition of George Payne, upon the demand of his Excellency the Governor of the State of Illinois, I have examined the requisition and papers attached, and find them correct in form. I have the honor further to advise you that said George Payne is now held in custody within the State Prison at Stillwater, this State, by virtue of the judgment and sentence of the District Court of the Third Judicial District in and for the county of Winona, for the crime of burglary committed in this State. Under these circumstances the question of your duty in the premises is somewhat complicated. As a rule, the surrender of a fugitive who has violated the laws of this State and is held to answer for such offense, or is imprisoned on final judgment therefor, should be postponed until the justice of the State is first satisfied. The rule is thus stated by the Supreme Court of the United States: "Where the demand is properly made by the Governor of one State upon the Governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter State have been put in force against the fugitive, and he is imprisoned there, the demands of these laws may first be satisfied. The duty of obedience then arises, and not before." Taylor vs. Taintor, 16 Wall. 366. The case in question presents this difficulty: Payne is charged with murder in the State of Illinois. It is important that he should be tried for the offense, and there may be reasons why he should be put on his trial before the expiration of his term of service in the State Prison of this State. On the other hand, he is held in prison by virtue of the judgment of a court of competent jurisdiction, and there is no way of getting him out of prison, to the end that he may be surrendered to the authorities of the State of Illinois, except by first granting him a pardon. This ought not to be done unless there is good reason to believe that he will be put on his trial in the State of Illinois for murder, and that the evidence against him is sufficient to warrant his conviction, and that it is further shown that the ends of justice would be liable to be defeated if his surrender should be deferred until he has served out his term of imprisonment. I would therefore suggest to your Excellency that you postpone the surrender until

the expiration of Payne's sentence in our State Prison, unless it is satisfactorily made to appear to your Excellency, by the certificate of the prosecuting attorney of Cook county, and State of Illinois, that the evidence against Payne is sufficient to warrant his conviction, and that such conviction will be hazarded by a delay of his trial until he serves out his term of imprisonment in this State. Should you become satisfied by such certificate that public justice requires Payne's pardon and surrender, I would further recommend that the warrant of surrender be directed to the Warden of the State Prison, and that the pardon be upon condition that Payne leaves the State of Minnesota and never returns to it.

March 5th, 1884. CHAS. M. START, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: Your favor of the first inst. is received. In reference to the proper method of computing interest on deposits of public funds by County Treasurers, under the provisions of chapter 8, Gen. St. 1878, (Young's,) § 150, I think the words "monthly balances," in the statute referred to, must be construed to mean the average balance on deposit during each month, which is to be ascertained by adding together the balance on deposit at the close of every day in the month. Divide the amount by the number of days in the month; the quotient is the "monthly balance" upon which interest is to be computed at the agreed rate per annum for one month, and this interest should be credited to the county on the first day of the month next following.

March 6th, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: I have received the communication of S. Lee Davis, Esq., dated the fifth inst,, addressed to you, asking "whether, under the text-book act, chapter 75, Laws 1877, as amended 1878, the County Auditor should refuse to draw his warrant on the application of School-district Treasurers where they do not produce the certificate of the County Superintendent of Schools of the fact that the text-books are used in their respective districts; or, in other words, has the Auditor any right to demand the production of said certificate, or is it the County Treasurer only who is to do so before he pays the warrrants?" By reference to the language of the law above referred to (Young's St. p. 500, § 166) it will be seen that the prohibition is upon the County Treasurer paying without the production of the certificate,—not upon the Auditor's drawing the warrant. The language of the statute is: "The Treasurer of such county shall pay no part of the State school-tax fund belonging to a district of his county to the Treasurer of such district, until such Treasurer produces his certificate in writing of the County Superintendent of Public Schools, certifying to the fact that the State text-books have been introduced into the school or schools of such district, and are used in such school to the exclusion of any other series of text-books."

While it might appear to be useless labor for the Auditor to draw the warrant, knowing that it could not be paid, and that it would be much simpler to require the certificate to be produced to the Auditor before the warrant is drawn, leaving the County Treasurer at liberty to pay all warrants properly drawn and presented, it is sufficient to say that the statute provides otherwise. It is the County Treasurer who is inhibited from paying the warrant unless the certificate is produced, not the Auditor from drawing the warrant. I am therefore of the opinion that the Auditor should draw the warrant in all cases, when demanded, where the school-district has funds in the county treasury. The Auditor cannot presume that the School-district Treasurer will be unable to comply with the condition upon which the warrant is payable. Inasmuch as the County Treasurer has no means of knowing, officially, when the two years from the time the Auditor received the State

text-books expires, the warrants on their face (when the two years have expired) should be made payable only upon the production of the certificate required by law, or the County Treasurer be officially informed in some practical manner that the two-years' limitation has expired. I have no other method to suggest than the one above indicated.

March 6th, 1880. CHAS. M. START, Atty. Gen.

H. Swenson, Esq., Co. Auditor, Kandiyohi Co., Willmar, Minn.:

DEAR SIR: Yours of fifth inst. is received. You ask whether section 100, *c.* 1, Laws 1878, which provides for the Auditor's certificate of no redemption on tax certificates and assignments thereof before recording, is in force; or, is the section (124) printed in Cooley's Index Digest, p. 47, which provides for a different mode of procedure, inconsistent with the other above named, in force. The County Attorney, whom you say differs with you, is undoubtedly right in holding that the first and not the last above-quoted section is in force. The latter was repealed by the repealing clause in section 120, *c.* 1, Laws 1878, except so far as affects cases in which rights had accrued under it. This is also the opinion and construction given by the State Auditor, whose duty it is, under section 119, to decide questions under the act, and whose decision is "to have force and effect." Hereafter, please address him in similar cases.

March 8th, 1880. CHAS. M. START, Atty. Gen.

A. P. Barker, Esq., County Atty., Mille Lacs Co.:

DEAR SIR: Yours of March 3d received. I will answer your questions in the order named, without repeating them: *First*, the amount repaid to the purchaser at a void tax sale, under the provisions of section 97, p. 240, Young's Statutes, should be charged to all the different funds benefited by the original sale, including the various school and town funds. The law is silent on the subject, but this would be the equitable rule, that each fund should contribute to the loss by the void sale in the same proportion that it was benefited by it originally. *Second*, demand county orders draw interest at the rate of 7 per cent. per annum after they have been duly presented for payment and payment refused for want of funds. Until a demand is made for payment at the office of the Treasurer, such orders would draw no interest; but after demand the rule in respect to interest against municipal corporations does not ordinarily differ from that which applies to individuals. If payment of a definite sum due on a contract is delayed beyond the time it ought to have been paid, interest at the legal rate is allowed as damages for the breach of the contract. This rule is applicable to counties. Op. Attys. Gen. p. 376; Dill. Mun. Corp. § 414.

March 8th, 1880. CHAS. M. START, Atty. Gen.

Hon. D. Burt, State Supt. of Public Instruction:

DEAR SIR: You ask my opinion upon the following questions: *First*, can the Trustees of a school-district permit the use of the school-house of the district for church festivals, dancing-parties, singing-schools, or other social entertainments? *Second*, if the Trustees have power to allow the use of the school-house for any of the above indicated purposes, and not all of them, please state plainly just what is permissible and what is not.

From the papers handed me it appears that the above questions have been submitted to you by the County Superintendent of Schools for Stearns county, who says: "The evil that troubles us is that in some districts the school-house is used

for a dancing-hall, to the injury of the school furniture and the annoyance of teachers and pupils. It is claimed that the school-house may be used for dancing quite as well as for a singing-school, a church festival, public lectures, or any other purpose not connected with the regular school, hence there is need of an opinion in regard to these matters more comprehensive than the one cited." The opinion referred to may be found on page 51 of the School Code of 1877, and is in the following words: "School Trustees may allow school buildings to be used for religious meetings, lectures, and similar purposes, when they are not wanted for public schools."

I confess my inability to offer a remedy for the evil complained of consistent with this rule. The origin of the evil is the rule itself, for if it be conceded that the Trustees of a school-district may, against the objection of a tax-payer of the district, permit the buildings of the district to be used for any purpose other than school purposes, and objects incidentally connected therewith, the concession carries with it the right of the Trustees to permit the use of the school-house for any purpose they see fit. If we say that they may, against the objection of a tax-payer, permit its use for religious purposes, who shall say what is or is not a religious purpose? That which would be a religious exercise in the opinion of one man might be regarded as blasphemy by another. Shall we say, as a legal proposition, that the Trustees may permit the use of the school-house for a religious meeting and not for a political meeting; for a church festival and not for a Grange picnic; for a Sunday-school and not for a singing-school; for a social entertainment of any kind and not for a dancing-party?

There is no middle ground. The Trustees of a school-district have no legal right to permit the use of the school-house of a district for other than school purposes. School districts are *quasi* corporations, organized with limited powers. The sole object of their creation is the education of the children of the district. To effect this object, a school-district has power to build and own, furnish and repair, school-houses, and to tax all the property owners of the district therefor. The Trustees have the *care* and control of the corporate property for this express purpose, and none other. They cannot misappropriate the trust property by permitting its use for religious, social, or political purposes.

Taxation cannot be invoked for these purposes. The powers and duties of School-district Trustees, in regard to the care and control of the property of the district, are substantially the same in the several States where the system of public schools has been adopted, and it has been held by the Supreme Courts of Connecticut, Wisconsin, and Kansas that neither the Trustees nor the district itself, by a vote of its electors, can authorize the use of a public school-house for other than school purposes. Schofield vs. Eighth School-dist. 27 Conn. 499; School-dist. vs. Arnold, 21 Wis. 665; Spencer vs. Joint School-dist. 15 Kan. 259.

In the first of these cases the district had voted to permit the use of its school-house for religious meetings and for Sunday-schools, and the court, on the petition of a tax-payer, enjoined such use, although it was shown that such use of the school-houses of the district did not interfere with the public schools of the district, and that such use had been customary for 40 years.

In the second case referred to the school-district voted to allow its school-house to be used for the meetings of a temperance society, and it had been so used for several years. The court held that the electors of a school-district could not authorize the use of the district school building for other than school purposes.

In Spencer vs. Joint School-dist. *supra*, the court says: "May a majority of the tax-payers and electors in a school-district, for other than school purposes, use, or permit the use, of the school-house built by funds raised by taxation? * * * It seems to us, upon well settled principles, the question must be answered in the negative. The public school-house cannot be used for any private purposes. The argument is a short one. Taxation is invoked to raise funds to erect the building, but taxation is illegitimate to provide for any private purpose. Taxation will not lie to raise funds to build a place for a religious society, a political society, or a social club. Whatever cannot be done directly, cannot be done indirectly. As you may

not levy taxes to build a church, no more may you levy taxes to build a school-house and then lease it for a church."

Upon principle and authority I am satisfied that the Trustees of a school-district are not authorized to permit the use of the school-house of the district for other than school purposes, if such use is objected to by one or more tax-payers of the district.

In the consideration of this question I have not overlooked the fact that throughout the State school-houses are used for Sunday-schools, church assemblies, political meetings, and social gatherings, and that in many towns of the State there are no public buildings except the school-houses; but the use of the school-house for such purposes must rest upon the general consent and acquiescence of the tax-payers, and not upon any legal right of the Trustees to grant such use against the objections of tax-payers.

To permit such use of the school-house, when objected to by tax-payers, would introduce into school-districts bitter controversies, "well calculated to hinder, rather than promote, either religion or learning." When the public sentiment is divided in regard to the use of its school buildings for religious, social, or political purposes, the Trustees should restrict its use to school purposes.

In conclusion, permit me to say that I find no record in this office of any opinion not in harmony with the views herein expressed.

ST. PAUL, March 11th, 1880. CHAS. M. START, Atty. Gen.

Hon. D. Burt, Superintendent Public Instruction:

DEAR SIR: You ask, "Are school-districts authorized to elect two or more persons in addition to the regular official Board of Trustees of the school-district, to act with and have equal voice and control with the Trustees in building a new school-house?" No. The statute makes no provision for any such *quasi* officers of the district. When a school-district votes to build a school-house, designates site and provides funds for the purpose, the Trustees of the district are charged with the duty of executing the will of the district in the premises. Gen St. 1878, p. 471, § 23.

March 19th, 1880. CHAS. M. START, Atty. Gen.

H. H. Hawkins Esq., County Auditor, Carlton Co.:

DEAR SIR: Yours of the seventeenth inst. received, asking if it would be legal for your Board of County Commissioners to abate penalties, interest, and cost on lands delinquent for 1878 and prior years, without the approval of the State Auditor. No. Section 119, *c.* 11, Gen. St. 1878, (Young's,) is the present law in reference to abatements. The Board and County Auditor forward a statement of the facts, with a favorable recommendation to the State Auditor, for his approval. All previous laws giving Boards of County Commissioners authority to abate taxes are repealed. Your question should have been sent to the State Auditor. I have conferred with him in regard to the question, and the foregoing is the ruling of his office on the question, in which I concur.

March 19th, 1880. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: In reply to your inquiry (whether the following classes of cases, viz.: "*First*, where the original homestead entries have been made in some other State, and the additional entries allowed by virtue of the same, under the provisions of the act of Congress approved June 8, 1872, (Rev. St. U. S. § 2306,) have been located in this

State; and, *second*, where both the original and additional entries have been made in this state, but are not contiguous,"—are within the provisions of an act of the Legislature of this State,—approved March 10, 1879,—chapter 84, Laws 1879,—entitled "An act for the relief of homestead settlers and timber-culture claimants on lands now claimed by the State as swamp lands") I have the honor to advise your Excellency that neither of these classes of cases come within the letter or spirit of said act. Section 1 of said act provides for the relinquishment of the title and interest of the state in all lands claimed by the State as swamp lands, *occupied* or held by *actual settlers*, their heirs or assigns, or timber-culture claimants, who hold the same by virtue of homestead or timber-culture entry, according to the laws of the United States relating thereto. This language, taken in connection with the preamble of the act, "that said *settlers* have, in good faith, fulfilled all the requirements of the homestead and timber-culture laws," necessarily excludes all entries on which proof of settlement or cultivation of timber, according to the laws of the United States, is not required. The act is intended for the protection of *actual settlers*, their heirs or assigns, and timber-culture claimants, *and no others*. It is not to be extended by implication so as to include "additional homestead entries."

March 20th, 1880. CHAS. M. START, Atty. Gen.

E. P. Freeman, Esq., County Attorney, Blue Earth County:

DEAR SIR: Your favor of the twentieth inst., in regard to relief of the poor by County Commissioners, received. Prior to the amendment of section 12, c. 15, Gen. St., by chapter 13, Laws 1877, it was the practice in many counties of the State for the Board of County Commissioners to make a limited allowance per week or month during the year to poor families in special cases, instead of sending them to the poor farm. This practice, when limited to proper cases, was not only humane and just, but was a pecuniary saving to the counties. Many families, when the father was disabled by sickness or other misfortune, were, with the assistance of the mother and the allowance made by the county, enabled to get along and keep out of the poor-house, and the children, at least, were saved from becoming chronic paupers. This practice, however, frequently resulted in abuses: families that were too shiftless to work, but too proud to go to the poor-house, would frequently impose upon the Commissioners, and obtain relief when not entitled thereto. I think the amendment referred to was intended to correct these abuses by fixing a limit, both as to the amount of relief and the time for which it might be granted. In counties that have poor farms, a single Commissioner is still limited in the matter of temporary relief of the poor of his district to $20, except by permission of the Board of County Commissioners of his county, "provided that such temporary and limited assistance shall not continue or be allowed for more than three months in any one year, nor exceed in the aggregate the sum of fifty dollars." That is, a single Commissioner is charged with the duty and authority of furnishing temporary relief to the extent of $20, and no more, but the Board may extend such relief to $50, and for a period of three months in each year, and no more.

By reference to section 6 of said chapter 15 it will be seen that the Board of County Commissioners are not authorized to support the poor of the county outside of the poor farm, except when they are of opinion that the number of poor persons in the county is not sufficiently large to warrant the purchase or rental of a farm or place for the maintenance of the poor of the county, when they may provide for their support in any other way which they may deem proper. Reading sections 6 and 12 as amended together, I think that where a county has provided a farm or other suitable place for the reception and maintenance of the poor of the county, they must be supported at such place or farm, except that temporary and limited assistance may be given, not to continue longer than three months in any one year, nor to exceed in the aggregate $50.

March 22d, 1880. CHAS. M. START, Atty. Gen.

A. C. Smith, Esq., Litchfield, Minn.:

DEAR SIR: On my return from Todd county, where I have been engaged in the trial of a murder case, I find yours of the twenty-second inst. I have only time to say that while I would be glad to assist you in the examination of the questions presented, if I had the time, I do not think any opinion I could give would be of any force or effect, or settle any disputes, in a case of this kind. It is only opinions given to State officers upon questions submitted by them that are to be followed until the court determines otherwise. I can cite you some opinions of my predecessors. On May 2, 1867, Attorney General Colville recorded an opinion which reads as follows: "Justices of the Peace are elected for a full term,—*never for less.* There is no reason why their terms of office should end on alternate years." On May 29, 1878, Attorney General Wilson used the following language in a recorded opinion: "The Legislature can neither lengthen nor shorten the term of an officer whose term is fixed by the Constitution. Keys vs. Ellanson, 3 Sandf. 6; Brown vs. Davis, 9 Humph. 208. Our Constitution fixes the term of Justices of the Peace at two years." On August 3, 1878, he recorded another opinion to the same effect. I have always, since the decision of Crowell vs. Lambert, been of opinion that the term of Justices of the Peace is fixed by the Constitution at two years, and that, being so fixed, the officer, when once duly elected, may hold his office for the full term of two years, whether he was elected to fill a vacancy of an unexpired term or not. Whether the office of "Police Justice," under your village charter, would come within the rules applied to Justices of the Peace, I cannot say, as I have no time at present to examine the question.

March 27th, 1880. CHAS. M. START, Atty. Gen.

Hon. Henry M. Knox, Pub. Examiner:

DEAR SIR: Your communication of the twenty-second inst. in reference to the bonds of the depositaries of the county funds of Stearns county, is received. Upon the statement made by you I am of the opinion that the bonds are correct and properly approved. Under the second subdivision of section 150, p. 148. Gen. St. 1878, I think the County Treasurer is not authorized to deposit in any bank or banking-house an amount exceeding the assessed capital stock of said bank or banking-house as appears on the tax-list. If he does, I think it is at his own risk, and his bond, in case of the failure of the bank, would be liable for the excess over the assessed valuation of the stock deposited with such bank. I assume, in this communication, that Mr. McClure is a banker, and engaged in the banking business. If he is not a banker, and engaged in the banking business, (your letter is silent on that question,) he could not be designated by the Board of Auditors one of the depositaries of the county funds.

March 29th, 1880. CHAS. M. START, Atty. Gen.

Hon. A. R. McGill, Insurance Commissioner:

DEAR SIR: You ask: 1st. Does the Board of Directors of town mutual insurance companies organized under chapter 83, Laws 1875, possess legal authority to extend the territory in which to do business beyond that fixed in the original articles of incorporation? No. Section 347, Gen. St. 1878, (Young's,) forbids town insurance companies insuring any property out of the limits of the town or towns in which they are located; that is, in which they are organized to do business. 2d. Have such companies the legal right to amend their articles of incorporation by including additional towns, and thereby extend their business beyond the territorial limits of their original organization? This must also be answered in the negative. The act under which this class of insurance companies are organized gives no authority for the amendment of the original articles of incorporation. Neither is the

amendment authorized by section 118, tit. 2, c. 34, Gen. St. 1878; for it is only corporations organized under said title 2 that are authorized to amend their articles of incorporation. 3d. What is the meaning of the phrase "adjoining towns," as used in the act authorizing the formation of town insurance compainies? The words are somewhat ambiguous, but their meaning is to be gathered from a consideration of the entire act,—its object, scope, and spirit,—and the words construed in harmony therewith. From a consideration of the act as a whole, I am satisfied that it was the intention of the Legislature that companies organized under said act should be limited in the territory in which they should do business. Thus the title of the act denominates them "town insurance companies." It is only in limited portions of the State that such companies are authorized to be organized. Section 1. The articles of incorporation, copy of by-laws, and names of officers are to be filed in the Town Clerk's office of the town where the company's office is located. Section 3. They are also exempted from liabilities imposed by law upon insurance companies doing business throughout the State. Section 17. I am therefore of the opinion that the words "adjoining towns" mean the towns adjoining the town in which the business office of the company is located, and from which it takes its name, and no others.

April 7th, 1880. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: In reply to your question, "Can a Judge of the District Court of this State act as one of the Regents of the University of Minnesota?" I have the honor to submit for the consideration of your Excellency that the answer to the question depends upon the further question: Is a Regent of the University an officer under this State within the meaning of section 11, art. 6, of the State Constitution, prohibiting Justices of the Supreme and District Courts from holding any other office under the State? This question was answered in the negative as early as 1861 by the then Attorney General, Cole, in an opinion which fully discusses the question, and to which your Excellency is respectfully referred. Op. Attys. Gen. 119.

From the conclusion reached, that a Regent of the University is not an officer under the State, but simply a member of the corporation known as the "University of Minnesota," it follows that your question should be answered in the affirmative. A Judge of the District Court may accept the appointment as Regent of the University.

April 7th, 1880. CHAS. M. START, Atty. Gen.

J. W. Childs, Esq., County Commissioner, Wilkin County:

DEAR SIR: In view of the special circumstances mentioned in your favor of March 29th, I answer the most important question therein propounded, but beg to suggest that I cannot act as County Attorney of Wilkin county, and that some arrangement should be made whereby the officers of your county can be advised by some competent attorney in regard to their official duties.

You ask—*First*, can the Board of County Commissioners grant licenses to vend intoxicating liquors at different rates; that is, a drug-store license at one price and a saloon license at another price? Section 2, c. 16, Gen. St., provides that "any person applying for a license to sell intoxicating liquors shall pay to the County Treasurer a sum not greater than one hundred dollars nor less than twenty-five dollars per annum, at the discretion of the Board of County Commissioners." Within these limits the whole matter as to the price to be fixed for a license is left to the discretion of the County Commissioners. It would be neither just nor a reasonable exercise of this discretion for the Board to charge two persons doing substantially the same amount and kind of business different prices for a license. The discretion reposed in the Board should be exercised with reference to the place where

the applicant's business is to be carried on; the extent of such business,—whether the sale of intoxicating liquors was his exclusive business, or only an incident to some other business. I have no doubt but the Board may, if it see fit, classify the parties to whom licenses are to be granted,—for example, drug-stores, saloons selling all kinds of mixed drinks, saloons dealing only in beer, saloons in cities and villages, saloons in the country, etc.,—and fix a different price for applicants of each class. But all persons belonging to the same class, that are found by the Board to possess the necessary *moral* qualifications to engage in the business of selling intoxicating liquors, should be treated exactly alike as to the amount they are required to pay for a license.

The other questions in your letter are so indefinitely stated that I cannot give an opinion thereon which would be at all satisfactory to you or to myself, and must therefore decline the attempt.

April 8th, 1880. CHAS. M. START, Atty. Gen.

Hon. D. Burt, State Supt. Pub. Inst.:

DEAR SIR: I am in receipt of your favor of the nineteenth inst., asking my official opinion on the following question, viz.: "Has a school-district a legal right to remove a school-house located on a site to which the district has title to one where it has not a good title?" The legal voters of a school-district, when lawfully assembled, may, by a two-thirds vote of the legal voters of the district, change the location of the school-house. Gen. St. 1878, p. 470, § 19. The mere fact that the district have title to the old site, and have not title to the new, at the time vote is taken, will not render the action of the district illegal, but before the school-house is removed to the designased site the district should acquire such a title to the same as will make it certain that the property of the district will not be jeopardized by the removal.

April 20th, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: In reply to the communication of the County Auditor of Carlton county, referred to me from your office, I have to say that, under section 97, *c.* 11, Gen. St. 1878, where a sale under a tax judgment has been declared void by judgment of court, the purchaser is entitled to have the amount paid by him at the sale, with interest at the rate of 12 per cent. per annum, refunded to him out of the county treasury. To entitle the purchaser to such repayment, he must file with the County Auditor a certified copy of the judgment of the court, in which must be set forth the reasons why the sale was adjudged void. Upon receiving the certified copy of such judgment, the Auditor should draw his order on the general revenue fund of the county in favor of the purchaser or assignee of the State for the amount paid and interest, as above indicated. The fact there is no money in the county treasury belonging to the general fund, would be no reason why the Auditor should not draw the order. His duty is complete when he has delivered the order. The amount refunded should be charged *pro rata* to all the different funds benefited by the original sale. 1 Leg. Rec. No. 2, p. 11. Where the tax sale and judgment are set aside, and money paid refunded, proceedings should be had under section 113, *c.* 11, Gen. St. 1878, to collect the original tax.

April 21st, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: Herewith I return the paper submitted to me by you from the Auditor of McLeod county. The copy of the decision of the court is insufficient to war-

rant the Auditor to draw his order for the amount paid by the purchaser at the tax sale, or as assignee of the State. The case comes within the provisions of section 28, c. 2, Laws 1874, not section 97, c. 11, Young St. Under either section the decision of the court, a copy of which was filed with the Auditor, is insufficient. To authorize the repayment of the money paid for the tax title, the judgment of the court must state *for what reason the sale is declared void*, and if it be for anything occurring or omitted to be done *subsequent* to the entry of the judgment, the money paid by the purchaser, with interest, shall be repaid. Chapter 2, § 28, Laws 1874. The copy of the judgment or decision referred to does not state the reason why the sale was declared void; it does not even appear from it that the question of a tax sale was involved in the action passed upon by the court. A strict compliance with the statute must be insisted upon by County Auditors, in applications, of this character, before they draw their order for the refunding of the money paid for the tax title. In all cases, before the order is drawn, a certified copy of the judgment of the court must be filed with the County Auditor, showing upon its face not only the reasons why the sale is void, but also a description of the premises, and the years for which they were claimed to have been sold for taxes.

April 23d, 1880. CHAS. M. START, Atty. Gen.

Hamilton Beatty, Esq., Treasurer Sibley Co.:

DEAR SIR: Yours of the twenty-first inst. is received. It is only when you deposit public funds in strict accordance with the provisions of section 150, c. 8, Gen. St. 1878, (Young's) that you and the sureties on your official bond will be exempted from liability therefor. Hence, it follows that the Board of Auditors, having failed to designate any depository of the public funds, and taken security thereof, you and your sureties are absolutely responsible for their safety. In case a bank is designated as a depository, and security taken, if you should deposit with such bank an amount exceeding the assessed capital stock of the bank, the excess of the deposit over assessed value of stock would be at your risk. You and your sureties would be held for it in case of loss.

April 23d, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: In reply to the letter of Mr. Chowen, submitted by you to me, I have to say that the rule *caveat emptor* applies to a purchaser at the tax sale. The State does not guaranty the title, nor assume responsibility for mistakes or irregularities in the proceedings upon which the tax sale is predicated, except as expressly provided by statute. People vs. Aud. Gen. 30 Mich. 12; Cooley, Tax'n, 229. Under the provisions of section 97 of chapter 11, Gen. St. 1878, the amount paid by the purchasers at the tax sale, and interest, may be refunded when the sale is declared void by the judgment of court, and the judgment states for what reason the sale is declared void. The right to have the purchase money and interest refunded is limited to the cases provided in this section, and the purchaser must bring himself strictly within its provisions before he is entitled to any relief. Executive officers have no power to declare a tax sale void and refund the amount paid on the sale. There must be an adjudication by the court that the sale is void, and the judgment must also state the reason for which the sale was declared void before the money can be refunded.

May, 4th, 1880. CHAS. M. START, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: Your favor of the first inst., inclosing copy of letter from the County Auditor of Rice county, with reference to the salary of the Judge of Probate of said county, is received. The question in controversy is, from what time is chapter 306 of the Special Laws of 1879 in force, so far as the same relates to the Judge of Probate of Rice county? It appears that the term of all the officers of said county who were in office at the date of the approval of said act, viz., March 11, 1879, has expired, except the County Auditor's, whose term will not expire until March 1, 1881. It is claimed by the Judge of Probate that chapter 306 does not take effect until the then present term of *all* the officers therein named has expired, and that he is entitled to the salary as fixed by Gen. St. 1878, *c.* 7, § 5, until the Auditor's term expires. It is possible so to construe section 10 of said act,—for it must be admitted that its language is very indefinite,—but such a construction is at variance with the evident intention of the Legislature, which seems to have been—*First*, to take the matter of the fees and salaries of the county officers of Rice county out of the operation of the General Statutes; *second*, that no change or reduction in the fees or salaries of the county officers who had accepted their offices with reference to the compensation fixed at the date of such acceptance should be made during the term for which they had been elected, but that such change and reduction should apply to all officers thereafter elected, as soon as they *severally* entered upon their term of office. Section 10 must be construed in harmony with this purpose and intention of the act. I am therefore of the opinion that chapter 306, Sp. Laws 1879, went into operation as to *each* officer therein named at the expiration of the then existing term of such officer, and that the County Auditor of Rice county was correct in his views of the act in declining to pay the Judge of Probate of said county under the General Statute. The special act referred to, regulating the fees of the county officers of said county, is in force as to him. The Judge of Probate should continue to collect the sums provided for the reimbursement of the county as required by section 8, *c.* 7, Gen. St. 1878, and no others. I see no inconsistency between sections 4 and 9 of said chapter 306. The word "fees" in section 9 has reference only to those officers who, previous to the passage of the act, were paid by fees. Judges of Probate, by the General Laws, were and are paid a salary, not by fees.

May 5th, 1880. CHAS. M. START, Atty. Gen.

Hon. A. R. McGill, Insurance Commissioner:

DEAR SIR: Your question of May 4th, "Would it be lawful and not in conflict with existing statutes to organize and operate in this State a mutual insurance company, without capital, to insure mill property and no other, throughout the State?" must, in my opinion, be answered in the negative. I am not aware of any statute now in force, authorizing the organization of mutual insurance companies, except town companies. Chapter 1, Gen. Laws 1872, repealed all acts and parts of acts, and laws of the State inconsistent with the provisions of said chapter. The incorporating and operating of mutual insurance companies without capital or assets would be inconsistent with the provisions of this chapter; hence, any law authorizing the organization of such companies is repealed, See sections 1, 3, 4, 5, and 6, subd. 3, tit. 3; and section 5, tit. 4, Laws 1872, *c.* 1. The language of section 2, tit. 4, of this act, "No mutual fire insurance company *not of this State* shall do business in this State unless," etc., is not to be construed as authorizing such companies within the State by implication. The manifest object of this section is to permit companies, already organized at the time the act went into operation, to continue to do business without being possessed of the requisite amount of cash surplus as provided for in said section 2.

May 6th, 1880. CHAS. M. START, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: I have your favor of the twenty-fourth inst., asking what construction is to be given to sections 10 and 11, *c.* 33, Gen. St. 1878, with reference to the capital stock of banks organized under said chapter. The construction claimed by parties interested, viz., "that from the absence of the words 'paid in' from the statute it is only necessary to provide for a capital stock in the articles of incorporation, and that payment may be called for according to the convenience of the shareholders or the demands of business," is untenable. Our banking law is crude, with but few practicable restrictions for the protection of depositors and other creditors, but it is not as absurd as such a construction would make it. As you suggest, if this view should obtain it might well happen that it would never be convenient for stockholders to pay for their stock, and the directors might be of the fixed opinion that the demands of business did not require such payments, and the result would be a banking corporation organized and doing business with no capital stock in fact, under and by virtue of a statute that provides that the capital stock of such corporation shall not be less than $25,000. The proper construction to be given to the statute under consideration is that no banking corporation can be organized by virtue of its provisions without *a paid-up* capital of at least $25,000

This view is, I think, fully sustained by the positive provisions of the statute. By section 10, *c.* 33, Gen. St. 1878, it is expressly declared that the aggregate capital stock of a bank organized under said chapter shall not be less than $25,000. The object of this provision is to insure the solvency of the institution, and thereby protect its depositors and creditors. This object would be defeated if the capital stock was never paid in. By section 11, Id., the certificate of incorporation must specify, among other matters, the amount of capital stock, but not *how or when it is to be paid in*, as is the case with other corporations, (see section 3, tit. 2, *c.* 34, Gen. St. 1878,) clearly implying that the stock must be paid up before the bank commences business. Hence there was no necessity that the articles of incorporation should provide how it should be paid in, nor when. The certificate must also state the name and residence of the shareholders, and the number of shares held by each; not its subscribers to the capital stock, but its actual owners, are to be named in the certificate. The capital stock is not to be subscribed for, and taken and paid for in the future, but it must all be taken and paid for before the organization of the bank is completed. By section 21, Id., a list of the names of the shareholders, with the amount of stock held by each, is required to be kept by the officers of the bank, and a copy thereof filed with the Register of Deeds of the proper county and with the State Auditor, on the first Monday in January and July in each year. How could this provision be complied with, if, in fact, there was no capital stock *paid in*, but simply provided for in the certificate of incorporation? Again, by section 31, Id., if the declared capital of the bank is reduced, the deficit must be made good by subscription of the shareholders, or out of subsequent accruing profits, before any dividend or profits can be made. If the capital stock is not required to be and has not been paid in when the bank was organized, why call for subscriptions to make it good, instead of providing for collecting what is due for the stock? How can a declared capital, payable at the convenience of the shareholders, or as business requires, and which has no existence except on paper, become reduced? It is unnecessary to extend the discussion. I think the sections referred to clearly show that all banks organized under the laws of the State must, before commencing business, have a paid-up capital of at least $25,000.

May 26th, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: I have examined the affidavits of William and John Johnson, submitted by you to me, and I herewith return the same. From these affidavits it appears that one John F. Pope purchased from the State, upon the usual terms, the N. W. ¼ of the N. E. ¼ section No. 16, town 108, range 10, receiving school-land

certificate No. 4,435 therefor; that John F. Pope assigned the certificate to James R. Pope, who assigned it to William and John Johnson; that the certificate and all the assignments have been lost, without having been recorded. The Johnsons ask that, upon paying the balance due the State, a patent for the lands be issued to them direct. Admitting the facts as stated in the affidavit, I think you would not be authorized to issue the patent to these parties direct. Patents should be issued in the name of the original purchaser, unless proof is made by competent evidence that the certificate has been duly assigned to the party claiming the patent, or that the party has succeeded to all the rights and title of the original purchaser. I know of no statute or rule of law that makes affidavits competent evidence in such cases. It would be establishing a very dangerous precedent to act upon such evidence. The most you can do for the applicants in this particular case would be to issue a duplicate of the original certificate (so marking it) and delivering to the parties; and upon their procuring deeds from the former owners, or assignments in the place of those lost, or establishing in court, in a proper action, their title to the premises, the patent could issue to them direct; otherwise it must be issued, if at all, in the name of the original purchaser.

May 29th, 1880. CHAS. M. START, Atty. Gen.

G. W. Hard, Esq., County Auditor, Fillmore Co.:

DEAR SIR: Yours of the twenty-seventh inst. is received. It should have been sent to the State Auditor, or the County Attorney of your county. However, to save time, I answer direct, without waiting for the question to be submitted to the State Auditor. The facts, as I understand them, upon which you desire advice are: That at the March session of the Board of County Commissioners of your county the Lanesboro *Journal* was designated by resolution as the newspaper in which to publish delinquent tax list for 1879. Afterwards, the name of the paper was changed to *Harding's Herald*, and subsequently to Lanesboro *Journal and Harding's Herald*. The paper is still published at the same office, and with the same press and type, and has the same subscription list as it had in March, and is in fact the Lanesboro *Journal* in all respects except its name, Upon these facts you ask if you would be authorized to deliver the list to the publisher of said paper. I think it is your duty so to do. The name of a newspaper, like that of a person, is used for the purpose of designation only; hence a change in the name is not material if its identity is preserved and can be established. The proof of the publication should show such identity; that is, that the Lanesboro *Journal and Harding's Herald* is the Lanesboro *Journal* in fact. Blackw. Tax Titles, marginal page 220; Isaac vs. Shattuck, 12 Vt. 668.

May 31st, 1880. CHAS. M. START, Atty. Gen.

C. E. Clark Esq., Co. Superintendent, Yellow Medicine, Granite Falls:

DEAR SIR: Yours of the first inst, is received. Your first question, "Is it necessary to have a joint meeting of the Commissioners of both counties to divide a school-district situated in the counties?" is answered by chapter 43, Gen. Laws 1879, which requires the petition for the alteration of the boundaries of school-districts consisting of parts of two counties to be made in duplicate and presented to the Commissioners of each county, who shall *severally* proceed to hear the petition. To effect the alteration requires the favorable action of the Commissioners of each county, but no joint meeting of the Commissioners of the counties is required.

Your second question presents some difficulties. As a general proposition, on the division of a municipal corporation into two separate corporations, *each*, in the absence of a different provision by the Legislature, is entitled to hold in severalty the public property that falls within its limits. I am not aware of any statute that

changes this rule. There should be a statute authorizing the Commissioners, upon dividing a school-district into two new ones, to make an equitable division of the property of the old district between them. Without such statute the Commissioners have no authority to make the division. Your letter should have been sent to the Superintendent of Public Instruction, for it is only on the written application of this officer the Attorney General is required to give his opinion. See Young's St. p. 477, § 48.

June 12th, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: In the matter of the petition of the City of Minneapolis for a rehearing upon the application of N. B. Harwood & Co. and others for an abatement of personal property taxes for the year 1879, I am of the opinion that you ought to be governed by the following conclusions: *First*, that under section 119 of chapter 11, Gen. St. 1878, the State Auditor has no jurisdiction or authority to hear and determine matters of grievance, relating to taxation on account of excessive valuation, except when the same are submitted with a favorable recommendation of the Commissioners and Auditor of the county in which the property is situated. The presentation to the State Auditor of such favorable recommendation is a condition precedent which must be complied with before the State Auditor can legally or properly act in the matter of abating taxes. *Second*, such favorable recommendation must be the official act of the Commissioners of the proper county, as a board, not the separate and individual act of a majority of the members of the board. Gen. St. 1878, p. 135, § 92; Baldwin vs. Canfield, 1 N. W. Rep. (N. S.) 261. Hence, in this matter, if there was no other recommendation of the abatement of the taxes in question to the State Auditor except that of individual members of the Board of County Commissioners, the State Auditor never acquired jurisdiction to act in the premises, and any pretended abatement is a nullity. *Third*, the State Auditor is an executive—not judicial—officer. As such, having once acted in the premises, he is not authorized to judicially determine that his previous action was illegal, and proceed to reverse it. Having once acted in the premises, he has exhausted all the powers conferred upon him by statute. He has not the incidental power to grant a rehearing or review of the matter. He may, without doubt, correct errors in computation or clerical mistakes; but where he has once acted in the premises and forwarded a certified copy of his action to the Auditor of the proper county, who has corrected his books in accordance with such decision, the validity of such action is a question for the courts alone.

I therefore advise that you dismiss the petition for a rehearing in this matter.

June 16th, 1880. CHAS. M. START, Atty. Gen.

Hon. Commissioners of Public Printing:

GENTLEMEN: In your favor of the third inst. you ask my advice upon the following statements therein contained, viz.: "The Commissioners duly advertised for sealed proposals for the execution of the several classes of public printing for the year commencing on the first day of November next. In response thereto they received five bids—one for each class—and no more; no two of the bids being for the same class. The lowest bid was one per cent. discount from maximum rates fixed by law, and the highest bid was one-eighth of one per cent. discount from said rate, averaging about one-half of one per cent. discount from maximum rates. The average rate paid by the State for the last three years has been a little more than sixty-six and two-thirds per cent. discount from maximum rates,—a difference of over sixty-six per cent.; or in round numbers, if the printing should be let at the rates bid, it will cost the State, for printing the ensuing year, at least $30,000 more than

it would if the past average rates paid were continued. The Commissioners are satisfied that the bids were the result of a combination to prevent competition, and to compel the State to pay full maximum rates, which, in view of prices heretofore paid, appear to be extravagantly high, and if they have authority to advertise for new proposals they believe that responsible bids, much more favorable to the State, will be received; therefore they desire to be advised whether they would be justified in rejecting the bids received and advertising for new proposals."

The advice I shall give you is based upon the hypothesis that you are correct in your conclusion that the bids were the result of a combination to prevent competition, and to compel the State to pay full maximum rates. One of the principal objects to be secured by the course of procedure prescribed by chapter 5, Young's St., relating to the State printing, is a fair and actual competition among the bidders for the work to be done. Hence, any combination or agreement on the part of the bidders, the object and effect of which is to stifle such competition, is contrary to the policy of the law, dangerous to the rights of the State, and fraudulent in its design; and any bid made in pursuance of such a combination may be treated as a nullity. While it must be admitted that the law has left little or nothing to your discretion in the premises, yet if it be true that the bids for the public printing were the result of an agreement among the bidders, whereby each was to limit his bid to a particular class of printing, and not to compete for the other classes, all such bids are fraudulent and void, and you may proceed as if no such proposals had been received in response to your advertisement; for it would be a reproach to the law if, by a technical compliance with its forms, a fraud could be perpetrated upon the State which her officers must assist in carrying into effect. The question whether, in case you treat the bids as a nullity and proceed as if none had been received, you are authorized to advertise for new proposals, is not free from doubt. The statute does not give express authority so to do in any case, although no bids are received in answer to the first advertisement, to be given in the month of May in each year. I think, however, such authority is given by necessary implication. The public printing must be done; it can only be done by contract; the contract can only be let in the particular way pointed out by law. The time within which the contract is to be awarded is not necessarily material, and the express authority to the Commissioners to contract for the printing carries with it all power essential to carrying out the object of the law; and if for any reason there is a failure of bidders, for the whole or any particular class of the public printing, in response to your first advertisement, you may again advertise for new proposals.

July 7th, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: I am in receipt of the communication of Telephone Exchange Company in regard to the taxation of the company referred to me by you. The property of the company is to be listed for taxation in accordance with the provisions of section 22, *c.* 11, Young's St. It cannot, for the purposes of taxation, be regarded as a telegraph company, so as to except it from the operation of said sections.

July 7th, 1880. CHAS. M. START, Atty. Gen.

Daniel Rohrer, Esq., Co. Attorney, Nobles Co.:

DEAR SIR: Yours of July 2d, with petition of William Brown, asking for an abatement of taxation on railroad land, which he holds by contract, to correspond with his interest in the same, is received. I think the decision of the Supreme Court in the case referred to by you settles the question that where the title is in the railroad a tax against the fee is not valid. The interest of the purchaser in the land and his improvements should be taxed as personal property. The taxes can

only be abated by the action of the Board of County Commissioners, and the recommendation of the County Auditor, and the approval of the State Auditor. Young's St. c. 11, § 119.

July 7th, 1880. CHAS. M. START, Atty. Gen.

Hon. D. Burt, Supt. Public Instruction:

I am in receipt of the communication referred to, of the director of school-district No. 9, Meeker county, asking my official opinion upon the following question, viz.: "Can the Board of Trustees of a school-district, before the election of the new member, before the length of the school year next ensuing has been determined by the annual meeting, and before the appropriation of money therefor has been made, bind the *new board* (district, I suppose he means) for the incoming year?"

The powers and duties of the Trustees, in relation to levying taxes and employing teachers, are fixed by sections 24 and 31, c. 36, Young's St. By section 24 the Trustees are empowered to levy a tax (in case the district neglects to vote such tax) sufficient to support a school for the time (three months) in each year necessary to secure for the district apportionments from the State school funds. The legal voters, not the trustees, may vote to have a school any further length of time deemed proper, provided that the Trustees, in any action taken without definite instructions, shall not permit the current expenses of the school in any year to exceed the amount they are authorized to levy. By section 31 the Trustees are required and authorized to "hire teachers for and in the name of the district, * * * and furnish all things necessary for the school-house during the time a school shall be taught therein, which shall be at least three months in each school year, and such further time as the district may by vote direct."

From the foregoing provisions it seems clear that the Board of Trustees may, without express authority from the district, hire a teacher and provide for a three months' school, and for no longer term, unless expressly authorized by a vote of the district. The language used in the sections of the school law referred to implies a restriction upon the powers of the Trustees, and if, in advance of the annual meeting of the district, and without authority from the district, they should hire a teacher for a longer period than three months, the contract in excess of three months would not be binding upon the district unless it was ratified by the district and the legal voters saw fit to levy a tax to enable the Trustees to carry out their contract. In other words, it matters not whether it is before the annual meeting and the election of the new member or not; the Trustees may, without express authority from the district, contract for a three-months' school, and no more; and all attempts to contract for a longer time would not be binding on the district unless ratified by the district. Op. Attys. Gen. 258.

July 13th, 1880. CHAS. M. START, Atty. Gen.

C. C. Kinsman, Esq., County Attorney, Mower County, Austin, Minn.:

DEAR SIR: Yours of the twentieth inst. is received, in which you submit the following statement for my opinion, viz.: The County Commissioners of Mower county have exhausted the limit of compensation fixed by section 100, p. 137, Young's St., in attending to the business of the county, and have not yet been paid for services as members of the Board of Equalization. *Question.* Are they entitled to compensation as members of such board? I think not. The statute gives no compensation in terms for such services. If there is any law giving compensation it is section 100, p. 137, Young's St., which provides that County Commissioners shall receive three dollars per day, not exceeding 20 days in each year, while necessarily employed in county business. By a liberal construction I think "county business" would include services while acting as a member of the Board of Equalization; but, having already received pay for 20 full days' services the present

year, they can receive nothing further as members of the Board of Equalization. The law imposes the duty and it must be performed, although it may not give compensation for the same.

July 21st, 1880. CHAS. M. START, Atty. Gen.

W. E. Hale, Esq., County Attorney, Hennepin County:

DEAR SIR: Yours of the sixth inst. is received, relating to the fees of the County Commissioners of Hennepin county. I am satisfied that you are correct; that they are not entitled to compensation while acting as members of the Board of Equalization, by the provisions of chapter 205, Sp. Laws 1877, relating to the meetings, duties, and compensation of the County Commissioners of Hennepin county. This act is silent as to services of Commissioners while acting as a Board of Equalization. It seems to have been drafted upon the assumption that compensation for such service was fixed by general law. Such, however, is not the case. In practice, in counties where the general law is in force, County Commissioners are paid for such services under the provisions of section 100, p. 137, Young's St. To justify this practice requires a *very liberal* construction of the section referred to. While there is no express repeal of this section, so far as the same relates to Hennepin county, yet they must look to special acts alone to determine the compensation. If they seek to bring themselves under the general law, they must take it with its limitation, viz., that they can receive pay for no more than 20 days' services in any one year. I should advise the commissioners that it is a case of an omission of the Legislature to grant compensation for services that must be performed and should be paid for; that the omission ought not to be supplied arbitrarily by the Commissioners, although substantial justice could be promoted thereby, but that relief should be sought from the Legislature by a special act fixing their compensation for the future, and authorizing payment for past services.

July 22d, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: Yours of the 23d, stating that the Board of Equalization of Anoka county failed to meet and organize on the third Monday of July, as required by law, is received. The necessity for a prompt answer forbids any extended discussion of the matter. An omission on the part of County Commissioners to equalize and credit the assessment tables renders any tax levied on such assessment void. Board of Co. Com'rs Dakota Co. vs. Parker, 7 Minn. 267. The day fixed for the meeting of the Board is mandatory, not discretionary. The law fixes the day on which they shall meet, so that tax-payers may have notice of the time of meeting, and opportunity to be heard. If it was discretionary for the Board to meet on some day other than that fixed by law, this opportunity would be lost to its tax-payers. "The interest of the public and protection to tax-payers require that the time during which the Board shall sit shall be, as far as may be, fixed by law, and not left to the will of the Board." Com'rs St. Louis Co. vs. Nettleton, 22 Minn. 365. The Board could not now assemble and make a valid equalization of the value of the property of the county. If you think advisable, they might convene and discharge the duties imposed on them by law, and a special act be passed by the Legislature, legalizing their act. Whether or not such an act would render the tax levy for the year 1880 valid or not, I have no time to discuss. The course herein suggested would undoubtedly result in the collection of a large portion of the tax. I would not send them any copy of this letter, but notify them to convene, for the less discussion there is about the matter the better, in case you conclude to take the course indicated, which, on the whole, is about the only thing that can be done.

July 24th, 1880. CHAS. M. START, Atty. Gen.

A. E. Flint, Esq., Co. Atty., Marshall Co., Warren:

DEAR SIR: Yours of July 29th received. The Legislature has the power, by special act or otherwise, to organize two or more congressional townships into one town. For example, the town of Moorhead was organized by special act, which was sustained by the Supreme Court in a recent decision; but there is no statute that I know of that authorizes the County Commissioners to organize two full townships or more, having each 100 or more inhabitants, into one town.

August 5th, 1880. CHAS. M. START, Atty. Gen.

Albert Shaller, Esq., Co. Atty., Dakota Co.:

DEAR SIR: Yours of the fourth inst., with copy of County Treasurer's account against your county, is received. The bill, and the whole thereof, should be disallowed by the County Commissioners. Section 172, c. 8, Young's St., fixes the compensation of County Treasurers in full of all services. This may be a hardship in some special cases, but when a party accepts an office he does so with all its burdens, for the compensation fixed by law. If the law imposes duties, but gives no compensation, the duties must be discharged; the officer can resign if the salary is wholly inadequate to the duties to be performed.

August 5th, 1880. CHAS. M. START, Atty. Gen.

H. Nelson, Esq., County Treasurer, Fergus Falls:

DEAR SIR: It is the general rule of this office that no county officer will be officially advised except County Attorneys, as it is the duty of that officer, not mine, to advise county officers in regard to their official duties. I presume in this instance there was some good reason why he was not consulted, and I answer, for this time, your questions in the order named: *First.* A certificate of appointment of your deputy and a certified copy of the tax-list is all the authority your deputy requires to authorize him to collect personal property taxes by distress or otherwise. *Second.* The treasurer or his deputy must make diligent search and inquiry for goods and chattels wherewith to collect the tax; he must satisfy himself that the delinquent has no property. The extent of his search and inquiry depends on circumstances; if he cannot satisfy himself without a personal visit to the delinquent, he must call upon him. As a rule, I should say it would be necessary so to do in order to make the affidavit mentioned in chapter 59. Chapter 11, Young's St. *Third.* There is nothing exempt from the payment of taxes, but the Treasurer would not be called upon to seize and carry away from a destitute family articles of no marketable value. If he can find property that can be sold for cash, to pay taxes and costs, he should take it. *Fourth.* The Treasurer is to return as delinquent all personal property taxes that he is unable to collect for want of goods and chattels. Yet, if he subsequently ascertains that there are taxes that he can collect by distress, I think he has authority to do so. Such remedy is concurrent with that pointed out in section 60, Id. *Fifth.* The fees of the treasurer or his deputy, where taxes are collected by distress, are the same as those allowed to constables on execution sales, viz.: 10 cents per mile each way for travel; copy of inventory of property seized, 15 cents; posting three notices of sale, 15 cents each; 5 per cent. on amount collected, and necessary expenses of removing and caring for property. No fees are allowed unless levy is made. The county is not liable for them. The Treasurer must get them, if at all, out of the delinquent or his property.

August 5th, 1880. CHAS. M. START, Atty. Gen.

Hon. D. Burt, Supt. of Pub. Inst.:

DEAR SIR: Herewith I return to you statement of facts agreed upon by the Board of County Commissioners of Polk county, and Thomas Dickson and others, on behalf of school-district No. 7 of said county. I do not deem it necessary or expedient to answer the questions appended to the statement by the parties. A shorter solution of the difficulties may be found. The proceedings of the County Commissioners set forth in the statement were irregular in many respects; but time has cured them. The statute provides that every school-district shall be presumed to have been legally organized when it shall have exercised the franchises of a district for one year." Gen. St. 1878, *c.* 36, § 1. It is conceded that the action of the Commissioners in canceling the organization of the then district No. 7, dividing its territory between districts Nos. 17 and 18, and organizing other territory into, and designating the same as, district No. 7 was irregular; yet the fact remains that this action was more than two years ago; that districts Nos. 17 and 18 have, for a year at least, exercised the franchises of school-districts; and it must be presumed that they were legally organized, and that the original district No. 7, if it ever had a corporate existence, is not now entitled to be recognized as a school-district.

ST. PAUL, August 5th, 1880. CHAS. M. START, Atty. Gen.

O. J. Wood Esq., County Attorney, Chippewa County:

DEAR SIR: Your favor of the tenth inst. is received, from which it appears that your county has been recently redistricted, and the number of Commissioner districts increased from three to five, and upon this statement you ask how many Commissioners are to be elected in your county the coming election, the terms of the present Commissioners expiring January, 1881, and in one and two years thereafter? Five; one for each district. This answer is based upon the assumption that the action of your board in redistricting the county was legal. Section 96, *c.* 8, Young's St., provides that "at the first election, when the County Commissioners will consist of five members, the person elected for district No. 1 shall hold his office for one year; the persons elected for districts Nos. 2 and 3, for two years; and the persons elected from districts 4 and 5, for three years; and thereafter the Commissioners elected shall hold for the term of three years." This requires the election of an entire new board at the first election next after the county is redistricted, and the number of districts increased from three to five. This is the view taken of the statute by my predecessors in office. In an opinion dated September 8, 1871, the then Attorney General, Cornell, speaking of this section of the statute, says: "The term of office of the members of the old board is subject to the power to redistrict, and when such power is legally exercised, it necessarily affects the term of such office."

August 13th, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Land Commissioner:

DEAR SIR: Herewith I return to you the abstract and application of Hugo Knoff for a patent for the S. W. ¼ of S. W. ¼ of section 16, township 708, range 26, to be issued in his name. It appears that in 1865 a tax deed of the premises was made to one Law, and that, by several quitclaim deeds, whatever title Law had to the land is now vested in Knoff, who makes application for the patent, and files affidavit that the original school-land certificate for the purchase of said premises has been lost, and that he is the assignee thereof. None of the assignments are produced. It does not clearly appear whether he claims the patent by virtue of the tax deed, or as assignee of the school-land certificate. Perhaps this is not material; for I am of the opinion that the patent for the land cannot be properly issued in his

name upon either claim. I am not aware of any statute authorizing the acceptance of an *ex parte* affidavit of the loss, assignment and present ownership of the original certificate, by one claiming to be the assignee thereof, in lieu of the return of the certificate, or transfer of the land therein described from the original purchaser to the party claiming the patent, which are necessary conditions to the issuing of the patent in the name of any person other than the original purchaser. The applicant is not entitled to have the patent issue in his name by virtue of the tax deed referred to, under the provisions of section 21, *c.* 38, Young's St. This section, as it now reads, was first enacted in 1870, nearly five years after the tax deed was made. Waiving the question whether or not this section is retroactive, it is clear that the applicant has never acted under its provisions, and does not bring himself within them. He has never filed his tax deed in your office, and no special certificate has been issued to him, or the parties through whom he claims. I therefore advise that if the applicant desires the patent to be issued at this time, it be issued in the name of the original purchaser.

August 14th, 1880. CHAS. M. START, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: I have your favor of the tenth inst., inclosing communication of Auditor of Lincoln county, submitting the following statement for your advice, viz.: The Commissioners of the county have not, since the organization of the county, provided offices for the county officers who have kept their offices at their private residences. They now present claims against the county for rent, fuel, etc., to an amount believed by the Commissioners to be unreasonable. *Question.* Has the Board power to determine what is a fair allowance, or is the county entirely at the mercy of the claimants? The Board should be advised that no more than a just and reasonable sum should be allowed in the premises. The Board is not bound to allow whatever sum is claimed.

Advice is also asked in regard to the duty of the Board of County Commissioners in case they find that the County Treasurer is short of funds. They can cause him to be prosecuted under the provisions of section 36, *c.* 95, Young's St., and in case he fails to pay over on demand the amount with which he stands charged, in the manner prescribed by law, they may cause an action to be commenced on his official bond, and when an action is commenced they may remove him. Young's St. *c.* 8, §§ 158, 159.

August 14th, 1880. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor Minnesota:

SIR: Herewith I hand you the report and supplementary report of the State Agricultural Society for 1879. Section 195, p. 408, Young's St., requires an accurate account of the manner of the expenditure of the money received from the State, and the society must transmit a certified copy of such account, signed by the President and Secretary of the society, to the Governor of the State, and a failure to make the required report of the disbursement of the fund received for one year works a forfeiture of the sum appropriated for the succeeding year. The reports do not comply with this section. Before the Society secures the $1,000 for this year it should file with your Excellency a certified copy of the account, signed by the President and Secretary, showing to whom and for what purpose the $1,000 received last year was paid. The object of the law requiring this account is to compel a compliance with section 191, p. 407, Young's St., which forbids the payment of any portion of the State appropriation for salaries or fees of officers, or as premiums for horse-racing.

August 20th, 1880. CHAS. M. START, Atty. Gen.

F. W. Pearsall, Esq., County Attorney, Lac Qui Parle:

DEAR SIR: Yours of the twenty-sixth inst. received. I answer your questions in the order named: *First.* "When is the United States census deemed to be legally completed, so as to justify the Board of County Commissioners acting upon it as a basis for redistricting their counties into Commissioner districts, under section 97, *c.* 8, Young's St.?" It may be regarded as completed for such purpose as soon as the returns are corrected and filed in the office of the Clerk of the District Court for the proper county. *Second.* "Where the Commissioner districts are increased from three to five, how many Commissioners must be elected at the first election after such redistricting?" Five. This is expressly provided for by section 96, Id. This section provides for the election of an entire new Board of County Commissioners at the first election occurring next after the number of districts are increased from three to five. Although the term of the Commissioners in the three old districts has not yet expired, they hold their office subject to the power to redistrict the county. *Third.* "Is it obligatory upon the County Commissioners to redistrict the county?" By section 92 it is provided that the Board *shall* consist of five members in those counties that poll 800 or more votes. Therefore, whenever a county has the requisite number of legal voters, I think it is the duty of the Board to redistrict the county, and increase the districts to five. Section 93, Id., has no application to the question under consideration, but applies to a case where the number is not increased.

August 31st, 1880. CHAS. M. START, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: The facts upon which my opinion is desired are briefly as follows: At the November, 1878, election A. J. Crain was elected County Treasurer of Lincoln county for the full term of two years, commencing March 1, 1879. He accepted the office, but resigned October 1, 1879, and Bigham, the present incumbent was appointed, who was afterwards, and at the November, 1879, election, duly elected County Treasurer of said county. *Question.* When does Bigham's term expire? March 1, 1881. The election held in November, 1879, was to fill a vacancy in the office occasioned by the resignation of Crain, for unless there was a vacancy to be filled there would be no authority for holding the election, the original term not having then expired. The previous appointment of Bigham filled the vacancy only for the time being; the power to appoint to fill the vacancy is but a temporary expedient to avoid the inconvenience of a special election. Having been elected to fill a vacancy, Bigham can only hold for the unexpired portion of Crain's original term; that is, to March 1, 1880. Young's St. *c.* 1, § 46. The provisions of chapter 8, § 144, Id., fixing the term of County Treasurer at two years, apply only to cases where the Treasurer is elected for the regular term, and not to cases where he is elected to fill a vacancy.

September 9th, 1880. CHAS. M. START, Atty. Gen.

Hon. D. Burt, Superintendent Public Instruction:

DEAR SIR: Your question—"Is instruction in the Greek grammar and lessons by the high schools of the State an essential prerequisite to their receiving aid under the provisions of the act entitled 'An act for the encouragement of higher education,' approved March 9, 1878?"—should, I think, be answered in the negative. By section 3 of said act (Young's St. p. 497, § 150) it is made a condition precedent that there be, in schools applying for aid, regular and orderly courses of study, embracing all the branches prescribed as prerequisite for admission to the collegiate department of the University of Minnesota not lower than the third or sub-freshman class. This requires instruction in all the branches essential to admit students to

any (not all) of the courses of the collegiate department of the University. There seem to be three courses in the collegiate department, viz., classical, scientific, and modern. Students may be admitted to the collegiate department of the University of Minnesota in either the scientific or modern course without an examination of Greek. Therefore, high schools applying for aid, who have complied with the law in other respects, are entitled to it, although Greek is not taught in said schools.

ST. PAUL, September 20th, 1880. CHAS. M. START, Atty. Gen.

Hon. D. Burt, Superintendent Public Instruction:

DEAR SIR: In reply to the questions submitted to me in reference to the vote upon the question of the continued use of the State text-books, I have the honor to advise you as follows:

First. Women are not entitled to vote on the question. True, it is a measure relating to schools, but the right of women to vote on such measures is limited by law to voting at the election or meeting in the school-district of which they shall at the time have been for 10 days a resident. Young's St. p. 468, § 13. The question is to be voted on at the next general election, at the usual polling places, and not at a school-district meeting or election held within the district. Hence, women cannot vote on the question. Young's St. p. 503, § 175.

Second. Electors residing in districts not subject to the provisions of the State text-books act are not entitled to vote on this question. The act is not obligatory upon Boards of Education acting under special charters. Young's St. 503. Therefore, electors residing in cities or towns having Boards of Education organized and acting under special charters cannot vote on the question.

Third. With the foregoing exceptions, all legal voters of the State are authorized to vote on the question, including electors in independent districts; for the Boards of Education of such districts are organized and act under the general laws of the State, and not under special charters.

ST. PAUL, September 20th, 1880. CHAS. M. START, Atty. Gen.

J. W. Reynolds, Esq., County Attorney:

DEAR SIR: Yours of the twelfth inst. received. I think that every organized county is entitled to elect a County Attorney, although it may be attached to some other county for judicial purposes, and such seems to be the practice in nearly all organized counties. Such counties are not entitled to a Clerk of the Court, because, by the constitution, (article 11, § 13,) it is only in counties where a district court is held that Clerks are to be elected. There are many duties enjoined upon County Attorneys by law that would not be applicable to County Attorneys in counties attached to another county for judicial purposes; but county officers need his advice, without reference to whether there is a term of court held in their county or not, particularly the Board of County Commissioners. This is the view of the question to take, I think, although some of the provisions of section 210, c. 8, Young's St., would seem to be inconsistent therewith. It is to be observed that the right of your county to have a County Attorney is expressly recognized by the act organizing the same. Section 3, c. 91, Gen. Laws 1873, p. 208.

October 16th, 1880. CHAS. M. START, Atty. Gen.

S. W. Hays, Esq., Redwood Falls:

DEAR SIR: By request of S. L. Bigham I write you in reference to the term of office of the Clerk of the District Court, where he is elected on the happening of a vacancy. There is considerable confusion in regard to the term of officers who are

elected in case of a vacancy, arising from the fact that the terms of some officers are fixed by the Constitution; others by the statute alone. The Legislature has no power to shorten the term of office where it is fixed by the Constitution; hence, in the case of the election of an officer whose term is fixed by the Constitution, he holds for the *full constitutional term*, whether elected upon the occasion of a vacancy or not; the statute cannot shorten the term fixed by the Constitution. Thus, whenever a Judge of the District or Supreme Court is elected, whether to fill a vacancy or not, he will hold for the full term of seven years. Whenever a Judge of Probate or a Justice of the Peace is elected he always holds for the term of two years. Whenever a Clerk of the District Court is elected he holds for the full terms of four years, whether elected to fill a vacancy or not, because the terms of these officers are *fixed by the Constitution*. In the case of all other officers whose term is not fixed by the Constitution, where they are elected to fill a vacancy, they hold only for the unexpired portion of the original term, in accordance with section 46, *c.* 1, Young's St. Thus, if a County Treasurer is elected to fill a vacancy, he holds only for the unexpired portion of the original term. If you elect a Clerk of the District Court this fall he will hold his office for the full term of four years. State Const. art. 11, § 13; Crowell vs. Lambert, 9 Minn. 283.

October 26th, 1880. CHAS. M. START, Atty. Gen.

A. C. Forbes, Esq., County Atty., Lyon Co.:

DEAR SIR: I think the regular term of office of County Commissioners begins January 1st next succeeding their election. Section 45, *c.* 1, Gen. St. This section must be held to control section 99, *c.* 8, Gen. St., if there is any conflict between them. I do not think the two sections conflict. Section 99 does not say *when* the Commissioner shall receive his certificate, neither is he required to enter upon the duties of his office immediately after receiving the certificate. It does not follow that an officer must enter upon his term of office immediately after he qualifies. Where the number of districts is increased, the Commissioner's term of office begins January 1st.

November 4th, 1880. CHAS. M. START, Atty. Gen.

Hon. Z. G. Redding, Judge of Probate:

DEAR SIR: Yours of the sixth inst. received. Your question, "Has a Judge of Probate lawful authority to perform the marriage ceremony?" must be answered in the affirmative. Probate Courts are courts of record. State Const. art. 6, § 7. "Marriage may be solemnized by any judge of a court of record." Young's St. p. 623, § 4. Therefore, a Judge of the Probate Court may perform the marriage ceremony.

ST. PAUL, November 9th, 1880. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: Herewith I return the application for the appointment of a State Temperance Detective, referred to me by your Excellency. I advise that the same be refused, for the reason that such appointment would be wholly without authority on your part. There is no such officer known to the constitution and laws of this State. If the usual and ordinary legal machinery for the punishment of crime is found in practice to be inadequate, necessitating the appointment of special officers, relief must be sought from the Legislature. Your Excellency has no authority to create new offices.

November 11th, 1880. CHAS. M. START, Atty. Gen.

John P. Williams, Esq., Judge of Probate, Fergus Falls:

DEAR SIR: Yours of the 13th received. I regret that I cannot concur with you in regard to the method of computing your fees. It seems quite clear to me that the census of 1880 cannot be made the basis of computing the salary of the Judge of Probate for that year. By section 5, *c.* 7, Young's St., the salary of the Judge of Probate is fixed at a definite sum per year for the first thousand inhabitants, and a further sum for each additional thousand inhabitants, to be paid *quarter yearly*, upon the warrant of the County Auditor. By section 6, Id., the Auditor is to determine the population by the rule therein stated, for the purpose of ascertaining the Judge's salary for the year. He must necessarily do this before he draws any warrant for a quarter year's salary. The first quarter for the year 1880 became due before the census was taken. Having fixed the basis of the salary for the year, I do not think the Auditor would be authorized to change it.

November 18th, 1880. CHAS. M. START, Atty. Gen.

Hon. D. Burt, Superintendent of Public Instruction:

DEAR SIR: Replying to the communication of James Callan, Esq., referred to this office by you, I think he should be advised that the school-district having, at a meeting of the electors thereof, adjusted the claim of the special committee (mentioned by Mr. Callan) for compensation, the Board of Trustees of the district have nothing to do with allowing or disallowing the claim. The district has attended to that matter, recognized the claim as valid, and voted to pay it. The clerk is authorized to draw an order for the amount in accordance with the vote.

November 18th, 1880. CHAS. M. START, Atty. Gen.

Hon. D. Burt, Supt. Public Instruction:

DEAR SIR: In reply to the communication of the County Superintendent of Le Sueur county I have to say that by section 1, subchapter 4 of chapter 74, Laws 1877, the office of County Superintendent of Schools is made elective throughout the State, and the term of office is to commence on the first Monday in December next after the election. The effect of this statute is to repeal chapter 97, Sp. Laws 1876, which provides for the election of County Superintendents of Schools in certain counties, (Le Sueur being among the number,) except that by the proviso to the act of 1877 County Superintendents of Schools in the counties referred to were continued in office until their successors were elected in 1878; from and after that time the general law governs in all the counties of the State. From this view it follows that it was proper to elect a County Superintendent in Le Sueur county at the general election of 1878; that the term of office of the person then elected expires on the first Monday in December, 1880; and that the person elected at the last general election is, if he qualifies, entitled to the office on that day.

December 3d, 1880. CHAS. M. START, Atty. Gen.

Wm. R. Patten, Esq., City Solicitor, Manchester, N. H.:

DEAR SIR: I have received yours of November 30th, stating that by your laws a person owing the city for taxes on personal property can be arrested anywhere in the state without a warrant, and kept in jail until payment, and asking if the party so owing your city taxes could be taken back from this State without a requisition? The party could not be taken out of this State for the cause specified, either with or without a requisition. Perhaps, it is owing to the ruder civilization of the West, as compared with the humane culture of New England, that poverty is not recog-

nized as a crime in this State; there is no imprisonment for debt or taxes here, with or without process.

December 4th, 1880. CHAS. M. START, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

DEAR SIR: You ask my opinion upon the following questions: *First.* Can a bank or banker having no stock or assessed capital be lawfully designated as a depository of the funds of a county? *Second.* Can mortgages on real or personal property be accepted as security of the public funds in lieu of the bond required by law? *Third.* If a bank or banker is designated as such depository, without complying with the statute in such case made and provided, and the County Treasurer deposits public funds therein, are the sureties on his bond released, in case of loss, by reason of the failure of the bank?

I am of the opinion that all these questions must be answered in the negative. The law in regard to the deposit and safe-keeping of county funds must be substantially complied with. By the second subdivision of section 150, *c.* 8, Young's St., it is expressly provided that the amount deposited in any bank or banking-house shall not exceed the assessed capital stock of such bank or banking-house as shall appear on the duplicate tax-list. By the third subdivision of the same section the character of the security to be accepted is defined; it requires a bond to be signed by not less than five freeholders of the county as sureties. This requirement is mandatory, and no departure from it should be permitted. If the bond is not given by the bank, it is not a legal depository of the funds. The County Treasurer and the sureties on his bond are primarily liable for the safe-keeping of all public money that he receives; but when he deposits the funds of the county in the manner provided by law, he and his sureties are exempt from liability if loss occurs by reason of the failure of the depository. Section 153, *c.* 8, Young's St. If the Treasurer deposits in an unauthorized depository, it is not a deposit as provided by law. He should decline to deposit in a bank that has failed to comply with the law in the giving of the bond required, unless he is willing to assume the responsibility of so doing.

December 6th, 1880. CHAS. M. START, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: The facts upon which you desire to be advised are as follows: The valuation of the taxable property in a county where there is no special law regulating the County Treasurer's salary is over six but less than eight millions of dollars. That the Attorney of the county in question claims that the Treasurer's fees should be computed in accordance with the provisions of chapter 139, Gen. Laws 1873, assigning as a reason therefor that section 3, *c.* 120, Gen. Laws 1877, (Young's St. *c.* 8, § 172,) has no application to counties having a valuation between six and eight millions of dollars of taxable property.

The question is, what is the maximum salary of the County Treasurer of said county? In answering this question we must determine whether or not the act of 1877 applies to said county. I am clearly of the opinion that it does, and that it is the only general statute now in force regulating the salaries of County Treasurers. This conclusion follows from the application of an elementary rule for the construction of amendments to statutes. The rule, briefly stated, is that in the amendment of a section of a statute "so as to read as follows," that which follows takes the place of the original, is a substitute for it, and operates as a repeal of all the provisions of the original section not re-enacted in the amendment. Examine section 3, *c.* 120, Laws 1877, in the light of this rule. It reads "that section 150 of chapter 8 of the General Statutes, as amended by section 1, *c.* 39, of the General Laws of 1873, also amended by section 2 of chapter 27, General Laws 1875, be amended *so as to*

read as follows." Then follow the provisions and limitations in regard to County Treasurers' salaries, as found in section 172, c. 8, Young's St. This section takes the place of all previous laws on the subject, and to it we must alone look for a solution of your question. By this section no County Treasurer can receive more than $1,200 for his services in any one year, in counties where the valuation of taxable property is less than four millions; nor more than $1,500 where it exceeds four but is less than six millions; nor more than $2,000 where such valuation exceeds eight but not ten millions. There is no express limitation where the valuation is between six and eight millions; hence, the *supposed* difficulty of the case; but it is to be observed that it is expressly provided that the treasurer's salary cannot exceed $2,000 when the valuation does not exceed ten millions. The greater includes the less; hence, the maximum salary could not exceed $2,000 in counties where the valuation is between six and eight millions of dollars. In other words, the only effect of the omission to fix a limitation, where the valuatiou is between six and eight millions, is to make the limitation of $2,000 applicable to all counties where the valuation is between six and ten millions. [*Contra*, 30 Minn. 392.]

ST. PAUL, December 13th, 1880, CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: In the matter of the application of the St. Paul, Minneapolis & Manitoba Railway Company for an abatement of taxes on lands owned by it, for the reason that the lands were and are exempt from taxation, I understand that tax judgments have been entered against the lands, and they have been sold to the State by virtue of the judgments. If this is the case, and conceding that the lands were exempt from taxation, I advise that you have no authority to consent to or grant the abatement. This advice is based upon the broad proposition that after a judgment has been entered against the land for the non-payment of taxes, whether the land is legally taxable or not, there can be no abatement of the taxes, or vacation of the judgment, or cancellation of the sale, by any executive officer or board. In the proceedings to obtain a tax judgment the first step is the filing with the Clerk of the proper county the delinquent list containing a description of the real estate upon which it is claimed there are unpaid taxes. The filing of this list has the force and effect of the commencement of an action of the county against each parcel of land therein described. It tenders to the land-owner, and all persons or corporations interested therein, the issue that the land is subject to taxation, that the taxes have been duly and legally assessed thereon, and are unpaid. Notice of the commencement of the action is published, and the land-owner required to answer the issue tendered, or judgment will be entered against the land. If he fails to answer, and the tax judgment is entered, the issue is judicially determined against the land-owner. If such is the effect of a tax judgment, it follows that neither the State Auditor nor any Board of Abatement are invested with the judicial power to vacate, or disturb in any manner, the judgment and sale thereunder, or determine whether the court had jurisdiction to enter the judgment or not. By this I am not to be understood as denying the power of the legislature to authorize the State Auditor to satisfy the judgment and sale where the State has bid in the lands and still holds them, on such terms and under such circumstances as may be prescribed by law, but that there is no statute now in force authorizing it. I think the question as to the effect of a tax judgment against real estate, although it may be by law exempt, is practically settled by the Supreme Court, in the Matter of the Petition of the Duluth Railroad Co. to Vacate Certain Tax Judgments, 6 N. W. Rep. 454; [S. C. 27 Minn. 109.] In this case tax judgments had been entered by default against certain lands of the company. Application was made to the District Court to open the judgments for the sole reason that the lands *were by law exempt from taxation*. The court granted the order, and set aside the judgments for that reason. The Supreme Court reverses the order, and says: "The judgments in these proceedings necessarily involve and determine that the tax appearing in the list was

or was not lawfully imposed. It is the policy of the statute that every objection to the enforcement of the taxes appearing on the list filed should be litigated and decided in those proceedings. That the land is exempt, or that the tax has been paid, is a defense that must be made by answer and proofs. Section 79. The court below erred in holding that the exemption went to the jurisdiction of the court."

ST. PAUL, December 23d, 1880. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor:

SIR: As I gather them from the letter of the Judge of Probate of Crow Wing county, referred to me, the following are the facts upon which advice is desired: The term of office of the present incumbent of the office of the Judge of Probate expired January, 1880. At the general election next before, his successor was duly elected, but refused to qualify, and the then and present incumbent has continued to discharge the duties of the office ever since. At the last general election another person was elected to the office. Upon these facts the present incumbent raises the question whether or not under the Constitution he can legally transfer the office to the person so elected. In my opinion he not only legally can, but it is his duty so to do. By the terms of our State Constitution the term of office of Judge of Probate is fixed at two years. The usual words, "and until his successor is elected and qualified," are omitted. Hence, the term of the present incumbent expired at the end of two years, although his successor failed to qualify.

By section 2, *c.* 9, Gen. St. 1878, an office becomes vacant upon the neglect or refusal of the person elected to the same to give the bond and take the oath within the time prescribed by law. The Judge of Probate is required by law to give bond and take oath of office before entering upon the duties of the office. The refusal of the person elected to the office to give the bond and take the oath within a reasonable time, created a vacancy in the office; the then incumbent would not hold over. Although the present incumbent has continued to discharge the duties of the office ever since the vacancy occurred, it was as a *de facto* officer only. The vacancy having been created by the failure of the person elected to qualify, the case does not fall within a strict construction of article 6, § 10, State Const., which provides that in case the office of any Judge shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by the governor, and that a successor shall be elected at the next annual election that occurs more than 30 days after the vacancy happens; for the person elected cannot technically be called a Judge until he qualifies. But the section must be construed with reference to its manifest object and purpose, viz., to provide for the filling of all vacancies, from whatever cause. It must be so construed as to prevent any interregnum in the office. Construing the section in accordance with its spirit, rather than with literal exactness, I have no doubt that the election to fill the vacancy was legal, and that the person so elected at the last general election will be, if he qualifies, entitled to hold the office for two years. Crowell vs. Lambert, 9 Minn. 267.

ST. PAUL, December 31st, 1880. CHAS. M. START, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: You ask if section 37, *c.* 6, Gen. Laws 1877, (Young's St. § 121, *c.* 11,) applies to tax sales made prior to the date of its passage. I think not. "Unless the contrary clearly appears to have been intended by the Legislature, statutes should be construed to be prospective in their scope and operation, and not retrospective. This is a familiar canon of construction." Giles vs. Giles, 22 Minn. 348; Wilson vs. Red Wing School-dist. 22 Minn. 488. It does not clearly appear from the language of the act referred to that it was to have a retrospective effect; but, if it was otherwise, I am of the opinion that the act should be construed as ap-

plicable to future tax sales and certificates only, for the reason that a construction so as to include within its scope and operation tax sales made prior to its passage, would contravene the principle that the obligation of contracts is inviolable. "The purchase at a tax sale is clearly a contract. It is made under the law as it then exists, and upon the terms prescribed by law. No subsequent statute can import new terms into the contract, or add to those before expressed. If it could be changed in one particular, it could be in all; if subject to legislative control at all, it is wholly at its mercy." Cooley, Tax'n, 370. The act should be construed as applicable only to tax certificates and sales made subsequently to its passage.

ST. PAUL, January 4th, 1881. CHAS. M. START, Atty. Gen.

Hon. H. S. Bassett, Judge of Probate, Preston:

DEAR SIR: Yours of December 30th just received. Upon page 7 of inclosed paper you will find the views of this office as to the proper method of ascertaining the population of a county for the purpose of computing the compensation of Judge of Probate. This opinion is in harmony with that of my predecessor, which I have followed without argument. There is much force in the points suggested by you, but I am inclined to follow the precedents of the office unless clearly of the opinion that they are wrong. The 5 per cent. is to be added for each year, *expiring after* the year the census was taken. I take it this refers to the official year commencing January 1st. This construction may lead to an injustice in some cases, as you suggest, but it must be referred to the law itself. We cannot correct the wrong by a forced construction.

Your other questions may be answered as follows: *First*, I think that it is discretionary with the Board of County Commissioners whether they allow you clerk hire or not, to be exercised reasonably in view of the amount of work to be done in the office, and that they should allow for clerk hire if the business of the office cannot be properly and seasonably done without it; *second*, that the Judge of Probate is not bound to hire a clerk and pay him from his own salary in order to speed the business of his office,—he can only be required to discharge the duties of his office to the best of his judgment and ability; *third*, the Judge of Probate is not authorized to charge or receive compensation for any official duties performed by him except as provided by sections 5, 7, c. 7, Gen. St. 1878.

ST. PAUL, January 4th, 1881. CHAS. M. START, Atty. Gen.

Hon. J. V. V. Lewis, Judge of Probate, McLeod Co.:

DEAR SIR: Yours of the eighth inst. is received. I do not, as a rule, advise county officers. It is the duty of County Attorneys so to do, not mine. I answer your questions in their order: *First*, the census of 1880 has nothing to do with the salary of the Judge of Probate for that year. His salary is to be paid quarter yearly, upon the basis of population. Your first quarter's salary became due for the year 1880 before any census was taken. It was the duty of the Auditor to *then* determine the population, for the purpose of computing your salary for the official year. You could not receive an annual salary at one rate for one portion of the year; then ascertain the population upon another basis, and be paid an annual salary for the balance of the year at a different rate. *Second*, I think the 5 per cent. may be added to the census of 1880 to determine the salary for 1881. The 5 per cent. is to be added for each year *expiring after* the year the census was taken. The year 1881 certainly will expire after the year in which the census was taken. *Third*, you are not entitled to charge for examinations of insane persons. Your suggestion in regard to the constitution is not well taken. You have no other jurisdiction except as conferred by the constitution. This question is fully discussed and decided in State vs. Wilcox, 25 Minn. 143.

January 11th, 1881. CHAS. M. START, Atty. Gen.

W. O. Crawford, Esq., County Auditor, Rock Co., Luverne:

DEAR SIR: In answer to yours of the eleventh inst. I herewith hand you a copy of an opinion dated September 8, 1871, by Cornell, then Attorney General, (now one of the judges of the Supreme Court,) which has since been followed in this office. It applies only where the number of districts *is increased*. If the opinion is a correct one, it follows that if the action of the Board of County Commissioners in redistricting the county and increasing the number of districts from three to five was legal, there should have been an entire new board elected at the last election, and the persons elected would have held their offices as follows: The person elected from district No. 1 for one year, from Nos. 2 and 3 for two years, and from Nos. 4 and 5 for three years, and all Commissioners thereafter elected would hold for three years. In this way there would always be a majority of old members on the board; that is, there would be three who had experience in county business. This seems to be the object of the statute. I have not and do not now express any opinion on the question of the legality of Barek's election. I have no authority to decide or give an authoritative opinion in the premises. It is, however, my duty to investigate complaints in regard to usurpation of office, and if I deem that public interests require it, to commence an action or permit it to be done in my name. Mr. Barek has made such complaint. Without intimating what my action in the premises may be, I suggest that public interests will be best subserved by avoiding all litigation. I think Barek, Marshall, and Skyberg should waive their claims to the offices; that is, the two latter resign, and the vacancies be filled by appointment. The appointees would hold until their successors were elected and qualified. Next fall Commissioners in districts No. 1 and 2 would be elected,—in No. 1 for a full term of three years; in No. 2 for the unexpired portion of the original term of two years, viz., for one year, (Young's St. *c.* 1, § 46,) who would go out of office at same time as the Commissioner in No. 3. In this way the order of the terms will be preserved as was intended by statute.

Please submit to your County Attorney, Cornell's opinion.

January 14th, 1881. CHAS. M. START, Atty. Gen.

Thos. F. Taylor, Esq., County Attorney, Scott Co.:

DEAR SIR: The facts upon which you request my opinion are, as I understand them, as follows: At the general election in November, 1879, Ring was elected County Treasurer for the term of two years, commencing March 1, 1880. In June, 1880, (Ring having entered upon the discharge of the duties of the office under such election,) the office was declared vacant by reason of his failure to give a new bond, as required by the Board of County Commissioners, and the board appointed Baumhager to fill the vacancy. At the general election in November, 1880, O'Doud was elected County Treasurer. Now, upon these facts, the question is submitted, when does O'Doud's term under the election begin, and for how long was he elected? The election in November, 1880, was to fill the vacancy occasioned by Ring's removal, and O'Doud was elected for the unexpired portion of Ring's term, and not for a full term of two years. O'Doud was entitled to enter upon the discharge of the duties of the office as soon as he qualified, and hold the office to the end of Ring's term, viz., until March 1, 1882. Gen. St. 1878, *c.* 1, § 46. The appointment of Baumhager did not fill the vacancy except for the time being, the power of appointment being but a temporary expedient to avoid the expense and inconvenience of a special election. If there was no vacancy to be filled by election, there would be no authority to hold an election for the purpose of electing a County Treasurer until the annual election in November, 1881, which would be the election next preceding the expiration of the original term. Id. Baumhager's appointment temporarily filled the vacancy until the then next general election, and until his successor was elected and qualified. O'Doud was elected to fill the vacancy, and was entitled to qualify immediately and enter upon the duties of the office for the unexpired portion of the term, and until his successor is elected

and qualified. This view of the question is the one taken by my predecessors in this office. I herewith hand you a copy of an opinion now of record in this office upon the construction of section 46, c. 1, Gen. St. 1878. The provisions of chapter 8, § 144, Gen. St. 1878, fixing the term of County Treasurer at two years, must be construed as applying to persons who are elected at the annual election next preceding the expiration of the full or regular term, and not to those elected to fill a vacancy.

ST. PAUL, January 19th, 1881. CHAS. M. START, Atty. Gen.

C. F. Washburn, Esq.:

DEAR SIR: I answer your questions in the order named:

First. Has the Governor the power to appoint County Commissioners in unorganized counties? Such has been the practical construction of the statute. If it was a new question I should be inclined to question his authority so to do; but, in view of the practice ever since the organization of the State, the question is answered in the affirmative.

Second. Can the people elect Commissioners in unorganized counties? My answer to this is the same as that to question No. 1.

Third. Can the Board of County Commissioners in an unorganized county organize towns and school-districts? I think not. Our Supreme Court, in the case of State vs. Parker, 25 Minn. 215, decided that unorganized counties are not entitled to a County Auditor, and that, until some act of the Legislature authorizing it, the people of no district have the right to act as an organized county. Having no County Auditor, who is Clerk of the Board, it necessarily follows that there are but few official acts that the Board in an unorganized county can legally perform. To organize towns and school-districts requires many official acts to be done by the County Auditor. Not being entitled to an Auditor, it would seem to follow that the provisions of law authorizing the Board of County Commissioners to organize towns and school-districts are applicable to organized counties alone.

Fourth. When a county is organized, do the people elect a full Board of County Commissioners at the first election after such organization, or does a portion of the Board previously elected hold over? It depends entirely upon the provisions of the act organizing the county. It is entirely competent for the Legislature to provide for an entire new Board, and designate the term of office of each member, and when it shall commence and end.

ST. PAUL, January 21st, 1881. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: In the matter of the application of the Winona & St. Peter Railroad Company for a deed from your Excellency of certain lands granted to the Territory and State of Minnesota to aid in the construction of certain railroads, which lands are in dispute between the Winona & St. Peter Railroad Company and the St. Paul, & Sioux City Railroad Company, I have the honor to advise you that said lands were claimed by both companies, and a contest was had before the general land-office at Washington involving the rights of the respective parties to the land. On November 30, 1873, the Secretary of the Interior decided such contest in favor of the St. Paul & Sioux City Company, and directed the lands to be certified to the State of Minnesota for the benefit of said company, which was accordingly done. Thereupon the Winona & St. Peter Railroad Company commenced an action in the District Court of the Sixth Judicial District, against the St. Paul & Sioux City Company, for the purpose of determining which company was entitled to the land. Such proceedings were had in the District Court that judgment was entered in said action on the twenty-fifth day of February, 1879, that the Winona Company was the owner in fee-simple of the lands, and was entitled to receive from the Governor of the State a deed of the same, and that the St. Paul Company be forever enjoined from apply-

ing for or receiving said deed. From this judgment the defendant (the St. Paul Company) appealed to the Supreme Court of this State, and such proceedings were had that the Supreme Court affirmed the judgment of the District Court on the thirteenth day of September, 1880. On November 11, 1880, a writ of error from the Supreme Court of the United States was prayed for by the defendant and allowed, but no *supersedeas* bond, but one for the costs only, was given. If the case is prosecuted in the Supreme Court of the United States, it will be some years yet before a final conclusion is reached.

The foregoing is in brief a statement of the history of the lands, and the litigation in regard to the same, as I gather it from the records of the case referred to. Upon these facts I am of the opinion, and so advise your Excellency, that the deed should be executed and delivered to the Winona & St. Peter Railroad Company as requested. The St. Paul & Sioux City Company having refused or neglected to give a bond to pay all damages that might accrue to the plaintiff in case the judgment in the Supreme Court of the United States is affirmed, proceedings under the judgment of the State are not stayed, and the plaintiff is entitled to have it carried into effect. This judgment determines that the plaintiff (the Winona Company) is the owner of the lands, and entitled to receive the deed therefor from the Governor. So far as carrying this judgment into effect is concerned, the case stands precisely as though no writ of error had been allowed, there being no stay. If the defendant desired such stay, and that the Governor should longer withhold the deed, a bond should have been given to indemnify the plaintiff, for all damages sustained by reason of the delay occasioned in presenting the case in the Supreme Court. It is for the interests of the State that these lands be sold to and occupied by settlers, and in case the judgment of the State Court should be reversed, the rights of the St. Paul & Sioux City Company would be protected, notwithstanding the lands had been deeded, for the Winona & St. Peter Company would be chargeable as trustee for all the lands, and liable to account for them.

ST. PAUL, January 21st, 1881. CHAS. M. START, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

DEAR SIR: Your favor of the twenty-ninth inst., with copy of letter from the Clerk of the District Court of Rice County, received. In reply thereto, I think the Clerk should be advised—*First*, that it is his duty to collect from all persons having occasion for his official services the fees prescribed by the General Laws for such services; *second*, that he should make report on the first day of January to the Board of County Commissioners of all fees charged in his office,—that is, all sums charged for official services, whether the same has been collected or not; *third*, if he uses reasonable diligence in the collection of such fees, he is not liable to the county for any losses; *fourth*, if attorneys decline to pay such fees, he should, after reasonable notice of his intention so to do, decline to perform the services requested until fees are paid. I am willing to concede that the special act referred to, regulating the fees and salaries of Rice county officers, is somewhat loosely drawn, and the construction suggested by the Clerk is possible, but it is not a reasonable construction. The act must be construed with reference to the purpose and object of the act. This object was not to make the litigants of Rice county an exception to all other friends of the profession in the State, by relieving them from the payment of the fees of the Clerk, but it was intended to regulate and limit the amount of compensation that the Clerk should receive for his own use, and give the county the benefit of all in excess of $1,200. If he was not authorized to collect any fees for his official services, how could he comply with the law, and pay over to the County Treasurer all fees collected and received over and above $1,200? Section 9 of the act can and must be construed in harmony with the other provisions of the act. It simply repeals all laws prescribing or fixing different salaries or fees that are to be retained by the officers named in the act. It is to be observed that if we construe the act as preventing the Clerk from collecting fees, the

same construction must be applied to the Register of Deeds, and every man would be entitled to have all papers recorded without charge,—a result certainly not intended by the act.

ST. PAUL, January 31st, 1881. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: Herewith I return House file No. 256, entitled: "An act to amend section 9 of chapter 100, Gen. St. 1878, relating to offenses against chastity and morality." Section 1 of this act changes the punishment for the crime of keeping a house of ill-fame. Under the present law it may be punished by imprisonment, or by fine not exceeding $300 nor less than $100; by this proposed amendment the punishment is increased so that it may be punished by imprisonment, or fine not exceeding $500 nor less than $100. If the act becomes a law it will take the place of the original section. There is no saving clause in the amendment, providing that the act shall not affect any prosecution for any offense committed prior to the passage of the act, but that all such offenses may be prosecuted and punished in the same manner as if this act had not been passed. The result of this omission would be, if the act becomes a law in its present form, it will operate as a jail-delivery as to all persons who have committed the offense prior to the passage of the act. They could not be punished under either law. State vs. McDonald, 20 Minn. 136. Your attention is respectfully called to one other feature of the act. The proviso to section 1 of the act provides that no person convicted of the offense under the ordinance of any municipal corporation shall be convicted and punished for the same offense under this act. The practical operation of this provision would be to license and foster prostitution. That is, so long as the prostitutes observed on their part the articles of copartnership existing between them and the municipal corporation in regard to a division of their earnings, by promptly reporting monthly, pleading guilty, paying a fine, so called, but in fact a license, they may prosecute their business and the State is powerless to interfere to punish them. I think the bill should be returned for correction in the particular first mentioned, if in no other.

February 18th, 1881. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: Herewith I return to you House file No. 15, entitled "An act to punish tramps," and respectfully suggest the propriety of returning the same to the House in which it originated without your approval. I have reluctantly come to this conclusion, for I am well aware that the people of the State have suffered from the insolence and brutality of that class of persons known as "tramps," and that there is a general demand for a law by which the nuisance may be abated; but a careful examination of the bill satisfies me that it ought not to become a law. Many of the provisions of this act are unnecessarily harsh and inhuman; the penalties are disproportionate to the gravity of the offense, making no discrimination between the unfortunate, weary wanderer, who would work if he could, and the vicious vagabond who seeks to live upon the voluntary or enforced bounty of honest men. Some of the provisions of the act contravene well-understood principles of constitutional law. Section 3 provides that the District Court of the county in which a person is confined under section 1 of the act, or the committing magistrate, may, on the recommendation of the Board of County Commissioners, release such prisoner if satisfied that he will return to an orderly life, and that public interests will be promoted thereby. This practicably invests the court and committing magistrate with the pardoning power, which can only be constitutionally exercised by the Executive of the State. State Const. art. 5, § 4; Cooley, Const. Lim. 115, 116. Section 5 provides that any tramp who shall willfully and maliciously do *any* injury (no matter

how slight) to the person or the property of another, shall be punished by imprisonment in the State Prison not more than *five years*. This section, together with some of the provisions of section 4, must be regarded as unequal and partial legislation, in that it punishes one class of persons in a different manner than persons not of that class are or can be punished for the same offense, and for this reason it is unconstitutional. This section does not punish a person for being a tramp. Section 1 provides for that, but when he has acquired the character of a tramp, if he do any willful and malicious injury to the person or property of another, he must be punished for the offense in a manner different from the punishment to be imposed upon a person, not a tramp, committing the same offense. To illustrate, if a tramp willfully and maliciously enters the field or inclosure of another, and carries away any fruit or vegetables therefrom, he must be sent to the State Prison not to exceed *five years*,—the court has no discretion in the premises; but if the same offense is committed by a person, not a tramp, he is to be punished by a fine not less than $10 nor more than $50, and imprisonment in the county jail not exceeding 30 days. Gen. St. 1878, p. 90, § 61. The illustration might be extended to other crimes and misdemeanors, for the words "any willful and malicious injury to the person or property of another," used in the act, includes a great number; but it is unnecessary. I am of the opinion that sections 3 and 5 of the act are unconstitutional, and if the act should become a law in its present form it would be a reproach to the justice of the State.

February 28th, 1881. CHAS. M. START, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: House file No. 20, entitled "An act relating to foreign corporations," is too general and sweeping in its scope. It provides that *any* foreign corporation, which now is or *hereafter* may be created in whole or in part for buying, selling, and dealing in real estate in this State, may acquire, use, and occupy land in this State without limitation. If this act becomes a law there is nothing to prevent corporations endowed with "legal immortality," organized anywhere in the civilized world, from purchasing in this State large tracts of land and holding the same in perpetuity. Under this act it is possible for a foreign corporation to hold lands in this State to any amount it sees fit to purchase, and retain them forever, cultivating them by its tenants, and thereby fasten upon the State, as to the lands so held, all the evils of the land laws of the old world. It is the policy of our Constitution and laws that the man who tills the soil should own it. This result is secured by abolishing feudal tenures, with all their incidents, and by forbidding the entailing of estates, so that when a large landed proprietor dies his estate is divided among his heirs. The act under consideration is inimical and subversive of this policy, and the true interests of the State. It is not an answer to this objection to say that the bill is not intended for any such purpose, and that the evils suggested are remote and improbable. It is sufficient to say that in these times, when corporate power is clearly becoming more and more aggressive, and is stretching out its iron hand to grasp the control of the material interests of the people, no door should be opened through which it is possible for the evil indicated to enter.

February 28th, 1881. CHAS. M. START, Atty. Gen.

WILLIAM J. HAHN, ATTY. GEN.—MARCH 11, 1881, TO ———.

Lyman B. Everdell, Esq., County Attorney, Wilkin Co.:

DEAR SIR: Your favor tenth inst. received. To your first question, viz., "What are the proper fees of the Clerk of the Court for certificate of judgments, suits, etc., on an abstract of title?" I answer: The statute is not clear. There does not seem to be any specific fee prescribed; but the statute provides that "for all other services required by law to be performed by such Clerk, respectively, such fees as compare favorably with the rates herein prescribed." The only fee "prescribed," that bears any analogy to this, is the one referred to by you. I therefore think his fees are "20 cents for the records or files of each year," but not for each owner, and 25 cents for certificate. To your second question you will find an answer in section 41, *c.* 1, p. 47, Young's St.

March 19th, 1881. W. J. HAHN, Atty. Gen.

J. M. Burlingame, Esq., County Attorney, Steele County:

DEAR SIR: There are no such blanks here as you ask for. There were printed instructions, but they were lost or mislaid at the fire. The application must be made by the County Attorney, who must certify that he approves same, and it must be shown by a duly-verified affidavit that the defendant was at the time of the commission of the alleged offense in the State of Minnesota, and has since fled therefrom, and is a fugitive from the justice thereof, and he believes is at the time in the State of ———, and the grounds of such belief must be specifically set forth in such affidavit, and that the ends of justice require that he should be brought back to this State for trial. If the application is made upon an indictment, a certified copy thereof must be furnished by the Clerk of the Court in which it is found. If upon affidavits, the magistrate taking them must certify that in his opinion the parties making them are to be believed, and that they present a proper case for a requisition. *The official character of the magistrate must be shown by certificate of Clerk of Court.* The affidavits must be so explicit in the necessary allegations of fact that it would justify a magistrate in committing the accused. The County Attorney must also certify that if the facts stated in affidavits are true, they would in his opinion result in a conviction. A proper person to whom the warrant is to issue must be named, and the County Attorney must certify that such person has no private interest in the arrest of the fugitive. Duplicates of all papers must be furnished.

March 22d, 1881. W. J. HAHN, Atty. Gen.

N. Kingsley, Esq., County Atty., Fillmore Co.:

DEAR SIR: Your favor received. Section 12, p. 777, Young's St., provides that the Sheriff shall be allowed "for bringing a prisoner before any court for examination," one dollar and mileage, and "for committing a prisoner to jail," one dollar and mileage, and "for attending court with *such* prisoner," two dollars per day. I think that the Sheriff should receive, in the case put by you, three dollars for committing the prisoners, viz., one dollar for each defendant, and three dollars for bringing the prisoners before the court for examination. He would not be entitled to an additional dollar for each prisoner every time the court adjourned. He receives two dollars per day "for attending court with *such prisoner.*" I think the design of the allowance for boarding prisoners was to include "washing and mending." At least, it is liberal enough to compensate the Sheriff for those matters, and I think I would so hold until the courts directed otherwise.

April 2d, 1881. W. J. HAHN, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

DEAR SIR: You ask: (1) "Can a Chairman of Board of County Commissioners or a member bid for or become the repository of county moneys?" (2) "Is he (the Chairman) eligible to the position of Deputy County Treasurer?"

First. Subdivision 2 of section 150, p. 145, Young's St., provides that all county funds shall be deposited in one or more designated national banks, or State or private bank or banks. Such bank is to be named by the Board of Auditors, which consists of the County Auditor, Clerk of the District Court, and Chairman of the Board of County Commissioners, after the advertisement and on the conditions named in said subdivision. I see nothing anywhere in the provisions of the law regulating this subject that would *legally* prevent the designation by the Board of Auditors of a bank in which such portion of the public funds as the law allows should be deposited, even though such bank is owned wholly or partly by such Chairman. That is a matter that seems to be left to the delicacy of the individual. It doubtless should have its due weight in influencing the judgment of the Board of Auditors; but it is not a legal disqualification.

Second. I do not think that the Chairman of the Board of County Commissioners is eligible to the office of Deputy Treasurer, or, as I understand the question to be, cannot hold, at the same time, the two offices. The duties of the Chairman, both as a member of the County Board and also as a member of the Board of Auditors, would prevent him from performing the duties of Deputy Treasurer. Section 147, p. 144, Young's St., in spirit at least, if not in letter, prevents it. He clearly could not be Treasurer and Chairman at the same time. Public policy and the principles of the common law would prevent it. The County Commissioners and Board of Auditors are intrusted with the supervision of the Treasury and Treasurer. That it would be improper to allow the same person to hold both these offices must be obvious. The same reasons that would prevent him from being Treasurer would also prevent him from being Deputy Treasurer.

April 8th, 1881. W. J. HAHN, Atty. Gen.

Geo. D. Hamilton, Esq., Publisher Detroit Record:

DEAR SIR: Your favor to Hon. Charles M. Start received. Section 113, p. 138, Young's St., makes it the imperative duty of the County Commissioners to have the statement therein provided for published. The fact that the proceedings of the Board are published as the meetings occur can make no difference, for two reasons: *First*, because section 105, p. 137, Young's St., as amended by section 1, c. 29, Laws 1879, requires such proceedings to be published; and, *second*, such proceedings cannot, in the nature of the case, contain the information required by section 113 aforesaid.

April 20th, 1881. W. J. HAHN, Atty. Gen.

E. Southworth, Esq., County Attorney, Scott County:

DEAR SIR: Your favor received. You say: "There are in our county a large number of tracts of land in fractional pieces, town lots, etc., of very small value, upon which tax has been a few cents each year, but which have not been included in the advertised lists, or sold at the tax sales, and no taxes have been paid thereon for many years,"—and ask whether such pieces should be included in the list of taxes which became delinquent in and prior to 1879. I think they should. The title of the act is, "To enforce payment of taxes which became delinquent in and prior to 1879." Section 1 of the act provides that "a list of *all taxes* upon real estate in the county, which appear to have become *delinquent* in the year 1879, and any prior year or years," etc. Taxes if not paid become *delinquent*, under the new tax law, on June 1st, and under the old law on March 1st, without any act or ceremony whatever. Therefore, all unpaid taxes appearing on the books of

the County Auditor, except the current year, are delinquent. It is true, the last clause of the section says that such list "shall *include* all taxes upon any real estate which may have been, at any tax sale, struck off to, or declared to be forfeited to, the State," etc.; but it does not say that the list shall contain such taxes and no other. Were it not for this last clause no land which had been forfeited could be included. The first clause of the section, therefore, seems to me to include all *delinquent taxes;* the last, all *forfeited lands.* If this is true both cases should be embraced in the list.

April 20th, 1881. W. J. HAHN, Atty. Gen.

L. H. McKusick, Esq., Co. Atty., Pine Co.:

DEAR SIR: Your letter to me, inclosing the communication directed to you by your County Auditor, was referred to the State Auditor, and has been in his hands since. He informs me that all the questions so submitted to you will be answered in a circular about to be issued by him, except the first one, and that he desires me to answer. It is this: "*First*, the County Commissioners having failed to designate a paper for the publication of the delinquent tax-list for the year 1880, I desire to know if the Auditor can properly designate for the publication of such list any other paper than the Pine County *Record*, a paper printed at Rush City, Chisago county, Minnesota, and mailed from the post-office at Pine City, in Pine county, no paper being printed in Pine county, and no other paper than the Pine County *Record* having been regularly mailed or distributed within said Pine county during the three months last past?" Section 72, p. 231, Young's St., provides in what paper the tax-list is to be published, and makes four qualifications necessary to be possessed by a newspaper in order that it may be legally designated, viz.: *First*, it must be a newspaper of general circulation; *second*, it must be printed in the English language; *third*, it must have been regularly published for at least three months previously; and, *fourth*, it must be published in one of three places: (1) In the county; or (2) in the county where the proceedings were instituted; or, (3) if there is no paper published in either of these, then in a paper published in the judicial district. It follows from the foregoing that if there is no paper published in Pine county, the County Auditor may designate any paper published in the judicial district that possesses the three first above prerequisities.

I return you the Auditor's letter.

April 20th, 1881. W. J. HAHN, Atty. Gen.

Geo. Berkelmann, Esq., County Auditor, St. Louis Co.:

DEAR SIR: Your favor, March 23d ult., to State Auditor has been referred to me for reply. The question as to whether the lands referred to in Sp. Laws 1878, c. 259, as amended by chapter 66, Sp. Laws 1879, are included in the act of 1881, entitled "An act to enforce the payment of taxes which became delinquent in and prior to the year 1879," has been considered, and I must answer the question in the affirmative. Section 11 of said chapter 259 expressly provides that the act shall not "in any manner interfere with the right of the State to dispose of any said lands which may hereafter become forfeited to the State, *or upon which taxes shall not be paid under this act.*" If the taxes have been paid under that act, of course the law of 1881 does not apply. The amendment of 1879 in no way interfered with this reserved right of the State, but only provided that the County Commissioners might dispose of the land referred to on such terms as they thought proper.

I think your construction of section 10 of said chapter 259 is erroneous. The State by that section was to have no claim against St. Louis county for any of the said delinquent taxes "*paid as provided for in this act.*" If the taxes have been *paid* under that act, as I have already said, the law of 1881 does not affect them. If not paid, the State still retains its claim.

April 20th, 1881. W. J. HAHN, Atty. Gen.

Messrs. Burnside & Somerville:

GENTLEMEN: Yours received. You ask, "Can a Justice of the Peace be a law partner with a practicing attorney, and allow said partner to practice before the said Justice of the Peace, if they do not have their office in the same room? See Young's St. p. 676, § 3." I unhesitatingly answer your question in the negative. The evident design of section 3 was (1) to prohibit *a justice* from occupying the same room with any practicing attorney, unless such attorney was his law partner; (2) to prohibit *in every case* the law partner of a Justice from practicing before him. There is no prohibition against the attorney who occupies the same room with the Justice. Why should the simple fact that the partner occupies the same room disqualify him any more than the same fact should disqualify any other attorney? The manifest impropriety of one partner appearing before his copartner to prosecute an action, the avails of which would, to a certain extent, be shared by the court itself, must be obvious. If such a thing were permitted, there ought to be no difficulty in the *client of the court* succeeding in every case.

April 21st, 1881. W. J. HAHN, Atty. Gen.

C. N. Akers, Esq., County Attorney, Goodhue Co:

DEAR SIR: The papers on the application for a requisition for Lorentz Iverson Soberg were handed me by his Excellency, the Governor, for examination and approval. I am sorry to say that I cannot sanction the issuance of a requisition on these papers as they now are. *First.* The application being on affidavit made to a magistrate, it is necessary that it be so explicit in the necessary allegations of fact that it would justify the magistrate in committing the accused. Ex parte Smith, 3 McLean, 121; People v. Brady, 56 N. Y. 182: Spear, Extr. 265. The affidavit in the case under consideration is, in my opinion, fatally defective in one very important particular. The statute (section 6, p. 920, Young's St.) provides that "any unmarried man, who, *under promise of marriage*, * * * seduces," etc. This, of course, means that the seduction be accomplished *by means* of a promise of marriage made by the defendant to the woman *prior* to the seduction. The allegation in the complaint is simply "then and there, under promise of marriage," without saying *with whom* that promise of marriage was made. For aught that appears, he, defendant, may have been under promise of marriage with some one other than the complainant. Again, it does not appear that *by means* of this promise the seduction was accomplished. I would refer you to Bish. St. Crimes, §§ 646, 647, for forms. *Second.* The affidavit that the "defendant is a fugitive from justice" is not enough. The affidavit should not only show that the defendant was, at the time of the commission of the offense, in the State of Minnesota but also, "that he has since said time *fled therefrom and* is a fugitive from the justice thereof." Spear, Extr. 273 *et seq.* *Third.* The rules adopted by the Executive department require a certificate from the magistrate "that in his opinion the parties making the affidavits are to be believed, and that they present a proper case for a requisition." The official character of the magistrate must also be shown. *Fourth.* It seems to me that the fact which appears in the woman's affidavit, that in November, 1879, after the alleged seduction, defendant told her he was going to Wisconsin, would militate against the idea that he had fled from Minnesota. Please have the papers corrected in accordance with the foregoing suggestions.

April 27th, 1881. W. J. HAHN, Atty. Gen.

Samuel McPhail, Esq., County Atty., Lincoln Co.:

DEAR SIR: In the letter from your County Auditor to you, which you refer to me for reply, he asks: "The County Commissioners having failed to provide me with an office, would I incur any responsibility or render myself liable to an action, civil or criminal, by removing the records and papers belonging to the office of Au-

ditor to a point away from the county seat?" "*Second.* In case the meetings of County Board were held at my office, and at a point away from county seat, would their acts be legal?" Section 129, p. 141, Young's St., makes it the duty of the Auditor to "keep his office at the county seat." Section 102, p. 137, Young's St., provides that the County Commissioners "shall meet at the county seat," etc. I do not think the failure of the County Commissioners to perform their duty would be any excuse for the County Auditor to neglect his. It seems to me plain that the county seat of a county cannot be thus indirectly and for all practical purposes removed. I do not think the meetings of the Board at any other point than the county seat, except, perhaps, in a case of great emergency, would be legal.

April 27th, 1881. W. J. HAHN, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

DEAR SIR: Your favor calling my attention to a special act "relating to the duties of certain county officers of Ramsey county, and of the city of St. Paul," approved March 7, 1881, received and considered. You ask my construction of that part of said act relating to the monthly and annual reports, and ask how much such reports shall contain.

First. Section 1 of the act in question provides that "a proper record-book, entitled Salary and Fee Record," shall be kept by the officers named, and then proceeds to set out in detail the matters and things that are to be entered in such record-book. In general terms, these are the receipts and expenditures of such officer in and by virtue of his official position. Section 2 provides that such officers "shall each make monthly reports, * * * which reports shall be a *transcript of the said record.*" The word "transcript" has a well-defined meaning, both in the law and by the common and approved usage of the language. It is defined by Bouvier (2 Bouv. 605) as "a *copy* of an original writing." By Webster as "a writing made from and according to an original; a writing or composition consisting of the *same words* with the original." By subdivision 1 of section 1, c. 4, Young's St., it is provided that in the construction of statutes "words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such peculiar and appropriate meaning." So far as the word under consideration is concerned, both the technical and common and approved meaning is the same. It follows, therefore, that these monthly reports are to be a copy of all the entries made in said "salary and fee record" during the month.

Second. As to the annual reports. They, by the act, are to be "a recapitulation of the said monthly transcripts." By this is meant, I apprehend, "a summary or concise statement of the principal points or facts" contained in the said monthly reports,—a gross statement for the year of each item embraced in such monthly reports. In other words, such annual report is to be in the same form as the monthly reports, but opposite each item contained therein should be placed the aggregate receipts from, or disbursements on account of, such item for the year.

April 29th, 1881. W. J. HAHN, Atty. Gen.

H. F. Barker, Esq., Co. Attorney, Isanti Co.:

DEAR SIR: The amendment to section 100, c. 8, Gen. St. 1878, is rather vague, and susceptible of the construction you suggest. But I think a careful reading of the amended section will lead to a different conclusion. The first clause limits the time for which compensation can be received to 20 days. The first proviso extends this time in the special case cited, and this extension is limited by the second proviso. But, instead of saying that no commissioner should receive pay *for any such service, i. e.*, the service named in said first proviso, (which, I apprehend, the Legislature would have said, had such been their intention,) they do say that "no

Commissioner shall *receive pay* for more than 25 days in one year." They are not to "*receive pay*" for any service beyond the 25 days.

May 5th, 1881. W. J. HAHN, Atty. Gen.

L. H. Bay, Esq., Co. Treas. Chippewa Co., Montevideo, Minn.:

DEAR SIR: Your favor to the State Auditor of April 22d was handed me for reply. Your letter is very indefinite as to the kind of personal property referred to. Section 8, p. 213, Gen. St. 1878, provides that "the capital stock and franchises of corporations and persons," except as otherwise provided, "shall be listed and taxed in the county, town, or district where the principal office or place of business of such corporation or person is located," etc. If the tax is for capital stock or franchises of the corporation, then the tax is improperly assessed in your county. But by section 22, p. 217, said statutes, there is to be deducted for the purposes of taxation, from the value of the shares of stock of the corporations referred to, the value of its real and personal property. The section then provides that "the real and personal property of such company * * * shall be assessed the same as other personal property." If the property is an "elevator, warehouse, or grain house," then chapter 4, Gen. Laws 1876, especially provides that such elevator, etc., shall be listed and assessed "in the town or district in which such elevator, etc., may be situate."

May 6th, 1881. W. J. HAHN, Atty. Gen.

J. I. Beaumont, Esq., Assessor, Ramsey County:

DEAR SIR: Your favor received. I appreciate and heartily join with you in your expressions of sympathy towards the poor men who compose a large part of the building associations you refer to. But I apprehend the same sympathy is due, and for the same reason, to every one who is so unfortunate as to have a mortgage or other lien upon his real estate. We, however, are not responsible for the law or the hardships it may work. Section 15, Gen. St. 1878, p. 214, as I read it, does not require the individual to include in the list of his taxable property "any share or portion of the capital stock * * * of any company or corporation which such company is required to list or return as its capital and property for taxation in this State." Section 22, p. 217, requires the proper officer of any company or association (with certain exceptions) to "make out and deliver to the Assessor a sworn statement of the amount of its capital stock," etc. From the market value of its shares of stock is to be deducted its indebtedness, and the value of its real and *personal property*, and the net amount is to be included in subdivision 24 of section 16. If these associations are required "to list and return" their "capital stock or property" by section 22, then the last clause of said section 15 applies, and any shares in such association held by an individual is not to be included in the list made by such individual, but the total net amount is to be included in the list made by such association. That they are included in said section 22 seems to me to be obvious.

May 10th, 1881. W. J. HAHN, Atty. Gen.

J. G. Foley, Esq., County Auditor, Washington Co.:

DEAR SIR: Your favor, inclosing a copy of a resolution passed by the County Commissioners of your county, received. I deem it best to say, in passing, that the duty of this office is to advise the *State officers*, but I have no objection to indicate my views on the questions covered by that resolution.

The first question propounded is the following: "To what year do the following words refer: 'At the time of making a list of delinquent taxes for the present year?' Do the words 'for the present year' modify the word 'taxes,' and refer to the taxes

of the present year, which will become delinquent in 1882, or can the words 'for the present year' by any construction be made to apply to the taxes of 1880, which will soon be delinquent?" The question is a serious one, and is left somewhat obscure by the act; nevertheless, after mature reflection, I have no doubt but that it refers to the taxes of 1880, which become delinquent the present year. The reading, I think, is the same as if the words were transposed as follows: "At the time of making the list for the present year of delinquent taxes," etc. The only *delinquent* taxes for the present year are the taxes of 1880. It is not the *taxes* for the present year, but the *delinquent* taxes. There are, so to speak, two kinds or classes of taxes, viz., current, and delinquent. The current taxes of 1880 are the delinquent taxes of 1881.

Second. As I understand the State Auditor's instructions with reference to the tax of 1879, it does not refer to *forfeitures* on account of the tax of 1879, but that where a piece of land had been in 1879, or any prior year, bid in by or forfeited to the State, and such piece is properly included in the list under consideration, then, opposite each piece, should be placed *all taxes* against the same, including the tax of 1879 and 1880; the evident object being to give notice to owners and others *how much* will be required to redeem. The County Auditor first makes the list of land covered by the act; then each piece is to be charged with *all taxes* appearing against it. As I understand the tax law, when land is bid in by the State for any one year, and the right of the State has not been assigned, no other or further judgment or sale of such piece is proper or is permitted. Land bid in for the State in 1874, and which has not been assigned, has not, properly or legally, any other judgment or sale against it. It follows, therefore, that to the question submitted, viz., "Should * * * the lands *sold for the taxes of* 1879 *be included?*" a negative answer must be given. The proceeding is to "enforce the payment of taxes which became delinquent *in* and *prior* to the year 1879." The tax of 1878 became delinquent in 1879. The tax of 1879 did not become delinquent until 1880.

Third. I beg leave to differ with your able County Attorney, for whose judgment I have the highest respect, on the point that the time of redemption, *where there has been no sale*, is a vested right, and cannot be interfered with by the Legislature. Permission to redeem, so far as the *tax-payer* is concerned, is the grant of a privilege. Burroughs, Tax'n, 362. But it is not necessary to enter into any controversy over this question. The act of 1881 does not deprive the owner of his right to redeem from the sale of 1879. It does not even impose any new conditions upon such right; but, on the contrary, it says to such owner, "You may not only redeem your land, but the State will waive all benefits, if any, it acquired by the judgment heretofore entered against the same, and will permit you to come in and make any defense you might have made, or may have neglected to make, before. Further than this, you were liable under the law to pay 10 per cent. penalty, and 18 per cent. per annum interest, on the amount for which your land was sold, but the State will remit this penalty and reduce the interest to 10 per cent. per annum." Can the owner complain of this? Again, this act does not cut off his right to redeem, *or shorten the time a single day.* The sale of 1879 was made on the third Monday of September, being September 15. The time for redemption under this sale expires September 15, 1881. The sale under the law of 1881 is to be made "immediately following" the delinquent sale in September," which last-named sale is to commence September 19, 1881. This act, therefore, gives him four days, at least, *additional time.*

Fourth. To the point made, that the taxes of 1878 and prior years are merged in the judgment, and the judgment satisfied by sale, I have to say that there was no merger designed, or, in my opinion, effected. Merger is the "absorption of a thing of lesser importance by a greater, whereby *the lesser ceases to exist*, but the greater is not increased." 2 Bouv. Law Dict. 175. Sections 102, 103, 104, 105, and other sections of the general tax law of 1878 all show that the Legislature never designed that the so-called lesser—the tax—should cease to exist. A tax is not a debt, nor is the assessment and levy the evidence of any debt. Under our laws there is no personal claim for real estate taxes against the individual. Section 105, p. 241,

Gen. St. 1878, provides that "the taxes assessed upon real property shall be a lien thereon from and including the first day of May, in the year in which they are levied, *until the same are paid.*" The statute creates the lien; the assessment and levy fixes the sum total of such lien. The judgment is simply a confirmation of the validity and amount of the lien, and is a proceeding *in rem* against the property. The judgment is but the adjudication of the fact of the lien, and does not create the same. It is simply a proceeding to enforce a specific lien on a particular piece of real estate. The entire act of 1878 is to be read together. There is nothing in it to modify in any way the express provision of section 105, that this lien of the State should continue until the taxes are paid. On the contrary, by section 94, p. 238, it is expressly provided that "when any parcel shall be bid in by the State, the sale shall not, *until the right of the State be assigned, * * * or the piece or parcel be redeemed*, operate as payment of the amount for which the same is sold." The judgment decrees that each piece of land is liable for taxes, etc., to the amount set opposite the same, etc., and such amount is declared a lien upon the same. The proceeding, like proceedings *in rem*, is "to determine the state or condition of the thing itself; and the judgment is a solemn declaration of the *status* of the thing, and it *ipso facto* renders it what it declares it to be." Woodruff vs. Taylor, 20 Vt. 65; 2 Smith, Lead. Cas. 585, 586. What does it declare it to be? Liable to a lien for taxes to the amount adjudged. If a sale thereof to the State does not operate as a payment of such lien, then such lien still exists, and the present proceeding is but a remedy provided by the Legislature for the foreclosure of such prior adjudicated lien. It may not be a wise one; it may be a cumbersome or expensive one. Nevertheless, unless it invades some constitutional right of the citizen, I can see no reason why it is not a valid one. No constitutional objection is suggested, and none occurs to me. "A tax, when duly levied, becomes a lien upon the land, which may be enforced in such manner as the Legislature shall prescribe. The mere remedy is always within the legislative control. A change in it divests no vested rights." Prichard vs. Madren, 24 Kan. 491. Again, if the forfeitures to the State have been valid, and the title to the land covered thereby became absolutely vested in the State, I can see nothing to prevent the State from disposing of its lands, so acquired, in whatever way it may see fit. The peculiar machinery to be adopted for such disposition is exclusively within the legislative control.

May 10th, 1881. W. J. HAHN, Atty. Gen.

L. H. McKusick, Esq., County Attorney, Pine County:

DEAR SIR: The facts submitted by you I understand to be these: A newspaper is printed in Chisago county, where the office of such paper is located. The name of the paper, in a portion of each weekly edition, is changed to the Pine County *News*, and that portion, after being printed, is taken to Pine City, and there mailed to subscribers. The paper, in everything except the mere name, is an exact copy of the paper printed and published in Chisago county. On these facts you ask me, is such newspaper a newspaper regularly published in Pine county, within the intent and meaning of section 72, p. 231, Young's St.? I answer, no. It is true that the publication of a newspaper is not the mere printing thereof. Some other act is necessary to complete publication. It must pass from the publisher's hands either into the hands of the people, or of such agencies as are appointed for the distribution among the people. But section 72, aforesaid, evidently referred, not only to the *place of distribution*, but also to the geographical division within which the office of publication is located. It certainly could not be held that a paper printed and generally circulated in one county, was also published in every other county within which a portion of its edition was distributed by being either delivered to its subscribers by carriers, or deposited in the post-offices of such county for distribution. Again, the office of publication might be located in one county, and the larger part of each edition be distributed in an adjoining county, either by carriers or by being deposited in the post-offices of such county. In which county

would the publication be said to be in such a case? It seems to me that the Legislature intended by this section to refer to the county in which the office of publication is located. Statutes requiring the publication of tax lists have, I believe, been uniformly held to have such reference. 21 Mich. 556.

May 12th, 1881. W. J. HAHN, Atty. Gen.

E. P. Freeman, Esq., Co. Atty., Mankato:

DEAR SIR: The question submitted in yours of the twelfth inst. I understand to be this, viz.: "Is the Register of Deeds, under section 178, p. 151, Gen. St. 1878, entitled, for making the necessary entries in the tract index-book to ten cents, for each transfer of deeds and mortgages, or ten cents for each description contained in such deed or mortgage against which he is to post such deed or mortgage in said books?" I think he is only entitled to 10 cents for each deed or mortgage, irrespective of the number of postings that may be required. The language of the prior part of said question is that he is to receive two cents "for each necessary entry or description * * * as to all entries" made of prior entries. When it comes to speak of subsequent deeds and mortgages the language is changed, and is for "each transfer of deeds and mortgages." Again, he is to receive the same fees for this that he is to receive for "discharging an instrument on the margins of record." It would not be claimed, I apprehend, that he was to receive 10 cents for each tract covered by the mortgage so satisfied.

May 13th, 1881. W. J. HAHN, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

DEAR SIR: Your favor, inclosing letter of County Attorney of Murray county, received. The question submitted by him is this: "Does the decision of the Supreme Court in case of Commissioners of Mower County vs. Williams, published in N. W. Rep. July 31, 1880, p. 21, affect opinion of Attorney General Start of April 10, 1880? or does a different rule of computing Auditor's salary obtain in counties where taxable property is not in excess of $1,500,000?" I think this decision is conclusive of this question. The wording of the act of 1877, *c.* 120, is, so far as this point is concerned, identical with that of 1871. The construction, therefore, must be the same. The language, as applied to counties with less than $1,500,000 valuation, is the same on this question as for those over that amount. The method of computation, therefore, must be the same.

You also ask the following question, viz.: "If, in computing the Auditor's salary under the act of 1877, subsequent additions to the tax list can be added to the value as fixed by the State Board of Equalization for the preceding year." I think not. The language of the act is, "as fixed by the State Board of Equalization for the preceding year." This is too clear for argument. The language is plain and positive. There is no room for construction. Subsequent additions can no more be added to this abitrary amount fixed by the act than can any other sum that might be thought of.

May 14th, 1881. W. J. HAHN, Atty. Gen.

H. W. Barrett, County Auditor, Traverse Co.:

DEAR SIR: You ask, "Are County Commissioners entitled to pay *per diem* while traveling to and from their residences to place of holding meeting of Commissioners, or only pay while doing actual business?" Section 100, p. 137, Young's St., as amended by act of 1881, provides that they are to receive the pay designated "for each day they are necessarily employed *in transacting the county business.*" They cannot be said to be "transacting the county business" while each individual member is pursuing his separate way to the county seat. By section 101 it is pro-

vided that "*no business* shall be done unless voted for by a majority of the whole Board." Again, had the Legislature designed allowing their pay for time so spent they would have provided that they should receive pay for the time necessarily employed in the performance of their duties, and not have limited it to time employed in "transacting the county business." To do the latter, I apprehend, it requires the Board to be in session; at least, so far as this question is concerned.

May 20th, 1881. W. J. HAHN, Atty. Gen.

C. E. Crane, Esq., County Auditor, Waseca County:

DEAR SIR: Yours of twelfth inst. to the State Auditor was handed me this day for reply. The County Commissioners have no authority to abate taxes. Section 119, p. 245, Gen. St. 1878, provides that "he [the State Auditor] shall hear and determine *all matters* of grievance relating to taxation on account of excessive valuation of property, or for other cause, when submitted to him, with a statement of facts in the case, and favorable recommendation of the Commissioners and Auditor of the county in which the property is situated." A record of his decision is to be made, and a certified copy thereof forwarded to the County Auditor, who is to file the same, and *then*, and not till then, the County Auditor is to correct his books accordingly. If the State Auditor is to "hear and determine *all matters of grievance relating to taxation*," there can be no power lodged in the County Commissioners to hear or determine. All that is left to the Commissioners on this subject, by the present tax law, is the right to make a favorable recommendation. When that is done, their authority in the premises is ended. If the Commissioners have no power to make abatement, then it follows, as a necessary sequence, that the County Auditor has no more right to enter abatements made by them than if made by any other person or body of men; and the same responsibility would attach to such unauthorized entry as would attach in case of any other illegal entry.

May 20th, 1881. W. J. HAHN, Atty. Gen.

C. Steenerson, Esq., Clerk Dist. Ct., Polk County.

DEAR SIR: Yours of twenty-first inst. at hand. It has been several times held by this office that County Treasurers are not entitled to traveling expenses while away from the county seat collecting taxes, when directed by the Board of County Commissioners. Neither the tax law nor the law relating to Treasurers' fees seem to make provision for compensation for such duties, and it is a well-settled rule of law that public officers accept their offices with all the burdens and duties imposed thereon by law, and for the compensation provided by law. The County Commissioners have no power to allow more. His compensation is fixed by section 172, *c.* 8, Gen. St. 1878, and is in full for all services of himself or his deputy.

May 23d, 1881. W. J. HAHN, Atty. Gen.

F. C. Field, Esq., County Auditor, Wadena Co.:

DEAR SIR: Your communication to the State Auditor has been handed to me for reply. Your duty is clear in the case submitted. Section 72, p. 231, Young's St., provides "that if the County Commissioners shall fail to designate such paper, then it shall be designated by the County Auditor." This section does not stipulate that the notice and list shall be published in the "official paper," but does say that the "newspaper in which such publication shall be made shall be designated by resolution of the Board of County Commissioners," at their meeting in January or March, and a certified copy of such resolution is to be filed with the Clerk of the Court. This is jurisdictional. Eastman vs. Linn, 26 Minn. 215. Again, section 110 provides that the list shall be let to the lowest bidder, and requires a bond on the part of the contractor. If the official paper is the proper paper in which to

publish the list, of course it could be legally published in no other; and the provision that it should be let to the "publisher * * * who will offer to do the same * * * for the lowest sum" (section 110) would be useless. The Commissioners having failed to make the necessary designation, it becomes your duty to make it. No form or substance of such designation is given. However, I would recommend the draught of a paper something like this: "The Board of County Commissioners of Wadena county having failed to designate a newspaper in which to publish the notice and list of delinquent taxes of the year 1880, I, F. C. Field, the County Auditor of said county, by virtue of the authority in me vested under and by virtue of section 72 of the general tax law of 1878, do hereby designate ———, (the name of the *paper*,) being a newspaper of general circulation, printed in the English language, and which has been regularly published for at least three months previously in said Wadena county, as the newspaper in which said notice and list shall be published." This should be signed by you, the original filed with the clerk, a record of it made in your office, and then, out of extreme caution, I would make a certified copy of such record, and file that with the Clerk.

May 24th, 1881. W. J. HAHN, Atty. Gen.

Hon. J. P. Schaller, Brownsville, Minn.:

DEAR SIR: Yours of first inst. received, inquiring whether "the owner of a brewery, who sells nothing but his own manufacture (beer) in less quantities than five gallons, can be compelled to pay under our statute a license if his brewery be located outside of the city or village limits?" Section 4, *c.* 16, Gen. St. 1878, prohibits *every* person from selling "any spirituous, vinous, fermented, or malt liquors in a less quantity than five gallons without first having obtained license therefor." The statute contains no exception whatever. The provision is, "*whoever* sells," etc., without license. Any one doing so subjects himself to the penalties; and it can make no difference whether it is the owner of a brewery or a manufacturer, or where the manufactory is located. See State vs. Cron, 23 Minn. 140.

June 3d, 1881. W. J. HAHN, Atty. Gen.

P. J. McGuire, Esq., Co. Auditor, Polk County:

DEAR SIR: Your favor received. You ask: "Does the act referred to (chapter 52, Gen. Laws 1881) imply that County Commissioners may receive pay for 20 days services on County Board, and 25 days for extra services, as while engaged on committees appointed by the board, or not?" I answer that 25 days is the limit under the present law for which County Commissioners can receive compensation both for services as Commissioners and for services on committee. On a similar statement from Martin county I recently gave the following opinion: Prior to the act of 1881, County Commissioners could only receive pay for 20 days. They are now allowed compensation for not to exceed 25 days—committee-work and all. This, with the mileage provided by law, is the utmost extent of their pay. They can, should they otherwise come within the provisions of the act of 1881, receive pay for 25 days this year, *and no more.* You cannot subdivide the year. What they drew previous to the passage of this law, and since January 1, 1881, is to be counted upon the yearly allowance.

June 14th, 1881. W. J. HAHN, Atty. Gen.

O. J. Wood, Esq., Co. Atty., Chippewa Co.:

DEAR SIR: Yours received, and contents noted. Under the sections referred to (section 78, p. 134, and section 1, p. 968, Gen. St. 1878) County Commissioners of your county would be authorized, for the purpose of building a jail, to issue county orders on their own motion, and without a vote of the people: provided,

however, that the amount of such orders do not exceed the limit authorized by law. Section 49, p. 246, Id., fixes the maximum amount of taxation allowed by law to be levied by the County Commissioners. Section 114, p. 243, renders it unlawful for the corporate authorities of any county to contract any debt, unless expressly authorized, which would require a greater rate of taxation in any one year than the amount authorized by law, and makes the Commissioners individually liable if they do so. On the foregoing views of the law you can estimate for what amount orders can be issued.

June 15th, 1881. W. J. HAHN, Atty. Gen.

F. W. Frink, Esq., County Auditor, Rice Co.:

DEAR SIR: Yours of twentieth inst. to State Auditor was handed me for reply. You ask: (1) "Whether the chapter (section 37, *c.* 6, Laws 1877) is or is not repealed by act last above referred to." Section 22, *c.* 10, Laws 1881. (2) "Whether I shall allow redemption on all sales made while the act was in force, if it is now repealed, until the provisions of section 121, *c.* 11, Laws 1878, have been complied with." To your first question I answer yes. Section 22 of chapter 10, Gen. Laws 1881, expressly repeals the section referred to. To your second question I answer, no. By the repeal of section 37, *c.* 6, Laws 1877, there is no longer any authority for you to issue, or for the purchaser to cause to be issued, any notice of the expiration of redemption. No notice, therefore, could be issued or served. If no notice can be issued or served, and you are to allow redemptions until notice is issued and served, it would follow that there would be no limit to the time of redemption. I do not think that the section referred to conferred any such vested right upon the tax-payer as would prevent the repeal of the law. It will be observed that notice is not to be served upon the owner of the land, but upon the person in whose name it was assessed. Again, the notice was not required when the land was bid in by the State. I am of the opinion, therefore, that by the repeal of this section the right to redeem, in the cases covered by it, was taken away.

June 23d, 1881. W. J. HAHN, Atty. Gen.

H. A. Eckholdt, Esq., County Attorney, Olmsted Co.:

DEAR SIR: You ask, "Is an Assessor who performs his duties under section 80, *c.* 6, Gen. St. 1878, entitled to compensation for said work under section 79 of said chapter 6, or as prescribed by section 86, *c.* 10, of said statutes?" I answer: As prescribed by section 86, *c.* 10. By section 80, *c.* 6, it is made a part of his duty as Assessor to furnish the statistics therein provided for. The duty of obtaining and reporting such information is clearly imposed upon him by that section. He is under just as much obligation to perform this service as any other that the law imposes upon him. He does it as, and in the course of the performance of the functions of his office of, Assessor, and it is done at the same time he makes his assessment. Section 86, *c.* 10, aforesaid, provides that he shall receive for his services two dollars per day while engaged in the performance of his duties as such Assessor. This is made a part of his duties. Section 79, *c.* 6, aforesaid, refers, in my opinion, not to the performance of such ordinary and usual official services, but to extraordinary and unusual duties. Should the Commissioner of Statistics desire any other or further information than is provided for in section 80, he is authorized to address either "general or special inquiries" to the officers named in said section, and for the information furnished in response to such inquiries compensation is to be allowed as prescribed in section 79; and this remuneration is to be paid by the county.

July 1st, 1881. W. J. HAHN, Atty. Gen.

Benedict Howard, Esq., County Attorney, Clay County:

DEAR SIR: Your favor received. Assuming that the redistricting of your county, and the increasing of the number of Commissioners from three to five, has been legally made,—in reference to which I express no opinion,—then the opinion of the late Judge Cornell, given when Attorney General, a copy of which I inclose, will give you a part of the information desired. This opinion was followed and approved by both Gen. Wilson and Gen. Start. The old Board hold their offices and perform their duties just as before until the next general election. Then an entire new Board are to be elected. In other words, the redistricting does not take effect, so far as the incumbents of the office are concerned, until after the next general election. The redistricting the county in this case operates in the same way as a new legislative apportionment operates in the State at large. It does not *ipso facto* legislate the incumbents out of office, but shortens the term of some of the Commissioners.

July 1st, 1881. W. J. HAHN, Atty. Gen.

Geo. L. Cheadle, Esq., Reg. Deeds, Le Sueur Co.:

DEAR SIR: You ask, "Is it lawful for me to receive and place upon the reception books in my office deeds that are not transferred by the Auditor?" I understand your question to refer to the certificate of the Auditor as to taxes. If I am correct, this is absolutely necessary. Section 106, p. 241, Gen. St. 1878, requires one of two forms of certificate to be made by the County Auditor before a deed can be recorded, viz., "taxes paid and transfer entered," or "taxes paid by sale of land described within." When either of these certificates is placed on a deed by the County Auditor, such deed, so far as this question is concerned, is entitled to be recorded.

July 1st, 1881. W. J. HAHN, Atty. Gen.

Hon. A. R. McGill, Ins. Com.:

DEAR SIR: You ask: (1) Are Directors of a town mutual insurance company who are elected by the members casting one vote, and not a vote for each $200 of insurance, legally elected? Each member is entitled to one vote for every $200 of insurance he may be carrying, but I know of no reason why he should be compelled to cast all the votes he is authorized to cast. Were he to make the offer and all votes but one refused, a very different question would be presented. (2) Can a non-resident of a town or towns in which such an insurance company is located, and who does not reside in an adjoining town, legally hold an office in the company, and especially that of Secretary? I answer, no. By section 351, p. 441, Gen. St. 1878, non-residents who own property in any town in which such insurance company is authorized to do business, may become members of such association; but it is provided that "it shall not be lawful for such non-resident to become a director of said company unless he be at the time of such membership a resident of a town adjoining the town or towns in which said company has been formed." Section 339, p. 439, Gen. St. 1878, authorizes the Directors to "choose one of their number President and one Secretary." If he cannot legally be chosen a Director, it follows that he cannot be elected Secretary. (3) Are the acts of a Secretary who has been thus illegally elected binding on the company? I answer, yes. He is *de facto* Secretary, and his acts as such bind the corporation in all cases as regards persons unaware of the illegality of his appointment, and would in many cases bind it even where the person dealing with the company had knowledge of the facts. Green's Brice's Ultra Vires, 522.

July 1st, 1881. W. J. HAHN, Atty. Gen.

George H. Wilson, Esq., County Attorney, Nobles Co.:

DEAR SIR: Your favor submitting affidavit of Peter Thompson, asking to have certain taxes by him paid, refunded, has been duly considered. It seems too clear for argument that the payment of the taxes in this case was purely voluntary, and therefore no recovery can be had. For aught that appears, it falls far below the case of Smith vs. Schroeder, 15 Minn. 35. Besides, I do not know of any authority under the present tax law for the County Commissioners to refund. Section 119, c. 11, Gen. St. 1878, is the present law, as I understand it, in reference to all matters of grievance relating to taxation. By this action, the Board and County Auditor forward a statement of the facts, with a favorable recommendation, to the State Auditor. It is left with him to decide. The authority of the County Commissioners over such matters is governed and regulated by the statutes. Unless some power can be found in the statute which authorizes them to refund, they cannot legally do so.

July 6th, 1881. W. J. HAHN, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: The application made to you by Emory Clark to cancel the taxes of 1877, 1878, 1879, and 1880 on a certain lot in the village of Worthington, "and to satisfy the tax judgment entered for the taxes of 1877, pursuant to the provisions of section 97, as amended," by chapter 10, Gen. Laws 1881, together with the certificate of J. H. Drake, Esq., Land Commissioner of the Sioux City & St. Paul Railroad Company, and referred by you to me, has been duly considered. The right to have the relief furnished by said section 97 "is limited to the cases provided in this section," and the petitioner must "bring himself strictly within its provisions before he is entitled to any relief." Op. Atty. Gen. Start, May, 1880. In this case the petitioner falls far short of bringing himself strictly within the provisions of this section. The claim arises, if at all, under the first proviso of said section, viz.: "That when lands *have been sold for taxes*, the title to which at the time such tax was levied thereon was in * * * any railroad company and not subject to taxation, upon the presentation to the County Auditor of the certificate * * * of the proper officer of the railroad company, *approved by the State Auditor*, showing the amount *paid on such sale*, and for subsequent taxes levied prior to such entry or sale, shall be *refunded to the tax purchaser*, * * * with interest." It will not be claimed for a moment that the case is covered by the foregoing. It does not appear that this land was sold for taxes, and, of course, no "amount paid on such sale" appears, and therefore there could be no amount *refunded*. Immediately following the above-quoted portion of the first proviso is this: "And if such lands were *bid in by the State of Minnesota*, the State Auditor shall cancel such sale and satisfy the tax judgment." As I said before, it does not appear that this lot was ever sold for taxes, and it is only when land is "bid in by the State of Minnesota" that you are authorized by this section to cancel "such sale" or "satisfy the tax judgment." I have therefore to advise you that on the papers in this case submitted to me you are not authorized to satisfy the tax judgment referred to, or to cancel the taxes against said lot.

July 6th, 1881. W. J. HAHN, Atty. Gen.

Hon. O. P. Whitcomb, State Auditor:

DEAR SIR: The question submitted by you I understand to be this: "Are railroad lands, otherwise exempt, which are sold on contract, to be assessed at their full value?" I answer, no. My predecessor, Judge Start, in an opinion dated July 7, 1880, on a somewhat similar question, held "that where the title is in the railroad, a tax against the fee is not valid. The interest of the purchaser in the land and his improvements should be taxed as personal property." To tax the fee is to render the land liable to a judgment *in rem*. If the provisions of the law are

complied with, under and by virtue of this judgment the land can be sold and the title of the railroad company be divested by and for a tax with which it was never legally chargeable. If the land—the fee—cannot be sold and title conveyed under the tax laws, it must be because the fee cannot be taxed. The converse of this proposition must be true also—that the fee cannot be taxed because it cannot be sold or conveyed to satisfy such tax.

July 6th, 1881. W. J. HAHN, Atty. Gen.

J. L. Higgins Esq., County Attorney, Martin Co.:

DEAR SIR: Mr. Lane has already referred you to an opinion given by me on the *per diem* of County Commissioners. Under chapter 52, Laws 1881, I think the Commissioners are entitled to mileage as follows: Ten cents per mile for attending meetings of Board; not, however, to exceed six sessions in any one year. In addition to this, when any County Commissioner is actually employed in the business of the county by order of the Board, he is entitled to ten cents per mile for every mile traveled in the performance of such duty. He may, therefore, when the facts justify it, receive mileage for six sessions, and also for any distance he may necessarily travel in performing the duty named in the first proviso of said chapter 52. The mileage is entirely separate and distinct from the *per diem*, and should not and cannot be embraced in or form a part of the gross amount of the same.

July 13th, 1881. W. J. HAHN, Atty. Gen.

School Board, Dist. 29, Dakota Co.:

GENTLEMEN: Your favor received. Section 212, p. 156, Gen. St., prescribes the duties of County Attorneys. As you will see, it is no part of his duties to advise school-district officers. For the services named he would be entitled to the same fees as if performed at request of a private individual.

July 13th, 1881. W. J. HAHN, Atty. Gen.

R. B. Basford, Esq., County Auditor, Winona Co.:

DEAR SIR: Your favor twelfth inst., submitting for my consideration and opinion nine questions, received. I will proceed to answer them in the order in which they are asked.

First. "Are County Commissioners of Winona county entitled to more than 35 days pay in one year?" I answer unhesitatingly, no. The compensation provided for county commissioners in your county is contained in chapter 244, Sp. Laws 1878. This act specifically and unequivocally states that "no county commissioner shall receive pay for more than 35 days * * * in each year." Nothing can be plainer. No room is left for conjecture.

Second. "Suppose 35 days are consumed in session work, are they entitled to $3 per day for services in looking after roads, poor, or any other business for the county, in addition to the 35 days session work?" I again answer, no. They are to "receive $3 per day for each day they are necessarily employed *in transacting the county business* of said county," and the limit of 35 days clearly applies to the transaction of the county business, and not simply to the sessions of the Board. When "looking after roads" they are transacting the county business.

Third. "Are they entitled to pay for use of their own teams while on duty looking after roads, poor, or any other business for the county?" They are not, in my opinion. County Commissioners can only receive such pay, and for such services, as the law prescribes. No man is obliged to accept any public office. When he does, he accepts it with such duties and such emoluments, and no other, as the law attaches to such office. If no compensation is provided, none can be paid. I know of no provision for use of teams.

Fourth. "Are they entitled to mere mileage for any services except going to and from sessions of the Board?" I answer, no. The chapter referred to provides that they shall be allowed "six cents per mile for every mile traveled in going and returning *from the meetings of the county board* of said county in the discharge of any official duty." As will be seen by this provision, it is only in going to and returning from a *meeting of the Board* that mileage is to be allowed. It necessarily follows that pay for any other distance they may be compelled to go in the discharge of official duty cannot be allowed.

This also answers your fifth inquiry.

Sixth. "Can any one or more Commissioners oversee road work or other work by and with consent or knowledge of the Board, and receive $3 per day for same?" If, when doing so, they are "necessarily employed in transacting the county business of said county," I can see no reason why they cannot: provided, however, that services so performed are to be counted as a part of the 35 days for which compensation is allowed them. When that time is exhausted no compensation can be paid them for any service as County Commissioner. If by this question you mean, however, the appointment of one of the County Commissioners, by the Board, to a position of overseer of the work referred to, and that, while acting in that capacity, he is not to be regarded as performing any duty as County Commissioner, then section 124, p. 140, Gen. St. 1878, would prohibit such appointment, and render the payment of any compensation therefor illegal.

Seventh. "Has the County Auditor authority to draw orders upon the Treasurer in favor of any Commissioner for labor or services outside of session work, or in excess of 35 days in one year, even if claims for such excess are approved by the Board in session?" I think not. Section 100 of chapter 8, Gen. St. 1878, as amended by chapter 52, Gen. Laws 1881, in spirit, at least, prohibits the County Auditor from doing so. It is true that this section says "the pay and traveling fees prescribed in this section;" but the clause in that section which says that "this act shall not affect the pay and traveling fees of the Commissioners of any county whose pay and fees are now provided for by a special law regulating the same," would seem to indicate that, except as to pay and traveling fees, the section should apply to all County Commissioners. But, however this may be, it seems to me clear that the County Auditor should refuse to make himself a party, directly or indirectly, to the payment of an illegal claim.

Your eighth question has been sufficiently answered by what I have already said.

Ninth. "Are the Commissioners entitled to $3 per day and mileage, as a Board of Equalization, outside and independent of the 35 days as County Commissioners?" Not unless some specific provision can be found allowing it. I do not know of any such provision.

July 13th, 1881. W. J. HAHN, Atty. Gen.

Lyman B. Everdell, Esq., County Attorney, Wilkin Co.:

DEAR SIR: You ask: (1) "Is a person summoned and attending as a juror at a Coroner's inquest entitled to mileage?" I think not. Section 30, p. 782, Gen. St. 1878, fixes the pay of a juror, in such cases, at one dollar per day. Nothing is said as to mileage, and this was evidently left out because the Legislature did not design that he should receive any. (2) "Can any 'expert fee' be allowed a witness at such inquest?" Except the expert be a "physician called by a Coroner to make any professional *post mortem* examination," (section 13, p. 778,) no expert fee can be allowed. It is only on the allowance of the District Judge that such fee (except as provided in section 13, p. 778) can be paid. Section 8, p. 774. As to physicians the question is somewhat doubtful, but I am inclined to the opinion that under said section 13, p. 778, a fee of six dollars per day and mileage could be allowed him if called by the Coroner for the purpose named in that section. He is to receive mileage to and from the place of "holding such *inquest* or examination." In the same section, in providing for the Coroner's fees, the same language is

used. This would seem to indicate that the design was to cover the time consumed by him in making the *post mortem* examination, and also in attendance upon the inquest. (3) "From what point should a juror's mileage (District Court) be computed,—his residence, or place where summoned?" From his residence. It is from there he is supposed to travel. Section 30, p. 782, allows the mileage fee "for each mile traveled in going to and returning from the said court." This can only mean from his residence. (4) "Can the Auditor issue a warrant on the Coroner's certificate for the Coroner's fees?" He cannot. Section 141, p. 143, Gen. St. 1878, as amended by chapter 13, p. 27, Gen. Laws 1879, provides that "no claims against the county shall be paid otherwise than upon the allowance of the County Commissioners upon the warrant of the Chairman of the Board, or except in those cases in which the *precise amount* is fixed by law, or is authorized to be fixed by some other person or tribunal." The "*precise amount*" the Coroner is to receive is not fixed by law; and the only "person or tribunal" authorized to "fix the same" is the County Board. The amount he is to receive depends upon the services he has rendered, the rate alone being fixed by law. Hence, such a claim must be verified and allowed by the Board the same as any other demand.

July 15th, 1881. W. J. HAHN, Atty. Gen.

E. P. Freeman, Esq., County Attorney, Blue Earth County:

DEAR SIR: Yours of the fourteenth received. Mr. Bookwalter's question was: "In case the County Commissioners alter a county road and allow damage, is the county held for the damage, or is the township wherein the road altered is located, held for payment of the damage allowed?" On examination of the matter I am still more strongly of the opinion that the answer lay in the provision of law that "all damages sustained by reason of laying out or altering any county road shall be * * * paid by the county," to which I referred him. Section 53, p. 262, Gen. St. 1878. This is made entirely clear by the amendment to section 63, p. 264, enacted last winter, (chapter 26, p. 45, Gen. Laws 1881,) which provides that "in no case shall any town be compelled to pay any damages that may be awarded in laying out, altering, or discontinuing any county road." Whatever may have been the decision of Judge McDonald prior to this amendment, it is not at all probable that he or any other judicial officer would now hold that towns were liable to pay the damages assessed by the County Board for laying out or altering a *county* road. The different kinds of roads referred to in the statute are State, District, County, and Town, and though, as to the matter of working and keeping in repair, the duty devolves on the respective road districts through which these run, yet, as to damages to be paid for establishing them, the corporations through which they respectively run, and *by whose authority they were laid out*, are liable; that is to say, in case of State and District roads, the several counties through which they run bear this expense. Section 55, p. 263, as to State roads; section 78, p. 267, as to District roads. In case of County roads, (which are those laid out by County Commissioners through two or more towns,) the damages are paid by the county in which they lie, (section 53, p. 262;) and in case of Town roads, (which are roads laid out by the Town Supervisors,) by the towns in which they are situated. Section 63, p. 264. There is no difficulty in reconciling the different provisions of the statute, if these distinctions are kept in view. Chapter 26, p. 45, Gen. Laws 1881, so far from being a repeal by implication, or otherwise, of section 63, p. 264, Gen. St. 1878, is, by express reference to it, an amendment thereof; and the last clause of the amendment above quoted clears up any doubt which may have heretofore existed on the question presented by Mr. Bookwalter.

July 18th, 1881. W. J. HAHN, Atty. Gen.

M. E. Mullen, Esq., Judge of Probate, Watonwan Co.:

DEAR SIR: Yours of twelfth inst. to State Auditor has been referred to this office for reply. You state that one Moe purchased school lands and held a certificate therefor at the time of his death, which occurred sometime afterwards, and before a patent issued; that his father is his heir, and there are no debts, "so that the opening of administration is not necessary, and Peter Moe, the father, has sold the land," and wishes the patent issued to his assignee, and you ask what evidence is required for this purpose. The Land Commissioner has always required, in case of the death of the holder of a certificate of purchase of school lands, the decree of distribution of the Probate Court as the best and only competent evidence as to who is entitled to the certificate and patent, and there are no apparent reasons for a departure from the rule in this case. Administration is necessary in order to judicially determine the very facts which you say render it unnecessary; namely, that the interest in the land is not necessary to be sold to pay debts, and that the father is the only heir. The Probate Court has exclusive jurisdiction of these questions, and is the only one which can determine them. When it does so, the State Land Commissioner would be authorized to act on that determination, and not until a copy, duly certified, of the final decree of distribution is furnished, can a patent be properly issued to the party or his assignee.

July 20th, 1881. W. J. HAHN, Atty. Gen.

Messrs. C. F. Washburn & Co.:

GENTLEMEN: You ask "whether County Treasurers are obliged by the law of last winter to deposit county funds in bank, if there is a bank in the county, or is it discretionary with them to do so, or not?" I think a County Treasurer is only required to so deposit when the bank or bankers shall be designated by the Board of Auditors, as specified in chapter 124, Laws 1881.

August 16th, 1881. W. J. HAHN, Atty. Gen.

Henry Bordewick, Esq., County Auditor, Yellow Medicine County:

DEAR SIR: Your favor received. I think two separate notices should be given of tax sales this year,—one of regular annual sale, the other of forfeited sale. The time when the latter would take place might be stated as "immediately following the sale of land for taxes of 1880, which will commence on the —— day of ——," etc.

August 16th, 1881. W. J. HAHN, Atty. Gen.

J. M. Van Schaack, Esq., Co. Aud., Redwood Co.:

DEAR SIR: Your favor to State Auditor has been handed me for reply. The Bond Case has delayed the matter. I do not see how you could, under the law, permit a redemption of a part of a tract of land sold for taxes. Redemption is a privilege accorded by the State, and a person can only avail himself of this privilege by pursuing the statutes. Section 90, p. 238, Gen. St. 1878, provides how and on what terms such redemption may be effected. "The amount for which the sum was bid in," with interest, etc., is to be paid, not part of such amount. You have no authority to apportion such amount. [Affirmed, 28 Minn. 328.]

August 16th, 1881. W. J. HAHN, Atty. Gen.

Lyman B. Everdell, Esq., County Attorney, Wilkin County:

DEAR SIR: The Bond Case has delayed my answering your favor of July 29th.

To your first question, viz., "Can the Board of County Commissioners legally allow themselves compensation for services performed by them as a 'Bridge Com-

mittee,' in excess of the number of days allowed for Commissioners' services by statute?" I answer, no. Section 100, p. 137, Gen. St. 1878, as amended by Gen. Laws 1881, expressly provides that County Commissioners shall only receive pay for not to exceed 25 days for committee work and all other services.

To your second question, viz., "In case such bill is audited and allowed by the Commissioners, should the Auditor attest it?" I say, I think not. The statutes of 1881 make the Auditor liable for signing any order in excess of the pay therein provided. He would not be warranted in signing any order for a known illegal purpose.

To your third question, viz., "Is the Treasurer warranted in paying an order or warrant which is illegal on its face; that is, when it shows on its face that it is a claim not warranted by law?" I reply, clearly not. A warrant illegal on its face is the same as no warrant at all.

To your fourth and fifth questions, viz., "Can the Board of County Commissioners legally order the Auditor to withhold a portion of the salary of an officer, such salary being fixed annually, for an alleged failure to perform some duty, or should they proceed by action on his official bond? and, in case such an order is made, is the Auditor required to withhold the warrant for the salary of such officer, or is he justified in so doing?" I answer, that in case of an officer whose duties are prescribed by law, and whom the County Commissioners have no authority to remove, they would not be justified in ordering any portion of his salary withheld, nor would the Auditor be warranted in withholding such salary. The County Commissioners are not a court, and if they have any right to declare a forfeiture they must be able to put their hands upon some clause in the statutes authorizing it. The official bond is given to secure the county against any damage by reason of a dereliction of duty. He is just as much entitled to his day in court as a private citizen.

To your sixth question, viz., "If an illegal claim has been actually paid on an Auditor's warrant, what action should I take?" I reply: If an illegal claim is *allowed* by the Board of County Commissioners, your duty in the premises is specified in section 89, p. 134, Gen. St. 1878. You should promptly take an appeal to the District Court. If actually paid, the course for you to pursue will depend on circumstances. If clearly illegal, the Auditor, and if illegal on its face I think the Treasurer, would be liable. Again, when your Grand Jury meet, have the court call their attention particularly to the matter, have them investigate it, and, if warranted, an indictment against the guilty parties would doubtless exert a salutary influence for the future, at least.

August 17th, 1881. W. J. HAHN, Atty. Gen.

C. C. Gregg, Esq., Co. Aud., Lyon Co.:

DEAR SIR: Your favor received, but an answer thereto has been delayed by my engagement with the Bond Case.

To first question, viz., "What rate of interest is charged against delinquent lands after 10 per cent. penalty is added on June 1st, from that time and until date of tax sale in September following?" I answer: No interest is to be charged. The statute is silent on this subject, and as, without a provision providing for it, interest could not be charged, it follows that none can be added to the amount of taxes and penalty which makes up the judgment. Section 98, p. 240, Gen. St. 1878, which is the only section on this subject, only provides for interest on and after judgment sale.

The purport of your second question I do not fully understand, and will not, therefore, answer it until advised further.

To your last question, viz., "Does the delinquent road fund reported to and by road overseer, and extended by Auditor on tax list, when collected, go to a common *town fund*, or can each road district claim its own if desired, *i. e.*, all money collected in its own territory?" I answer: To a common town fund. Section 28, p.

258, Gen. St. 1878, is plain, and cannot be misunderstood. It in substance provides that it shall be paid to the Town Treasurer, and shall be applied by the Supervisors in the construction or repair of roads and bridges.

I am sorry that circumstances have prevented an earlier reply. No excuse is necessary for asking the questions. I am always ready to give my "guess" to county officers when desired.

August 17th, 1881. W. J. HAHN, Atty. Gen.

C. E. Crane, Co. Aud., Waseca Co.:

DEAR SIR: Your favor to State Auditor was handed me for answer, but has been delayed by press of other duties. You ask: "(1) Does the law (chapter 52, Gen. Laws 1881) act retrospectively, and am I to consider the official year of Commissioners as commencing on the first day of January last, as the language of the amendment seems to imply? (2) If the amendment can act no further back than February 28, 1881, how much and by what *pro rata* shall I allow the Commissioners pay for the remainder of the official year? (3) Is a Commissioner acting 'by order of the Board' unless the Board at some special or regular session has passed an order in due form, and entered such order in the minutes of their proceedings, setting apart or designating by name each Commissioner to some special work or service? And (4) in this light will the following order entitle the Commissioner, acting by *its authority alone*, to draw pay for special services for county performed outside of regular or special sessions, viz.: 'Ordered that each Commissioner be appointed as committee on extra duties in his respective district?' (5) Have the bills of County Commissioners for services for which they are legally entitled to pay, and after allowance by the Board, any preference over other bills to be paid as soon as allowed, and before the expiration of thirty days?"

First. The official year of Commissioners commences January 1st. Prior to this act of 1881 County Commissioners were only allowed pay for 20 days for all services. This act increases the time under certain circumstances to 25 days. I think it should receive a liberal construction, and therefore would hold that it applies to the year 1881. This disposes of your second question also.

Second. A Commissioner is not acting "by order of the Board" unless the Board at some session, by order or resolution entered in its minutes, assigned him to the performance of some business of the county. The Board, as such, can only act when in session, and a record of their proceedings is to be kept, and it is by such record that their action is to be verified. I doubt whether the order referred to by you is sufficient. It does not specify the character of such duties, and I do not see how any person could show that the number of days claimed to have been spent in the performance of "extra duties" was not in fact performed, or that the same were such duties as might be performed by a single Commissioner, or were such as the county would in any event be liable for. If an order to perform "extra duties" is sufficient, then it seems to me a bill for "extra duties" would be good. It is only while "employed in the *business of the county*" that a Commissioner, under the law, can receive pay for anything outside of the meetings of the Board. The order, therefore, ought to show on its face, by specifying the particular business which such Commissioner is ordered to perform, that it is "the business of the county."

Third. Bills for services of County Commissioners have not, under the law, any preference over other bills. The statute makes no distinction, and I know of no power, except the Legislature, that can interpolate a provision making such preference. The same reason, also, which applies to other bills applies equally to theirs. The statute says, (section 89, p. 134, Gen. St. 1878,) "when the claim of *any* person against a county," etc. This is certainly broad and specific enough to include the claims referred to.

August 18th, 1881. W. J. HAHN, Atty. Gen.

J. L. Higgins, Co. Atty., Martin Co., Fairmont:

DEAR SIR: I beg your pardon for the long delay in answering your favor of July 16th. I have thought of nothing else save "*those bonds.*" I don't see how it is possible for the County Commissioners to direct the County Treasurer as to the order in which county orders are to be paid. Section 147, p. 149, Gen. St. 1878, as amended by chapter 33, Gen. Laws 1879, expressly provides that county orders and warrants "shall be entitled to preference as to payment according to the time *when presented*, of which a record shall be kept by the County Treasurer." This seems to be imperative, and I know of no other provision which in any way militates against this construction.

August 18th, 1881. W. J. HAHN, Atty. Gen.

O. J. Wood, Esq., Co. Atty., Chippewa Co.:

DEAR SIR: I have been so intently engaged on the Bond Case that all letters have necessarily remained unanswered. You ask "whether a county is liable for the expense incurred by a Sheriff in recapturing a criminal who has escaped from jail." The statutes are silent on the subject; but, if such escape was through the carelessness or negligence of the Sheriff, he should not be entitled to any compensation. Section 14, p. 910, Gen. St. 1878, which makes it a criminal offense to negligently suffer a criminal to escape, makes it evident that in such case he would not be entitled to any compensation for recovering such prisoner. If, however, such escape was not caused by the Sheriff's negligence,—if he was without fault in the matter,—I am of the opinion that he would be entitled to mileage for the distance actually and necessarily traveled by him in good faith while engaged in an honest effort to catch the criminal. If the Commissioners are satisfied that the Sheriff has not acted within the above rule, they should disallow his bill, or reduce it to such sum as he is legally entitled to under this rule. He, however, could not hire help and make the county liable for the same. This would fall within the principle of the rule in 22 Minn. 73.

I fully agree with you on the matter of the county road and bridge fund. It should not be *levied* as a separate tax; but I think 22 Minn. 356, clearly holds that, in making up the estimate of the amount required to be raised for general revenue fund, the Commissioners are authorized to include in such estimate a given amount supposed by them to be necessary for that purpose,—so much for salaries, so much for poor, so much for roads and bridges, etc.,—may be properly set out in the record as showing how the gross amount of revenue is arrived at; but no separate and distinct tax should be levied for any or either of these purposes. A gross levy is all that is permitted. Section 49, p. 226, Gen. St. 1878, however, expressly limits the rate per cent. that they are authorized to levy for county purposes, and, of course, they must keep within this limit.

August 18th, 1881. W. J. HAHN, Atty. Gen.

E. E. Luce, Esq., Clerk District Court:

DEAR SIR: The books referred to in section 229, p. 163, Gen. St. 1878, are to be procured by the Clerk at the expense of the county. The Commissioners are required to procure the supplies mentioned in section 110. The two are separate and distinct. In my opinion, therefore, the books referred to in section 229 are not to be deducted from the amount of supplies stated in section 110. It being conceded that the books are necessary, and are such as are mentioned in section 229, I think the Commissioners should allow for same.

August 23d, 1881. W. J. HAHN, Atty. Gen.

Hon. W. B. Mitchell, St. Cloud, Minn.:

DEAR SIR: Your inquiry as to whether the words in brackets in chapter 29, Laws 1879, viz., "which publication shall be let by contract to the lowest bidder," is a part of that law, has been necessarily delayed. In my opinion they are not. To enact a law it is necessary not only that it pass the two Houses, but that it be approved by the Governor. This law was only approved so far as the enrolled bill is concerned. This clause was not in that bill, and was therefore never approved. It is a material, substantive clause, which would not be supplied by intendment. Were it a single word necessary to the sense of a sentence, it would be different.

August 24th, 1881. W. J. HAHN, Atty. Gen.

James Hodgson, Esq., Co. Atty., Swift Co.:

DEAR SIR: You say, in 1879 one S. was elected County Attorney, qualified, and served as such until September, 1880, when he resigned; the Commissioners appointed one in his place until the November, 1880, election, when a successor was elected and qualified; and ask this question, viz.: "Does the last-elected attorney hold for two years from his election, or the full statutory term, or is he only elected to fill the vacancy caused by Mr. Stewart's resignation?" I answer, to fill the vacancy. Section 46, p. 48, Gen. St. 1878, provides that when any one is elected to fill a vacancy he shall "hold the same during the unexpired term for which he was elected, and until his successor is elected and qualified." Section 11, p. 166, same statutes, as amended by chapter 53, Gen. Laws 1879, provides for the temporary filling of vacancies. My predecessor, Judge Start, in an opinion dated September 9, 1880, with reference to the office of County Treasurer, says: "The provisions of chapter 8, § 144, fixing the term of County Treasurers at two years, apply only to cases where the Treasurer is elected for the regular term, and not to cases where he is elected to fill a vacancy." I fully agree with this ruling. The same language is applicable to title 8, *c.* 8, p. 155, relating to County Attorneys.

August 26th, 1881. W. J. HAHN, Atty. Gen.

Wm. Morin, Esq.:

DEAR SIR: You favor to the State Treasurer has been handed me for reply. Your question in substance is as to the effect of the Auditor's certificate on a deed that "taxes are paid." This question was submitted to Attorney General Wilson, and in reply he said: "As the law stands, I am quite certain that the courts would hold that the Auditor's certificate of taxes paid, if untrue, would not operate to discharge the taxes; * * * that the party injured by such false certificate would have a remedy by action against the officer." With this ruling I fully concur. Surely, this certificate could be no more efficacious than a tax receipt from the Treasurer for the amount of tax for any one year. Such a receipt, I apprehend, would be open to "*contradiction* or explanation by the evidence of persons having personal knowledge of the facts." See Jonstone vs. Scott, 11 Mich. 232; Hammond vs. Haumer, 21 Mich. 383; Cooley, Tax'n, 323, and cases cited, note 2.

September 2d, 1881. W. J. HAHN, Atty. Gen.

H. W. Elms, Esq., County Auditor, Mower County:

DEAR SIR: You ask whether, where "land is contracted by a railroad company in 1874, and taxed in 1875, and sold for taxes for 1875 to 1880, inclusive, and the contract canceled by the company in 1881, I am obliged to refund the money paid by the purchaser, or are the certificates good against the land?" Section 97, p. 240, Gen. St. 1878, provides when and under what circumstances you are obliged to refund the money. It is only when the sale is "declared void by judgment of court," stating the reasons for such judment, that the Auditor is authorized to refund. Until that occurs you have no authority to act. This section 97 was amended

by chapter 10, Laws 1881, and now provides how such judgment may be canceled and sale annulled. In the case put, the approval of the State Auditor is necessary by this amendment.

September 2d, 1881. W. J. HAHN, Atty. Gen.

C. C. Webster, Esq., Co. Aud., Goodhue Co.:

DEAR SIR: Yours of 27th to State Auditor was handed me for reply. You say: "There are several parish schools in this city [Red Wing] under the auspices of different churches. Does the recent decision of the Supreme Court render all such exempt from taxation? If so, what action is necessary to have such taxes abated?" There is no doubt that under the Constitution and laws, as construed and applied by the Supreme Court, (In re Grace, 8 N. W. Rep. 761,) such schools are exempt from taxation. Taxes which may have been assessed thereon may be abated in the manner prescribed in section 119, *c.* 11, Gen. St. 1878; *i. e.*, "a statement of facts in the case," and favorable recommendation of the County Commissioners and Auditor, submitted to the State Auditor. After judgment and sale the proceeding should be under section 97, as amended by chapter 10, Laws 1881.

September 2d, 1881. W. J. HAHN, Atty. Gen.

A. H. Yarns, Esq., Wood Lake, Minn.:

DEAR SIR: Yours of seventh inst. received. You state that it was left to abide my decision on the point whether a vote in your district meeting "to allow the Director and Treasurer the same per cent. on disbursements as the Clerk receives," under the law, was proper and legal. I decide in the negative. The law is the place to look for the compensation of public officers. Unless it provides for it, no compensation can be voted or allowed to them, and whatever compensation is provided can neither be increased nor diminished except by a change in the law. The power to fix the compensation of officers of school-districts is not one of the powers conferred upon the voters of the district, and hence remains in the Legislature. The vote was not within their jurisdiction, and is therefore void.

September 13th, 1881. W. J. HAHN, Atty. Gen.

Jacob Schwab, Esq., Dist. No. 2, Anoka Co., Minn.:

DEAR SIR: Yours of fifth inst. received. You state that at your annual school meeting, without any previous notice being given of such purpose, the question of changing the site of the school-house and building a new one on the new site was voted upon, and that only 15 legal voters were present, while the whole number of legal voters in the district would exceed 45; and you ask whether such vote was legal. I answer, no. Section 38, *c.* 36, Gen. St. 1878, p. 475, provides "that at any annual meeting the legal voters present may act upon any matter properly before them, *except the raising of money* for building or purchasing a school-house or *fixing the site thereof*, although it has not been particularly set forth in the notice for such meeting." This is equivalent to providing that the matters here excepted cannot be voted upon unless they have "been particularly set forth in the notice for such meeting." It amounts to a prohibition against any action upon these subjects where notice of such proposed action has not been previously given. Again, by subdivision 4, § 19, of said chapter it is provided that "the site of a school-house shall not be changed, after having been designated, unless *at least two-thirds* of the legal *voters of the district* vote in favor of such change," (except in a certain contingency, where a majority present and voting may change the site to a more central location, which does not appear to be the case here.) Under this provision it would require at least 30 legal voters in your district to legally change the site of the school-

house. The vote of the meeting was therefore illegal and void, if the facts are as stated by you.

September 14th, 1881. W. J. HAHN, Atty. Gen.

P. T. McGuire, Esq., Co. Auditor, Polk Co.:

DEAR SIR: You say: "In November, 1880, our County Auditor was elected. He died last spring. I was appointed his successor until next annual election. Shall my successor hold office for *one* or for two years?" I answer, until the first Monday of March, 1883. Section 46, p. 48, Gen. St. 1878, provides that when any one is elected, to fill a vacancy, he shall "hold the same during the unexpired term for which he was elected, and until his successor is elected and qualified." The term of your predecessor would have expired at the time above indicated. In the fall of 1882 an Auditor will be again elected, who will assume the duties of his office in March, 1883.

September 15th, 1881. W. J. HAHN, Atty. Gen.

P. D. O'Phelan, Clerk Dist. No. 12, Traverse Co.:

DEAR SIR: Yours of the ninth inst., rec'd. It seems a controversy exists in regard to the legality of certain proceedings at your annual school meeting. The illegality it is claimed results from the alleged facts that the Moderator chosen to preside was a non-resident of the district, and one of the voters present did not reside in the district, and hence that neither was qualified to vote at the meeting. I do not think these facts would vitiate or render the proceedings, otherwise regular, illegal. The duty of the Moderator is simply to preside—to keep order at the meeting; and, so far as the validity of the vote is concerned, it is immaterial whether he is a duly-qualified voter in the district or not. It has been held by the Supreme Court that the election is not affected by the fact that one of the judges of election was not duly qualified. Taylor vs. Taylor, 10 Minn. 81, 84, (Gil. Ed.) The rule would more strongly apply to the case of a *de facto* Moderator than to a judge of an election who was not qualified. So far as the one illegal vote is concerned, unless the casting of it would change the result from what it would have been without it, the whole vote would stand as valid. This is not claimed in this case. The meeting and proceedings thereat were therefore legal and valid. I think you were wrong in assuming it to be illegal. It was not your province to decide the question of legality. "That was a question for judicial, not for ministerial officers,—a question that could only be decided by a court that could call in witnesses, hear evidence, and decide questions of law and fact." Taylor vs. Taylor, 10 Minn. 83.

As to your duty to report to County Superintendent, I refer you to section 39, school law; and as to penalty for failure of duty, to sections 86, 87. I do not think you were justified in calling a special meeting, or that the meeting, if held, would be legal, or the proceedings attempting to annul those of the annual meeting of any validity, except as to subjects duly noticed.

September 15th, 1881. W. J. HAHN, Atty. Gen.

D. Cameron, Esq., La Crescent, Minn.:

DEAR SIR: Your postal received. No such opinion as you speak of was given by Gen. Start, but Gen. Cole in 1862, in construing the same provision, substantially, regarding notice of annual meetings for school-districts, held it directory merely so far as the election of officers or any other business, except that which the statute requires to be particularly set forth in the call, viz., *the raising of money for building or purchasing a school-house, or fixing or changing the site thereof.* Hence, that the meeting is legal and valid for any of the purposes except those above italicized, without any notice having been previously given or posted. See pub-

lished Op. Attys. Gen. 189. I fully concur in this view. The statute itself fixes the time of the annual meeting, and notice is unnecessary, except for the purposes named.

September 15th, 1881. W. J. HAHN, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: In the communication submitted by your Excellency it is stated that the Commission of Appraisal appointed in pursuance of the award made by the Commissioners, constituted by virtue of an act of the legislature of this State entitled "An act to provide for the appointment of Commissioners to settle all matters of difference of the State of Minnesota with Seymour, Sabin & Co.," approved March 11, 1878, "returned the old engine, not now in use, $4,500," and the opinion of this office is asked as to whether there was any authority in the appraisers, at the appraisal provided for by said award in the spring of 1881, to appraise this piece of property. I answer: There was no such authority, in my opinion. The fifth subdivision of said award of 1878, which provides for the purchase by the State of the machinery, engine, etc,, in use in the prison-shops, divides the articles to be so purchased into two classes, and fixes the time when the appraisal of each separate class is to be made and the purchase thereof consummated. By this subdivision, "the engine, boiler, pumps, and attachments thereto, then in use in the prison-shops, and in good order," were to be appraised and taken by the State at such appraisal, "in the month of March, 1880." By the same clause of said award "all the fixed and movable machinery belonging to them and then in use in the said prison-shops and yard, in good order and condition, including all shafting and belting for driving the same," were to be appraised and purchased by the State, "at the termination of said contract, on the first day of April, 1881." It will be seen, from the language of this award, that the "*engine*, (*not engines*,) boiler, pumps, and attachments thereto," were to be separated from the rest of the machinery, and, for the purposes of such purchase, were not to be considered as forming a part of "the fixed and movable machinery belonging to them." If an engine could be appraised in 1881, and the State forced to buy it at such appraisal, for the same reason a boiler or boilers, pumps or attachments, might also have been included in and covered by such appraisal; and if so, what was the object and purpose of the Commissioners in thus dividing the articles to be bought by the State, and providing for two sets of appraisers and two appraisals? Again, it is evident, from the use of the term "engine," that it was not the intention of the commission of 1878 that the State should purchase more than one engine, and particularly that it should purchase an engine not in use; for if this be not true, and the appraisers are not limited either as to the number or character of the engines which they were to appraise and the State to buy, I can see nothing which would have prevented Seymour, Sabin & Co. from disposing of any and all engines which they may have desired to dispose of in this way, or have had on hand for the purpose of sale.

September 16th, 1881. W. J. HAHN, Atty. Gen.

O. J. Wood, Esq., Co. Atty., Chippewa Co.:

DEAR SIR: Yours of 21st received. There is no doubt but that the Legislature, when in session, whether special or regular, may properly consider and legislate upon any matter which may be brought before it, whether mentioned in the call or not, that comes within the scope of the legislative power. Hence, the matter you refer to may properly be acted upon, and the law repealed, if the Legislature so desires.

September 23d, 1881. W. J. HAHN, Atty. Gen.

C. E. Crane, Esq., Auditor, Waseca County:

DEAR SIR: You are not only "justified and safe" in following the State Auditor's directions, but by section 119, p. 245, Gen. St. 1878, it is made his duty to construe the tax law, and the construction given by him is to *have force and effect* until annulled by judgment of court.

September 24th, 1881. W. J. HAHN, Atty. Gen.

Geo. D. Goodrich, Esq.:

DEAR SIR: You ask: "After a district has voted upon the time of commencing school at the annual meeting, can the time of commencing be changed at a special meeting?" I think it can. Section 19, *c.* 36, Gen. St. 1878, provides "that the legal voters of school-districts, when lawfully assembled, not less than five being present, shall have power, by a majority vote of those present, * * * (subdivision 6,) to repeal or modify their proceedings *from time to time* in accordance with the powers conferred by this act." There is no limitation on their powers in regard to this subject, and the power to "repeal or modify their proceedings from time to time" would therefore be applicable.

September 24th, 1881. W. J. HAHN, Atty Gen.

M. K. Armstrong, Esq., Co. Treas., Wat. Co., St. James:

DEAR SIR: Yours of twenty-fourth inst. received. You having been appointed to fill the vacancy in your office, will hold only till the election and qualification of a successor, who should be elected at the coming annual election this fall. He in turn will serve only for the *unexpired portion* of the regular term, viz., one year, and hence, there will have to be an election next year for the full term.

September 27th, 1881. W. J. HAHN, Atty. Gen.

B. H. Whitney, Esq., County Attorney, Murray County:

DEAR SIR: By section 4, p. 280, Gen. St. 878, it is provided that "any person * * * who has resided in any county in this State *one year continuously*, shall, for the purposes of this chapter, be deemed to have gained a legal residence and settlement in such county." The chapter referred to relates to the support of the poor. Section 14 of the chapter directs the Chairman or Board to warn any person applying for relief who has no legal settlement in the county, but has such settlement in some other county in the State, to depart from the county; and, in case he is unable, or refuses to depart, authority is vested in the chairman to issue an order to and authorizes the Sheriff to convey such person to the proper county. If such person cannot be safely or humanely removed under section 14, then section 15, under the circumstances therein stated, authorizes the Commissioners to grant relief "in the same manner and to the same effect" as provided for in sections 12 and 13 of that chapter, and "the amount of all proper expenditures and disbursements made by such county, in and about the support and relief of any such sick and infirm person, shall constitute a valid legal claim in favor of such county against the county in which such person has a legal settlement." To constitute, therefore, a valid claim by one county against another for support of poor, it is necessary that the person to whom such aid has been extended had a legal settlement in the debtor county, and that such person is so infirm, etc., as to prevent his removal to the county where such legal settlement is. [Affirmed, 29 Minn. 240.]

September 30th, 1881. W. J. HAHN, Atty. Gen.

J. L. Higgins, Esq., Co. Atty., Martin Co.:

DEAR SIR: I beg pardon for the delay in answering your last favor, but it was laid aside and overlooked. I am of the opinion that your views of section 97, *c.* 1, Laws 1878, as amended by section 19, *c.* 10, Laws 1881, are correct. The amendment expressly provides that "this proviso shall also apply to sales of real estate upon which satisfactory proof shall be made to the County Auditor that the taxes had been paid prior to sale." The only question is as to whether the sale should be canceled and the judgment satisfied by the State Auditor, or by the County Auditor. This point is left blind by the law; but, as there is no express authority given to the County Auditor to cancel the sale, etc., and the State Auditor is the officer to whom such authority is committed, I think he is the proper person to make the necessary cancellation. I do not see how the Laws of 1878 affect section 37, *c.* 6, Laws 1877. Are you not mistaken in your reference?

October 4th, 1881. W. J. HAHN, Atty. Gen.

Hon. Loren Fletcher, Speaker of House:

SIR: You ask: "Do the officers elected at the regular session of 1881 constitute the officers of the special session called to meet October 11, 1881?" So far as the Speaker is concerned, he holds his office to the end of the term for which the present Legislature was elected. This, I believe, is the universal rule both as to the Speaker of the House of Commons in England, and as to the presiding officers of the legislative assemblies in this country. Cush. Law & Pr. of Leg. Assem. 114. As to the other officers, section 9, tit. 2, *c.* 3, Gen. St. 1878, provides that "the Clerks and Sergeant-at-arms shall hold their office for and during the session at which they are elected." This seems to dispose of the Clerks, etc., and to necessitate a new election of those officers. The only precedent we have in our own State was the extra session in 1862. No question seems to have been made at that time as to the right of all the officers to continue to serve. The Speaker called the House to order, and after roll-call the journal proceeds to say: "Vacancies being found to exist in the Clerk's department, Mr. Allen introduced the following resolution: Resolved, that the Chief Clerk, by and with the advice and consent of the House, be empowered to fill the vacancies existing in the Clerk's department caused by the absence of the Assistant and Enrolling Clerks." These vacancies were filled in pursuance of this resolution, and the officers of the regular session continued to serve during the extra session. As the attention of the House, so far as the journal shows, was not called to the provision of the statutes limiting the term of those officers, its value as a legislative precedent is somewhat limited. Of course, there is nothing to prevent the House, when assembled, from continuing, by vote of the members, the old officers; and this might be done, I apprehend, as well by resolution as otherwise.

October 5th, 1881. W. J. HAHN, Atty. Gen.

Hon. D. B. Searle:

DEAR SIR: Your esteemed favor of fourth inst. received. You say: "The Board of County Commissioners, at their last session last month, changed the boundaries and territory of all the Commissioner Districts in this [Stearns] county, but leaving the numbers the same as before the change was made, and each Commissioner now resides in the same district and number that he did before the change was made;" and ask: "Does this action affect the *status* of any of the Commissioners; that is, does it render a new election necessary in districts where the Commissioner's term does not expire until one year from January 1st, next? In other words, does this action create any vacancy in itself?" My predecessors have held, on similar questions, that when the Board is increased from three to five members, at the first election thereafter an entire new Board is to be elected; but that where the number is five, and the board redistrict the county under the authority conferred by section

93, p. 135, Gen. St. 1878, it only operates to vacate the seats of such members of the Board as, under the new apportionment, would cease to be inhabitants of the district for which they were elected. This I understand to have been the ruling of both Judge Cornell, when Attorney General, and Gen. Wilson. I fully concur in this view of the matter. The expression in section 96, p. 136, that at the *first* election, etc., the Commissioners elected in the districts named shall hold their office for the terms specified, and then that "a commissioner shall be elected annually thereafter for *three years*," would seem to settle the question.

October 5th, 1881. W. J. HAHN, Atty. Gen.

Prof. J. L. Noyes, Supt. Inst. for Deaf, Dumb, and Blind:

DEAR SIR: You ask whether the Superintendent of the Asylum for the Deaf, Dumb, and Blind is also the Superintendent, under chapter 31, Gen. Laws 1879, of the imbeciles therein provided for. I answer: In my opinion he is. There is no provision in said act for a separate Superintendent. No authority is vested in the Trustees to establish any such office. The only place where such an officer is named is in section 5, where it is provided that "the said (?) Superintendent shall have full power to remand any such child or youth to the parents thereof, or to the Board of County Commissioners of the county from which the child or youth was sent." It is the Trustees of the Asylum for the Deaf, Dumb, and Blind who are to receive such persons, and it must be the Superintendent of that institution who is referred to; and, if he is vested with this plenary authority, it must be because he is to have general charge and supervision over these wards of the State.

October 5th, 1881. W. J. HAHN, Atty. Gen.

Geo. W. Boyington, Esq., Register of Deeds, Otter Tail Co.:

DEAR SIR: You ask: "*First*, is the Register of Deeds allowed 10 cents for each transfer on abstract records, (see page 151, § 178?) *second*, and is he entitled to fees for abstracts, 25 cents an entry and 25 cents for certificate, when the county owns the abstract records? See page 781." To the first I answer: He is entitled to 10 cents for indexing each transfer of deeds and mortgages on his abstract records; not 10 cents for each time he is to enter such transfer opposite a description, but 10 cents for indexing the entire land embraced in an instrument filed with him. To the second I answer, that in my opinion, when the county own a set of tract index-books, the Register is to receive for making abstracts "a fee of 15 cents for each transfer." Section 178, p. 151, and section 27, p. 781, Gen. St. 1878, are to be read together, and so construed that both may stand. Section 27 does not repeal section 178 by express words, and repeals by implication are not favored in the law. Section 27, so far as abstracts are concerned, should be held to be applicable to counties where there are no abstract index-books, and section 178 to counties where there are such books.

October 5th, 1881. W. J. HAHN, Atty. Gen.

H. G. Stordock, Esq., Co. Aud., Wilkin Co.:

DEAR SIR: You ask whether the County Treasurer has any right to pay an order signed by one who was Deputy Auditor, but after such Deputy had been removed and a new one appointed, and after the Treasurer had been notified not to honor any more orders signed by such former Deputy? I answer, he has not. County Auditors are authorized, by section 137, p. 142, Gen. St. 1878, to appoint Deputy Auditors, who are authorized, when so appointed, to sign all papers which the Auditor himself might sign. But the same section provides that the Auditor "may revoke their appointment at any time." When revoked, they cease to have any more right to sign an order than a private person would have; and the Treas-

urer, after being notified of such revocation, would have no more authority to pay an order signed by such former Deputy than if signed by a private person.

October 6th, 1881. W. J. HAHN, Atty. Gen.

C. B. Sleeper, Esq., Clerk Dist. Ct., Crow Wing Co.:

DEAR SIR: Your position on the question of when your term expires is undoubtedly correct. The Constitution fixes it at four years, and no difference is made by that instrument in case the election is to fill a vacancy. The cases of Crowell vs. Lambert, 9 Minn. 267, and State vs. Beebe, 22 Minn. 336, are directly in point. The distinction between an officer whose term is fixed by the Constitution and one whose tenure is established by legislative enactment is obvious to any lawyer who gives the matter any reflection. The former, when elected, whether to fill a vacancy or for the regular term, holds for the full constitutional period; the latter, if to fill a vacancy, for the unexpired term.

October 7th, 1881. W. J. HAHN, Atty. Gen.

George F. Goodwin, Esq., County Attorney, Mower Co.:

DEAR SIR: Your favor received. *First.* You say: "In a suit against this county it became necessary to take several depositions in Wisconsin and this State on part of defendant. I did not attend in person to take depositions, but employed an attorney there to appear and examine the witnesses for the county. *Query:* Should the county pay the attorneys thus employed, or should I pay them out of my salary?" I think you should, under the law, pay for it; or, rather, that if you had attended and taken the depositions you would not be entitled to pay for the same. It is your duty, under section 212, p. 156, Gen. St. 1878, to appear and prosecute or defend all cases where the county is a party; and the Supreme Court held, in Co. Com'rs Hennepin Co. vs. Robinson, 16 Minn. 387, that it is the duty of that officer to appear in such cases, whether pending within or without his county, without further compensation than his salary. *Second.* As to compensation for "taking charge of the matter of *securing* and perfecting title to site" for court-house, on the facts stated, as I understand them, I do not think it was a part of your official duty; and if within the power of the Board to incur the expense, and they employed you to take charge of it, I think you are entitled to pay for the same. As to whether the title to the land was supposed to be in the county at the time, or whether it was a piece of land which they proposed to purchase, you do not say. In either case it would be your duty to examine the title on request of the Board, and advise them as to the condition of the same; but it would not be your province to do the labor necessary to perfect the title unless by suit brought by the county.

October 10th, 1881. W. J. HAHN, Atty. Gen.

L. S. Terry, Esq., Ch. Bd. Sup., Garden City:

DEAR SIR: You say: "(1) The law reads that road districts must be divided within at least twenty days before the annual town meeting. Our County Attorney says that the division may be made at any time during the year, except the twenty days before the town meeting; that the twenty days are required to notify the people of such division. Some hold that the division should be made during the last twenty days." Your County Attorney is correct in his construction of the statute. It is too plain for argument. "(2) Our town voted at its last annual meeting to remove the place of holding our town meetings. The Clerk's notice stated to remove the place of holding town meetings, etc. Should the election this fall be held at the old or new place?" Section 2, c. 1, Gen. St. 1878, provides that the annual election in November "shall be held in each election district at the place where the last preceding town meeting or ward election was held; but if a

vote is taken to hold it elsewhere the election shall be held at the place designated." From this provision it follows that if the place for holding the annual town meeting has been legally changed, the annual election is to be held at the new place designated by the voters at the town meeting.

October 11th, 1881. W. J. HAHN, Atty. Gen.

To the Honorable the Senate of the State of Minnesota:

The resolution submitted by your honorable body is as follows: "Resolved, that the Attorney General of the State is hereby requested to examine and report to the Senate the rights, powers, and privileges of the corporation known as the 'Millers' Association,' on this particular point, viz.: Has said association any legal or equitable right to extend its authority over any or all grain-purchasing markets in the State, and fix the price at which wheat and other cereals shall be sold?" If by this I am to understand that your honorable body desire my opinion as to whether or not the Minneapolis Millers' Association has the legal right to place buyers of wheat and other grain on its account at any and all stations in the State, and fix the price at which such agents shall purchase grain, I answer, unhesitatingly, that it has the undoubted right to do this. Any individual, I apprehend, would have this privilege, and as the "general nature of its (the Millers' Association) business (as expressed in its charter) shall be the purchase, shipment, storage, and sale of wheat and other cereals," I can see no reason why it would not have the same rights in this regard as an individual. But if you mean, by the question propounded, to ask whether this Association has the right to regulate and control the price that shall be paid by other buyers, then I say they have no such authority, and I can conceive of no means by which they can legally *compel* any one to comply with any such demand.

October 15th, 1881. W. J. HAHN, Atty. Gen.

Hon. John W. Arctander, Dist. Atty., Twelfth Jud. Dist.:

DEAR SIR: Your favor received. The question submitted is somewhat difficult of solution. Section 5, c. 113, Gen. St. 1878, provides for a change of venue, on application of the State, "upon the same terms and *to the same extent*" as if the application was made by the defendant. Section 1 of the same chapter regulates the conditions upon which such a change may be made in the latter case. One of these necessary prerequisites is that the offense charged in the indictment is punishable with death, or imprisonment in the State Prison." In other words, it must be a felony, for by section 2, c. 91, such punishment makes the offense a felony. Libel was a misdemeanor at common law, punishable by fine or imprisonment, or both. But, being a misdemeanor, I doubt whether the court, on conviction, could punish by imprisonment in the State Prison. If not, it seems to me clear that no change could be granted under section 5 aforesaid. Unless, therefore, you are clear upon the point that the defendant could, on conviction, be sentenced to the State Prison, I would advise that no effort be made to obtain a change of venue.

October 18th, 1881. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Superindendent Public Instruction:

DEAR SIR: You ask: "In case the County Commissioners fail to levy the one mill tax, as provided by section 84, c. 36, Gen. St. 1878, is it the duty of the County Auditor to extend it upon the assessment rolls as the law contemplates?" I think not. It is, by that section, made the duty of the County Commissioners to levy the tax, and when "so levied" it shall be extended, etc,, by the County Auditor. The Auditor cannot both levy and extend. The duty of levying the tax is imposed on the Commissioners; the duty of extending it, on the Auditor. It is true that the

action of the Commissioners in reference to this tax is purely formal, but it is nevertheless necessary for them to act. I would respectfully suggest that the Legislature be asked to amend this section requiring the County Auditor to extend this tax without any action by the Board. [Amended, chapter 53, Laws 1883.]

October 28th, 1881. W. J. HAHN, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: Your communication of to-day duly received. You make the following statement: "Erick Hokanson was elected County Treasurer, November 5, 1878, for the term expiring March 1, 1881. He resigned, and N. H. Danforth was appointed by the Board of Commissioners, September 20, 1879, to fill the vacancy. John Pomeroy was elected Treasurer at the general election of November, 1879, and gave bond, December 6, 1879. At the general election in November, 1880, Allen Cookson was elected Treasurer, and gave bond, January 5, 1881. Pomeroy refused to give up the books or turn over funds, claiming that he was elected for a full term of two years, or until March 1, 1882. To avoid a fight, which seemed imminent, Cookson withdrew, leaving Pomeroy in possession. The above *data* are from the Commissioners' records, and are agreed to by both parties. Pomeroy's bond (dated December 6, 1879) has the following condition: "Duly elected at the general election, November 4, 1879, for the unexpired term of Erick Hokanson, and until the first day of March, 1881, and until his successor is elected and qualified, (said election being to fill vacancy caused by the resignation of Erick Hokanson.)" And you ask: "(1) Who is the legal Treasurer of Kanabec county? (2) If Pomeroy is the legal Treasurer, would a bond with the above condition be valid after March 1, 1881?"

To the first question I answer, that Pomeroy's election was only to fill the unexpired term of Hokanson, and his term expired March 1, 1881. Section 46, p. 48, Gen. St. 1878, expressly provides that where a person is elected to fill a vacancy he shall "hold the same during the unexpired term for which he was elected, and until his successor is elected and qualified." When, therefore, Cookson duly qualified, and March 1, 1881, arrived, he was clearly entitled to the office; and if I understand your remark, that "Cookson withdrew," to mean that he refused to enter into a controversy for the possession, but did not resign or refuse to perform the duties of his office, he is still entitled to the possession of the same, and should demand the records and funds, and if refused take the proper legal steps to compel their delivery to him.

Second. The condition of Pomeroy's bond was that it should continue only until March 1, 1881, and until his successor was *elected and qualified.* I understand from your statement, as held by me in answer to your first question, that his successor has been elected and has qualified. The time, then, beyond which the sureties in Pomeroy's bond were not to be holden has arrived, and it is a serious question whether or not he is not acting as Treasurer without any bond. Certainly. the bond referred to should not be considered as sufficient for a single day. The case, it seems to me, is one requiring prompt and vigorous action, in view of the serious question as to the liability of his sureties. Pomeroy is neither the legal Treasurer, nor is his bond sufficient. [See 30 Minn. 398.]

October 28th, 1881. W. J. HAHN, Atty. Gen.

Hon. G. W. Mead, Judge of Probate, Blue Earth Co.:

DEAR SIR: Your favor requesting the opinion of this office as to whether or not the Judge of Probate is entitled, under sections 21 and 22 of chapter 35, Gen. St. 1878, to a fee of three dollars for the examination of an insane person, and making the written certificate required by those sections, duly received. Under section 22, in view of the provisions of sections 5 and 7, p. 108, I do not think the Judge of Probate entitled to anything. The amendment of section 22 by chapter 42, Gen. Laws

1877, was not in reference to the fees to be allowed, but as to the persons to whom such allowance should be ordered, and was enacted to cover the change in section 21 made by the same chapter. By section 21 the jury is to consist of the Judge himself and two respectable persons, one of whom must be, and both may be, a physician. The Judge is to allow (by section 22) to the physician, (if only one,) and to "such other *person*," not persons, "on the jury, three dollars each." When this section speaks of physicians it uses the expression "physician or physicians," and evidently because the jury may consist of one or two of that profession. But when it comes to announce the rule as to the laymen who are or may be on the jury, it does not say such other person or persons; and, in view of the fact that the jury is to have at least one layman, (the Judge or Court Commissioner,) and may have two, this change in the phraseology is significant. But, however this may be, the positive and emphatic provision of section 5, p. 108, that "the Probate Judges in this State are hereby prohibited from taking or receiving, either directly or indirectly, *any fees whatever* for their official services other than taking acknowledgments of papers and administering oaths outside the line of probate duties," is perfectly conclusive of the question. There is no room for construction or doubt.

October 29th, 1881. W. J. HAHN, Atty. Gen.

Hon. A. R. McGill, Insurance Commissioner:

DEAR SIR: You submit the following question for my opinion, viz.: "Have you the right to authorize an insurance company other than life, fire, and marine, organized under the laws of a foreign government, with a capital of $100,000, and a deposit of $100,000 with the chief financial officer or Commissioner of Insurance of New York, but no deposit in this State, to do an insurance business in this State under the provisions of chapter 123 of General Laws of 1881?" I answer, you have not, in my opinion. By section 2 of said act you are prohibited from granting a certificate to any such company, unless such company has (1) a paid-up capital of $100,000; and (2) either a deposit of $100,000 with the State Treasurer of this State, or a deposit of $100,000 "with the chief financial officer or Commissioner of Insurance of the State where such company or association is organized." An insurance company is organized in the State or country where its corporate existence is established. The suggestion in the argument submitted that the license to do business, issued in New York, amounts to an organization in New York, is, to my mind, untenable. The granting of a certificate to an insurance company by the Insurance Commissioner does not organize the company; it simply authorizes a company already organized to do business. There must be an organization before a license can issue. To say that authority to do business may be granted to a corporation that has no organization, would be a solecism. The organization of a corporation and its right to transact business in a foreign state are by no means synonymous, either legally or in the common or ordinary acceptation of the language. To organize is to constitute, to form. If your certificate of authority constitutes, forms, the corporation, then such certificate must be evidence of the corporate existence of the company to whom issued.

October 31st, 1881. W. J. HAHN, Atty. Gen.

O. Taylor, Esq., County Auditor, Marshall County:

DEAR SIR: Your favor received. You are mistaken in supposing that I am not and have not been in possession of all the facts you allege. Your statement does not in the least change the legal *status* of the case. Your county was organized by chapter 10, Gen. Laws 1879. By section 6 of that chapter it was provided that "the County Commissioners * * * shall, *at their first meeting, or within twenty days thereafter*," locate the county seat. This was a special, limited authority. The statute carefully and specifically says that at *such a time* (and that is equivalent to

saying you can do so at no other time) you may locate the county seat. Again, this section does not authorize, generally, the County Commissioners of the county to locate the county seat, but says "the County Commissioners, *appointed and qualified* according to the provisions of section 5," shall locate it. Section 5 provides for the appointment by the Governor of three persons as the first Board, and by that section their term of office was limited until the next general election, which occurred November, 1879. The Board of County Commissioners who assumed to locate the county seat last April were not and are not pretended to be "the County Commissioners appointed and qualified according to the provisions of section 5" of that act. They therefore had no more right to locate it than you yourself or the County Attorney, or any other county officer had. It is a maxim of the law that "the expression of one is the exclusion of all others." The designation, therefore, of a *particular Board*, to whom this power was committed, was to the exclusion of any other Board that might be subsequently chosen. Again, for two years Warren was recognized as the county seat of your county, and by a special law of last winter the Legislature, inferentially at least, recognize and ratify the location at Warren. The attempted location, therefore, of your county seat by your *present* Board was an utter nullity, and you and the other officers had just as much right to remove to any other place you might select as to Argyle.

November 3d, 1881. W. J. HAHN, Atty. Gen.

C. A. Couillard, Esq., Co. Attorney, Wadena Co.:

DEAR SIR: If I understand the case put by you, it is this: An entire county is organized into a school-district. Subsequently, new districts have been carved out of portions of the county, leaving about half of the county still remaining. If I am right in the foregoing, then all that remains not so organized into new districts constitutes district No. 1, and, of course, taxes could be levied and collected in such district, the same as if no new district had been organized.

November 9th, 1881. W. J. HAHN, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

DEAR SIR: Your favor received. You ask "whether County Treasurers are entitled, under chapter 8, § 172, Gen. St. 1878, to percentage on moneys collected for the State text-books." I understand by this you mean a percentage on the amount *retained* from the several districts under the provisions of section 163, p. 500, Gen. St. 1878, to pay for text-books ordered. I answer, he is not. A County Treasurer's fees, and the only fees he is allowed, are prescribed by law. He is entitled, by said section 172, to a percentage on all moneys by him collected or received; nothing on moneys by him disbursed. The case put is a disbursement and not a collection. A district orders books; the County Treasurer pays the State Treasurer the cost, and deducts the amount so paid from the amount due the district on the next settlement. In such case he makes two payments on account of the gross sum due the district, but no collection. If entitled to fees on one, why not on the other? When the district levies a tax to replace the school funds so disbursed, the Treasurer, of course, receives his percentage on such tax.

November 9th, 1881. W. J. HAHN, Atty. Gen.

Hon. D. L. Keihle, Superintendent of Public Instruction:

DEAR SIR: You ask, "Can a person who is a member of the School Board, and related also to one or more members of the Board, be engaged to teach school in his own district?" I think not. The duties of Trustee and of teacher are incompatible. The Board have not only the general supervision of the school, but of the teacher also. Again, by section 31, c. 36, Gen. St. 1878, no teacher "who is re-

lated by blood or marriage to any member of the School Board," can be employed "without the concurrence of all the members of the Board of Trustees, by vote duly entered on the Clerk's record of proceedings." In the case put the contract could only be made by *all the members* of the Board. A majority is not sufficient. The party would, therefore, while acting in a fiduciary capacity, be contracting with himself.

In the case of Picket vs. School Dist., etc., 25 Wis. 551, which was a case of a contract by the Clerk and Treasurer with the Director for the building of a schoolhouse, the court say "that inasmuch as it appears that the plaintiff was himself the Director of the district at the time the contract was let, and took part as such in the proceedings to let it, it was against public policy to allow him, while holding that fiduciary relation to the district, to place himself in an antagonistic position and obtain the contract for himself from the board of which he was a member. * * * Where one attempts to act in a fiduciary capacity for another, the law will not allow him, while so acting, to deal with himself in his individual capacity."

This entire case, with the numerous cases cited, fully sustains the conclusion at which I have arrived.

November 11th, 1881. W. J. HAHN, Atty. Gen.

Hon. D. L. Keihle, Superintendent Public Instruction:

DEAR SIR: You ask my opinion as to the eligibility of women to the office of County Superintendent of Schools. My predecessor, Gen. Wilson, for whose judgment I have profound respect, held, in an opinion given May 24, 1879, that they were not. All that appears in the opinion on that subject is the following, viz.: "Women are not eligible to the office of County Superintendent." In view of this opinion I have given the matter all the consideration possible in the press of other matters. Prior to the adoption of the amendment of 1875, being section 8 of article 7 of our Constitution, the right to hold an elective office was limited to persons who were entitled by the provisions of that article to vote. The right to vote was restricted to males alone. This amendment empowered the Legislature to extend by law the elective franchise to females "at any election held for the purpose of choosing any officers of schools," and to extend the right to hold "*any* office pertaining solely to the management of schools" to "any woman at the age of 21 years and upward." This was an empowering provision, and required action on the law-making department of the government before the rights authorized to be conferred by it could be enjoyed. This being the *status* of our Constitution, two questions arise, viz.: (1) Has the Legislature made the necessary provisions for carrying out this article? and (2) does the office of Superintendent of Schools "pertain solely to the management of schools?"

First. By section 13 of chapter 36, Gen. St. 1878, I think the Legislature has made all the provisions necessary under this amendment. This section first prescribes the requisite qualifications to entitle a woman to vote at "any election held for the purpose of choosing any officer of schools," etc., and then provides that "any woman so entitled to vote shall be eligible to hold any office pertaining solely to the management of public schools."

Second. Is the character of the office such as to fall within the designation of that amendment and of the statute? I think it is. There is nothing that I am aware of in the duties of a County Superintendent, as prescribed by law, that does not pertain solely to the management of public schools. Every duty imposed upon him, all the authority committed to him, has reference to that very purpose. He examines teachers, visits schools, and makes reports relating to public schools. Under some one of these heads may be grouped all the functions of his office. Beyond them his official business does not extend. Again, by this amendment and the statute passed by virtue of it, women, so far as the class of officers designated therein is concerned, are placed in a better situation than if the limitation in sec-

tion 7, art. 7, was not there. Without this limitation, I apprehend, there would be but little, if any, doubt of her eligibility. In 7 Kan. 601, it was held that a woman might be elected to the office of County Superintendent of Public Instruction, there being no "express constitutional disqualification of females, and no affirmative statement of qualifications which would exclude them," and that there was "nothing in the language of the section creating the office, nor in the duties imposed by law upon the officer, which would imply the necessary or intended exclusion of either sex." No qualifications for the office in this State are prescribed by law, and the language quoted from the above case as to its duties are applicable here. In 115 Mass. 602, it was held that, without any constitutional provision authorizing it, a woman might be elected and perform the duties of a member of a school committee that has under their law the general charge and superintendence of the school of a town or city.

I am of the opinion, therefore, that, as the law now stands, a woman is eligible to the office of County Superintendent of Schools.

November 11th, 1881. W. J. HAHN, Atty. Gen.

F. W. Burnham, Esq., Co. Auditor, Otter Tail Co.:

DEAR SIR: Your communication to the State Auditor has been handed me for reply. To the question submitted to him, viz., "Shall the excess of the amount due, paid at the forfeited land sale, be paid to the owner of the land upon his application therefor?" I answer, it should not, in my opinion. There is no provision in the law, either express or implied, that authorizes such payment. No power is given to the Auditor or any one else to draw orders for such excess, or to the Treasurer to pay the same with or without an order. On the contrary, section 4 makes it the duty of the County Treasurer to attend the sale and receive *all moneys* paid thereon. The money being thus in his hands officially, section 149, *c.* 8, Gen. St. 1878, as amended by chapter 11, Gen. Laws 1881, applies. This section provides that he shall only pay out moneys directed by law to be paid by him upon the order of the proper authority. Who is the proper authority in this case, and how is such authority to be exercised? There is no provision that I know of in the general tax law which is at all parallel. Again, by section 8 (of the Laws of 1881, under which the forfeited sale is made) it is provided that "the proceeds of such sale shall be distributed to the revenue funds for which the taxes were levied." This is a positive disposition of such proceeds, and would, in my opinion, override any supposed intention to dispose of it in any other way.

November 16th, 1881. W. J. HAHN, Atty. Gen.

To the Honorable the House of Representatives of the State of Minnesota:

To the question submitted by your honorable body, viz., "If the bill for the apportioning of the State into five congressional districts, now in the hands of the Governor, should be approved by him, and if Congress of the United States, at its next session, fails to make an apportionment under the census of 1880, would the State have the right to elect to the Congress of the United States a member of Congress from each congressional district as the State is now apportioned?" I answer, in my opinion, it would. Should Congress fail to make such apportionment, or should the number assigned to this State be less than five, then, I apprehend, the act in question would be inoperative and void. If void for any reason, the general repealing clause of all inconsistent acts would also fail. If the new law is void, the provisions of the former law cannot with propriety be said to be in conflict with it. Nothing can come in conflict with a nullity. A law can only be said to conflict with a former law when it *legally* conflicts. Harbeck vs. Mayor, etc., 10 Bosw. 366; Dovey vs. Mayor, etc., 35 Barb. 264; Tenis vs. State, 26 Ala. 165; Childs vs. Shower, 18 Iowa, 261; Campau vs. Detroit, 14 Mich. 276; Sullivan vs. Adams, 3

Gray, 476; Shepardson vs. Railroad Co. 6 Wis. 578; State ex rel. vs. Burton, 11 Wis. 51.

November 18th, 1881. W. J. HAHN, Atty. Gen.

His Excellency, John S. Pillsbury, Governor of Minnesota:

SIR: Herewith I return Senate file No. 118,—an act to authorize the Supervisors of the town of Oronoco, in Olmsted county, to issue bonds for the purpose of loaning the same, or the proceeds from the sale thereof, for the building of a flouring mill in said town,—and respectfully suggest the propriety of vetoing the same. The act is clearly and palpably unconstitutional, and if approved, and bonds should be issued under it, they would be worthless. Litigation by reason of their issue would probably ensue, their payment be enjoined, and the town be charged with repudiation. The Legislature has no authority to pass laws enabling towns, by gifts or loans of money or bonds, to assist individuals or corporations to establish or carry on manufacturing enterprises. Such gifts or loans can only be raised by taxation, and taxation can only be resorted to for public purposes. The proposed purpose is not a public purpose within the meaning of the Constitution.

As said by the Supreme Court of Maine, in 58 Me. 592: "Individuals and corporations embark in manufactures for the purpose of personal and corporate gain. Their purposes and objects are precisely the same as those of the farmer, the mechanic, or the day laborer. * * * If the manufacturing be gainful, there seems to be no public purpose to be accomplished by assessing a tax on reluctant citizens and coercing its collection to swell the gains of successful enterprise. If the business is a losing one, it is not readily perceived what public or governmental purpose is attained by taxing those who would have received no share of the profits to pay for the loss of an unprosperous manufacturer. * * * The tax-payer should not be compelled to pay for the loss when he is denied a share of the profit. * * * If the right of confiscating the private property of individuals for the purpose of giving it away to one branch of industry can be conferred on towns, one does not easily see where or what bounds can be imposed, or limitations made."

Judge Miller, in delivering the judgment of the Supreme Court of the United States, in 20 Wall. 665, says: "No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

Chief Justice Black, in 21 Pa. St. 168, in speaking of the right of taxation, uses this forcible expression: "When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder."

The following cases will be found to fully justify what I have said, viz.: 2 Dill. Mun. Corp. § 735; Cooley, Tax'n, 76; 103 Mass. 104; 2 Dill. 353; 9 Kan. 689; 60 Me. 124; 20 Wall. 655; 64 N. Y. 91; 69 Pa. St. 147.

It is true that by this bill the bonds or their proceeds are to be loaned, and security for the repayment is to be taken; but, as said in 58 Me. 596, "towns are not banking corporations. * * * It may be taking one's money without his consent to be loaned to an individual whom its owner would not trust, for a time which might be inconvenient, for a purpose which he might deem injudicious, and at a rate of interest at which he would decline lending to any one. * * * It is no answer that the loan may be repaid." The case in 60 Me. 124, is directly in point, and the court unanimously held that placing it in the shape of a loan did not relieve the act from objection.

November 22d, 1881. W. J. HAHN, Atty. Gen.

Hon. D. L. Keihle, Superintendent of Public Instruction:

DEAR SIR: You ask what is to be done by the district in case a Clerk refuses to file his bond as required in section 173, c. 3, Gen. St. 1878. I am at a loss to say what, if anything, can be done by the district, except to designate an agent as pro-

vided in section 174. The bond named in section 173 is not required as a part of the qualifications of a Clerk before entering upon the performance of his official duties. It is only necessary "before any money or property shall be received by him under the provisions of this act." He is a duly-qualified officer without it. The only penalty, if penalty it may be called, which, by this section, is to follow a neglect or refusal to give such bond, is to disqualify the officer so in default from receiving from his predecessor, or the County Auditor, the school books belonging to or ordered by his district, or of receiving any money realized from the sale of such books. No pecuniary penalty attaches by reason of such neglect or refusal, nor is it provided that by reason thereof anybody is authorized to remove such Clerk. It follows, therefore, as it seems to me, that this provision, being without the sanction which is so necessary to make a law effectual, that the district in the case put is without any means of enforcing its observance.

November 28th, 1881. W. J. HAHN, Atty. Gen.

H. W. Elms, Esq., Co. Aud., Mower Co.:

DEAR SIR: I do not think that you can draw the $700 allowed you for Clerk hire, under resolution of your board, passed in pursuance of section 7, c. 108, Sp. Laws 1881, except for services actually rendered by a Clerk or Clerks. This chapter only fixes the compensation to be allowed. The general law regulates the manner and time of payment. Section 143, p. 144, Gen. St. 1878, is, in my opinion, applicable.

November 30th, 1881. W. J. HAHN, Atty. Gen.

J. W. Reynolds, Esq., Co. Atty., Grant Co., Herman, Minn.:

DEAR SIR: You ask where the county seat of your county is, pending a contest over the vote for its removal. The law under which your county-seat election was held provided that if the law was adopted the Governor should make proclamation. This proclamation, in my opinion, has the same force and effect as the certificate of election to an officer, given by the County Auditor. It is *prima facie* evidence of the adoption of the law, and consequent removal of the county seat. As the officer holding the certificate would be entitled to the possession of the office pending the contest, so should the place holding the certificate (so to speak) of the Governor be entitled to the county seat pending any contest over it.

December 9th, 1881. W. J. HAHN, Atty. Gen.

J. I. Beaumont, Esq., County Assessor, Ramsey County:

DEAR SIR: Your communication relative to your compensation while doing duty as a member of the County Board of Equalization has necessarily remained unanswered, pending the disposition of the matters pertaining to the railroad bonds and claims, which has occupied almost my entire time of late. I find that chapter 212, Sp. Laws 1876, which you refer to as fixing the duties and compensation, as well as the persons composing the Board of Equalization, was passed upon and construed in connection with the statute fixing the salary of the County Auditor, (who is, by this statute of 1876, made a member, as well as the Assessor, of the said Board,) by my late predecessor, Judge Start. He said: "By section 2, c. 207, Sp. Laws 1876, the salary of the Auditor is fixed at $4,000 per year, and by section 1 no other or greater compensation, could be allowed as additional compensation, or for deputies, clerk hire, or otherwise. I do not think this act should be construed as depriving the Auditor of the compensation of $3 per day as a member of the Board of Equalization of Ramsey county, as provided for by section 4, c. 212, Sp. Laws 1876. Section 1 of the latter act designates who shall constitute the Board; sections 2 and 3 define their duties and powers. The members of the Board are to meet on the first

day of September in each year (unless it should be Sunday, in which case they are to meet on the second day of the month) and complete their labors on or before the twenty-eighth day of the same month. Section 4 provides that each member of the Board—the Auditor is a member—'shall be paid the sum of $3 per day for every day's *actual services aforesaid;*' that is, for the services mentioned in sections 2 and 3. It will be observed that all the duties of the Board must be completed in 28 days, (excluding Sundays,) and this would be the limit for which the Auditor could receive $3 per day for services as a member of the Board. The duties imposed on the Auditor by section 5 of the act are made a part of his official duties as an Auditor, and, no compensation having been given by the law imposing the new duties, he is not entitled to any in addition to the salary fixed by law. If the view that I have taken of these statutes is correct, it follows that the Auditor was entitled to $3 per day for services as a member of the Board of Equalization, not exceeding 28 days in each year; that he is not entitled to extra compensation as Clerk of the Board of Equalizationn, or as a member of the tax commmittee." With this opinion of Judge Start I fully concur. The reasoning is equally applicable to the Assessor, and the same conclusion must be reached as to him.

January 4th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Keihle, Supt. Pub. Inst.:

DEAR SIR: You ask: "(1) In case lands are set off from one district and joined to another, after a tax has been levied, but before it has been paid, into which treasury should the tax be paid? If it belongs to the former, by what means can it be recovered in case it has been paid to the latter?" It should be paid to the Treasurer of the district from which the land was taken. If payment is refused, demand should be made, and, if not then paid, a suit at law is the only way to recover it. "(2) Can the enrollment of evening schools, conducted by the regular corps of teachers, be reported for apportionment the same as day pupils?" They can. There is nothing in the law requiring the apportionment to be made to day scholars only. Care, however, should be taken to see that the list of pupils is not in part duplicated,—some on day list and some on evening list.

January 4th, 1882. W. J. HAHN, Atty. Gen.

Hon. Fayette Marsh, Co. Attorney, Washington Co.:

DEAR SIR: You say, in yours of the twenty-seventh ult.: "I have given it as my opinion, and wish to know if you concur with me, that under section 106, p. 241, of the General Statutes, an Auditor should examine his books; and if it appears by the books in his office that there are no taxes delinquent upon a certain piece of real estate that he should go no further in his search, but should certify the deed and enter the transfer; that it is only in cases where there are delinquent taxes under the general tax law, and under this section also, that the person desiring to have a deed certified should pay the current tax not yet delinquent." I regret to say that I cannot concur with you in the foregoing opinion. By section 106, p. 241, Gen. St. 1878, it is made the duty of the County Auditor to "ascertain from the books and records in his office if there be delinquent taxes due upon the land described therein, or if it has been sold for taxes; and if there are delinquent taxes due *he shall certify to the same;* and upon the payment of such delinquent or other taxes that may be in the hands of the County Treasurer for collection he shall transfer the same," etc. It will be seen from the foregoing, and from what follows in this section, that he is to "ascertain from the books and records in *his* office" two things: (1) whether there are delinquent taxes, or (2) whether the land has been sold for taxes. The purpose of this examination is obvious. If there are *delinquent taxes* he is to "certify to the same,"—not on the deed, but on a statement,—so that the grantee may go to the Treasurer and pay them. If the land has been sold for taxes, then he is to certify that fact on the deed. But it is only on payment,

not only of "such delinquent taxes," but also of "other taxes that may be in the hands of the County Treasurer for collection," that he is authorized to note upon such deed "taxes paid and transfer entered;" and without this certificate, or the certificate "paid by sale of land described within," the Register has no authority to record such deed. 26 Minn. 521.

January 4th, 1882. W. J. HAHN, Atty. Gen.

Frank A. Day, Esq., Fairmont, Minn.:

DEAR SIR: You ask, "Has a newspaper that has not been published three months a legal right to any of the official county printing?" So far as I can find, it is only in reference to publication of tax lists and notices, and of the laws, that the newspaper publishing them shall have been printed at least three months prior to the time of letting or publication. The law relating to publication of proceedings of the County Commissioners (chapter 29, Gen. Laws 1879) provides simply that the publication shall be "in some newspaper printed and published in their county." This would clearly give other newspapers than those published three months a legal right to publish these proceedings, there being no restriction as to the age of paper. The same is true as to the publication under sections 113, 167, and 267, *c.* 8, Gen. St. 1878. Unless some such restriction is found in that statute, as there is relating to taxes and laws, none can be imposed.

January 5th, 1882. W. J. HAHN, Atty. Gen.

H. E. Craig, Esq., Co. Com'r Sherburne Co., Orrock, Minn.:

DEAR SIR: You ask: (1) "Where a committee of three County Commissioners were appointed to view a county road and two only were present,—one of the two reporting in favor of granting the prayer of petitioners, the other for rejection,—can the Commissioners proceed legally on a minority report?" I answer, no. At least two of the committee must concur in the report. (2) "Section 100, *c.* 8, Gen. St. 1878, as amended by chapter 52, Gen. Laws 1881, provides that 'no Commissioner shall secure pay for more than twenty-five days in one year.' Does that include committee work, the work of the chairman as a member of the Board of Auditors, the Board of Equalization, and all other work for the interest of the county?" I have repeatedly held that County Commissioners are not entitled to extra pay for committee work or any business of the county beyond twenty-five days. As to acting on Boards of Equalization, section 1, *c.* 113, Gen. Laws 1881, provides for compensation of the members the same pay and mileage as when acting as County Commissioners, but limits their pay for this service to 10 days' pay, and mileage for one session. This is not to be counted as a part of the 25 days' service as Commissioners. As to the Chairman's compensation, when acting as a member of the Board of Auditors, he would be entitled to what the law relating to that Board provides as pay for the members thereof, viz.: "$3 per day for each day actually employed in the discharge of their duties," which, under chapter 48, Gen Laws 1881, is "to be paid upon allowance by the Board of County Commissioners in the same manner as other claims are paid."

January 5th, 1882. W. J. HAHN, Atty. Gen.

E. B. McIntire, Esq., Justice of the Peace:

DEAR SIR: Every one having a claim against the county for costs or witness fees must itemize and verify the same in accordance with sections 115, 116, p. 139, Gen. St. 1878. Chapter 74, Gen. Laws 1881, expressly says that the judges of the district court may in their discretion allow witness fees to defendants' witnesses. This necessarily excludes the allowance by a justice. He can scarcely claim to be a judge of the district court.

January 11th, 1882. W. J. HAHN, Atty. Gen.

E. P. Freeman, Esq., Co. Atty., Blue Earth Co.:

DEAR SIR: I understand section 40, p. 260, Gen. St. 1878, to be this: (1) If the supervisors refuse to lay out a highway, they cannot again act upon the same highway for one year thereafter. (2) If the supervisors determine to lay out, etc., a highway, and such determination is appealed from, and reversed on appeal, then they cannot again act on such highway for one year after the making of the determination so reversed. The object of these sections, I think, is to prevent parties opposed to laying out a highway from being put to the trouble and expense of constantly objecting to and litigating the propriety of such action. If the matter is heard by the supervisors, and their decision is against such action, or if they determine in favor of the petition, but on appeal the court or jury decide against the application, then that ends all controversy for one year.

January 11th, 1882. W. J. HAHN, Atty. Gen.

J. C. Pope, Esq., Co. Atty., Lac Qui Parle Co.:

DEAR SIR: Section 113, p. 138, Gen. St. 1878, by express terms makes it the duty of the County Board, in September and January, to examine and count funds in treasury, and examine the accounts and vouchers of the Auditor and Treasurer, and make the written certificate thereon specified. There is no law changing this. The duty still remains, and it is very important that it should be performed.

January 11th, 1882. W. J. HAHN, Atty. Gen.

J. A. Senn, Esq., Co. Atty., Benton Co.:

DEAR SIR: If the bank you name is defunct it, of course, can no longer be a public depository, and the bond given by the owner thereof would not cover any deposits made by the county in the bank which succeeds such defunct bank after the change had been made. It must follow, therefore, as it seems to me, that the Board of Auditors should ask for new bids and designate a new depository. The bond given by the depositary runs for two years, if he so long continues to operate a bank and receives as such the public funds; but on his death his business as a banker must end, and the sureties on his bond do not undertake to be responsible for any default that may occur on the part of the person or persons who may, after his decease, either by purchase or otherwise, succeed to the business of such bank.

January 19th, 1882. W. J. HAHN, Atty. Gen.

B. N. Johnson, Esq., Co. Auditor, Otter Tail Co.:

DEAR SIR: I do not think, under chapter 135, Gen. Laws 1881, there is any authority to satisfy a tax judgment and sale made thereunder. This act was passed subsequent to the amendment of section 97, c. 1, Gen. Laws 1878. By section 7 of said chapter 135 it is provided that if the taxes have been paid, that the "judgment and sale shall be void upon proof at any time that such taxes have been paid," etc. This does not say that on such proof being made such sale shall be declared void by the Auditor, and, in the absence of express authority to that effect, he would have no such power.

January 19th, 1882. W. J. HAHN, Atty. Gen.

Albert Schaller, Esq., Co. Atty., Dakota Co.:

DEAR SIR: *First.* The bill in favor of the city of Hastings, for care, etc., of small-pox patients, is, I think, a charge upon the county to which such patient belongs. Section 62, p. 175, Gen. St. 1878, settles this question, in my opinion. This assumes, of course, that the person so cared for, his parents, guardian, or master,

if any, are not able to pay the same. If they are, the city must look to him or them. If not, it must look to the county to which such patient belongs. If, therefore, the patient in this case did not belong in your county, the city would have no claim on your county, but would have upon the patient's county. *Second.* I do not think that the Court Commissioner is entitled to have an office furnished at the expense of the county. Section 110, p. 138, Gen. St. 1878, specifies for what officers the Board shall provide offices, and he is not one of the number. The Latin maxim, *expressio unius est exclusio alterius*, is applicable here. *Third.* I do not think the charge for preliminary examination by a Justice previous to issuing the warrant, at 15 cents per folio, a proper charge. When reduced to writing, he is allowed 15 cents per folio, and 15 cents for administering the oath. This is all. In brief, without proceeding to answer your questions in detail, he must be able to put his finger upon some express provision of the statute which authorizes the charge, before it can be allowed. An examination of section 17, p. 779, Gen. St. 1878, will answer all your questions on this head.

January 19th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Keihle, Supt. of Pub. Inst.:

DEAR SIR: You ask my opinion on the following questions, viz.: "(1) In section 166, *c.* 36, Gen. St. 1878, is not the certificate of the County Superintendent presumptively valid and continuous in its force for the time during which the Superintendent has immediate supervision of the school for which he has certified? (2) If not, what are its limitations? (3) Does 'produce' require more than that it be presented for the satisfaction of the Treasurer that the books are in use? (4) If more, how much more?" The section referred to is very indefinite and uncertain, and it is difficult to understand from its terms just what was intended. In order to comprehend its meaning it is necessary to read the entire act. Sections 159 and 160 provide the machinery by which these text-books are to be distributed among the districts. Its operation must necessarily be slow, and by the terms of these sections it may be May 15th before the orders reach the contractor. He is to fill the orders direct to the County Auditor "as soon as possible." Then the Auditor is to transmit to the Clerk of each school-district the number of books ordered. By section 165, the public schools were not required to use these text-books until within "one year" after they were printed and furnished the State Superintendent. Then comes the section under consideration, and, reading that in the light of these prior provisions, I think the design was to place a limit beyond which a school-district could not go without the loss to it of the State school-tax fund, unless such district had introduced into the schools of such district the State text-books, and were using them to the exclusion of any other series of text-books. This limit was "two years from the time the County Auditor of any county has received the number of text-books required for the district schools of his county from the Superintendent of Public Instruction." In other words, it was the duty of a school-district to use such books within one year after they were printed and furnished, and this duty, at the end of two years after the Auditor had received his complement of books, was to be enforced by a penalty, viz., the withholding of the *quota* of State school tax due such district. When once introduced and used "to the exclusion of any other series of text-books," it seems to have been assumed that no further compulsory means were required to enforce their continued use. If I am right in this conclusion, it follows that but one certificate is required, and this certificate is to be retained by the school-district Treasurer and *produced* (*exhibited, shown*) by him to the County Treasurer when he draws the money due his district.

January 19th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. B. Searle, Co. Atty., Stearns Co.:

DEAR SIR: Your favor, asking my opinion on section 61 of the school law, received. The salary of County Superintendent is to be fixed by the Board of County Commissioners within the limits named in this section. It is not to exceed $1,800 per annum, nor is it to be less "than at the rate of $10 for each organized district in the county to be reckoned *pro rata* for the year from the time of the commencement of the *first school* in the district." As to the organization of the district it can make no difference how such organization is effected,—whether by special act of the Legislature, by the act of the people, or of the County Commissioners. So long as it remains an organized district, it is to be reckoned in estimating the maximum amount to be allowed. But a new district may be organized at any time during the year, and the question remains, from what time is such new district to be counted in estimating his salary? This section fixes it "from the time of the commencement of the first school in the district." That is, if a new district is organized in January, but school does not commence therein until July, then it is to be reckoned from July and not from January. This is all, it seems to me, that the expression "from the time of the commencement of the first school in the district" means. When the district is organized and school is once held therein, it makes no difference afterwards, so far as this question is concerned, whether school is held therein or not. His salary is not to be fixed by the time school is held in the several districts each year, but by the number of organized districts in which school at some time has been held.

January 20th, 1882. W. J. HAHN, Atty. Gen.

D. B. Searle, Esq., Co. Atty., Stearns Co., St. Cloud, Minn.:

DEAR SIR: The law is silent on the point submitted. But, in my opinion, where the district is composed of parts of two counties, it should, in estimating the County Superintendent's salary, be counted in the county in which the school-house is situated. This has been the uniform construction of the law given by the Superintendent of Public Instruction in reference to the County Superintendent from whom a certificate to teach is to be obtained by a teacher teaching in such district. It seems to me to be the most reasonable, as such Superintendent is, under the law, to visit such schools. The labor being thus imposed upon him he should have the compensation.

February 9th, 1882. W. J. HAHN, Atty Gen.

His Excellency, L. F. Hubbard, Governor:

In my opinion any bonds issued now, under the bond adjustment act of November 4, 1881, should be signed by the present State officers. The act provides that these bonds shall be signed by the Governor and the other officers named, and contains no limitation upon the time within which the old bondholders are to avail themselves of the provisions of the act. I apprehend, therefore, that any such holder may come in at any time while the act continues in force, and accept its provisions. When he does so elect to accept its terms, *then* new bonds of the character specified are to be issued, and, when issued, to be signed by the then officers. The fact that these new bonds are to bear date July 1, 1881, is, in my opinion, immaterial, so far as this point is concerned.

February 11th, 1882. W. J. HAHN, Atty. Gen.

T. M. Grant, Esq., Co. Atty., Big Stone Co.:

DEAR SIR: Your favor received. You state the following facts: "Big Stone county at one time undertook to assume all the prerogatives of an organized county, but had its illusion dispelled by the Supreme Court. See 25 Minn. 215. During

this assumption various claims were allowed by the then Board of County Commissioners, and orders issued therefor, chiefly in payment of salaries to pretended officers, which orders were signed by the Chairman of the Board and the pretended County Auditor, but have never been paid until now, when the present Board of Commissioners, elected under the act of 1881, organizing the county, have undertaken to pay said old orders by causing new orders to be issued in their place and stead, signed by the present County Auditor, and have proceeded to levy a tax of 2 7-10 mills for the purpose of paying the new orders, which said tax the tax-payers objected to paying, claiming it to be illegal," and ask "if, in my opinion, the issuance of the new orders and the levy of the tax to pay them is legal."

So far as the payment of salaries to pretended officers is concerned, it seems to me there can be no question that the act of the Commissioners is illegal and void. The Supreme Court has decided that there were no county officers, and it necessarily follows that there could be no salaries to pay. The issuance of the orders to such persons would therefore be a mere gratuity, and I know of no power in the County Commissioners to distribute money, raised by taxation, among a few or many of its citizens. The records in the Auditor's office, if they show what they should, would make it perfectly apparent that these orders were issued for an illegal purpose. Suppose, for example, that A. B. should appear before the Board, and claim that he should be allowed a salary as County Auditor for a given period, and that the Commissioners should allow the claim, although there could be no pretense that he had ever served a moment in that capacity. Can it be possible that such allowance would or could create a legal and valid claim against the county? The present case, in view of the Supreme Court decision, is the same thing. In 11 Minn. (Gil.) 12, the Supreme Court held that the validity of all evidences of indebtedness issued by County Commissioners could be inquired into. If these evidences are illegal, therefore such illegality can be investigated and declared void by judgment of court. By section 89, p. 134, Gen. St. 1878, I think it would be the duty of the County Attorney to appeal from the allowance of such claims. I am also of the opinion that all alleged claims against the county, arising out of its former supposed organization, are subject to the same objections as that of salary of pretended officers.

February 11th, 1882. W. J. HAHN, Atty. Gen.

F. C. Field, Esq., Co. Aud., Wadena Co.:

DEAR SIR: You ask: "Can a county liquor license be issued without a meeting of the Board to approve bond?" The County Board, as such, can only act when in session in any case. Chapter 16, Gen. St. 1878, makes it the duty of the Board, *as a Board*, to exercise discretion, discrimination, and judgment as to the persons to whom licenses shall be granted, and the sum to be paid, as well as the sufficiency of the applicant's bond. The duty and responsibility thus imposed cannot be delegated, but must be discharged by the Board, and by no one member thereof, or any other person or body. Co. Com'rs Hennepin Co. vs. Robinson, 16 Minn. 381.

February 20th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Keihle, Supt. Pub. Inst.:

SIR: You ask my opinion upon the following, viz: "In the interpretation of section 23, c. 36, Gen. St. 1878, (1) can the Trustees rent the school-house, except upon petition of a majority of the legal voters? (2) Have they a right to allow a minority to use the school-house for the same purpose (*e. g.*, worship) for which they have already allowed its use by a majority?" To the first *query* I answer, no. The provisions of section 23 are that the Trustees may, "when petitioned therefor by a majority of the legal voters of said district," permit and authorize the use of the school-house for the purposes named. *Expressio unius est exclusio alterius* is a maxim of the law. When, therefore, the Legislature says that the Trustees may let

the school-house "when petitioned," etc., it is equivalent to saying they cannot so let it unless so petitioned. This section does not provide that the right to use the school-house for purposes of worship should be granted to the majority of the legal voters, but on the petition of a majority. The petition should be for the right to use the building for divine worship, or for Sabbath schools, etc, and not for the right of any *particular denomination* to so use it. The petition being in proper form, such petition would vest the Trustees with the power to let it to any person or body for the purposes named in the petition. In other words, but one proper petition is needed to confer the requisite authority upon the Trustees to let for divine worship. It then remains for the Trustees to determine the individual applications; and it can make no difference whether the particular denomination applying for its use is or is not backed by the majority of the legal voters.

February 21st, 1882. W. J. HAHN, Atty. Gen.

Wm. McAboy, Judge of Probate, Douglas Co.:

DEAR SIR: Judges of probate *cannot* "legally charge the fees allowed by section 27, *c.* 35, tit. 3, Young's St., for services required by said section." Section 7, *c.* 7, p. 108, (same statutes,) expressly says that "the Probate Judges in this State are hereby prohibited from taking or receiving, either directly or indirectly, *any fees whatever* for their official services other than" acknowledgments and oaths outside of the line of probate duties. This was passed in 1875; the section referred to, (section 27,) in 1868. It seems to me that this provision is too plain to admit of a question in the mind of any one.

March 1st, 1882. W. J. HAHN, Atty. Gen.

E. B. Pierce and Jos. Bookwalter:

GENTLEMEN: You ask: "Must the people of a town vote no license at every town meeting if they wish to prevent the licensing of saloon-keepers in the town, or will once voting serve until it is revoked by a vote to the contrary?" One favorable vote against license is sufficient to prevent the issuance of licenses until the people, in pursuance of section 1, *c.* 16, Young's St., again desire to and do vote upon the question. The result of that second submission of the question will determine the question for the future until another vote is had, and so on *ad infinitum*.

March 1st, 1882. W. J. HAHN, Atty. Gen.

J. L. Higgins, Esq., Co. Atty., Martin Co.:

DEAR SIR: Section 1, *c.* 124, Gen. Laws 1881, expressly provides what is to be understood as capital stock, for the purpose of determining the amount to be deposited in a designated depository. It is to include "the *personal property* of private banks or bankers, or the individual members of said banking firms," and is assessed upon the tax-lists of any county of the State. This necessarily excludes real estate in determining the amount to be deposited. Anything deposited in the bank in question, in excess of the amount allowed by law, is in the bank at the risk of the Treasurer. The neglect of the Treasurer-elect to give the new bond within 10 days would not, I think, necessarily vacate the office, if he does, within a reasonable time, execute and deliver a bond that is approved. If, however, he should absolutely refuse to comply with the order of the Commissioners, the case might be different. Section 7, *c.* 110, Gen. Laws 1881, contains provisions on this subject.

March 1st, 1882. W. J. HAHN, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: You ask my opinion as to the limitation imposed on State banks by section 47, *c.* 77, Gen. Laws 1881. This section seems to me to be reasonably clear. The first clause of the section provides plainly and specifically that "the *total liabilities* to any association of any person * * * for money borrowed * * * shall at no time exceed fifteen per cent. of aggregate amount of the capital stock of such association actually paid in, and of the permanent surplus fund of such association." If the provisions of the section stopped here it seems to me clear that the gross amount of money which any one individual could legally borrow in any manner from a State bank would be 15 per cent. of the capital paid in, and of its permanent surplus, irrespective of the character, kind, or amount of security given or offered. The limitation is absolute and unconditional. From this positive and sweeping restriction, however, the last clause of this section makes two exceptions, and only two: *First.* "The discount of bills of exchange drawn in good faith against actually existing values." *Second.* "The discount of commercial or business paper actually owned by the person negotiating the same." The first of these exceptions needs no elucidation. The meaning of "bills of exchange" is well known in the commercial world. The second is equally clear. It must be "commercial or business paper actually owned by the person negotiating the same." This would exclude accommodation paper, and by no possible fair construction could be twisted so as to include a person's own note, however well secured. If the latter construction were given it would nulify the body of the act.

March 6th, 1882. W. J. HAHN, Atty. Gen.

J. D. La Chance, Esq., Co. Aud., Morrison Co.:

DEAR SIR: You ask: "Has the Chairman of the Board of County Commissioners, or the balance of the Board when he is away, the right to sign county orders at any time, whether in session or not? Does the law contemplate that the order shall be made during the session of the Board, and signed at the same time, and delivered by the County Auditor after the thirty days have expired?" In my opinion the Chairman may sign any order for any bill allowed by the Board at any time after such allowance. It is not necessary that the Board should be in session when such order is signed. No order should be signed, of course, until the claim for which it is drawn is allowed; that is, no signing of orders in blank, to be subsequently filled up, is contemplated.

March 17th, 1882. W. J. HAHN, Atty. Gen.

Hon. J. A. Reed, Warden State Prison:

DEAR SIR: Your favor received. You ask me whether the word "physicians," as used in section 36, p. 1016, Gen. St. 1878, "apply to other than those employed in schools or colleges medical?" In my opinion it does not. The language is in the conjunctive. You are authorized (in the case named) to deliver the remains "to *the* physicians, professors, and teachers in medical colleges and schools in the state * * * for purposes of medical and surgical study." The object and purpose of this provision is obvious. Had the Legislature intended that such remains might be delivered to physicians generally, they would have said "to physicians *or* to professors, teachers," etc. The purpose of medical and surgical study named, seems to me, when read in the light of the words "medical colleges and schools," to refer to such study by persons attending such institutions for that purpose.

March 17th, 1882. W. J. HAHN, Atty. Gen.

Lyman B. Everdell, Esq., Co. Atty., Wilkin Co.:

DEAR SIR: Your favor of eighteenth inst. received. You ask whether the mileage and *per diem* allowed to County Commissioners can be drawn before being actually earned, or "in any way except on an order allowed by the Board in the usual manner, upon a properly verified claim?" Certainly not. Their claim for compensation for services and travel can only arise after being rendered or performed. The amount cannot be ascertained until then. They therefore stand on the same footing as all other claims where the amount due is not "fixed by law, or authorized to be fixed by some other person or tribunal." Section 141, Gen. St. 1878, p. 143. Hence, their claims must be itemized and verified under sec. 115, p. 139, Id.

March 23d, 1882. W. J. HAHN, Atty. Gen.

His Excellency, L. F. Hubbard, Governor:

SIR: The bill of Fred. Richter, Esq., Sheriff of Ramsey county, against the State of Minnesota for board, etc., of Henry Taylor and George Harris, committed to the jail of said Ramsey county on a charge of murder committed in said last-named county, referred to me by your Excellency, has been duly examined. I have the honor to advise your Excellency that the State is not liable for this bill, or any part of it. By section 3 of chapter 120, Gen. St. 1878, "when there is no sufficient jail in any county wherein any criminal offense has been committed," the examining magistrate is authorized upon his own motion to order any person charged with such offense, and directed to be committed to prison, to be sent to the jail of the county nearest, having a sufficient jail. By the commitment, it appears that the Sheriff of Aitkin county was directed by the committing magistrate to convey said prisoners to the common jail of Ramsey county, and the keeper of that jail was required to receive and detain them for the reason stated in the warrant, that there was no sufficient jail in said Aitkin county to hold them. By section 17 of the aforesaid chapter it is provided that in a case such as this "the Sheriff of the county in which such prisoner is to be confined shall keep said prisoner at the expense of the county in which the offense was committed, and shall be allowed therefor four dollars per week." By this section it is also made the imperative duty of the County Commissioners of the said county, "at their first session after the commitment of such prisoner," to authorize orders to be drawn, and sent to the Sheriff of the county to which such prisoners are sent, for the expense of maintaining such prisoner until the meeting of the court at which he is to be tried. I am at a loss to know how human language could be found so as to make the liability of Aitkin county, in the case under consideration, more imperative. There is no provision of law that I am aware of that could create any liability on the part of the State.

March 27th, 1882. W. J. HAHN, Atty. Gen.

Hon. John M. Martin, Judge of Probate, Norman Co.:

DEAR SIR: Your favor, asking what fees should be allowed the Sheriff for carrying an insane person to the hospital for the insane, committed under title 3 of chapter 35, Gen. Laws 1878, is received. By section 21 of said chapter, where such commitment is ordered, the committing officer is directed to "place the warrant in the hands of the Sheriff or some other suitable person, whom he shall authorize to convey the said insane person to the hospital." By this section it is evident that the person designated need not necessarily be the Sheriff. Section 22 of same chapter definitely and emphatically fixes the compensation of the person so designated for the services to be by him performed under said warrant. It is fixed at "two dollars per day for the time necessarily employed, and all necessary disbursements for travel, and for support of himself and insane person and assistants." I am at a loss to know how language so plain could be misconstrued. The statute had just

said he might authorize the Sheriff or some other suitable person, and then says "the person so authorized" (*i. e.*, the Sheriff, if he is designated) "shall receive," etc. Again, the mileage allowed the Sheriff in the performance of the ordinary duties of his office is to reimburse him for the expenses of travel, etc., necessarily incident to the discharge of his duties. To allow him travel fees and his disbursements would be a double allowance. If he performs this duty he receives the same and no greater compensation than would any other person for the same service.

March 27th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Keihle, Superintendent of Public Instruction:

DEAR SIR: In response to your favor, submitting certain questions for my opinion, I have the honor to say, in answer to your first question, viz., "Is six miles square equivalent to thirty-six square miles, within the meaning of section 17, *c.* 36, Gen. St. 1878? In other words, can a district be more than six miles long?"—that in my opinion six miles square is not equivalent to thirty-six square miles. Under this section the district may comprise an entire township, irrespective of its length, bredth, or area; or it may comprise a territory six miles square in different townships. In the latter case its dimensions are definitely fixed, and, as the authority is statutory, it cannot be extended by construction or implication. To your second query, viz., "Does this section authorize County Commissioners to give any non-resident of a district school privileges within it?" I answer that the school privileges which the County Commissioners are authorized by this section to grant, are confined to "such district," *i. e.*, a district composed of an entire township, or of six miles square, and is also limited to "persons non-resident of *such* district, and to whom the school in *such* district is easier of access than the school in any other district." It does not apply to school-districts in general. To your third query, viz., "In *proviso* 2, § 17, is any limitation to the magnitude of a school-district implied?" I answer that there is no such limitation implied by this section, in my opinion.

March 28th, 1882. W. J. HAHN, Atty. Gen.

E. P. Freeman, Esq., Co. Atty., Blue Earth Co.:

DEAR SIR: Your favor received. You ask: "Where an independent school-district is organized,—not by special act of the Legislature, but by action in conformity with the general school law on the subject,—can the County Board change the limits of said school-district on petition, or on petition allow any particular part to be set off from said independent school-district into another district?" In my opinion they cannot. This point was before my predecessor, Gen. Wilson, and decided by him in the same way. The case of State ex rel. vs. Sharp, 27 Minn. 38, also indicates the same thing. Independent districts are organized irrespective of any action of the County Board. They are created by their own act, and, as said by the Supreme Court in that case, "as respects organization it was not the intention of the Legislature to subject independent districts to the control of what is styled the general school law, but to make them, as their name implies, wholly independent thereof, subject only to the provisions of subchapter 7." Chapter 74, Gen. Laws 1877. If the Board can, after organization, add to or take from such a district, they might thus indirectly do what they have no authority to do directly, viz., effect, in fact, an organization of an entirely new district. Again, power to take a part, in this case, implies a power to take the whole, and consequently a power to destroy. As the County Commissioners have no authority to organize such a district, the power to destroy it, when created, must be conferred in clear, unmistakable terms. It cannot be claimed by implication.

March 28th, 1882. W. J. HAHN, Atty. Gen.

C. Brown, Esq., Treas. Ind. School-Dist. No. 12, Houston County:

DEAR SIR: Your inquiry is entirely outside the line of my duties, but, nevertheless, on account of its importance, I will indicate my views on the question submitted. You ask (1) as to your liability as such Treasurer for public money stolen from you; and (2) as to the power of the Board of Education of your district to relieve you from your liability for such money, if you are liable for it.

First. That you are absolutely liable for the money so stolen I have no doubt. You are, by section 107, p. 488, Gen. St. 1878, required to give a bond for the faithful discharge of your duties as Treasurer. It is also made the duty of such Treasurer to receive all moneys belonging to the district, and pay out the same upon the order of the Clerk and President. He is also required to keep accurate, detailed, and separate account of each fund coming into his hands, and to render a report of the business of his office annually, and as often as called for by the Board. These provisions of the statute clearly indicate a purpose on the part of the Legislature to impose upon such officer an absolute and unqualified liability for money received by him in his official capacity. See District Tp. of Taylor vs. Morton, 37 Iowa 550; Dist. Tp. of Union vs. Smith, 39 Iowa, 9; Dist. Tp. of Bluff Creek vs. Shinkle, 40 Iowa, 130; Co. Com'rs McLeod Co. vs. Gilbert, 19 Minn. 214; Co. Com'rs Hennepin Co. vs. Jones, 18 Minn. 199.

Second. The Board of Education have no power to release you from your liability. Section 111 of said chapter specifies the powers of such Board, and there is nothing therein that will authorize that body to discharge, for the reasons stated, a lawful claim of the district. The powers possessed by the Board are only those conferred by law. They can lawfully exercise no others. See the cases cited *supra.*

March 28th, 1882. W. J. HAHN, Atty. Gen.

A. Y. Felton, Esq., Sec. Dist. No. 60, Wab. Co.:

DEAR SIR: Your favor of sixteenth inst. has remained unanswered on account of the press of other matters. I do not think your Board of Directors have the authority to make an appropriation for the purpose of a public library. Section 111, p. 489, Gen. St. 1878, specifies the powers of such board. Anything outside of its terms is unauthorized. Subdivision 4 of this section is the only one which could be claimed as at all applicable. This is limited to "school apparatus, furniture, stoves, and other appendages for school-houses." None of these would cover a public library.

March 28th, 1882. W. J. HAHN, Atty. Gen.

B. H. Whitney, Esq., Co. Attorney, Murray Co.:

DEAR SIR: *First.* Under section 90 of the general tax law the proceeding necessary to follow in order to effect a redemption is clearly pointed out. I know of no other way, and think the County Auditor should insist upon a substantial compliance with its provisions. *Second.* No fees are allowed in collecting delinquent personal property tax unless a levy is made. The county is not liable for them. This was held by the late Judge Cornell when Attorney General, and by Gen. Wilson, and by Judge Start, my immediate predecessor. I fully concur in the same. The Treasurer is bound to receive the taxes, if properly tendered, without requiring mileage where there has been no levy. *Third.* Under section 10, c. 74, Gen. Laws 1881, the fees of witnesses in criminal cases before a Justice of the Peace are not a county charge. The section is too plain for argument. It says the judges of the District Court may allow, etc., to defendant's witnesses in the *district court.* It is needless to say that a Justice is not a Judge of the District Court, or that a Justice Court is not a District Court.

March 28th, 1882. W. J. HAHN, Atty. Gen.

Hon. W. W. Braden, State Auditor:

DEAR SIR: My attention has been called by you to section 21 of chapter 10, Gen. Laws 1881, and my opinion requested as to whether said section is to have a retrospective or a prospective operation. Our Supreme Court, in the case of Brown vs. Delaney, 22 Minn. 348, says that "unless the contrary clearly appears to have been intended by the Legislature, statutes should be construed to be prospective in their scope and operation, and not retrospective. This is a familiar canon of construction." Does it then clearly appear that this section was intended by the Legislature to have a retrospective operation? It seems to me that it does not, but that, on the contrary, it does appear, from the entire chapter, that the scope and operation of this section was intended to be prospective. I am of opinion that the clause "whenever the holder of any tax certificate of sale" refers to a certificate of sale issued in the future, after the statute goes into effect, and not to certificates issued prior to its passage. This view is not only strengthened, but, as it seems to me, conclusively established, by reference to section 19 of the same chapter. This last section, like the section under consideration, was enacted in the interest of the purchaser at a tax sale, and provides an easy and inexpensive method by which such purchaser may, in a given case, have the amount invested by him in a tax certificate refunded. It starts out with the expression "that when lands *have been* sold for taxes," etc., which, to my mind, indicates fully as clear an intention to make its scope retrospective, as does the phrase "whenever the holder of any tax certificate of sale," etc., found in section 21; and yet the Legislature deemed it necessary to expressly provide "that the provisions of this section" (section 19) "shall apply to all sales of land for taxes made prior to the passage of this act." No such provision is found in section 21, and its absence, under the circumstances, can only be accounted for on the theory that section 21 was not to apply "to all sales of land for taxes made prior to the passage of this act," but was to have a prospective operation only. Again, this section makes an entirely new departure in the matter of tax certificates and tax sales. It would seem that the deed of the State was to be in the nature of a warranty, instead of a quitclaim, and that the purchaser was to have the land or his money, with interest, in any event. This is a radical change, and, if it were to receive a retrospective construction, could not but work most disastrous results to counties, towns, cities, and school-districts. In one county alone, I am informed by the County Attorney, it would take $50,000 from the various funds. An intention to thus temporarily cripple these municipal bodies should certainly be clearly expressed, or be necessarily and unavoidably implied.

March 29th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. Pub. Inst.:

DEAR SIR: My predecessor, Gen. Wilson, in passing upon the qualifications of a female voter at a school election, held: "(1) The minor children of any parent duly naturalized, and who, at the time of such naturalization of the parent, reside within the United States, become citizens and entitled to all the privileges of citizens immediately on their arriving at the age of twenty-one years. (2) A foreign woman becomes a citizen by marriage to a citizen, or when an alien to whom she is married becomes a citizen. (3) Foreign-born women who have not been naturalized by marriage, or by the naturalization of their parents while they were minors, in order to vote for school-district officers or on school matters, must have taken the same steps towards becoming citizens that are required of foreign males." In the views thus expressed by him I fully concur.

April 3d, 1882. W. J. HAHN, Atty. Gen.

L. W. Collins, Esq.:

DEAR SIR: Your favor to State Auditor has been called to my attention. On a moment's reflection it will be obvious to you that I was construing section 21 and not section 19 of Laws 1881, and that I only referred to section 19 by way of illus-

tration. The latter section was not before me for examination. It is true, I made a *lapsus linguæ* in saying section 19 starts out, etc., instead of the first proviso starts out. But the important part of this section, for the purpose of illustration, was the last clause of the section. I am sorry that I seem to have been so unfortunate in the use of language as to leave the opinion in doubt. But as I started out with a statement that section 21 was the one to which my attention had been called, I perhaps unwittingly supposed it would be understood as applying solely to that section. Should the State Auditor, or yourself as County Attorney, desire my guess on the facts stated by you, I will be glad to give it. The opinion you refer to does not and was not intended to cover the case put.

April 11th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. Pub. Inst.:

DEAR SIR: The letter inclosed by you for my consideration, and on which you desire my opinion, has been considered. The statement is this: "At a meeting of the legal voters of independent school-district No. 22, called by notice, to build school-house on block 23, 'yes,' received 28 out of 36 votes; 'to authorize Board to select site,' 6 votes. At the next meeting of the Board, by a majority vote, the school-house was located on block 18. Is this legal?" Section 111 of the public school laws defines the powers of the Board of Education of an independent school-district. The third subdivision of this section provides that such board, "when authorized by a vote of the district, may purchase a site for a school-house." This is equivalent to saying that without such authorization they have no power to so purchase. If the voters of the district may or may not, as they see fit, grant or withhold this power, it follows as a necessary sequence that they may attach such conditions and limitations to the exercise of the power so granted as they see fit; and, if they only authorize the Board to purchase a given site, their power to purchase at all is necessarily limited to the one so designated. The purchase of any other would be as invalid as if done by the board on their own motion, and without any authorization by a vote of the district. The latter would be clearly void; the former no less so.

April 19th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Pub. Inst.:

DEAR SIR: You ask my opinion on the following statement, to-wit: "A district having voted four months' school and $100, to be held in two terms, one of two months in winter and one of two in summer, have the Board any discretion that will allow them, if they think it best, to hold one term of four months? and may they also engage teachers at $30 per month, creating an indebtedness of $20?" Except in case the district neglects to vote a tax "sufficient to support a school for the time in each year necessary to secure apportionments from the state school funds," the legal voters may decide how long school shall be held in their district; and it is for them and them alone to so decide, and to provide the funds requisite to maintain the same. Section 24, School Laws. As it is necessary, therefore, in order to have four months' school in a district, that the voters thereof should so decide, it seems to me that it rests with them if they see fit to do so, when giving this authority, to prescribe how this time shall be apportioned,—whether into one or two terms, and, if into two, the length of each. It is to be presumed that when this direction is specifically made by the voters that they would not otherwise have voted that length of time. If the voters themselves have the power to so apportion, and the right to have four months' school is restricted to two terms of two months each, then it follows that the agents of the district (the trustees) must, at least substantially, carry out the specific restriction necessarily implied in the direction given them by their principal, (the legal voters.) As to the right of the trustees, where

$100 is voted for teacher's wages, to engage a teacher at $30 per month for four months, thus creating an indebtedness of $20, it seems to me that the proviso in section 24 of school laws necessarily prohibits any such action. It is there stated that the trustees "shall not *permit* the current expenses of the school in any year to exceed the amount * * * which the district has voted, or which may be on hand for such school." If they are not to *permit*, they clearly could not directly authorize.

April 19th, 1882. W. J. HAHN, Atty. Gen.

Chas. N. Hewitt, M. D., Sec. State Board of Health:

DEAR SIR: Your favor has remained unanswered on account of the press of other matters pending at the time of its reception. I will answer your questions in the order of their asking:

1. Can School Boards exclude unvaccinated children from the public schools? His honor, Judge Lochren, in a recent case arising in Anoka county, decided that they could not. This opinion, I have no doubt, is correct. The only provisions of the statutes, under which such power could be claimed, is the third proviso to section 32 of the Laws of Minnesota relating to public schools. It provides "that Boards of Trustees and Boards of Education may suspend or expel pupils for insubordination, immorality, or infectious disease." It seems to me clear that under neither of these heads could such exclusion be made. "Infectious disease," the only one at all applicable, clearly means a pupil having a disease that is infectious, or coming from a family, or perhaps a neighborhood, where a disease of an infectious character is prevailing; the object and purpose being to prevent the spread of an *existing* sickness, liable to be communicated by such excluded pupil. The exclusion is made because the scholar himself is infected, or because persons with whom he comes in contact *are* infected, with a contagious disease, and not because he refuses to submit to what may be deemed necessary by the Board to protect him from liability to contract a given sickness. The right of the Legislature itself to specifically enforce compulsory vaccination is, perhaps, open to question. But whether they have or have not such authority, it is not necessary to decide now. But in the absence of express and positive sanction there seems to me no room to doubt that no officer of the government could, under any plea, insist upon a person submitting to this ordeal as a necessary prerequisite to the enjoyment of the privileges of our common schools.

2. Can Boards of Health order such exclusion? I think not. They have no control over the admission or rejection of pupils in our public schools. The Board of Trustees or the Boards of Education have, under the law, the general charge of the interests of schools and school-houses in their districts. To authorize an interference with this power by any other person or body, such as the exclusion of pupils for any cause, the authority so to do must be clearly expressed. Inference or implication would not be a sufficient warrant for so doing. There is no express grant of such right to Boards of Health, nor indeed any provision from which a legal inference or implication therefor could be drawn or claimed.

3. Can School Boards exclude from school, children from families having infectious disease? I think they can. What has already been said in answer to your first question sufficiently answers this in the affirmative.

4. Can we, as Boards of Health, order such exclusion? I think not, for reasons given in answer to your second query. Boards of Health may have the power to order school closed where an infectious disease is prevailing in a community. Town Boards, under section 62, p. 175, Gen. St. 1878, may, where persons are, or lately have been, infected with a contagious disease, dangerous to the public health, cause such person to be removed to a separate house, etc. The State or Town Boards might, possibly, make regulations relative to persons staying in families where a contagious disease is prevailing that would be obligatory on School Boards and Trustees, but they could not, in my opinion, order a given pupil to be excluded

from the public school, and have such order effectual, without some action on the part of such Board of Trustees.

5. Does the power of the State Board of Health include such action? It does not; and for the reasons already given. The statute creating this board provides that "they shall also have charge of all matters pertaining to quarantine, and authority to enact and enforce such measures as may be necessary to the public health;" but, save as prescribed in chapter 11 of Laws of Extra Session of 1881, there are no means provided for the enforcement of such measures. The last-named chapter only applies to Boards of Health and health officers, and does not include school officers. [See Laws 1883, *c.* 132.]

April 20th, 1882. W. J. HAHN, Atty. Gen.

Hon. L. W. Collins:

DEAR SIR: The statement on which you desire my opinion I understand to be this: On December 29, 1880, a judgment was entered in a foreclosure action, in which the holder of a tax certificate on the land in question was a defendant, "directing the usual foreclosure sale, and declaring the certificate holder to have no lien on or interest in the land," but failing to state for what reasons the tax sale was void. *Quere:* Had the said certificate holder any right to have the money paid by him at the tax sale returned to him; and has the County Auditor any right to reassess the amount so returned against the land? The law in force at the time (section 97, p. 240, Gen. St. 1878) provided that a judgment declaring a tax sale void should state for what reason such sale is declared void, and it was only in cases where any sale has been or shall be *so* declared void, that the money is or was to be refunded. The amendment of this section in 1881 makes no change in this regard. It must be *so* set aside. In order, therefore, to authorize the refundment to a tax purchaser under this section, either as it stood before or since the amendment, the judgment declaring the sale void must state for what reason such sale is annulled. A judgment that falls short of this does not warrant a refundment under this section. If the refundment is unauthorized and illegal, the amount so repaid cannot, even under the amendment of 1881, be relieved, in my opinion.

April 20th, 1882. W. J. HAHN, Atty. Gen.

H. H. Crowell, Esq., Co. Atty., Todd Co.:

DEAR SIR: You ask whether, in my opinion, "a vote of the people of a township against license revokes all outstanding licenses to sell liquor in that township, or does the license stand good for the time it was issued?" I do not think, under section 1, *c.* 16, Gen. St. 1878, that a vote of no license by the people of a township revokes licenses in force. The effect of such a vote, as stated in that section, is to forbid the Board of County Commissioners from granting any license in said township. It does not prohibit the sale after such vote. It operates as a limitation on the power of the Commissioners in this regard for the future. It does not invalidate licenses issued, or render such licenses nugatory for the future.

April 24th, 1882. W. J. HAHN, Atty. Gen.

D. L. Bugbee, Esq., County Attorney, Anoka County:

DEAR SIR: You ask whether, under section 8, p. 67, Sp. Laws 1881, a majority of all votes cast at the election, or only a majority on the question submitted, is required in order to prevent the issuance of licenses in the city of Anoka? The statute, it seems to me, is clear. It says: "If such returns show that a majority of the legal votes *cast at said election* shall be against license," etc.; not cast on that question. 16 Minn. 249; 35 Mo. 103; 37 Mo. 270; 38 Mo. 451.

April 24th, 1882. W. J. HAHN, Atty. Gen.

J. L. Higgins, Esq., Co. Attorney, Martin Co.:

DEAR SIR: You ask: "Is the Assessor of the town of Fairmont, or the Assessor elected by the Village Council, the proper party to assess the village of Fairmont?" In my opinion, the assessor elected by the town of Fairmont. There is no provision in the law relating to the organization of villages for the election or appointment of an Assessor. These villages are made separate election districts "only for the election of village officers." He is not made one of such officers. The Council have no authority to elect.

April 24th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Public Instruction:

DEAR SIR: You state that "a Board of Education in an independent district has adopted the following rule: 'Whenever during any term any pupil has been absent three half days, or tardy three times, or tardy and absent three times, without good excuse, said pupil shall be suspended from the privileges of the school, and can be reinstated only by a majority vote of the Board at one of its meetings,' "—and ask: "Will a fair interpretation of the law in section 111, subd. 8, authorize School Boards to lay this condition upon pupils who desire the benefit of the school?"

By subdivision 8 of section 111, Laws of Minnesota, relating to the public schools, Boards of Education of independent school-districts have power, and it is made their duty, "to superintend and manage in all respects the school of said district, and from time to time to adopt * * * rules for their * * * government and instruction, * * * for the reception of pupils, * * * their *suspension*, expulsion," etc. That Boards of Education, under this clause, have the right to adopt rules for the suspension and expulsion of scholars must be conceded. The language is too plain to admit of question, unless it should be claimed that the right to attend school is an absolute right, and not one to be enjoyed on reasonable conditions. The authorities are numerous, and by the ablest courts in the land, that this right is not an absolute one, but is to be enjoyed subject to system and order under established rules; that "in this respect the citizen is in subordination to the lawful rules for the regulation of schools, and the improvement of scholars in learning; and this is for the same fundamental reason that he is in subordination to the statutes themselves on that or any other subject; and it is no more his right to defy or disregard those rules than it is to defy and disregard any statute that affects him as a citizen in respect to schools, or any other subject involving the common weal." Ferriter vs. Tyler, 48 Vt. 468; Board of Ed. of Cincinnati vs. Minor, 23 Ohio St. 421; Sherman vs. Charleston, 8 Cush. 160; Spiller vs. Woburn, 12 Allen, 127; Spear vs. Cummings, 23 Pick. 224; Hodkins vs. Rockport, 105 Mass. 475; Burdick vs. Babcock, 31 Iowa, 562; Stephenson vs. Hall, 14 Barb. 222; People vs. School Officers, 18 Abb. Pr. 165*n*.

The power being thus vested in such board, the sole question to be examined and considered is as to whether the rule under consideration is a reasonable and proper one. If it is, it is valid. If not, it is invalid. This, however, does not imply that the Board are the ultimate judges whether the *enforcement* of the rule in a given case is lawfully requisite and proper. Where such question of lawfulness is made between a party against whom the rule operates and the Board, that question is open before the courts for consideration and decision, under all the circumstances. Is this rule, then, a reasonable and proper one? I think it is. As said by the Supreme Court of Vermont (48 Vt. 471) in a case arising under a somewhat similar rule: "The rule in question is for the purpose of inducing and enforcing constancy in attendance. That such constancy is essential to such improvement is not debatable. That such attendance is requisite as matter of regulation, in order to the necessary classification of the scholars in reference to age, capacity, studies, and proficiency, is not debatable. Those who attend constantly cannot be required to linger in order that the inconstant may keep along with them; nor can such inconstant scholars keep equal pace with those who attend constantly. The rule, then,

is such as is contemplated by the statute, so far as the *purpose* of it is concerned. That purpose is indispensable to the attainment of the object and end proposed by the statutes, both as to the individual scholar and as to all others who may be affected by his attendance and absence."

In 31 Iowa, 562, a rule which provided that "any pupil who is absent six half days in any consecutive four weeks, and two times tardy, shall be counted as one absent, unless detained by sickness or other unavoidable cause, shall be suspended from the schools until the end of the term, unless reinstated by the Superintendent or Board," was sustained as being a reasonable and proper rule. The court say that "any rule of the school, not subversive of the rights of the children or parents, or in conflict with humanity and the precepts of divine law, which tends to advance the object of the law in establishing public schools, must be considered reasonable and proper;" that object being stated to be "to secure education to the children of the State." Again, they say: "The rule requiring constant and prompt attendance is for the good of the pupil, and to secure the very object that the law had in view in establishing public schools. * * * It is required by the best interest of all the pupils of the school."

To the same effect are the other cases referred to above. Nothing which I could say would add anything to the reasoning of the court in these cases. To me it seems to be conclusive. By the rule under consideration it is for the Board to decide in the first instance as to the sufficiency of the excuse; and it is not to be presumed that if a good excuse should be presented to them that they would refuse to recognize its efficacy; and, as the pupils cannot be suspended or expelled under the rule without their action, no inconvenience or injury is liable to arise in its application.

May 11th, 1882. W. J. HAHN, Atty. Gen.

Dr. C. N. Hewitt, Secy. State Bd. Health:

DEAR SIR: Your favor received during my absence at court in Wabasha county. I will answer your questions in the order of their asking: "1. Do the provisions of sections 52-60, [old numbers,] both inclusive, chapter 10, Gen. St. 1878, or any of them, apply to boards of health of incorporated villages or cities when not in conflict with the provisions of the charters of such villages or cities?" The sections referred to, down to section 58, refer exclusively to towns. Section 58 is made applicable to cities as well as towns; and I can see no reason why it should not be held to apply to all cities, unless, perhaps, it should appear to be in conflict with their charters. "2. Are the provisions, or any of them, of chapter 8, Gen. Laws 1873, as amended by chapter 11, Gen. Laws (Extra Session) 1881, applicable to Boards of Health of incorporated villages or cities, whose acts of incorporation vest in the City Council or other body the power to appoint Boards of Health? This with especial reference to section 3 of said act." It seems to me that section 3 of the act of 1873 must be held to be applicable to all Boards of Health, whether in incorporated cities or not. This is the important section of the act. The other sections, where in conflict with the charter of a city, would not apply. "3. Whose duty is it to look after the offenses against public health defined in chapter 101, Gen. St. 1878?" It is the duty of every good citizen to see that the laws are faithfully executed, and especially laws affecting the public health. But more especially, as it seems to me, is it the duty of all health officers to see that all offenders against the provisions of chapter 101 are prosecuted. It is not *specifically* made the duty of these officers to look after these matters, but it is clearly in the line of their duties.

May 26th, 1882. W. J. HAHN, Atty. Gen.

M. B. Webber, Esq., Co. Atty., Winona Co.:

DEAR SIR: Press of business in the courts has prevented an earlier reply to yours of 4th inst. On April 24, 1882, the first question you ask, whether a vote against license in a town revokes licenses previously granted, was answered as follows: "I do not think that under section 1, *c.* 16, Gen. St. 1878, that a vote of no license by the people of a township revokes licenses in force. The effect of such a vote, as stated in that section, is to forbid the Board of County Commissioners from granting any license in said township. It does not prohibit the sale after such vote. It operates as a limitation on the power of the Commissioners in this regard for the future. It does not invalidate licenses issued, or render such licenses nugatory for the future." 2. County Commissioners have no authority, in my opinion, to transfer a liquor license from one person to another. A new license must be issued, and such new license can only be granted on payment of the license fee for one year, (chapter 30, Gen. Laws 1881,) and filing a proper bond. 3. County Commissioners have no power to refund *pro rata* portion of license fee where party proposes to quit business. General Laws 1881, *supra*, requires the license fee fixed for a year to be paid in every case, and all licenses are made to expire on the second Tuesday of January. A party taking out a license in November would have to pay as much as if licensed in January.

May 31st, 1882. W. J. HAHN, Atty. Gen.

Hon. W. W. Braden, State Auditor:

SIR: To your inquiry relating to the disposal of lands covered by chapter 135, Gen. Laws, 1881, in Washington county, where no sale was had because of an injunction, I have the honor to reply that, in my opinion, section 9 of said chapter 135 is broad enough to include, and does include, all lands remaining unsold at the sale provided for by that act, irrespective of the reasons which may have prevented their disposition. The language is, "*all* pieces or parcels remaining unsold," etc., and not all pieces which the Auditor may be unable to sell.

June 2d, 1882. W. J. HAHN, Atty. Gen.

R. H. McClelland, Esq., Co. Atty., Scott Co.:

DEAR SIR: You ask: "Is a member of the Board of County Commissioners eligible to the office of 'Overseer of the Poor,' under an appointment by the Board of which he is a member? And if so appointed, and he qualifies and enters upon the discharge of his duties as such overseer, is he entitled to any compensation for such services?" I take it that you refer, by your questions, to the office provided for by section 7, p. 280, Gen. St. 1878. If I am correct in this, I must answer both of your questions in the negative. The officer provided for by this section is to be appointed, his salary fixed, and he to be removed by the Board of County Commissioners. It is a different office than that of Superintendent of the Poor, and the duties attached to it are not the same. A County Commissioner is *ex officio* a Superintendent of the Poor, but is not an Overseer of the Poor, as defined by said section 7. By section 124, p. 140, Gen. St. 1878, it is expressly and emphatically provided that "no County Commissioner shall be appointed, * * * by the Board of County Commissioners of which he is a member, to any office * * * to which such Commissioners are by law to appoint; * * * nor shall any compensation or salary be paid to any person heretofore or hereafter so appointed. * * * And every appointment * * * heretofore or hereafter made, * * * or payment voted for or made contrary to the provisions of this section, is void; and any violation of this section hereafter committed shall be a malfeasance in office which will subject the commissioner so offending to be removed from office." Nothing, to my mind, could make this any more plain. Not only is such appointment void, and not only is any payment voted for services performed under such void appointment void, but the Commissioner who should presume to

act under it would be guilty of malfeasance in office. The reason for such stringent provisions is too obvious to require mentioning. And even without any such statute it would be manifestly improper and reprehensible for any such thing to be seriously thought of, much less to be actually attempted.

June 10th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Public Inst.:

SIR: You ask: "Has the Treasurer authority to recognize by payment an order signed by the Clerk only?" I think not. Section 45 of school laws provides that "the Clerk shall draw orders on the Treasurer of the district, * * * and *when* such orders are attested by the director they shall be paid by the Treasurer." It will be observed that it is only when attested by the Director that the Treasurer is authorized to pay. Section 46 provides for payment of orders signed by the Director alone in case of the absence, inability, or refusal of the *Clerk* to draw orders; but there is no similar provision applicable to the Director, and this positive stipulation as to the Clerk, and entire silence as to the Director, would seem to be conclusive of the question.

June 15th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Public Inst.:

SIR: Your first queries are covered by an opinion given by my immediate predecessor, Judge Start, a copy of which I inclose. I fully concur in the conclusions arrived at in that opinion. To your second question, viz., "Can a County Superintendent revoke a certificate at his pleasure and without cause, as expressed in section 9, c. 36, Gen. St. 1878? Would the circumstance that because of division of sentiment in a district it would be unwise or harmful to engage a particular teacher, warrant a Superintendent in revoking her certificate in case she decided to accept the offer of the School Board?"—I answer, in my opinion he cannot; and the circumstances stated by you do not change my judgment. By the provisions of section 62 of Laws of Minnesota relating to the public schools, County Superintendents are to examine and license teachers, "and annul certificates *for cause shown.*" By section 69 they may cite to re-examination, "and being satisfied, upon such examination or otherwise, that such person (1) is not of good moral character; or (2) has not sufficient learning and ability to teach a common school; or (3) if such person shall refuse or neglect to attend upon such re-examination,—the Superintendent shall revoke the license held by such person," etc. Here are three distinct enumerated causes, for any one of which a revocation of the certificate may be made, viz., absence of moral character, lack of ability, and failure to appear when cited for re-examination. It is a familiar maxim of the law that "the expression of one thing is to the exclusion of all others." And the Legislature having thus specified certain causes for which a license may be revoked, and having provided that certificates may be annulled "for *cause shown*," it necessarily excludes the idea that a Superintendent can arbitrarily and *without* cause cancel a certificate duly issued to a person recognized by him to be of good moral character, and qualified to teach in all the branches specified in section 66. It is not for him to decide whether the employment of a given teacher in a particular district is or is not wise; that matter the law has committed to other hands. And it would be an unwarranted assumption on his part to interfere, especially to the extent of unlawfully and unjustly annulling the certificate of a teacher against whom he has nothing else to bring save the fact that the parties, and the only parties whom the law authorizes to select a teacher, have seen fit to select him. It seems to me that the Superintendent should remove the Trustees rather than annul the certificate of the teacher; for if either are derelict in duty it is the Board.

June 19th, 1882. W. J. HAHN, Atty. Gen.

Hon. W. W. Braden, State Auditor:

DEAR SIR: You ask whether your office, in view of the decision of our Supreme Court in 21 Minn. 101, ought to require that the wives of the assignors of school-land certificates shall join in the assignment of the same, if any such are made. I think you should require, in every case, either that the wife, if any, join in the assignment, or that satisfactory evidence be furnished that the tract was not a homestead at the time the assignment was made. This requirement would be in the interest of purchasers and their assignees. If the land is a homestead, no alienation thereof by the husband alone, in whatever way it may be attempted to be effected, is of any validity. Thomp. Homest. § 274; Smyth, Homest. §§ 240-242. In the case of McCabe vs. Mazzuchelli, 13 Wis. 534, it was expressly held that a married man, holding land under a school-land certificate, and occupying it as a homestead, could not make a valid assignment of the certificate without the signature of the wife thereto, and that assignment so made was void. The provisions of the Wisconsin homestead law, at the time of this decision, were, so far as the point under consideration is concerned, substantially like ours.

June 28th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Superintendent of Public Instruction:

SIR: Your favor, inclosing letter from the Clerk of a school-district in Swift county, for my opinion, has been duly considered. The facts, as I gather them from the letter, are in brief, these: 1st. After the destruction of the school-house the district was divided. At a meeting held prior to such division, it was resolved, a majority from the proposed new district being present, that all moneys belonging to the district should be equally divided. On these facts the question is asked, whether such vote is binding on the old district, or can it retain the whole money and property? In an opinion given your predecessor, Hon. H. B. Wilson, by Attorney General Wilson, bearing date July 10, 1874, on a similar question, he held that the old district retains the entire money and property. For authorities sustaining this position, and the reasons therefor, I respectfully refer you to that opinion. I fully concur with him in his conclusion. 2d. In the old district a meeting was called, and officers elected to fill vacancies, and a vote taken on the site for the school-house. At this meeting, July 31, 1881, the vote stood: For site at center of district, five votes; for site one mile from center, six votes. At another called meeting, on June 17, 1882, the vote stood: For the center site, ten votes; for the other, a mile from center, eight votes. The district contains 35 votes, when all present. The question is, which of these, if either, is the legal site? Assuming that due and proper notice of the last meeting was given, and that the first site designated was more than one-quarter of a mile from the center of the district, the site having the majority vote at that meeting, being the center of the district, is the proper site. The first proviso of section 19, school laws, expressly provides that in such case "a majority of the legal voters of such district, voting thereon, may change the site to a a more central location."

July 6th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Public Inst.:

DEAR SIR: The letter referred by you to this office contains the following statement, viz.: One B. was elected Treasurer of a school-district, gave bond, entered upon the discharge of the duties of the office, and, as such treasurer, received the moneys belonging to the district. He subsequently failed, owing the district about $550. The sureties claim that they are not held, because, they say, B. was not in fact a resident of the district, and hence was not the legal Treasurer thereof. On this statement it is asked whether or not the sureties can be held for the defalcation. I have no doubt they can. Whether B. was or was not the Treasurer

de jure, he was at least Treasurer *de facto*, and held and acted under color of title. This being so, his acts, so far as they affect the public, were entirely valid. 4 Minn. 30; 14 Minn. 252; 17 Minn. 451. Having acccepted the office and acted under it, and these parties having signed his bond as sureties in such office, and he having received the moneys as treasurer of the district, it is altogether too late to argue that he never became treasurer. 39 N. Y. 399; 17 Minn. 454.

July 7th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Pub. Inst.:

DEAR SIR: I think, in the case put by the letter of Charles Booth to you, the judgment creditor had sufficient notice of the title of the district to prevent the judgment referred to from becoming a lien upon the school-house lot. The possession of the district was open and notorious,—a school-house standing thereon and used as such for years prior to the judgment. Open, notorious, and exclusive possession of real estate, under an apparent claim of ownership, is notice to those who subsequently deal with the title of whatever interest the one in possession has in the fee. Wade on Notice, 117, and authorities cited. The existence of such judgment, and a sale under execution thereon, will not affect the right of the district to issue bonds to build a school-house on that site,—the district intending to redeem in time from the sale. There seems to me no limitation imposed upon the legal voters of a school-district, by law, that would prevent them, by the requisite majority, from removing the site of the school-house at any proper and legal meeting of the district, due and proper notice having been given. See section 19 of school law.

July 7th, 1882. W. J. HAHN, Atty. Gen.

Hon. Henry M. Knox, Public Examiner:

DEAR SIR: Your esteemed favor of the 26th inst. has been duly considered, and in reply I have the honor to say: 1st. That in the case of Dawson & Co., on the facts stated by you, a new bond should undoubtedly be required, and such new bond should be large enough to cover all probable deposits in accordance with the requirements of subdivision 2 of sections 87, 89, Gen. St. 1878. 2d. A new bond should also be required from the Merchants' National. The above subdivision requires five (5) sureties; this, both on account of the death of one of the sureties and on account of the smallness of the penalty. 3d. Subdivision 3 aforesaid, in spirit, at least, requires that the banks selected as depositories of the State funds, should, prior to any deposit of such funds, furnish bonds, to be approved as specified therein, in double the amount so deposited; and that when the treasurer desires to increase such deposits beyond 50 per cent. of the penalty of such bonds, that then, and before such increased deposits are made, that additional bond be required of the character specified. 4th. The change, by oral agreement, of the rate of interest to be allowed from 4 per cent. to 3 per cent., would not affect the liability of the bondsmen. Had the change been from 3 per cent. to 4 per cent., the result might have been different. 5th. I do not think that the Public Examiner has any authority under chapter 6, § 92, Gen. St., to approve or reject any of these bonds. They are to be approved by the Board of Auditors. Neither do I think that such Board has any authority relative to this matter, save the right to approve or reject such bonds when presented for their approval. The statute is clearly deficient in not giving authority to such Board to require a new or an additional bond whenever in their opinion it is necessary, and the statute in this regard should be amended.

July 29th, 1882. W. J. HAHN, Atty. Gen.

T. Scattergood, Esq., Co. Aud., Blue Earth Co.:

DEAR SIR: You ask: "Have we a right to allow parties to redeem lands sold to purchasers for taxes for the years 1877, 1878, 1879, and 1880, where the purchasers have failed to present a certificate, etc., to comply with the General Statutes, c. 11, § 121?" Section 121 was repealed by laws of 1881. As to taxes for years 1878, 1879, and 1880, there is no doubt that the repeal of said section obviated any necessity of the purchaser presenting his certificate, etc., as required by that section; the time of redemption not having expired at the time of the repeal, and a reasonable time still remaining for the owner to redeem before such expiration. As to the tax of 1877 there is a serious question. I can find no authority in point, but after mature reflection I am inclined to change my opinion, and hold that the time of redemption from the sale for the taxes of 1877 having expired, under the provisions of section 90, prior to the repeal of section 121, the owner, by such repeal, is thus summarily deprived of the right of redemption given by said section 121, and that while the Legislature, so far as the tax-payer is concerned, can change the time of redemption, either lenghtening or shortening it, yet I doubt whether it can absolutely cut it off after the sale without leaving a reasonable time within which it may be exercised. I should therefore advise that as to that tax you permit parties to redeem until the courts shall decide otherwise.

July 29th, 1882. W. J. HAHN, Atty. Gen.

Josephus Alley, Esq., Co. Atty., Traverse Co.:

DEAR SIR: The petition for the formation of a school-district, submitted by your favor of 17th inst., is fatally defective. The petitioners are legal voters only. The County Commissioners are not authorized to form a new school-district on petition of legal voters. The petitioners must be "*freeholders* who are legal voters," and must comprise a majority of such qualified petitioners residing in each district to be affected thereby. It is only on a petition signed by such number of persons possessing such qualifications that the County Commissioners are authorized to act. Without such a petition they have no more jurisdiction than if they acted without *any* petition. Again, the recommendation of the County Superintendent is required. That is, the petitioners and the County Superintendent must unite in the same request. In this case there is no such unity of solicitation. The petitioners ask for the formation of certain territory into a district. The County Superintendent does not approve this, but recommends that different territory be taken for the district. Until they both agree upon the same thing (if such approval by the County Superintendent is, as in this case, necessary) the County Commissioners could not act.

July 29th, 1882. W. J. HAHN, Atty. Gen.

J. L. Higgins, Esq., Co. Atty., Martin Co.:

DEAR SIR: The recent decision of our Supreme Court in Co. Com'rs Lyon Co. vs. Murray Co. 13 N. W. Rep. 43, decides the case put by you in letter of July 26th, I think. I refer you to that case. In regard to payment of damages on county road, it is the *Board* that is to assess the damages, and after such assessment they are to be paid by an order signed by the Chairman and County Auditor. There is no necessity, after the Board has fixed the damages and ordered their payment, to again present the matter in the shape of a claim and have it reallowed. The assessment amounts to an allowance.

August 7th, 1882. W. J. HAHN, Atty. Gen.

Hon. Jas. H. Baker, State Railroad Com'r:

SIR: Your favor inclosing the communication from Hon. Gordon E. Cole relative to the taxation of the Union Depot Company has been duly considered. I see no reason, after mature reflection, to change the opinion I have already given you orally. The Union Depot Company is a distinct corporation, liable as such to pay a percentage on *its* gross earnings, and the fact that the persons or corporations from whom such earnings are received have been taxed on the moneys paid such company, cannot, in my opinion, release it from *its* liability to pay on such moneys, if such moneys are part of *its* gross earnings. It seeems to be conceded by Gen. Cole that the amount in controversy is a part of the gross earnings of the depot company.

August 15th, 1882. W. J. HAHN, Atty. Gen.

I. W. Castle, Esq., County Attorney, Washington Co.:

DEAR SIR: In reply to the question submitted by you in our consultation the other day, viz., "Was it necessary that the County Superintendent should allege or specify, in his statement of the revocation of the teacher's certificate which he filed in the office of the District Clerk, the ground or grounds of each revocation?" I would say that in my opinion it was. The effect of the statute is to constitute the superintendent a tribunal with limited and defined powers to act in specified cases; and, like all tribunals of like character, his record of proceedings in the matters thus passed upon should show or recite facts sufficient to indicate that he acted within his jurisdiction. The "statement" is in the nature of a judgment.

August 26th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Pub. Inst.:

SIR: You ask: "Are women, by virtue of section 13, Gen. St. 1878, p. 468, taken in connection with section 19, Sp. Laws 1864, p. 254, and section 14, Sp. Laws 1864, p. 252, entitled to vote for members of the Board of Education in the Faribault school-district?" I answer, in my opinion they are so entitled. Neither section 14 nor section 19 of chapter 15, Sp. Laws 1864, in any way affects the question. Section 14 simply provides what the "legal voters of said district, when lawfully assembled," may do. It does not pretend to prescribe the qualifications necessary to constitute a legal voter. The people in their sovereign capacity might, I apprehend, by way of a constitutional amendment, have extended the elective franchise to women, so as to enable them to vote in the Faribault school-district, without specially naming or mentioning said chapter 15. By the amendment of 1875 the people authorized the Legislature to grant to women the right to vote at any election held for the purpose of choosing any officers of schools, etc.; and I can see no more necessity of specially mentioning or naming said chapter 15 in the general law passed in pursuance of such amendment than in the amendment itself, had it, in terms, granted the same right.

October 4th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. Pub. Inst.:

SIR: You ask: "Under the law in section 66, *c.* 36, Gen. St. 1878, reading 'Third Grade, valid in a given district only for six months,' it has been the custom of this office to issue for the use of County Superintendents blank bonds like the inclosed. (1) When this is filled out by the officers as required, may a teacher make her contract? In case she does, and for any reason the third grade certificate is not made out or procured, may she collect her pay? (2) It has been the instructions of this department that certificates should be dated with the examination. Is this according to the usual custom, and is the certificate in force unless 'procured' by the

teacher?" The blank "bond for third grade certificate," inclosed with your communication, does not profess to be a certificate of either of the grades prescribed by section 66. It simply certifies that a third-grade certificate *will be issued* on the happening of a given contingency. This so-called "bond" is something outside of the provisions of law relating to certificates to teach. This being true, it necessarily follows that the holder of such "bond" is not a person "*having* a certificate of qualification," and therefore not a person with whom the Board of Trustees can legally contract to teach. Section 31, by necessary implication, prohibits the employment of persons to teach who have not certificates of qualification, which certificates, section 66 provides, shall be either of three kinds, viz., first, second, or third grade. Any contract made by the teacher prior to the procurement of such certificate is unauthorized and void. The teacher must *have* his certificate *at the time of his hiring*. See Jenness vs. School-dist. 12 Minn. 448; McKinny vs. School-dist. 20 Minn. 72; Ryan vs. School-dist. 27 Minn. 433.

October 9th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. Pub. Inst.:

SIR: Your favor requesting my opinion on the following questions, viz.: "The office of Treasurer in a school-district being vacant, may the Clerk and Director appoint for the office of Director? May the Clerk and the new Director (the old Director having resigned) appoint a Treasurer?"—have been duly considered. I am at a loss to conceive how the Clerk and Director could make an appointment to an office in which there was no vacancy, It is only in case of a vacancy that the Board of Trustees, under section 21, (school law,) are authorized to appoint. The Director not having resigned, but still occupying and exercising the functions of that office, the attempted appointment of Director was null and void. The action in this matter being void, it follows that the attempted appointment of Treasurer was equally nugatory.

October 12th, 1882. W. J. HAHN, Atty. Gen.

Hon. J. I. Beaumont, Esq.:

DEAR SIR: Your favor was duly received, and has been carefully considered. The matter submitted seems to be a controversy between you and the Commissioners of Ramsey county. The County Attorney, under the law, is the proper person to advise county officers, and this office has uniformly, and very properly, refused to interfere, by way of advice, in matters coming or that should come before him. On a moment's reflection you will, doubtless, see the propriety of this rule. I must therefore most respectfully decline to express an opinion on the matter submitted.

October 25th, 1882. W. J. HAHN, Atty. Gen.

His Excellency, L. F. Hubbard, Governor of Minnesota:

SIR: The claim of Gen. John B. Sanborn, together with the accompanying papers, which were referred to me by you for examination, and on which my opinion was desired, have been duly considered. This claim, as stated, is "for services prosecuting claim of the state for five per cent. of the minimum price of the public lands included in permanent Indian reservations in Minnesota, as the agent of the State appointed by the Governor under joint resolution No. 34 of the legislative session of 1874, (Sess. Laws, 313, 314,) under date of November 5, 1874, and November 5, 1875, fifteen per cent. of $37,203.59, as per contract with the Governor of said dates, $5,580.53." On this claim two questions arise, viz.: *First*, was the aforesaid sum of $37,203.59 realized out of the lands embraced in and covered by said joint resolution? and, *second*, has your Excellency authority to adjust and pay the same?

In view of my opinion on the second question, the first is, for the present, at least, comparatively unimportant; nevertheless, as I have investigated the facts in reference thereto, I deem it best to submit the result of my investigations to your Excellency. In deciding the first query, it became necessary to ascertain from the department at Washington whether the lands, on account of the sales of which this sum was paid to the State, were or were not regarded as permanent Indian reservations. At my request the State Auditor submitted to the Honorable Commissioner of the General Land-office this question, viz.: Were the Sioux and Winnebago Indian reservations (being the reservations in question) regarded as permanent Indian reservations?" To this query the Commissioner answered that they were not so regarded, and stated further that "no account had been stated by his office in favor of the State of Minnesota, under the act of March 3, 1857, for 5 per cent. of the estimated value of land embraced in permanent Indian reservations, the first Comptroller having held, in the Nebraska Case, that said act did not apply to States admitted subsequent to the date of that act." This correspondence was submitted to Gen. Sanborn, and at his solicitation, and with the approval of your Excellency, I addressed a letter to the Honorable Secretary of the Interior, submitting the same question to him. Under date of October 20, 1882, in a communication directed to the Commissioner of the General Land-office, the Honorable Secretary reverses the holding of that office. and decides that said reservations were regarded as permanent Indian reservations. I have the honor to herewith submit, for your Excellency's consideration, copies of said correspondence. It will thus be seen that there is not entire harmony in the rulings of the department at Washington on this subject; and, were it necessary to decide this question at this time, I would deem it best to obtain a copy of the decision of the First Comptroller in the Kansas Case, so that we might see whether or not the account stated in this case was approved by him because the lands were not permanent reservations.

Second. As to the authority of your Excellency to adjust and pay this claim, the joint resolution aforesaid authorizes the Governor to appoint an agent for the purposes therein named, and directs that a stipulation or contract be made with such agent of the tenor stated in said resolution. No other or further power in the premises is conferred upon him. I am therefore of the opinion, and so advise your Excellency, that when such agent was appointed, and a contract made with him by the Governor of the State, that the duties of the executive department relative thereto were at an end; that all questions arising under such contract were reserved by the Legislature, and must be settled and adjusted by it; that your Excellency, therefore, has no authority to adjust or pay this claim.

November 6th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Pub. Inst.:

DEAR SIR: The questions submitted, relating to the State text-book act, have been duly considered. Since my communication to you of January 19, 1882, upon somwhat similar questions, the matter has been fully argued before me, and I have come to the conclusion that my opinion of that date was, in part at least, erroneous, and will have to be modified. You ask: "1st. Must a certificate, of the character prescribed, be produced by the District Treasurer to the County Treasurer at the time each payment of such funds is made by the latter to the former during the entire period fixed by the said laws for the duration of the contract for furnishing the books?" I think such certificate is required by section 166, p. 500, Gen. St. 1878, to be produced at each and every payment. "2d. If so, will it be necessary that it shall appear from such certificate that the State text-books are in use in the schools of the district to the exclusion of books of other series, at the time each of such payments is made?" Not necessarily at the exact time. Were this required the Superintendent and the Treasurers of each and every district would have to meet at the county seat on the day the payments were made. This section must receive a reasonable construction, and a certificate bearing date a reasonable time anterior to

the application for payment is all that is required. "3d. Will certificates of the character mentioned, made in the years 1880 and 1881, be sufficient evidence that the State text-books are in use in the respective districts to which such certificates relate, in the year 1882 and in subsequent years, to authorize the County Treasurer to pay over to such districts the funds belonging to them respectively, arising from taxation?" I think not. As already stated, the certificate should bear date a reasonably short time anterior to its presentation.

November 8th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. Pub. Inst.:

SIR: The two questions submitted I will answer in the order of their asking, viz., 1. Can a County Superintendent issue a certificate to teach for a less period than that named in section 66 of laws relating to public schools? I think he can. The period named in this section is a limitation in time, beyond which no certificate can legally be made to extend. It does not, in express words, nor in my opinion, by necessary implication, prevent the County Superintendent from fixing a shorter period than that named in the statute during which a given certificate should be operative. 2. As to the amount of the bond which a District Treasurer is required by section 34 to execute. This section, I think, is perfectly clear. It expressly provides that he "shall execute a bond to the district in *double the amount of money*, as near as can be ascertained, which will come into his hands as Treasurer *during his term*." I do not see how I can add anything to the foregoing that would make its meaning any more plain. The *total* amount, as near as can be ascertained, which he will receive during his *entire term of office* is to be estimated, and that sum doubled; the last-named sum is to be the sum for which his bond is to be given.

November 9th, 1882. W. J. HAHN, Atty. Gen.

Hon. John M. Martin, Judge of Probate, Norman Co.:

DEAR SIR: When you audited the amount of fees, etc., for conveying the insane person to the hospital, and gave the Sheriff your written order for the same, your duties in the premises were performed. Section 22, p. 456, Gen. St. 1878. On filing such written order with the Auditor, he had certain duties to perform. If he illegally refuses, the party has his remedy by applying to the District Court for redress; but you have no power, in my opinion, to compel him to issue a warrant for the amount.

November 13th, 1882. W. J. HAHN, Atty. Gen.

Hamilton Beatty, Esq., Co. Treasurer of Sibley Co.:

DEAR SIR: The action taken by the County Board as to your percentage, you say, was taken "by advice of the County Attorney." This being the case I must respectfully decline to give an opinion on the matter. It is the duty of the County Attorney to advise county officers, as it is my duty to advise State officers. There is no provision of law allowing an appeal from his decision to this office. It would be discourteous to him and result in needless confusion. A moment's reflection, I know, will convince you of the manifest impropriety of my interfering.

November 13th, 1882. W. J. HAHN, Atty. Gen.

B. Howard, Esq., County Attorney, Clay County:

DEAR SIR: In my opinion Becker county is the senior county in your legislative district. It was organized in 1871; the others, in 1872. Until organized a

county has no officers to whom returns could be made. Its age, then, for this purpose, is to be determined by the date when it was in condition to receive and canvass the returns provided for in section 34, p. 44, Gen. St. 1878.

November 13th, 1882. W. J. HAHN, Atty. Gen.

Benedict Howard, Esq., Co. Atty., Clay Co.:

DEAR SIR: You ask: "Is it the duty of county attorneys to appear and prosecute and defend tax cases on appeal in the Supreme Court?" I have no doubt it is. By section 212, p. 156, Gen. St. 1878, it is made the duty of the County Attorney to "appear in *all cases* where the county is a party, and prosecute or defend for the county." This clearly means, prosecute or defend to final judgment. By section 70, p. 230, said statutes, a proceeding to enforce the payment of taxes against real estate is to be regarded as a suit brought by the county against each piece or parcel of land. This statute makes the county the party plaintiff, so to speak, in all such proceedings. Section 47, p. 90, relating to the duties of the Attorney General, does not militate against this view. It simply imposes the duty on that officer to appear in civil actions in which the State is interested, whenever, *in his opinion*, the public interest requires it. Suppose a tax case should come here, in which, in the opinion of the Attorney General, the State had not sufficient interest to warrant his appearing; what then? He, however, appears for the purpose of protecting the interests of the State,—the County Attorney to look after the interests of the county.

November 13th, 1882. W. J. HAHN, Atty. Gen.

Hon. A. D. Perkins, County Attorney, Cottonwood County:

DEAR SIR: You ask: 1. "Has chapter 16, Gen. St. 1878, and amendments, been rendered inoperative within the village of Windom by Sp. Laws 1875, incorporating the village? On this point see 27 Minn. 76. 2. Notwithstanding the incorporating act, is it still a crime to sell liquor within the village of Windom to minors, habitual drunkards, and students, under said chapter 16, and punishable thereunder?"

1st. In so far as "any board, officer, person, or municipality" of your county is concerned, said chapter 16 has been "rendered inoperative within the village of Windom." In so far as sales to minors, habitual drunkards, or students is concerned, it is not so rendered inoperative. Exclusive control over the sale of intoxicating liquors within the limits of said village is not by the charter vested in the village authorities. The case, therefore, in my opinion, is not covered by *State* v. *Wheeler*, 27 Minn. 76. 2d. To your second question I answer that, in my opinion, it is.

December 8th, 1882. W. J. HAHN, Atty. Gen.

C. E. Shannon, Esq., Co. Atty., Yellow Medicine Co.:

DEAR SIR: Your favor received. The matter submitted is entirely outside of the line of my official duties, nevertheless I have no objection to indicating my views upon the question. Chapter 82 of the Special Laws, Extra Session of 1881, authorizes the County Commissioners of your county to issue bonds to the amount and for the purposes therein specified, whenever a majority of the electors of your county, voting on the question, shall vote in favor of the issuance of the same. In other words, the grant of authority to the Commissioners is conditional, and can only be exercised after the people have approved of the scheme. Again, it seems clear that the time within which the Commissioners may act and the people vote is not restricted by the law in question. The proposition may be submitted at a general election, or a special election * * * called for that purpose; not at the

next general election, or at a special election called prior to that time. The necessary result of this is that it rests with the Commissioners to say when such proposition shall be submitted. They might legally determine to submit it at the general election in 1882, or any subsequent year; or they might call a special election for that purpose at any time, either before or after the general election in 1882. Action of the Commissioners fixing the time when the proposition should be submitted being thus essential, it seems to me that some notice that the question was to be voted on is necessary; otherwise, how are the electors to know that fact? The law does not fix the time, as it does the time of general elections. If it did, the presumption that every one knows the law would dispense with the necessity of notice. This is the reason of the rule that a failure to post the notices of general elections does not invalidate the same. The reason of the rule failing in the case under consideration, the rule itself ceases. For these reasons, and others that will doubtless occur to you, I am of the opinion that notice of the fact that the proposition will be submitted at a general as well as a special election is an absolutely necessary prerequisite, without which no valid election on that subject can be held. The County Commissioners therefore, in my opinion, are not as yet authorized to issue the bonds provided for by the act under consideration.

December 11th, 1882. W. J. HAHN, Atty. Gen.

D. H. Fisk, Esq., Co. Atty., Norman Co.:

DEAR SIR: Your favor received. You say: "We are having a dispute in this county regarding the time the new county officers qualify and enter upon the duties of their offices. I hold January 1, 1883, is the time, and that the county officers appointed in this county hold until that time. Am I correct?" In my opinion the officers appointed under and in pursuance of section 6, *c.* 92, Gen. Laws 1881, only hold "until the next general election after their appointment, and until their successors are elected and qualified." The act does not say until January 1, 1883, and I am at a loss to know how the term so specifically stated can be extended until January 1st, or why January 1st should be interpolated into the section rather than any other date. It is true, certain of the officers would at that time assume their official duties were it a usual and ordinary change, such as would occur in the older organized counties; but there are certain others (viz., the Treasurer and Auditor) who would not be entitled to their office until March. The language of this section is too plain to need construction.

December 12th, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Superintendent of Public Instruction:

DEAR SIR: You ask: "Are District Treasurers required to give new bonds upon re-election? Will the old bond cover the time of service until a successor is elected and qualified?"

To the first branch of your question I answer, most emphatically, they are. Until they do give such new bonds they are not serving by virtue of the re-election, but, if legally serving at all, it is only by virtue of the extension of their former term, under the words, "until a successor is elected and qualified."

To the second branch of your question I answer that it will only cover the time from the date of the expiration of the former term until the time that the office will, under the provisions of law, become vacant by reason of the failure to give a new bond. See County of Scott vs. Ring, 13 N. W. Rep. 181. Chapter 9, Gen. St. 1878, § 2, provides that *every office* shall become vacant on the refusal or neglect of the officer to give *or renew* his official bond, or to file such bond within the time prescribed by law. By section 34 of the school law the District Treasurer is to execute his bond, and file it with the Clerk, and that if he fails to do so the Director and Clerk *shall* proceed to appoint another Treasurer. By section 20, officers elected are to enter upon their terms of office on the tenth day after notice, which is

to be served within three days. By section 22, all persons elected as district officers are required to file their acceptance of same within 10 days after notice. From all these provisions I conclude that the Treasurer has these 10 days within which to file his new bond, and that if he fails so to do the office is vacant, and it becomes the duty of the officers to fill the same by appointment. Under the ruling of our Supreme Court in Scott Co. vs. Ring, *supra*, the obligation of the sureties would only extend to the time as above indicated, and probably to such further time as might be reasonably necessary for the purpose of filling the office by appointment.

December 19th, 1882. W. J. HAHN, Atty. Gen.

His Excellency, L. F. Hubbard, Governor:

SIR: The petition of Frank Ives and others, asking you to appoint a Justice of the Peace for the city of Crookston, referred to this office by your Excellency, has been duly considered, and I have the honor to advise you that you have no authority to comply with the request of the petitioners. The charter of the city of Crookston (chapter 12, Sp. Laws 1879) vests the power of filling any vacancy in any of the offices of that city (except the Mayor) in the city council, and not in the Governor. The suggestion made in the petition, that there are "grave doubts about the authority of a municipal government, as the common council of a city, to appoint an officer whom the Constitution declares shall be elected," is without any force. Surely, an appointment by your Excellency would no more be an election, than an appointment by any other person or body. The Constitution also declares that the Clerk of the District Court shall be elected; but the statutes say that in case of any vacancy in that office the District Court shall proceed to fill it; and I have never heard it intimated that such a provision infringed the Constitution in any way. It is, however, sufficient to say that neither the Constitution nor any law has vested in your Excellency any authority to appoint a Justice of the Peace in the case under consideration. Of the constitutionality of the provision authorizing the city council to temporarily fill that office by appointment there can be no doubt. It is needless to say that a Justice of the Peace is not a Judge; at least, within the intent and meaning of section 10 of article 6 of the Constitution.

December 22d, 1882. W. J. HAHN, Atty. Gen.

His Excellency, L. F. Hubbard, Governor:

SIR: The communication from the General Land-office of the United States, November 25, 1882, addressed to your Excellency, and which was referred by you to this office for my opinion as to whether the case therein stated comes within the statutes authorizing relinquishment of the State's interest in swamp lands claimed by a settler, has been duly considered. It appears from the Commissioner's letter that "said lands are embraced in the homestead entry of Lars P. Smith, No. 5,813, final certificate No. 929, commuted from pre-emption declaratory statement No. 600, September 2, 1881. Smith has filed in this office his affidavit alleging that he made a pre-emption settlement on said lands, January 10, 1871, and that, before the time had expired within which he was required to make proof and payment thereunder, he was prepared to commute the same to a homestead entry, but was unable to do so for reason of the swamp claim, and now he asks that, in view of the fact that the Legislature of the State has passed an act for the relief of settlers on swamp lands, he be allowed to avail himself of the provisions thereof." By chapter 154, Gen. Laws 1881, the Governor is "authorized and empowered to relinquish to the United States all the right, title, and interest of said State in and to all lands claimed by the State as swamp lands now occupied or held by actual settlers, their heirs or assigns, or claimants who hold the same by virtue of homestead pre-emption or timber-culture entry, according to the laws of the United States relating thereto, whether patented to the said claimant or not, or that may have been or may be hereafter canceled by reason of the State having claimed the same as swamp lands."

If your Excellency, therefore, is satisfied by proper evidence that Smith, at the date of the passage of the act of 1881, occupied or held the land in question by virtue of homestead or timber-culture entry, according to the laws of the United States relating thereto," then I have the honor to advise you that such lands are embraced within the law authorizing a relinquishment. As to what would be proper evidence, I would say that a certificate, either from the General Land-office, or from the Local Land-office within whose territory the said lands are situated, showing a filing thereon by Smith prior to February 24, 1881, under one of the enumerated classes of entry, would be sufficient, and it seems to me should be required.

December 23d, 1882. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. Pub. Inst.:

SIR: You request my opinion on the following: "A common-school district with a territory eight miles by six miles voted to organize as an independent district. 1. Was this lawful? Section 94, par. 3, c. 36, School Laws. 2. If not, what is the *status*? 3. How may they cut off two miles by six without forming themselves into a new district, thus leaving the property in the hands of the section cut off?"

1. The organization was not lawful. By an amendment of section 94 of school laws (Laws 1881, c. 41) the territorial limits of independent districts thereafter organized is restricted to six miles square. The attempted organization, therefore, of a territory eight miles by six miles was absolutely void. 2. It necessarily results from the foregoing that the old district remains the same as if no attempt had been made for a reorganization under the independent district law. 3. Either by the County Commissioners organizing the surplus into a new district, or by so amending the general law as to make provision for such a state of facts.

December 30th, 1882. W. J. HAHN, Atty. Gen.

Hon. F. E. Briggs, Judge of Probate, Clay Co.:

DEAR SIR: Your favor received. You ask: "Have not the County Commissioners and County Auditor the right to determine the population (for the purpose of fixing the Judge of Probate's salary) as nearly as they can by the vote cast, and otherwise, and fix the salary accordingly? and is it not the intention of the statute, and should it not be so construed, that the salary is to be based on the actual population, as nearly as the same can be determined, without being bound to take the last census and adding only five per cent. each year?" To the first branch of your inquiry I answer that they have no such power; to the second, that such is not the intention of the statute, neither should it be construed as intimated, in my opinion. The statute referred to is clear and imperative, and leaves nothing to be done either by the County Commissioners or Auditor, save for the Auditor to make the computation provided, and as provided. The County Commissioners cannot ignore this statute and fix the salary aside from the question of population.

January 16th, 1883. W. J. HAHN, Atty. Gen.

His Excellency, L. F. Hubbard, Governor:

SIR: I have the honor to acknowledge the receipt this day of your favor of seventeenth inst. You make the following statement of facts, viz.: "January 14, 1881, David Burt was appointed Superintendent of Public Instruction for the term of two years from the first Tuesday in April, 1881. The Senate refused to confirm the appointment. O. V. Tousley was appointed February 2, 1881, for the term of two years from the first Tuesday in April, 1881. His appointment was confirmed, but Mr. Tousley never qualified nor entered upon the duties of the office, and formally resigned July 2, 1881. Mr. D. L. Kiehle was appointed August 16, 1881, in general language, the Governor not undertaking to indicate when his legal term

began. Mr. Burt, whose prior appointment was for two years from the first Tuesday in April, 1879, continued in recognized possession of the office until August 31, 1881, and Mr. Kiehle, upon his aforesaid appointment of August 16th, entered upon recognized possession September 1, 1881." On this you ask when you "shall consider that the legal term of the present Superintendent of Public Instruction will end." I have the honor to advise your Excellency, on the foregoing facts, that the failure of Hon. O. V. Tousley to qualify, as well as his formal resignation, created a vacancy in the office, which, under the provisions of section 4 of chapter 9, Gen. St. 1878, the Governor was authorized to fill by appointing "some suitable person to perform the duties of such office *for the time being.*" As no mention is made of such appointment having been confirmed by the Senate, I assume that no such confirmation has been had. If so, he only holds until a successor has been nominated and confirmed, and such nomination, I respectfully suggest, should be made at the earliest practical moment. If, however, the appointment of the present incumbent of that office was confirmed by the Senate at the extra session of the Legislature, a more serious question would arise. Nevertheless, although the law is by no means as clear and explicit as it should be, I am of the opinion that, even in that case, the term of the present incumbent would end on the first Tuesday of April, 1883.

January 19th, 1883. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Pub. Inst.:

SIR: You ask: "May a person lawfully hold the offices of County Superintendent and County Attorney at the same time?" I think he may. I find no statutory prohibition, and the offices, in my opinion, are not incompatible. "Incompatibility in offices exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both."

January 19th, 1883. W. J. HAHN, Atty. Gen.

E. P. Freeman, Esq., County Attorney, Blue Earth Co.:

DEAR SIR: I do not think that under section 33, c. 13, Gen. St. 1878, it is necessary that the petitioners who petition for the laying out of a highway be legal voters of the town, whose Supervisors are called upon to act. This section only requires that they be legal voters who own real estate, etc., within one mile of the road to be altered, etc. I can see no valid reason why the words "of the town" should be interpolated after the words "legal voters." There is no ambiguity in this section, as it seems to me.

January 20th, 1883. W. J. HAHN, Atty. Gen.

Hon. W. W. Braden, State Auditor:

DEAR SIR: The communication from G. A. Schultze to you, asking whether he, professing to act as County Auditor of Lake county, or the County Auditor of Cook county, should collect the taxes of the last-named county for 1882, and which communication was referred to me for my opinion, has been duly considered. The county of Lake is not an organized county, and therefore is not entitled to have a County Auditor or other county officers except County Commissioners. By Gen. Laws 1856, p. 63, this county was established, and by Spec. Laws 1860, p. 107, the county is attached to St. Louis county for judicial purposes. This is the present *status;* and until the Legislature organizes it, or authorizes its organization, there are and can be no officers in the county authorized to collect either the taxes of that county or any other. It is therefore clear that, at least as between the counties of Lake and Cook, the former cannot collect the taxes of the latter.

January 20th, 1883. W. J. HAHN, Atty. Gen.

To the Honorable, the House of Representatives of the State of Minnesota:

The memorial of L. K. Stannard and others, praying for moneys due them by the State as land-officers for the entry of swamp lands, referred to me by resolution of your honorable body, with the request that I "furnish the House with any information I may have as to the facts therein referred to, and also as to the law relating thereto," has been duly considered. I regret to say that I am in possession of no information that would throw any light on the facts referred to in said petition. A similar application for fees in a like case was made in January, 1866, to the then State Auditor, and by him referred to Atty. Gen. Colville. I have the honor to herewith submit a copy of his opinion given to the State Auditor on that application. I fully concur in the conclusions arrived at by him. The fee of one dollar, provided for by the act of congress of 1864, is for each "*final location*" of 160 acres. Location, says Bouvier, is "the act of selecting and designating lands which the person making the location is authorized by law to *select*." For lands which the State is authorized by law to *select*, and which, in pursuance of such authority, it does select and designate, the fee of one dollar for each 160 acres so selected is allowed. The swamp lands are not selected by the State; neither is it necessary for the State to do anything in order to perfect the grant. The character of the lands being established, the grant takes effect at once, and it is for the Secretary of the Interior, and not the local land-officers, or the State, to select and designate the particular pieces covered by the grant.

In the case of French vs. Fyon, 93 U. S. 169, the Supreme Court of the United States held that the act of 1850, (9 St. 519,) granting swamp lands, makes it the duty of the Secretary of the Interior to select or identify them, make lists thereof, and cause patents to be issued therefor, and that a patent so issued cannot be impeached in an action at law, by showing that the land which it conveys was not in fact swamp land; that the grant made by that act was a grant *in præsenti*, by which the title to those lands passed at once to the State in which they lay, except as to the states admitted into the Union after its passage, and as to those it takes effect as of the date of admission; that the act conferred the power and devolved the duty on the Secretary of "determining what lands were of the description granted by the act, and made his office the tribunal, whose decision on that subject should be controlling."

January 23d, 1883. W. J. HAHN, Atty. Gen.

Hon. D. B. Searle:

DEAR SIR: The facts submitted by you are as follows: A. was appointed County Commissioner to fill vacancy. At the last election B. was elected for the unexpired term, but failed to qualify. Does A. hold under his appointment until a successor is elected and qualified? He does, in my opinion. Section 104, p. 137, and section 46, p. 48, Gen. St. 1878, cover the question. In substance they provide that a person appointed to fill a vacancy shall hold his office until the next general election, and until his successor is elected and qualified.

January 31st, 1883. W. J. HAHN, Atty. Gen.

L. O. Storla, Esq., Co. Aud., Clay Co.:

DEAR SIR: You say the population of your county in 1880 was 5,900, and ask what the salary of the Judge of Probate should be for the year 1882? In a communication to the Public Examiner on the subject of salary of Judge of Probate in February, 1880, Judge Start, the then Attorney General, said: "That to determine the population of any county for such purpose, add 5 per cent. of the population of the county, as shown by the last census, * * * for each year *expiring* after the year in which said census was taken. Nothing should be added for the year 1875; *neither should the percentage be compounded*." I fully concur in the views thus expressed. Adding, then, 10 per cent. to the census of 1880, (5,900,) viz., 590,

makes the population of your county for this purpose, for the year 1882, 6,490, and the salary of your Judge of Probate for that year, $350.

January 31st, 1883. W. J. HAHN, Atty. Gen.

John D. Wilcox, Esq., County Attorney, Pine County:

DEAR SIR: I think I can best answer your numerous questions relative to County Treasurers' bonds by a general statement of the law on that subject, as I understand it. In the first place, it is for the County Commissioners, under section 145, p. 144, Gen. St. 1878, to fix the amount of the bond to be given by the County Treasurer; and so long as they act in good faith this amount is left to their discretion. The amount having been fixed by them at or before their session in January, and the County Treasurer having given a bond for such amount in proper form and with sufficient sureties, it is the duty of the Commissioners to either approve or disapprove the same; and that as to this, his original bond, they cannot refuse to approve it because the amount is not large enough, provided it is for the amount fixed by them prior to its execution. If, in the opinion of a majority of the board, "the sureties, or any of them, on the original bond are deemed insufficient for any cause," or "whenever the penalty of such original bond is deemed insufficient" by a majority of such board, they may, under section 163, require the County Treasurer to give a new bond, and a failure to give such new bond will cause a vacancy in the office. But this new or additional bond in no way impairs or interferes with the original bond. Should any one of the Board act "willfully or maliciously" in this matter, it would be a sufficient cause for his removal by the Governor, under section 3 of chapter 9, Gen. St. 1878, and prompt complaint and vigorous prosecution should be made against any such officer. So long as they act in good faith, the amount of bonds which they may require from a County Treasurer is unlimited.

February 3d, 1883. W. J. HAHN, Atty. Gen.

J. M. Greenman, Esq., Co. Attorney, Mower Co.:

DEAR SIR: You state that "A. resides on premises now in school-district No. 69 as a tenant of B.; B. is the owner of the fee and A. is not a freeholder, but is a voter; B. is not a resident of the district,"—and ask, "Will the joint petition of both A. and B. confer upon the County Commissioners authority to attach the premises of B. to another adjoining district?" It clearly will not. The third proviso of section 16 of chapter 36, Gen. St. 1878, applies and only applies to a legal voter of and freeholder in the district from which he desires to be set off. In other words, the petitioner *himself* must be both a voter and a freeholder in such district. In the case put, A. is not a proper petitioner because he is not a freeholder, and B. is not, because he is not a voter. "Naught plus naught equals naught."

February 5th, 1883. W. J. HAHN, Atty. Gen.

P. Fitzpatrick, Esq., Co. Atty., Winona Co.:

DEAR SIR: Your favor, asking whether in my opinion a Town Treasurer is entitled to a per centum on the money in the treasury "which he receives from his predecessor, or only on such money as is received into the treasury during his term," has been received. Section 83, p. 178, Gen. St. 1878, fixes the fees of Town Treasurers, and in my opinion it does not apply to moneys received by him from his predecessor. His fees are to be computed on "all moneys *paid into* the town treasury." The money he receives from his predecessor has already been paid into such treasury, and the delivery of the money from one custodian to another cannot be considered a new payment.

February 12th, 1883. W. J. HAHN, Atty. Gen.

His Excellency, L. F. Hubbard, Governor:

SIR: I have had under consideration, at your request, Senate file No. 28, entitled "An act to change the rate of interest upon the sale of public lands from seven (7) to five (5) per cent., being an amendment to section seven (7) of chapter thirty-eight, (38,) General St. 1878," and have the honor to advise your Excellency that in my opinion the proviso at the end of section one (1) of said act, if not in conflict with the strict letter, is at least opposed to the spirit of that part of the Constitution relating to school funds. By section 2 of article 8 of the Constitution, it is provided that "the principal of all funds arising from sales or other disposition of lands or other property granted or intrusted to this State in each township for educational purposes, shall forever be preserved inviolate and undiminished, and the income arising from the lease or sale of said school land shall be distributed to the different townships throughout the State in proportion to the number of scholars in each township between the ages of five and twenty-one years, and shall be faithfully applied to the specific objects of the original grants or appropriations." It will be seen by this section that not only is the principal of the so-called school fund to remain inviolate, but the income arising from such fund is disposed of in a particular manner and for a specific purpose. Being so disposed of by the organic act itself, such income, at least as soon as it accrues, if not before, is as much beyond the control of the Legislature as the principal is; and it can make no difference, as it seems to me, whether such accrued income has or has not reached the State treasury. In either case it is beyond the power of disposal by the Legislature. The proviso under consideration does by its terms attempt to dispose of 2 per cent. of the accrued interest on all outstanding school-land certificates. It says "that on sales of such lands heretofore made, upon which any part of the purchase money thereof shall remain unpaid at the passage of this act, interest upon such purchase money shall only be collected at the rate of five per cent. per annum." Had it added, "from the date of the passage of this act," it would not be open to the objection I am now considering.

But aside from the foregoing considerations, which, so far as the amount of money involved is concerned, is of but small moment, it occurs to me that this entire proviso is at least opposed to the manifest spirit of this constitutional provision. The State school fund now holds land certificates, the principal of which amounts to $2,900,000 in round numbers. The past year has been an unusually prosperous one, and by reason thereof the payment on account of principal by these certificate holders has been exceptionally large, amounting, as I am informed by the State Auditor, to $200,000. Assuming that the succeeding 14 years is equally prosperous, (and surely we cannot anticipate any more favorable future,) and that by reason thereof the same amount will be paid in on the same account during each of those years, the loss to the revenue of this fund will be in round numbers $452,000. By this proviso, therefore, there is given away, or attempted to be given away, a large amount of the future income to accrue on account of a part of the principal of this fund. Can this be done without doing violence to the spirit and intention of these constitutional restrictions? If it can, I can see nothing to prevent the Legislature from providing that the State shall only pay to this fund, on account of interest on the railroad adjustment bonds held by it, interest at 2 per centum, or shall not pay any interest at all.

The power of the Legislature to authorize or direct the change of securities in which the permanent school fund shall be invested, or to authorize or direct the sale of present securities and reinvestment in others, within the limitation imposed by the section of the constitution under consideration, is undoubted. But this proviso does not authorize or direct any such change or sale. Could it be claimed that the Legislature have the right (without, at least, a violation of the spirit of these provisions) to appropriate any part of the interest *to accrue* from the securities held by this fund to any other purpose than that named in the Constitution? Could it be claimed that it has the power (without such violation) to provide that 2 per centum of all interest hereafter paid on account of these certificates shall be returned to the party so paying the same? If not, how can it be said that the Legislature has the authority to *make a donation in advance* of such per centum? Is it

possible that the State may give away funds which she has no right to use for her own benefit? That she may in advance donate a part of the income of a trust fund she holds, which income, when paid, is beyond her control? It seems to me not.

I submit herewith a copy of an opinion of my predecessor, Gen. Wilson, in which he construes these same constitutional enactments, and comes to a similar conclusion as to the legislative power over the school funds.

February 23d, 1883. W. J. HAHN, Atty. Gen.

Hon. Loren Fletcher, Speaker of House:

SIR: I have examined House files 434 and 435, referred to this office by resolulution of the honorable body over which you preside. The resolution requests this office to "examine into the liability of the State in each case, waiving the State sovereignty."

House file 434 makes an appropriation for one George Bolan "on account of having had a leg broken by the carelessness and negligence of employes of the State, said Bolan being at the time in the employ of the State as a teamster." The foregoing are all the facts I have any knowledge of relative to the cause or circumstances of the injury, and are by far too meager to warrant a safe opinion upon. I gather, however, from this statement, that Bolan was injured by the carelessness and negligence of a co-servant engaged in the same general business. If so, no action could be maintained against the State therefor, were the State liable to suit. Foster vs. Minn. Cent. R. Co. 14 Minn. 360, and cases cited; Brown vs. W. & St. P. R. Co. 27 Minn. 162.

House file 435 contains no statement of facts on which to base an opinion.

It might be and probably would be necessary to have an abstract of title before an intelligent opinion could be given. For these reasons I regret to say it will be impossible for me to comply with the resolution, so far as this bill is concerned.

February 23d, 1883. W. J. HAHN, Atty. Gen.

Hon. J. B. Gilfillan, Chairman Judiciary Committee of Senate:

SIR: I have not had the time to give to the investigation of the grave question covered by the resolution of your honorable committee which its importance demands; but, as I understand you desire my opinion at once, I will indicate the conclusions at which I have arrived, from a very hasty and necessarily imperfect investigation of the same. Subdivision 9 of section 33, art. 4, of the Constitution, prohibits the enactment of any special law "for incorporating any town or village." This, I take it, is no broader than section 2 of article 10, which provides that "no corporation shall be formed under special acts except for municipal purposes." This latter clause has been construed by our Supreme Court in 21 Minn. 241, 283. The court say: "Any amendment which, if operative, would, in effect, form a corporation, (except for municipal purposes,) would clearly be repugnant to the section, because it would attempt to do what that section forbids; but the power of the Legislature in respect to such territorial laws, so long as it does not attempt to form a corporation, is not affected by the prohibition." Page 283. Again, in 22 Minn. 372-374, the court say: "In making these amendments the Legislature did not, as plaintiff contends, exceed its authority, since neither of the amendments falls within that provision of the Constitution which prohibits the *formation* of corporations under special act." It will be seen that the word "formation" is italicized by the court. My present opinion, therefore, is that so long as the Legislature does not attempt to incorporate a town or village, any amendment in respect to such corporations already existing is not affected by the prohibition.

February 23d, 1883. W. J. HAHN, Atty. Gen.

Hon. Loren Fletcher, Speaker of House:

SIR: Since writing my communication of twenty-third inst., I have found that on June 28, 1851, Charles Bazille and Annie Jane Bazille, his wife, executed a full covenant warranty deed to the Governor and Legislative Assembly of the Territory of Minnesota in trust for said Territory. The deed recites the passage of an act of the Assembly of the Territory, entitled "An act to provide for the erection of public buildings in the Territory," approved February 7, 1851, providing for the election of Commissioners to carry out the same, the election of certain Commissioners, their qualifications, and meeting on June 27, 1851, for locating buildings and the passage of the following resolution: "Resolved, that the location for capitol buildings offered by Charles Bazille in his communication to the Board this day, viz., block No. six, (6,) in Bazille & Guerin's addition to the town of St. Paul, be accepted by said Board." The consideration stated in the deed is as follows: "The said parties of the first part, for and in consideration of the benefits accruing to them in consequence of said location, and the sum of one dollar in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged." There is no limitation, restriction, or condition of any kind in the deed. I have therefore the honor to advise the honorable body over which you preside that no cause of action exists against the State in favor of the beneficiaries named in House file 435, so far as I am at present advised.

February 24th, 1883. W. J. HAHN, Atty. Gen.

Hon. J. B. Gilfillan, Chairman of Senate Judiciary Committee:

SIR: Since writing my communication to your honorable committee, yesterday, my attention has been called particularly, by some of your members, to subdivision 7 of section 33 of article 4. I have carefully considered this subdivision, and also subdivision 10, but see no reason to change the conclusion arrived at yesterday. Were it not for section 2 of article 10 of the Constitution, the meaning of subdivisions 7, 9, and 10 of this section 33 would, it seems to me, be perfectly clear. Subdivision 7 would be construed as prohibiting the grant of corporate charters except to cities; subdivision 9, from incorporating any town or village; and subdivision 10, from granting to any corporation after its creation, or to any individual or association, *except municipal*, any special or exclusive privilege, immunity, or franchise whatever. But when we consider that this amendment was taken almost bodily from the Wisconsin amendment of 1871, and that that state had no similar provision to section 2, art. 10, it seems to me that its presence in our Constitution should make no difference.

The Supreme Court of Wisconsin, in Atty. Gen. vs. Railroad Cos. 35 Wis. 425, 460,—a very important case,—in construing an identical provision to that of the seventh subdivision, held that "the phrase in the amendment, 'to grant corporate powers or privileges' to mean *in principio donationis*, and equivalent to the phrase 'to grant corporate charters.' This is implied not only by the word 'grant,' but also by the word 'corporate.' A franchise is not essentially corporate; and it is not the grant of franchise which is prohibited, but of corporate franchise; that is, as we understood it. franchise by act of incorporation."

In Smith vs. Sherry, 50 Wis. 213, the court says: "If the ninth subdivision of the amending section 31 had been omitted altogether, it is probable that the amendment would have been construed as not applicable to municipal corporations at all; but, however that might have been, it is now very clear that the Legislature in adopting the seventh subdivision, and the people in ratifying the same, in connection with the ninth subdivision of the section, did not intend that the seventh subdivision should extend to towns and villages. If the general terms used in the seventh subdivision had been intended to prohibit the Legislature from granting corporate powers and privileges to towns and villages by special or private laws, as well as to corporations of a private nature, there would have been no necessity for add-

ing the ninth subdivision, which in express terms prohibits the incorporation of any town or village, or to amend the charter thereof by any special law."

Again, when we take into consideration the fact that this amendment was taken thus bodily from Wisconsin, and that the clause of section 9 of the Wisconsin amendment which prohibits the passage of any act amending the incorporating act of a town or village was left off in ours, we must conclude that the Legislature and the people designed to reserve the power of amendment. Again, subdivision 10, by necessary implication, reserves the right to the Legislature to grant to an existing municipal corporation special and exclusive privileges, immunities, and franchises.

February 24th, 1883. W. J. HAHN, Atty. Gen.

To the Honorable the Senate of the State of Minnesota:

I have the honor to acknowledge the receipt of the following resolution, passed by your honorable body, viz.: "Resolved, that the Attorney General of this State be and is hereby requested to furnish his opinion for the use of this Senate upon the question as to the length of the terms of the Senators elected at the last general election in 1882." The terms of the Senators elected in 1882 is fixed by the amendment to the constitution adopted in 1877. By this amendment the terms of the Senators were to be the same as theretofore prescribed, *until* the general election in 1878, at which time an entire new election of such officers was to be had. It then goes on to provide that "the Senators chosen *at such election*, by districts designated by odd numbers," should hold for two years, and those designated by even numbers, for four years; "and *thereafter* Senators shall be chosen for four years," except that there shall be an entire new election after each apportionment. It will be seen from this amendment that it is only such senators as are chosen by odd-numbered districts at the election of 1878 who are to hold for two years. Thereafter there is to be no difference in the term: all hold for four years. The language of this amendment is too plain to admit of doubt. The Legislature in proposing, and the people in adopting, this amendment, must be deemed to have meant just what the language used clearly imports. "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently, no room is left for construction. Possible and even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere." Cooley, Const. Lim. 68, 69. "We are not at liberty to presume that the framers of the Constitution, or the people who adopted it, did not understand the force of language," says Mr. Justice Bronson in People vs. Purdy, 2 Hill, 35. Mr. Justice Johnson, in Newell vs. People, 7 N. Y. 9, expresses the same idea in this language: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is *the thought which it expresses*. To ascertain this, the first resort in all cases is to the natural signification of the words employed in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare, is the meaning of the instrument, and neither courts nor Legislatures have a right to add to or take away from that meaning." I am, therefore, clearly of the opinion that the Senators elected in 1882, whether from odd or even numbered districts, hold for four years.

February 27th, 1883. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Pub. Inst.:

SIR: I have examined, at your request, the queries propounded and the papers submitted by Hon. J. Q. Farmer. Before proceeding to answer these several questions, I will say that on the facts as stated in the accompanying papers I am at a loss to know how there has been any violation of rule 9 of the rules and regulations of the Board of Education of Spring Valley. As I understand, Judge Farmer's son was not "absent from any composition or special exercise," but, on the contrary, was present at such exercise and announced himself as ready to take part in the same. If so, there clearly was no violation of rule 9, whatever other rule or regulation he may have been guilty of breaking.

The questions propounded are as follows: "*First.* When declamation or composition is allowed or required by the rules of the Board of Education in our public schools, have the pupils the right to select their pieces for declamation and their subjects for composition and write their own thoughts, provided the pieces selected for declamation or written composition contain nothing immoral, profane, obscene, vulgar, libelous, or abusive? *Second.* Whether the piece herewith submitted, purporting to be the remarks of Hon. Robert G. Ingersoll, made at the grave and burial of the little son of George D. Miller at the congressional cemetery in Washington, entitled 'Whence and Whither,' comes within the proviso of above question? *Third.* In a public school of this State, when the Board of Education allow or require declamation and composition as one of the studies, has the Board of Education or teacher the right to compel the pupils to declaim or write composition, when the parent does not wish his pupil to declaim or write composition, and asks the Board to excuse the pupil from the same? *Fourth.* Was the Board of Education of the independent school-district of the village of Spring Valley justified, from the evidence herewith submitted, in rejecting the petition of J. Q. Farmer to have his son received back to the school upon the terms offered, or either of them?"

These questions may be answered generally. The relative rights of pupil and Board as to this matter depend upon what, if any, action the Board has taken on the subject. There is, in my opinion, under our laws, no absolute right in a pupil to select a piece for declamation or subject for composition, any more than there is no such right to select the studies he will pursue or the books he will use. By subdivision 8 of section 111, Laws Minn., relating to public schools, the Boards of Education of independent school-districts are empowered "to superintend and *manage in all respects* the schools of said district, and from time to time to adopt, alter, modify, or repeal rules for their organization, *government*, and *instruction;* for the * * * reception of pupils; * * * their suspension, expulsion, and transfer; * * * to prescribe text-books and a course of study for the schools," etc. This is as broad as it could well be made, and undoubtedly includes the right to designate pieces to be declaimed.

The case cited in Wisconsin was a controversy between *teacher* and pupil, and, while correctly decided, possibly what the court say as to the rights of parents is *obiter*, or at least not applicable to our law. For authorities sustaining the foregoing conclusion, I refer you to an opinion given to you by this office under date of May 11, 1882. In the absence of regulation on the subject under consideration, the pupil being required to declaim, and no selection having been made for him, it would necessarily follow that the pupil was expected to and had the right to select his own piece, subject to the proviso suggested in the first question, and subject, further, to the liability of having another and different selection made for him by the teacher, under the *authority and direction of the Board.* The right of the Board of Education to compel pupils to declaim is to my mind undoubted. The authorities already referred to amply sustain this proposition. As, on the evidence submitted to me, there does not seem to have been any violation of rule 9, and that is the only rule claimed to have been violated, the Board were not justified, in my opinion, in refusing to reinstate the pupil.

In the light of the views already expressed, the second query becomes unimportant, and I therefore decline answering it.

March 13th, 1883. W. J. HAHN, Atty. Gen.

J. L. Brady, Esq., Co. Atty. of Mille Lacs Co.:

DEAR SIR: Without answering your communication in detail, I will proceed to state some general principles which are decisive of the questions propounded: *First.* Under our laws, real estate and personal property is assessed and taxed at its fair cash value, irrespective of the incumbrances that may be on it, or of the parties holding such incumbrances. *Second.* All mortgages owned by residents of this State are to be assessed in the town or district where the mortgagee resides; and the fact that the land or personal property on which such mortgage is a lien is also assessed, can make no difference. The taxation of mortgages necessarily results in a sort of double taxation. Had Barker borrowed $6,700 from A., a resident of your town, and secured the loan by mortgage on his farm, and then had paid Mrs. Ross this sum in cash, and she had had it on hand at the time of assessment, under our laws, Barber's farm, A.'s mortgage, and Mrs. Ross' cash would, each and all, have been assessable,—the one as real estate, another as credits, and the other as moneys. *Third.* There is no authority vested anywhere for separating or apportioning any supposed "equitable value of each class of such property." There is no question of equity involved. It is one of law, and it is now just where the law designed it should be. Neither can the County Commissioners, at this or any other time, abate any part of such or any taxes. There is no power of abatement of taxes vested in County Commissioners. The only person, under our present tax law, who is authorized to hear or determine matters of grievance relating to taxation, is the State Auditor, and the mode of procedure in such case is prescribed by section 119, p. 245, Gen. St. 1878.

March 16th, 1883. W. J. HAHN, Atty. Gen.

Hon. Henry M. Knox, Pub. Examiner:

DEAR SIR: Your esteemed favor, asking whether, in my opinion, "a County Treasurer is entitled to receive the one-half per cent. for receiving and disbursing the school-land funds in counties where the limit of salary is reached, without taking such funds into the account," has been duly considered. I would say, in answer, that he is not entitled to receive such per cent. in addition to his salary as limited by section 172, c. 8, Gen. St. 1878. That section proceeds in the first place to fix the rate per cent. and the moneys on which fees shall be allowed,—the first item of which is the moneys referred to. It then expressly limits the gross sum which the Treasurer shall receive for his personal services, and provides that "*all moneys* received as fees or *percentage*, in excess of amount provided for, * * * shall be paid by the County Treasurer at the end of each year into the revenue fund of the county." The ½ per cent. which he is to be allowed for receiving and disbursing moneys an account of sales of lands, he receives "*as fees.*" It is therefore clearly within the strict letter of the second proviso to this section.

March 16th, 1883. W. J. HAHN, Atty. Gen.

Hon. W. W. Braden, State Auditor:

SIR: Your favor submitting statement of refundment made by Auditor of Wabasha county on sale declared void by judgment of court, and asking my opinion "as to the reassessment or levy of the taxes, and advice as to section of law, if any, which provides for such relevy, with manner of procedure," has been duly considered. No reassessment or relevy is necessary under the law. Section 97 of the tax law, (page 240, Gen. St. 1878,) as amended by chapter 10, Gen. Laws 1878, provides that in such a case as that under consideration the tax included in the refundment "shall stand as *originally extended* against the property, and, with all accruing penalties, interest, and costs, be included with the taxes thereon *for the current year* in the *next* delinquent tax sale." This plainly negatives any idea of a reassessment or relevy. The sale being set aside, the original tax, with accrued

penalties and costs, still remains a lien upon the land, the same as if no sale had been made. The mode of procedure would, therefore, be to place in the list of delinquent taxes, opposite the description of the land covered by such refunded tax for the current year, and in a separate column, the amount of such refunded tax, etc., and ask to take judgment for the sum of these two items. The sale on such judgment would, of course, be for the amount of such judgment.

March 19th, 1883. W. J. HAHN, Atty. Gen.

Ira W. Castle, Esq., County Atty., Washington Co.:

DEAR SIR: Your favor received. I agree with you in holding that the County Commissioners may allow more than six dollars for *post mortem* examinations. A physician is not obliged to make such an examination, In many cases the ends of justice imperatively require that a *post mortem* be held; and to say that unless you could procure the services of a competent man for six dollars you must abandon the examination, is not warranted by the language of the law.

March 26th, 1883. W. J. HAHN, Atty. Gen.

H. W. Barrett, Esq., Co. Auditor, Traverse Co.:

DEAR SIR: You ask—1st. "If Chairman of Board of County Commissioners comes to county seat, on purpose to sign county orders, is he entitled to mileage?" I answer, he clearly is not. 2d. "During winter should County Commissioners receive extra mileage, than what they receive usually, by having to make a circuitous route to attend the County Commissioners' meetings, on account of impassable roads by the usual route?" I answer, they are entitled to their mileage for every mile necessarily traveled in going to or returning from the meetings of the Board, etc.; and if, by reason of impassable roads, the route necessarily taken is longer than usual, they are entitled to mileage for the entire distance necessarily traveled.

March 26th, 1883. W. J. HAHN, Atty. Gen.

A. D. Perkins, Esq., Co. Atty., Cottonwood Co.:

DEAR SIR: The facts stated by you in yours of nineteenth inst., in which you request my opinion, in the belief that it will settle the matter in dispute, are briefly as follows: The electors, at the annual town meeting in March, 1882, voted, without any previous notice of any contemplated change, to change the usual place of holding town meetings to the residence of A., in the town. Subsequently, and in 1883, the Town Supervisor assumed to change the place of meeting to still another place in the town,—a certain school-house. The Clerk posted notices that the meeting this year would be held at the said school-house, and certain of the electors met there on the day of meeting, while others met at the residence of A.,—each going through the form of electing a full set of officers; and each set now claim an election. It seems no meeting was held at the usual place. You ask, "Are either of the sets of officers legally elected and entitled to the offices, and if so, which one?"

Section 13, *c.* 10, Gen. St. 1878, as amended by chapter 47, § 1, Gen. Laws 1879, contains the provisions of law relating to the place of holding town meetings. By this they are to be held "at such place in each town as the electors thereof, at their annual town meetings, from time to time appoint." The Town Clerk is required to post notices of all meetings, and before any change of place of holding can be made, the Clerk must receive notice from a member of the Town Board of the contemplated change, and must incorporate it into his regular notice, and then the electors decide the matter by vote. There is no authority to vote upon a change without this previous notice. There is no authority in the Board or Clerk to change the place of meeting without a vote of the electors. These provisions of law, like all provisions relating to the time and place of holding elections, are *mandatory*,

and to render the election or vote valid, must be strictly pursued. McCrary, Elect. § 114, and cases cited; Dill. Mun. Corp. § 194, and cases cited; Cooley, Const. Lim. 759, (603,) and cases cited; Chadwick vs. Melvin, 68 Pa. St. 333. In this last-cited case it was held that to remove the place of election from a designated school-house to a vacant house more than half a mile distant therefrom, without authority or any controlling circumstances, (such as necessity or compulsion,) rendered the election held at the latter place void. I am therefore of the opinion that, there having been no notice of a contemplated change in the notice of the annual meeting in 1882, the vote to change the place of meeting was void, and the meeting held at such place—the residence of A.—was invalid for any purpose; that the Board or Clerk, having no authority to change the place to the school-house, that meeting was also void; that there having been no meeting at the legal place of meeting,—the old or usual place,—there was no valid meeting, and therefore no election of officers.

March 29th, 1883. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. Pub. Inst.:

DEAR SIR: Your favor asking "whether School Boards, acting under the law for the encouragement of higher education, may discriminate against non-resident pupils by making charges for incidental expenses which do not apply to all the pupils of the school," is received. The language of the act referred to, as well as the rules of the High School Board, provide that schools receiving the aid specified in that law "shall admit students of either sex * * * without charge for tuition." Tuition is the price or money paid for instruction. If, under the guise or name of "incidentals," any School Board should charge non-resident pupils anything for instruction, they would, of course, place themselves in a condition where they could not legally receive State aid, and the fact that they called it "incidentals" could make no difference. But if there is anything aside from *instruction* for which a charge might properly be made against non-resident scholars, I do not think that such charge would necessarily work a forfeiture of the right of the school to State aid. It is, of course, a very dangerous precedent to establish such a right, as it is liable to great abuse; but it seems to me that your Board, by a proper rule or regulation, might obviate, to a considerable extent at least, this danger, and can require the clearest proof that the so-called incidentals are not simply a cover for tuition.

April 11th, 1883. W. J. HAHN, Atty. Gen.

Luther Osborn, Esq., Justice of the Peace, Glyndon, Minn.:

DEAR SIR: The question submitted is entirely outside the line of my official duties; nevertheless, as you intimate that my opinion may amicably settle the question, I will answer it. As I understand the facts submitted, you, by accepting the appointment of Town Justice, vacated your office of Village Justice. If so, there can be no doubt of your duty to turn your docket, used as Village Justice, over to your successor. The fact that you still continue to be a Justice of the Peace cuts no figure, since you are such Justice in another municipality. Section 8, p. 677, Gen. St. 1878, is not to be construed as imposing the duty to deliver the docket to a successor only in case the person *ceases* to be a Justice, but to the case where he ceases to be a Justice in the municipality at whose expense such docket was provided.

April 21st, 1883. W. J. HAHN, Atty. Gen.

His Excellency, L. F. Hubbard, Governor:

SIR: In reply to your inquiry respecting the eligibility of a District Judge to a position on the Board of Corrections and Charities for the State of Minnesota, which

Board was established by an act of the last Legislature, I have to say that the solution of this question depends upon whether a member of that Board is to be deemed an officer, and such a position an office, within the meaning of section 11 of article 6 of the Constitution, which prohibits the Judges of the Supreme and District Courts from holding any other office under this State. An office is defined in Carth. 478, 479. It is there said that "every man is a public officer who hath any duty concerning the public, and he is not the less a public officer when his authority is confined to narrow limits; because it is the duty and nature of that duty which makes him a public officer, and not the extent of his authority." This definition is approved in Bunn ex rel. vs. People, 45 Ill. 397. Chief Justice Marshall, in U. S. vs. Maurice, 2 Brock. 103, defines an office to be "a public charge or employment, and he who performs the duties of the office is an officer;" and that where the duty is a continuing one, which is prescribed by the government and not by contract,—where the duties continue though the person be changed,—it is difficult to distinguish such a charge or employment from an office. The case of Dickson vs. People, 17 Ill. 191, holds that a Director of a State institution for the deaf and dumb is an office of honor.

That this board "has a duty concerning the public" must be conceded. That it is a public charge or employment; that the duty is a continuing one; that it is prescribed by the government and not by contract; that the duties continue though the persons be changed,—is equally clear. The trust committed to this board is a public trust; the duty imposed upon it a public and important duty. They have power in making investigations to send for persons and papers, and to administer oaths and affirmations; and they are to make reports to the Governor, and through him to the Legislature.

I have, therefore, the honor to advise your Excellency, that, in my opinion, a District Judge is ineligible to a position on this Board. I have very reluctantly come to this conclusion, as it may result in depriving this Board of the very valuable aid and assistance of persons whose training, experience, and research peculiarly fit them for the performance of the duties prescribed in this act. But the Constitution should not, even in spirit, be violated for any reason. So far, at least, as executive officers are concerned, all doubts should, in my opinion, be resolved in favor of, rather than against, a Constitutional prohibition. I would also advise that the members of this Board take an official oath.

May 2d, 1883. W. J. HAHN, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

DEAR SIR: I have carefully examined the question submitted by you relative to the transfer of shares of bank stock in the light of sections 14 and 21 of chapter 33, Gen. St. 1878. These sections assume that a book or books will be kept by all banks, in which all transfers of stock will be entered; the particular manner of the transfer being left to be agreed upon in the articles or prescribed in the by-laws. As between the parties, the delivery of the certificate, with an assignment and power indorsed, passes the entire title, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books. These provisions do not incapacitate the shareholder from parting with his interest, and his assignment, not on the books, passes the title to the stock, subject to such liens or claims as the corporation may have upon it, or the creditors of the bank may have. Bank of Utica vs. Smalley, 2 Cow. 770; McNeil vs. Tenth Nat. Bank, 46 N. Y. 331; Isham vs. Buckingham, 49 N. Y. 222; 5 Cal. 188; 42 Ind. 5; 28 Mo. 388; 5 Gray, 373; 2 Wheat. 390. It is provided by section 21 that a list of the stockholders, showing date of transfer, etc., shall be kept, and a copy filed and recorded, as therein provided. By it, also, stockholders are made individually liable, in an amount equal to double the amount of stock owned by them, for all the debts of such bank, such liability to continue for one year after sale or transfer of such stock. Under a somewhat similar provision it was held by the Court of Appeals

of New York, in Johnson vs. Underhill, 52 N. Y. 203, that a person having once been a stockholder, it could not avail him, in a suit brought against him by a creditor of the corporation, "to show that he had sold and assigned his stock to another, and had given to that other all the usual and necessary means of making a valid and effectual transfer of it to himself upon the books of the company, if, in truth, such transfer had never taken place thereon." It seems to me clear that section 21 meant, not only to make all stockholders liable for debts to the amount and during the time therein specified, but "also to provide the means to the creditors of easily learning who were the stockholders at any time, and of easily showing the fact; and still further, to hold any one ever a stockholder to a continued liability, unless there should be put upon the proper book the entry which should show when he ceased to be a stockholder, and to whom he had transferred his stock."

The remedy for a failure of the bank officer to comply with sections 14 and 21, as well as for a violation of any other provision of the same chapter, is twofold: *First*, by section 43 any person so violating such provisions is liable to a fine of from $50 to $500 for each offense; *second*, by section 44 they forfeit their franchise, and, on demand of the State Auditor, it is made the duty of the Attorney General to commence an action for the purpose of annulling the existence of the corporation.

May 4th, 1883. W. J. HAHN, Atty. Gen.

J. L. Brady, Esq., Co. Atty., Mille Lacs Co.:

DEAR SIR: Under the dog law, (chapter 82, Ex. Sess. 1881,) the residue, after paying all orders drawn, is, on January 1st, to be passed to the general fund of the town. On January 1st the amount you refer to became a part of the general fund, and the repeal of the law in March did not, neither did it profess to, change the *status* of this money. The vote, therefore, to refund was invalid, as it was an appropriation to individuals, without consideration, of the town funds.

May 17th, 1883. W. J. HAHN, Atty. Gen.

F. W. Barlow, Esq., Co. Treas., Freeborn Co.:

DEAR SIR: Your favor to State Auditor has been handed me for reply. You cannot safely agree to postpone the collection of a personal property tax until after June 1st. On that day you must make your return to the County Auditor, and your authority after that date to levy distress is, at least, very questionable. The law gives you from March 1st to June 1st to enforce the payment of such taxes. To permit a collectible tax to run beyond that might render you liable. The party can pay and apply for a refundment. Since he has permitted this matter to run so long, I would advise you to insist upon this course.

May 19th, 1883. W. J. HAHN, Atty. Gen.

Ole O. Canestorp, Esq., Co. Treas., Grant Co.:

DEAR SIR: Personal property tax is not made a lien on the property assessed; it is a personal claim against the owner. If the identical property assessed therefor is sold before levy by the Treasurer to a *bona fide* purchaser, the Treasurer cannot take such property to pay the tax.

May 19th, 1883. W. J. HAHN, Atty. Gen.

C. C. Webster, Esq., Co. Aud., Goodhue Co.:

DEAR SIR: Your favor to the State Auditor has been handed me for reply. You say: "The Minnesota Central Railroad Company purchased real estate in this county between May 1 and December 1, 1882, and deeds for the same were recorded be-

tween the above dates. The taxes for 1882 were levied on said property, and now stand against it. Can said railroad company claim exemption from the payment of such taxes?" I answer: In my opinion, it cannot. Section 105, p. 241, Gen. St. 1878, makes all taxes assessed upon real estate "a lien thereon from and including the first day of May in the year in which they are levied." When the railroad company, therefore, purchased this property there was a lien thereon in favor of the State to the amount of the taxes, and they purchased the same subject to such lien, and must pay the same.

May 19th, 1883. W. J. HAHN, Atty. Gen.

C. R. Davis, Esq., Co. Atty., Nicollet Co.:

DEAR SIR: I think there is no authority to acquire a site for a school-house on school lands owned by the State, but occupied and held under contract of purchase. To do so you would have to make the State a party to the proceedings, and the school law gives no such right. Without express authority you cannot bring the State into court.

March 29th, 1883. W. J. HAHN, Atty. Gen.

Hon. W. M. Campbell, Litchfield, Minn.:

DEAR SIR: In answer to the question submitted by you as a member of the committee appointed to view the bridge mentioned in chapter 299, Sp. Laws 1881, as to whether the money thereby appropriated can be paid before the approaches to said bridge are constructed and the bridge ready for travel, I have to say that in my opinion the language of the act is too plain to admit of a question of that kind. It reads, (section 2:) "No part of said appropriation shall be paid until said bridge shall be completed *and ready for travel.*" The appropriation is "to *aid* in building" the bridge in question. If the bridge requires approaches to make it ready for travel, so long as they remain unbuilt the money cannot be legally paid.

June 6th, 1883. W. J. HAHN, Atty. Gen.

Hon. W. W. Braden, State Auditor:

DEAR SIR: The letter of C. E. Crane, county Auditor of Waseca County, referred to this office by you, has been duly considered, and in reply would say that by section 69 of tax law, a penalty of 10 per cent. is to be charged upon all taxes remaining unpaid on June 1st. In the statement of delinquent taxes filed with the Clerk by the Auditor this penalty is to be included therein. Interest, however, is not to be charged until judgment is entered and the land sold. Section 98. It follows, therefore, that in the case put by Mr. Crane the owner has the right to pay the original tax, with the 10 per cent. penalty and accrued cost, and that no interest can as yet be demanded or required of him. As to the other question propounded I would say that if a piece of land is at a tax sale bid in by the State, and the interest thus acquired by the State is not assigned nor the land redeemed, then and in that case it is not proper to either enter another judgment against the same or to again sell the same. Section 89 expressly provides that in case the right of the State is assigned before absolute forfeiture and before redemption, the purchaser or assignee "shall pay the amount for which the same shall have been bid in, with interest, and the amount of all subsequent delinquent taxes, penalties, costs, and interest upon the same." If redeemed, the redemptioner must pay "the amount for which the same was bid in, with interest, and the amount of delinquent taxes, penalties, costs, and interest thereon." Section 90. If, however, the land has been sold to a purchaser, or the right of the State at any prior sale has been assigned, then it is necessary that such lands, having delinquent taxes thereon, be sold, the same as though no prior judgment or sale had been entered or had.

June 8th, 1883. W. J. HAHN, Atty. Gen.

J. R. McMillan, Esq., Assessor, etc.:

DEAR SIR: I presented your letter to the State Auditor, to whom it should have been addressed, and at his request I will answer your queries. In the first case put, Mr. Hartshorn should be assessed $3,000. He has no right to deduct his indebtedness from any portion of his assessable property except credits. Sections 16, 18, Tax Law. In the second case put, the parties owning the logs are not entitled to any deduction. Whether they do or do not owe a portion of the purchase price of the same makes no difference.

June 15th, 1883. W. J. HAHN, Atty. Gen.

O. J. Wood, Esq., Co. Atty., Chippewa Co.:

DEAR SIR: I agree with you that, under section 6, *c.* 15, Gen. St. 1878, the County Commissioners can only provide for the purchase of a poor farm at a regular meeting. When the statute says that they may, "at any regular meeting," so provide, it by necessary implication negatives the doing of it at any other time. The "time and manner of payment" for such farm is left to the discretion of the Commissioners. I do not think, therefore, that the tax to pay for the same must be levied and collected before any purchase can be completed, or evidences of debt issued.

June 15th, 1883. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Pub. Inst.:

DEAR SIR: I have had under consideration the following questions submitted to you by the Board of Education of the city of St. Paul, and by you referred to this office for my opinion, viz.: "1st. As to what branches may be taught in the public schools of the city of St. Paul, under the laws of the State, and an act of the Legislature of the State of Minnesota entitled 'An act to amend and consolidate the several acts relating to the Board of Education of the city of St. Paul,' approved March 9, 1883." "2d. Have the Board of Education any authority to expend any of the public money in having German or any other foreign language taught in the public schools of said city?"

The first question is entirely too general. To make a list of branches that may be taught in the public schools of St. Paul would require more time than I have at my command, and would necessarily be incomplete and imperfect. I must therefore respectfully decline answering so sweeping a question.

I understand the second question to refer to the right of the Board of Education of St. Paul to have German taught in the public schools of that city, *as a study*, and not as to their authority to cause any of the public schools of the city to be taught in the German language, and I shall answer it in view of this understanding. Under the general laws, school-districts are classified: (1) Common school-districts; (2) independent school-districts; and (3) special school-districts. The city of St. Paul falls under the third class. By the terms of section 9 of the act of March 9, 1883, full power and authority is given the Board of Education to make by-laws and ordinances "relative to the regulation of schools and the books to be used therein," and "*relative to any and everything whatever* that may advance the interests of education, the good government and prosperity of the public schools in said city, and the welfare of the public concerning the same." So far, therefore, as the power of the Board of Education is concerned, the grant is certainly broad enough to warrant them in prescribing German as one of the studies to be pursued in the public schools of St. Paul, if, in the opinion of the Board, the pursuit of such study "may advance the interests of education," or the "prosperity of the public schools in said city, and the welfare of the public concerning the same." Again, under the provisions of the charter above referred to, it is either left with the Board of Education to say whether or not the study of any foreign language shall be embraced in the curriculum of the public schools of St. Paul, or else the law by necessary implication prohibits abso-

lutely the pursuit of any such study. It seems to me the latter conclusion is unwarranted, in view of the fact that even in common school-districts, under certain circumstances, instruction in a foreign language may be given for at least one hour each day. I am therefore of the opinion that there is nothing in the act of March, 1883, or in the General Laws applicable to the Board of Education of the city of St. Paul, which would prevent said Board from prescribing German as one of the studies to be pursued in the public schools of St. Paul.

June 19th, 1883. W. J. HAHN, Atty. Gen.

J. M. Woods, Esq., Judge of Probate, Anoka Co.:

DEAR SIR: From your statements I take it that Mrs. N., on May 1, 1883, had $1,000 liable to assessment as personal property, and returned the same to the Assessor for taxation; that some three or four weeks after that, this money was invested in real estate; and you ask whether this sum is still taxable as personal property, and whether she must pay tax on both. Undoubtedly it is so taxable. Property is to be listed as of its *status* on May 1st. If then taxable as personal property, its subsequent disposition can make no difference. The personal property tax is a personal claim against the then owner of the property. The real estate tax is a claim or lien on the land, and attaches to and follows it into whatever hands it passes. This is too plain for argument.

July 18th, 1883. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Public Inst.:

DEAR SIR: To your first question, viz, "Is the employment of a teacher by the Treasurer and Clerk of a school-district, without any notice to the Director and without any meeting held, legal?" I answer that it is not. By section 31, Laws Minn., relating to public schools it is provided that the Board of Trustees, "at a meeting called for that purpose," shall hire a teacher. This, by necessary implication, precludes the idea of a valid hiring being made in any other manner. There must be a meeting, because it is the *board*, and not the individuals who compose it, who are to hire; and it must be called for that purpose, so that each and every member of the Board may know that the performance of this very important public duty is *the* business to be considered and determined at such meeting. Judgment and discretion are to be exercised in making the selection, and conference and comparison of judgments are necessary in order to reach a proper result. The act is in its nature judicial, and the general rule of law governing such bodies, aside from such positive requirement of statute, is that all must meet, or have notice to meet, when official action is intended. 41 N. J. Law, 312; 89 Pa. St. 395; 47 Mich. 627; 22 Ohio St. 144. "It was clearly not the intention of the Legislature to confer upon the individual members constituting the Board of Trustees the power of acting separately in the selection and appointment of teachers. The intention was to have them act and confer together; the result of their combined judgment, or of the majority of them, constituting a single act." 41 N. J. Law, 312. The appointment should be made by a majority of the members convened for the purpose, and with notice to all the members of the meeting that they may be present and participate. Our own Supreme Court, in the case of Ryan vs. School-dist. 27 Minn. 433, strongly intimate, if they do not directly decide, that in no other way can the district enter into such an agreement. Again, by the amendment of 1881 to section 23 of said act, it is provided that "*no contract* shall be made or authorized without due notice to all the members of the Board of a meeting of the Trustees called for the transaction of such business."

Your second question, viz., "In case of such an illegal hiring, if the teacher is permitted to go on and perform services as teacher, can he recover under the contract," is by no means so free from doubt. It was expressly held, in 47 Mich. 627,

that he could not; but the Michigan statute was somewhat stronger than the one under consideration. However, if the teacher knew that his contract was not so properly made, that two of the Board, individually and not as a Board, signed the same, and that the other member never assented to or ratified the same, I am of the opinion that he could not recover. Otherwise, you could have the two members, who had thus in an illegal manner attempted to make a contract, by their silence ratify and make valid their own illegal acts, and by this indirect method enable them to accomplish what the law by necessary implication prohibits. The hiring is to be "for and in the name of the district." The contract, therefore, is the contract of the school-district and not of the Board of Trustees, who, for this purpose, are the agents of the district. The ratification, therefore, must be by the district. The mere silence of the trustees is not, in my opinion, enough.

ST. PAUL, July 20th, 1883. W. J. HAHN, Atty. Gen.

O. J. Wood, Esq., Co. Atty., Chippewa Co.:

DEAR SIR: You state the following facts, viz.: "The time for the first publication of the delinquent list was July 14th, according to the issue of the paper which was to publish the same, but the paper did not come out until the twenty-first inst., when both issues were published the same day, viz., July 21, 1883, but dated July 14th and July 21st, respectively. Is the publication legal? If not, is the county compelled to pay the publisher his fees for making the publication, and can the Clerk enter judgment against, and collect his fees for entering judgment against, the delinquents? I might further add that the above referred to paper has not been distributed through the post-office for the past six weeks." I do not think the attempted publication is legal. Section 72, tax law, requires the first publication to be made within 15 days after the delivery of the list to the Auditor. The *printing* of the list is not a publication of it. It is published when actually distributed. There was, therefore, in the case under consideration, at most, but one publication, viz., on July 21st. It must be published "in each of two consecutive weeks," the first of which cannot be later than July 15th. As the publication of the list failed through the fault of the publisher, he is clearly not entitled to his compensation. Neither should any judgment be entered thereon, because the court has no jurisdiction to enter it.

July 31st, 1883. W. J. HAHN, Atty. Gen.

J. C. Pope, Esq., Co. Atty., Lac Qui Parle Co.:

DEAR SIR: You ask: "Where a county seat has been located by the Board of County Commissioners, but has never been established by a vote of the people, is it necessary to have an act of the Legislature in order to bring the question before the people to vote upon the removal or establishing the county seat at any town the people may by vote select?" The Constitution (section 1, art. 11) provides, that "the Legislature may from time to time establish and organize new counties, * * * and all laws changing county lines in counties already organized, or for removing county seats, shall, before taking effect, be submitted to the electors of the county or counties to be affected thereby," for adoption. The laws establishing and organizing new counties under this provision provide for the location of the county seat either by naming the point in the law, or by providing for its selection by Commissioners. A selection by either mode is competent, as the Constitution does not require the selection to be ratified or "established by a vote of the people," as your question seems to assume. After the county seat is once selected by the Commissioners in accordance with the act providing therefor, it cannot be legally removed except by an act of the Legislature duly submitted to and adopted by the electors of the county, in accordance with the Constitution.

August 2d, 1883. W. J. HAHN, Atty. Gen.

A. Y. Eaton, Esq., Co. Atty., Wright Co.:

DEAR SIR: You ask whether, under the public health act, the county eventually pays the expense a town board of health may be put to under and in pursuance of the terms of that act, or whether the tax levied to reimburse the town funds for such expenditure is to be levied on the property of the town alone? Section 260 of the Health Code provides that "all expenses so incurred by any town or village board of health * * * shall, *in the first instance*," be paid out of the town or village treasury, and out of the special fund mentioned in and provided for by said act. If that fund is insufficient, then out of the general fund. If any part of such expenses are paid out of the *general funds*, such amount and no other is to be certified to the County Auditor, and a tax sufficient to raise such amount is to "be extended *on the tax-list of the county*," not on the tax-list of the town. I am therefore of the opinion that whatever expenses are incurred by a town board of health, covered by said section 260, which cannot be paid out of such special fund, but is necessarily paid out of the general fund of such town, is to be eventually borne by the entire county; that the tax levied to reimburse the general fund of such town for such expenditure is to be levied on the taxable property of the entire county.

August 4th, 1883. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Pub. Inst.:

DEAR SIR: I am in receipt of your favor asking for an opinion on a number of questions. I will answer them in the order of their asking: 1st. "Can the Commissioners of two counties, containing a joint district, add to or take from the territory of said joint district without the consent of the other county?" They cannot. The first proviso of section 16 of laws relating to public schools, expressly provides that where the territory to be affected by the alteration of a school-district consists of parts of two or more counties, that to effect such alteration it shall require the *concurrent* action of the Commissioners of each of such counties. The Commissioners of each county are severally to hear the petition, but they must both agree to the proposed change before the action of either is of any validity whatever. 2d. "Are school text-book agents responsible for loss of books by fire, theft, etc.?" I think not. There is nothing in the law defining their duties which would seem to make them absolute insurers of the property committed to them. They are to account for all books received, and to pay over all moneys received for those sold. 3d. "Have school boards authority to engage teachers for the ensuing year before the annual meeting?" It was held by my immediate predecessor, Judge Start, in an opinion to the late Hon. D. Burt, under date of July 13, 1880, that "it matters not whether it is before the annual meeting and the election of the new member or not, the Trustees may, without express authority from the district, contract for a *three-months* school and no more." I fully concur in this view of the law. 4th. "What constitutes the qualification of a school-district officer?" The taking and subscribing of the official oath. Section 1, c. 72, p. 786, Gen. St. 1878, provides that "every person elected or appointed to any public office, * * * all county and local officers, shall, before entering on the discharge of their official duties, take and subscribe the oath" as therein prescribed. 5th. "When is the new board in an independent district constituted? or, in other words, when does the new member take his place on the board?" On the third Saturday of September. By section 99 of school law, that is when the new board are for the first time to meet and organize, and from that time their official term begins to run.

September 15th, 1883. W. J. HAHN, Atty. Gen.

L. F. Vanasek, Esq.:

DEAR SIR: You state that the New Prague school-district No. 73, which lies partly in Scott and partly in Le Sueur county, has for the past 20 years been organized as one school-district, having elected but one set of officers, had but one

school-house, hired but one teacher, received and levied taxes as one district, and in all respects has acted and been recognized and treated as one district for that entire time, but that there cannot now be found any record in either county of the formation of said territory into a joint district; and ask if it can be said to have a legal *status* as a school-district, so that it may be formed into an independent district? In my opinion the facts you state will have the effect to give it a legal *status* as a school-district, and it may properly be formed into an independent school-district; that the district having been organized and acted as a district without question for so long, the law will conclusively presume that it was legally constituted as such, and will not permit its legality to be questioned. I assume, of course, that the territory mentioned does not exceed six miles square.

September 17th, 1883. W. J. HAHN, Atty. Gen.

Hon. John S. Proctor, Surveyor Gen., 1st Dist.:

DEAR SIR: You ask whether, (and inclose opinions sent me,) in the opinion of this office, it is your duty to comply with the requirements of section 3, *c.* 41, Laws 1868,—the question of its constitutionality having been raised. I do not deem it necessary or expedient to express an opinion on the validity of the act, in view of the manifest duty of executive officers to obey all State laws not plainly unconstitutional, until the question is authoritively settled by the courts. In 1865, Atty. Gen. Cole, in an opinion bearing date November 28th, says: "As an executive officer I deem myself justified in advising action under State laws until they are held nugatory by competent authority;" and the late Judge Cornell, when Attorney General, under date of May 1, 1872, says: "Questions as to the constitutionality of a law properly enacted by the Legislature and approved by the Governor, belong exclusively with the courts, and whatever views an executive or administrative officer may entertain concerning it should not interfere, except in extreme cases, in enforcing the same." It is needless to say that I fully concur in the views thus expressed. The objections urged against this law are not of such a character, in my opinion, as to render this an exception to this general rule.

September 26th, 1883. W. J. HAHN, Atty. Gen.

Hon. Henry A. Castle, State Inspector of Oils:

DEAR SIR: You ask: "Under sections 116 and 118, taken together, of chapter 6, Gen. St. 1878, pp. 103, 104, is it a violation of law for any manufacturer or dealer in this State to 'offer for sale,' or to sell, uninspected oil to any other manufacturer, dealer, or consumer, residing in this State, with the understanding that the oil is to consumed outside of this state? In other words, does the promise that the oil is to be consumed outside of the State, release it from the requirements of the law, when it is not only 'offered for sale' in this state, but sold in this State, to parties residing in this state?" I have to advise you that, in my opinion, when oil is sold in this State to parties residing therein, it is the duty of the vendor of such oil to have the same inspected before sale, and that a failure so to do renders him guilty of a misdemeanor under section 118, p. 104, Gen. St. 1878.

The statute does not seem to make the place where the oil is to be *used* of any importance whatever. The language of the act is: "If any * * * dealer shall sell to any person *within this state* any such illuminating oils * * * before having the same inspected as provided in this act, he shall be deemed guilty," etc.; not if he shall sell to any person to be resold or used in this State. The reason why the former rather than the latter clause was inserted is obvious. If a dealer could evade the law by simply showing that the understanding with the purchaser was that the oil was not to be consumed in this State, it would enable parties to escape the penalty by a very easy process.

October 12th, 1883. W. J. HAHN, Atty. Gen.

Hon. C. A. Congdon, Asst. U. S. Attorney:

DEAR SIR: I have the honor to acknowledge the receipt of your favor of twelfth inst., calling my attention to the refusal of the managers of the State Reform School to receive one Philip Gilbride into their custody, for the reason that the sentence of the United States District Court was for a fixed term and not during the minority of said Gilbride, and asking that I "advise them as to their duty in the matter." It seems to me that it would scarcely be correct for me to thrust my advice upon the Superintendent when no information has been given me by him that my counsel was desired. However, in view of the necessity of immediate action I will indicate to you my opinion on the matter, which you can use as you see fit. I agree with you that chapter 98, Gen. Laws 1879, so far changes the provisions of section 44, p. 460, Gen. St. 1878, as to authorize the reception of Gilbride into that institution, notwithstanding the fact that his sentence is for a fixed term, instead of during his minority. The term of punishment for offenses against the United States being fixed by the laws of the United States, the court, of course, cannot exceed such term; and when the act of 1879 authorizes, unqualifiedly, the reception of all juvenile offenders duly convicted and sentenced by the United States courts, it neceessarily implies that the term of commitment shall be left to the provisions of the laws of the United States, and to the judgment of the court acting thereunder. Again, the act of 1879 is a separate and independent act, passed subsequent to the enactment of section 44, and in no way conflicts with that section. Section 44 applies to all commitments made by our State courts; the act of 1879, to those made by the United States courts. The absence of any provision in the act of 1879 fixing the time of the infant's detention in such school other than "until discharged by due course of law," conclusively shows, as it seems to me, that the length of the sentence was a matter to be entirely disregarded by the managers of that institution. I agree with you also in saying that there are but two facts to be determined in order to warrant the reception of a person under the act of 1879, viz.: 1st. "Was he committed to said school by the sentence of a court of the United States, in and for this State, in punishment for a crime against the laws of the United States?" and, 2d, "Is he under seventeen years of age?"

Trusting that this communication may be as efficacious as if directed to the Superintendent of the Reform School, I have the honor to be, yours, truly.

October 13th, 1883. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Pub. Inst.:

DEAR SIR: The communication of J. N. Byington, Esq., referred by you to the State Auditor, has been handed me for reply. As I gather from Mr. Byington's letter, the school-district in which he resides has certain outstanding bonds which mature November 25, 1884, and he wishes to know whether it is the duty of the district to levy a tax this year to take up said bonds, or whether they should wait until next year. The tax should be levied this year. Section 28 of the general school laws makes it the duty of the Board of Trustees to duly certify to the Auditor a tax equal to the amount of principal and interest maturing next after such levy. This means, maturing next after the tax so levied becomes due and payable; the object of the law being to provide a fund to take up such bonds at maturity. The tax levied in October does not become due or payable until the January succeeding.

October 24th, 1883. W. J. HAHN, Atty. Gen.

M. R. Kent, Esq., Co. Atty., Kanabec Co.:

DEAR SIR: You present the case of one holding office whom you say you think is not a citizen, and as, under the Constitution, only citizens who are electors are entitled to hold office, ask by what means can the office he holds be declared vacant

on account of his ineligibility, and he be required to vacate it. I think the proper way to try the title to an office—particularly where ineligibility is the alleged ground of the illegal holding—is by a proceeding in the nature of *quo warranto* under the statute. See sections 3, 5, 6, 9, *c.* 79, Gen. St. 1878, and Territory vs. Smith, 3 Minn. (Gil.) 164; Atherton vs. Sherwood, 15 Minn. 225, 226; State vs. Williams, 25 Minn. 340. The question as to his right to hold the office cannot be raised in any other way or any other proceeding,—cannot be questioned collaterally. He is, by virtue of his certificate of election and holding of the office, an officer *de facto*, and his acts as to the public and third parties are valid and unquestionable, except in a direct proceeding to test his right to act as an officer. State vs. Brown, 12 Minn. 538.

October 29th, 1883. W. J. HAHN, Atty. Gen.

Hon. D. L. Kiehle, Supt. of Pub. Inst.:

DEAR SIR: You ask: "Can women cast their votes for the office of County Superintendent, and, if so, by what method?" I answer, they cannot, in my opinion. Section 8 of article 7 of the Constitution is an enabling enactment. It does not *ipso facto* confer the elective franchise to any extent upon women. It simply authorizes the Legislature to make provision for women voting at any election held for the purpose of choosing any officers of schools, or upon any measure relating to schools. It therefore was necessary for the Legislature to act in the premises before any right could be claimed under this section. That the Legislature have the power to authorize women to vote for County Superintendent I have no doubt, but they have not seen fit to do so. Her right to vote is, by section 13 of laws relating to public schools, limited to "the school-district of which she shall at the time have been for ten days a resident." Section 14 makes provision for her voting in cities or villages whose act of incorporation provides for the election of school officers at the charter election, and authorizes the use of a separate ballot-box in which to deposit her ballot. A similar arrangement would be required were she to vote for County Superintendent. In view, therefore, of this positive limitation, as well as the absence of proper and necessary provisions for receiving and canvassing the vote, it seems to me clear that at present women have no right to vote for County Superintendent. Gen. Wilson came to the same conclusion in an opinion dated August 17, 1876.

October 30th, 1883. W. J. HAHN, Atty. Gen.

Hon. Burton Hanson, Asst. Solicitor C., M. & St. P. R. Co.:

DEAR SIR: I have the honor to acknowledge the receipt of your favor of the first ult., calling my attention to the application of the Land Commissioner of your company, made to the State Auditor, to cancel the taxes on certain lands mentioned in said application. The facts on which such petition is based are, as stated by you, that "the Southern Minnesota Railroad Company acquired these lands, among others, under a certain grant to it; that after the said company had so acquired them, it disposed of some by land contract and some by deed, taking back a mortgage for the unpaid balance of the purchase money; that some of the lands conveyed by deed, and on which there was a mortgage taken back, the company afterwards acquired by foreclosure of the mortgages;" and the question to be decided is, "whether or not, after the company has again acquired the title to these lands, they are subject to taxation while in the possession of the company." In considering this question, in so far as it affects the present application to the State Auditor to cancel the taxes and tax sales referred to, it is necessary to ascertain the extent of that officer's authority in this direction. And, in the first place, it has been held by this office, by my predecessors, and I have no doubt correctly, that the State Auditor has only such powers in a matter of this kind as the statute expressly gives him. The only authority he has is given by section 97, Gen. Tax Laws 1881. This

section limits his right to act in cases (among others) where "lands have been sold for taxes, the title to which, at the time such tax was levied thereon, was in * * * any railroad company, *and not subject to taxation.*" The authority thus conferred being special and statutory, he has no right, as it seems to me, to consider any supposed equities which may exist in favor of the company, but it is to decide the question as one of strict law, and, if he has any doubt upon the question, give the State the benefit of such doubt, and thus refer the matter to the courts for final determination. The exemption from taxation of the lands granted to the Southern Minnesota Railroad was only to continue until the same were sold and conveyed. When sold and conveyed, therefore, the exemption *ipso facto* ceased, and they at once became liable to taxation the same as other lands; and, if now exempt, it must be by virtue of some other clause of the charter. It appears and is admitted that they were both sold and conveyed long prior to the time when the taxes in question were assessed. By the strict letter of the law, therefore, these lands were "subject to taxation;" and as there is no presumption in favor of their immunity, and as every reasonable doubt should be resolved against it, and as such an exemption is never permitted to be extended, *either in scope or duration*, beyond what the terms of the concession clearly require, it seems to me clear that the lands in controversy were, at the time the taxes thereon were levied, and still are, subject to taxation. I am consequently compelled to advise the State Auditor that he has no authority to grant the request prayed for in the petition of your company. I refer you to 22 Wall. 575, and 93 U. S. 597.

November 2d, 1883. W. J. HAHN, Atty. Gen.

A. H. Strong, Esq., Secretary Board of Education of Village of Jackson, Minn.:

DEAR SIR: Your communication of October 20th was referred to the Superintendent of Public Instruction, to whom it should have been addressed. It has now been handed me for reply. You ask whether your Board of Education have a right to issue bonds to refund bonds falling due this year without a vote of the district. I do not think they have. No such authority is vested in your Board, and, without such positive power being given to it, it could not do so. Section 26 of the laws relating to public schools is the section under which you must act, if at all.

November 3d, 1883. W. J. HAHN, Atty. Gen.

His Excellency, L. F. Hubbard, Governor:

SIR: On the ninth inst. your Excellency referred to me the application for a requisition on the Governor of the State of Illinois for Gen. William Myers, made by Messrs. O'Brien & Wilson, on behalf of Daniel B. Vermilye, Esq., with a request that I investigate the grounds of such application, and report to you all material circumstances which might come to my knowledge, with an abstract of the evidence, and my opinion as to the expediency of the demand. On the same day I caused notice to be served on Messrs. O'Brien & Wilson, informing them of your Excellency's action in the premises, and appointing 2 P. M. of that day as the time when a hearing would be granted. The afternoon of that day, and also of the following day, was consumed in the hearing,—most of it in an endeavor to convince the parties applying of the reasonableness of your Excellency's requirements. The testimony of Mr. Vermilye was taken, and is herewith transmitted for your Excellency's examination. No other evidence was offered. Statements were made as to other facts, which it was claimed could be substantiated by competent testimony; but, as no such proof was produced, I deem it unnecessary to trouble your Excellency with a repetition of them. You are so conversant with what has since transpired that it is useless to call attention to it. There are no other material circumstances which have come to my knowledge with which your Excellency is not already familiar.

And, now, as to my opinion of the expediency of the demand. In considering this question it is to be observed at the outset that the only paper submitted, upon which to base the granting of this request, is a certified copy of a complaint made before the Municipal Court of St. Paul, and an affidavit of Mr. Vermilye, that Gen. Myers, on or about October 15, 1882, "did depart and has fled from the said State of Minnesota, and is now, and has been since, on or about the fifteenth day of October, 1882, a fugitive from the justice of the State of Minnesota." By the rules of the executive department of this State, governing the issuance of requisitions,—and rules of similar import are in force in all, or nearly all, the States of the Union,—applications are required to be made by the County Attorney, who is required to certify that he approves of the application, and that the ends of justice require that he should be brought back to this state for trial. He is also required, when the application is on complaint before a magistrate, to certify that if the facts stated in the affidavits accompanying the complaint are true, they would, in his opinion, result in a conviction. Said rules also require that if the application is made upon complaint and affidavit, the magistrate taking them must certify that, in his opinion, the parties making the affidavits are to be believed, and that they present a proper case for a requisition. The necessity and wisdom of these requirements are obvious, and need no justification. They simply embody in a condensed form what is said by Spear in his work on Extradition, p. 32. He says that the application should always proceed from some official authority, and that the prosecuting officer is the proper person to make the application. He also says that the Executive should have before him, either in the form of an indictment, or an affidavit or affidavits, an exhibit of the *facts and circumstances* constituting the crime alleged. Upon the evidence submitted he should exercise a careful judgment as to its character, its legality, the facts set forth by it, and all circumstances which may in any way affect the conclusions to be drawn therefrom. In the case under consideration there is an entire absence of any attempt to comply with either of these rules. This fact should, in my opinion, require the closest scrutiny of the grounds of the application, and, before a requisition should be issued under such circumstances, your Excellency ought to be convinced, by the showing made, that there is sufficient legal evidence at hand to at least warrant an indictment. Whether or not the testimony submitted is sufficient for that purpose, is for your Excellency to decide; and in view of another question which arises in this case, and which, to my mind, is an absolutely fatal objection to the granting of the requisition, it is unnecessary for me to intimate to your Excellency my own views on the adequacy of the evidence introduced. That objection is the bar of the statute of limitations.

Section I of chapter 100, p. 919, Gen. St. 1878, after prescribing the punishment for adultery, concludes: "But no *prosecution* for adultery shall be commenced except on the complaint of the husband or the wife, *and no such prosecution* shall be commenced *after* one year from the time of committing the offense." (In this case it is alleged that the crime was committed September, 1882. Prosecution began November 7, 1883.) This provision is so plain to my mind that if counsel had not so strenuously insisted in the argument before you that there was no bar in this case, I would not deem it necessary to do more than simply draw your attention to this clause. However, under the circumstances, I will state to your Excellency a few considerations which occur to me why this statute means just what it says. It will be observed that this crime is peculiar, and notably in this: that no one can institute proceedings against the offender except the husband or wife. He or she must be the moving party—must put the investigation in motion. But *how?* By entering a complaint either before the Grand Jury or a *magistrate*. State vs. Armstrong, 4 Minn. 343. *When* must the husband or wife institute these proceedings, put the investigation in motion, make such complaint? The statute says, before the expiration of one year from the commission of the offense. By the clause limiting the prosecution of the crime of adultery to cases in which the complaint should be made by the husband or wife, our Supreme Court say that the legislature meant that it was a crime, which, if the parties immediately interested did not feel

sufficiently injured by it to institute proceedings against the offender, the public would not notice it. State vs. Armstrong, *supra*. If this be true, they must have meant by the last clause, that, unless the injury was severe enough to cause them to act before the expiration of a year from the infliction thereof, even they would be prevented from noticing it.

But it is said that section 18 of chapter 108, Gen. St. 1878, which provides that "in all other cases" (except murder) "*indictments* shall be found and filed in the proper court within three years after the commission of the offense; but the time during which the defendant is not an inhabitant of or usually resident within this State, shall not constitute any part of *the said limitation of three years*,"—permits this prosecution to be commenced even after the expiration of one year, because the defendant has not been "an inhabitant of or usually resident within this State" since a short time subsequent to the commission of the alleged offense. It will be observed, however, that this exception only applies to the time within which an *indictment* may be found. Section 1 of chapter 100, *supra*, limits, and only limits, the time within which a *prosecution* may be commenced. Prosecution and indictment are not synonymous terms. A prosecution may be commenced by the finding of an indictment, but the commencement of a prosecution need not necessarily be by indictment.

In Rex vs. Wallace it was held by all the judges, in construing 8 & 9 Wm. III. *c.* 26, § 9, which provided that no *prosecution* shall be made for any offense against that act, unless *such prosecution be commenced* within three months next after such offense is committed, that information and proceeding before a magistrate was the commencement of prosecution, and not the preferring of the indictment. 1 East, P. C. 186.

By section 4 of chapter 69 of 9 Geo. IV. it is provided that "the *prosecution* for every offense punishable by indictment by virtue of that act shall be commenced within twelve calendar months after the commission of the offense."

In the case of Rex vs. Brooks, 1 Denison, C. C. 222, the offense was committed December 4, 1845; information and warrant before justices, December 19th; indictment found April 5, 1847. The question reserved for the opinion of all the judges was whether the prosecution was commenced in time, and they were unanimously of the opinion that it was.

Under the Alabama Code, *prosecutions* are required to be commenced within certain limitations, and it has been held that the time runs from the institution of the prosecution, *either* before the magistrate or by the finding of an indictment, if that is the commencement. Mollett vs. State, 33 Ala. 408; Foster vs. State, 38 Ala. 425; Ross vs. State, 55 Ala. 177.

Section 1 of chapter 100, and section 18 of chapter 108, *supra*, are not, therefore, inconsistent, but are to be read together. By the first, the *prosecution* must be commenced within the year, and as to that there is no exception. By the second, an indictment may be found (provided prosecution is instituted in proper time) at any time within three years; and as to that there is an exception. As no exception was, by the Legislature, inserted in section 1, no one save the Legislature can legislate upon the subject and make the insertion. Com. vs. Ruffner, 28 Pa. St. 259; U. S. vs. Brown, 2 Low. 267. A saving or exception restrictive of its operation, not found in a statute of limitations, will not be implied. Howell vs. Hair, 15 Ala. 194; The Sam Slick, 2 Curt. 480. In the latter case, Curtis, J., said: "It is now a settled doctrine, which has been repeatedly announced and applied by the Supreme Court of the United States, that, however strong the reasons may be, the courts cannot ingraft on a statute of limitations an exception not made in it;" citing Clementson vs. Williams, 8 Cranch, 72; McIver vs. Ragan, 2 Wheat. 25; Bank of Alabama vs. Dalton, 9 How. 522. This principle has been applied to particular sections containing a limitation, and held to exclude any exception contained in other portions of the statutes. Favorite vs. Bocher's Adm'r, 17 Ohio St. 555; Hall vs. Bumpstead, 20 Pick. 2; Warfield vs. Fox, 53 Pa. St. 382. In the latter case the court say: "A saving from the operation of statutes for disabilities must be expressed, or it does not exist."

In Wells vs. Child, 12 Allen, 333, the court held that even "courts of equity allow no exceptions not expressly made in the statute of limitations, on the ground of personal disability to sue, such as infancy, coverture, *absence from the State*, or the like."

In Beaubien vs. Beaubien, 23 How. 190, it is held that if there is no saving clause in a statute of limitations as to absentees, etc., the court will make none even in equity cases.

In Stevenson vs. Westfall, 18 Ill. 209, where the statute of limitations affecting writs of error made no exception in favor of a party who may have been out of the State or beyond seas, it was held that none could be made by inference from the fact that the statute of limitations relative to other matters did make such exceptions. See, also, Hall vs. Maybonier, 2 Salk. 420; Beckford vs. Wade, 17 Ves. Jr. 87; Swayne vs. Stevens, 4 Croke, 333.

Such have been the uniform rulings of the courts; and when to this is added the well-settled doctrine that "statutes of limitation are to be liberally construed in favor of the defendant," that "it is the policy of the law that prosecutions should be prompt, and that statutes enforcing such promptitude should be vigorously maintained," (Whart. Crim. Pr. & Pl. § 316,) it seems to me too clear to leave any doubt that in the case under consideration the bar of the statute is complete, and that, consequently, bringing the defendant back to this State would serve no public purpose. I therefore, for these reasons, have the honor to advise your Excellency that, in my opinion, it is inexpedient to issue a requisition in the case under consideration.

November 19th, 1883. W. J. HAHN, Atty. Gen.

Dr. P. H. Millard, Secy. State Medical Examining Board, Stillwater, Minn.:

DEAR SIR: Your favor asking for my "official interpretation of the last clause of section 12 of medical practice act," passed March 5, 1883, viz.: "Provided, that the provisions of this act shall not apply to those who have been practicing medicine five years within this State,"—has been duly considered. It seems to me that the proviso above quoted is too plain to need much interpretation. Words and phrases are to be construed according to the common and approved usage of the language. Applying this rule to the clause under consideration, there can be no difficulty in coming to the conclusion that the Legislature meant to exempt from the operation of the act all persons who had practiced medicine in the State for five years. The very object and purpose of a proviso in an act of the Legislature is to defeat the operation of the act conditionally; to avoid the enactment by way of defeasance or excuse. Reasons for taking out of the operation of the act persons of the class named in this proviso are suggested by the Supreme Court of Nevada in Ex parte Spinney, 10 Nev. 323, in considering a similar clause of the medical practice act of that State. In Texas, under a similar proviso found in the "Act to regulate the practice of medicine," it has been held that if a defendant can prove, when prosecuted for a violation of the act, that he comes within the proviso, he would be guilty of no violation of the act and be entitled to an acquittal. Smith vs. State, 5 Tex. App. 318; Logan vs. State, Id. 306; Blaisdell vs. State, Id. 263; Auth vs. State, 6 Tex. App. 202. But, even if the proviso be limited to the section alone, the result would be the same, for the only penalties prescribed by the act for the violation of any of its provisions are contained in section 12. Without that section we have a law without vindicatory parts, and, as Blackstone says, (vol. 1, p. 55,) "It is but lost labor to say, do this, or avoid that, unless we also declare this shall be the consequence of your non-compliance."

November 19th, 1883. W. J. HAHN, Atty. Gen.

A. J. Steward, Esq., Supt. Schools, Wright Co.:

DEAR SIR: The amendment to the Constitution, proposed by chapter 2, Gen. Laws 1883, is not to take effect and be in force until it is ascertained, in the manner therein provided, that a majority of the votes cast thereon were cast in favor of the same, nor until the Governor shall make proclamation thereof. This will not be done until after January 1, 1884. All County Superintendents of Schools, therefore, will take their office, December 1, 1883, the same as if no such amendment had been proposed. Your second question needs no answer at the present time, and I must therefore decline to express an opinion thereon.

November 24th, 1883. W. J. HAHN, Atty. Gen.

P. Fitzpatrick, Esq., Co. Atty., Winona Co.:

DEAR SIR: You ask: "Will the newly elected County Treasurers and Superintendents of Schools commence their terms of office on the first Monday of January, 1884?" As to the Superintendents of Schools, I held, in an opinion this day given to the Superintendent of Wright county, that these officers take their offices December 1st, as heretofore, because the result of the vote on the constitutional amendment (chapter 2, Laws 1883) will not be ascertained, nor the proclamation of the Governor be issued until after January 1st, and the amendment is not in force until these things are ascertained and done. As to County Treasurers, a different conclusion must be arrived at, because the result of the vote and the proclamation of the Governor will, in the ordinary course of events, be ascertained and made before the first Monday of January, 1884. If it shall appear that the amendment is adopted, all laws inconsistent with it will *pro tanto* be inoperative, and the clause in said amendment providing that "*all terms* of office shall terminate at that time," viz., the first Monday of January in each year, will be the rule and guide for the future, notwithstanding anything in any of the laws of this state to the contrary. I am therefore of the opinion that the newly elected County Treasurers will take their offices on the first Monday of January, 1884, and other years as well, instead of the first day of March, as heretofore.

November 24th, 1883. W. J. HAHN, Atty. Gen.

Eslen J. Rogem, Esq., Co. Aud., Marshall Co.:

DEAR SIR: You ask "what time the County Auditor's salary for 1884 commences." You also state that you were informed by the County Auditor of Polk county that Auditors are entitled to the full pay for 1883, and also for January and February, 1884, and ask, "When can I draw the salary for January and February which is due on the 1883 salary?" As your term expires on the first Monday of January, 1884, the salary of the newly elected Auditor will commence from that time. I am at a loss to know how there can be any salary due you for January and February, 1884. Your salary must end with the close of your term, which is the first Monday of January, 1884. The effect of the constitutional amendment is to shorten your term two months, but for the time so taken from your term you are not entitled to draw salary. There being, therefore, no salary to draw, there is, of course, no time when you can legally draw it.

December 10th, 1883. W. J. HAHN, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

DEAR SIR: Your favor received. You say that "under the 'Examiner Act,' § 91, p. 78, Gen. St. 1878, it is made my first *duty* in respect to county officers 'to *order* and *enforce* a correct, and, as far as practicable, uniform system of book-keeping;' and for two reasons: (1) To afford a *suitable check* upon the mutual work of the officers; and (2) to insure the thorough supervision and safety of the

funds. In order to effect this important result and primary purpose of this office, the assistance of the Attorney General is provided (same section) to enforce obedience to instructions, and the executive authority may be used to suspend summarily from office. See, also, chapter 21 and chapter 108, § 1, Laws 1881. The important end sought has been practically gained in a majority of the counties without resort to the power conferred by the above sections, but running through the statutes are provisions standing squarely in the way of any orderly system of accounting, and these are pleaded or referred to by officers as sufficient reasons for neglect to comply with my instructions." You also say that the uniform system of book-keeping proposed by you "seeks to introduce into county work what is the *basis* of all other systems of book-keeping, viz., the *daily* entries of the transactions of the Treasurer's office, (daily absolutely in the larger counties, and approximately in all,) that the ledgers in both Auditor's and Treasurer's office shall show at night the Treasurer's exact balance on hand, as do the books of any other well-conducted business." In the way of the accomplishment of this very desirable end, there are, as you say, supposed to be certain legal hinderances, behind which some of the County Auditors have taken refuge, and by reason of which they seek to excuse themselves for non-compliance with your proposed system. The first is section 56, p. 228, Gen. St. 1878. I am at a loss to see how this section interferes in any way with section 91, *c.* 6, p. 98. It provides for the tax receipt, and the contents thereof, which is to be given to the tax-payer, and specifies that duplicate stubs shall be kept by the Treasurer, which stubs are to be returned to the County Auditor at the end of each month, who is to file and preserve the same, "charging the Treasurer with the amount thereof." Reading this provision with section 91, *supra*, it seems to me that there is nothing inconsistent between them. If the Public Examiner, under the power vested in him by section 91, has prescribed a uniform system of book-keeping, in pursuance of which a daily charge to the Treasurer by the Auditor of the amount of tax collected is made, then when such tax stubs are returned by the Treasurer no new charge is to be made. The statute does not require such charging to be done at that particular time and no other. If done before, the evident purpose and object of the law is as well or better accomplished as if done at that time. But, even if there is any inconsistency, the Examiner act was approved March 12th, while chapter 1, Laws 1878, which includes section 56, was approved March 11, and the later law takes precedence.

The second "hinderance" to which you call my attention is section 67, *c.* 11, p. 230, Gen. St. It seems to me that there is now no difficulty, so far as this section is concerned. By chapter 33, Gen. Laws 1879, the Treasurer is required to deposit with the Auditor on the day of redemption *all orders and warrants* on the treasury by him redeemed, and the Auditor, at the close of the day, is to credit the Treasurer with the same upon his journal and ledger. This section necessarily supersedes section 67, so far as the matter of book-keeping is concerned, and removes out of the way any stumbling-block which may have been there prior thereto.

To your third query, viz., "Can the Examiner act be employed to correct false legislation in regard to accounting made since its passage," I must answer it cannot. The Legislature, on this subject, is the supreme authority; and to it, and it alone, must be addressed all applications for redress on this account.

December 13th, 1883. W. J. HAHN, Atty. Gen.

Hon. H. M. Knox, Public Examiner:

DEAR SIR: You desire my opinion "in regard to the commencement of the salary year under the new amendment," and say you "suppose it must conform to the new official term, and commence on the first Monday of January, 1884." In every case where a County Treasurer has been elected at the late general election, your supposition is correct, in my opinion. A new term begins on the first Monday of January, and from such beginning the computation of the salary is to be made; but when the old Treasurer holds over another year, if he has already received all

the law allows up to the first of March, 1884, I do not think he is to be paid a second time, or that the amendment, as to him, works any change in the salary, or the time from which it is to be computed. The Auditor draws a salary based, it is true, on the valuation, but nevertheless a salary, and I can see no objection to figuring his salary from the first Monday of January. Of course, as to all newly elected Auditors, this would be the case, and as the Auditors who hold over have not drawn any salary for January and February, 1884, I can see no objection even as to them, of applying the same rule.

December 13th, 1883. W. J. HAHN, Atty. Gen.

Hon. Henry A. Castle, State Inspector of Oils:

DEAR SIR: Your favor, inclosing letter of W. H. Mellen, Esq., received. The questions propounded by Mr. Mellen are these: "1. Is it lawful for a dealer to hold uninspected oils in a warehouse in Minnesota under pretense of supplying Dakota trade? 2. Is it lawful for an inspector to enter such a warehouse and inspect all uninspected oil, and can he collect his fees for such inspection? 3. Is it lawful for a dealer to sell uninspected oil in barrel lots in this State?" To the first query I answer that it is lawful for a dealer *to hold* uninspected oil, irrespective of the pretense he may advance for doing so. It is not the *holding*, but the selling, or offering to sell, uninspected oils that is prohibited and made a misdemeanor. To the second question I answer no to both branches of the query. The third question, I think, is sufficiently answered in the opinion given you October 12, 1883.

December 15th, 1883. W. J. HAHN, Atty. Gen.

Myron R. Kent, Esq., Co. Atty., Kanabec Co.:

DEAR SIR: Your favor of thirteenth inst. received, in which you say that "one J. M. Hulbert, of this county, filed his declaratory papers to become a citizen of the United States, October 13, 1868, in Hennepin county, Minnesota, and has not since that time taken his final papers of naturalization. Can he hold the office of County Commissioner? Is he eligible to the office? His term does not expire for two years yet, but at the last election we voted for Charles A. Staples, son of Isaac Staples, and he was elected, received his certificate of election, and qualified yesterday, and he will endeavor to take his seat the first Monday in January." The Constitution is so plain that it seems to me a mere casual glance at its provisions would dispose of the questions suggested. By subdivision 2 of section 1, art. 7, of the Constitution, "persons of foreign birth *who shall have declared their intention to become citizens*," etc., are entitled to vote if they are males over 21 years of age, and have resided in the United States one year and the State four months. By section 7 of said article, "*every* person who, by the provisions of this article, shall be entitled to vote at any election, shall be eligible to any office which now is or hereafter shall be elective by the people," etc., except as otherwise provided, etc. Comment is unnecessary. Hulbert is eligible and can hold the office; and the election of Mr. Staples, if Hulbert's term has still two years to run, was a simple and innocent amusement, and in no way entitles him to the office.

December 15th, 1883. W. J. HAHN, Atty. Gen.

P. Fitzpatrick, Esq., Co. Atty., Winona Co.:

DEAR SIR: Your favor received. You say that "by chapter 309, Sp. Laws 1879, the salary of the Treasurer of Winona county is fixed at $2,500 per year," and ask, "Will the retiring Treasurer (as he claims under the law) be entitled to receive the full year's salary for ten months' service?" I answer, he will not, in my opinion. When his term stops his salary ceases. Had his term been cut short by death at the end of 10 months, it would not be claimed, I take it, that his personal repre-

sentatives would be entitled to receive from the county the full year's salary. I think a constitutional amendment fully as effective, so far as this question is concerned, as death itself.

December 18th, 1883. W. J. HAHN, Atty. Gen.

Hastings H. Hart, Esq., Sec. Board of Corrections and Charities:

DEAR SIR: I will answer the questions propounded in the order of their asking:

First. "In cases where it is understood that the county shall, by its Commissioners, furnish necessary bedding, change of underclothing, or other necessary clothing, or towels, for the use of prisoners in a county jail, is it the duty of the Sheriff or Jailer to purchase the same without the order of the County Commissioners, in case of their neglect to do so, after due notice given? If so, in what manner is he to collect payment for the same in case of the refusal of the Commissioners to pay?" By section 19, p. 970, Gen. St. 1878, it is made the duty of the keeper of each jail, under the circumstances stated in your query, to furnish the articles indicated. In case he does so provide such supplies, he is to be paid therefor out of the county treasury. The section is silent as to the manner by which such payment is to be made. It follows therefrom that it must be made on the order of the County Commissioners, as this is the usual way by which claims against the county are paid. In case the Commissioners should refuse to allow and order paid his bill for the same, he has his remedy by appeal to the district court under section 89, p. 134, or he may commence an original action against the county for the amount of his claim. 14 Minn. 67.

Second. "In case of the neglect of the County Commissioners to remedy defective sewerage in a county jail for several months, although duly requested so to do by the Sheriff, and although the health of the Sheriff's family and the prisoners is endangered thereby, is the Sheriff empowered by section 8, *c.* 120, Gen. St., to make the necessary repairs at the expense of the county? If not, has the Board of Health of the city or town in which the jail is located, or any other Board, authority to compel the making of such repairs?" No authority to make any such repairs is given to the Sheriff by section 8. This section makes it his duty to see that the prison is kept in a "cleanly and healthful condition;" but there being no provision, such as is found in section 19, for repayment of expenditures made in and about the performance of such duty, it seems to me that the word "healthful," found in this section, must be construed as equivalent, or nearly equivalent, to the preceding word "cleanly." He is to see that it is kept in a "healthful condition," so far as it is possible for him to do so. The jail is kept "by authority of the Board of County Commissioners and at the expense of the county," and, unless there is a power clearly vested in some other person or body to incur expenditures on account thereof, it rests with the Board alone to say when and what repairs shall be made; and, in my opinion, no Board of Health or any other Board can *compel* the making of such repairs. See Laws 1883, *c.* 178; Com'rs Neosho Co. vs. Stoddard, 13 Kan. 207. It seems to me that the only way such repairs could be enforced would be through the action of the Grand Jury. A willful neglect of duty on the part of the Board of County Commissioners would render them liable to indictment. See section 8, *c.* 91, p. 879, Gen. St. 1878; 1 Russ. Cr. 200 *et seq.*

Third. "What is meant by 'separate rooms,' in section 2, *c.* 120, Gen. St.? (*a*) In a case where male prisoners are confined in an iron 'cage,' of which the grating has openings three inches square, and female prisoners are confined in the room in which the 'cage' is situated, having their beds on the top of said cage, with full privilege to see, touch, and converse with said male prisoners, are they in separate rooms, within the meaning of the statute? (*b*) Where women occupy an upper tier of such an iron 'cage' and men the lower tier, they being able to converse freely, but not to see or touch each other, are they in 'separate rooms,' within the meaning of the statute?" To the first subdivision of above question (*a*) I answer, they are not in separate rooms within the meaning of the statute. The second subdivision of above question must also be answered in the negative, in my opinion. As

I understand the expression "separate rooms," as used in section 2, *supra*, it means that the sexes should be kept entirely separate, so that they can hold no converse or intercourse with each other; and, so long as they are able to do either, they are not kept in separate rooms, within the intent and meaning of this section.

December 21st, 1883. W. J. HAHN, Atty. Gen.

H. R. Geary, Esq.:

DEAR SIR: Your favor received. You ask whether, "in case a town votes license, *must* the Commissioners grant license to parties asking for it, or is it optional with them?" It is optional with them. Unless the vote is "against license," it has no effect on the powers or duties of the Commissioners. They act in the same manner, exercise the same discretion, grant or refuse the application for license, the same as if no vote had been taken. Section 1, *c.* 16, Gen. St. 1878, does not *require* the Board to issue licenses; it simply provides that they may grant them. Discretion and discrimination are to be exercised by them in every case. Co. Com'rs Hennepin Co. vs. Robinson, 16 Minn. 381.

December 21st, 1883. W. J. HAHN, Atty. Gen.

Hon. W. W. Braden, State Auditor:

DEAR SIR: The communication of J. F. McGovern, Esq., County Attorney of Wabasha county, addressed to me, and referred by this office to you, has been returned, with the request that I advise you relative to the matters therein contained. The facts, in brief, are these, viz.: In 1871 a certain lot was sold to F. for taxes of the preceding year. At the forfeited sale in 1881 it was again sold for the taxes of 1874, 1875, 1876, 1877, 1878, and 1879, to R. In November, 1883; in an action by F. vs. R., it was decided by the court that the various sales to F. were void, for reasons given by the court in the decision. F. thereupon makes application, in due form, for a refundment of the amount paid by him on account of said sales. *Quære*, is he entitled to such refundment? So far as the sales in 1871, 1872, and 1873 are concerned, it seems to me that the question is foreclosed by the decision of the Supreme Court in Fleming vs. Roverud, 30 Minn. 273, and In re Barber Tax Judgments, 17 N. W. Rep. 473, which hold that the right to a refundment, in such case, is a matter of contract, which cannot be interfered with. As to the sale in 1874, the question is somewhat different. By section 138, *c.* 1, Gen. Laws 1874, the money paid by the purchaser was only to be refunded in case the sale was declared void "by reason of anything occurring or omitted to be done subsequent to the entry of judgment." In the case under consideration the reason stated by the court for holding the sale void was an omission occurring *prior* to the entry of judgment. So far, then, as this sale is concerned, there is no matter of contract involved. However, section 97, *c.* 11, Gen. St. 1878, as amended by section 19, *c.* 18, Gen. Laws 1881, by express language covers this case, and entitles the tax purchaser to a refundment. Section 97, even prior to the amendment, explicitly making it applicable to "all sales of land for taxes made prior to the passage" of the act, was held by the Supreme Court, in the case of the State vs. Cronkhite, 28 Minn. 197, to "apply to a case where the sale was made prior to the date of the passage of the statutes, but the judgment declaring it void was rendered subsequently." The fact that the tax purchaser has not paid the taxes levied subsequent to his purchase is not, as the law now stands, made a condition upon which his right to a refundment depends. I can readily see how the court in such case, if it found the subsequent sale to be a valid one, might refuse to investigate or decide the validity of the prior sales, for the reason that, whether valid or invalid, his (the purchaser's) rights had been lost by his own negligence. But where the court in fact does determine the validity of a given sale, and holds the same to be invalid, and in its judgment states for what reason such sale is declared void, the right of the purchaser to a refundment is complete.

December 21st, 1883. W. J. HAHN, Atty. Gen.

J. M. Martin, Esq.:

DEAR SIR: "When does a Treasurer, elected this last fall, take possession of his office, and for how long does he hold the same?" By the constitutional amendment (chapter 2, Gen. Laws 1883) it is provided that the official year shall commence on the first Monday of January of each year, and all offices shall terminate at that time. It also provides (section 2) that the amendment shall take effect and be in force, as a part of the Constitution, from and after the proclamation of the Governor, (this proclamation will be issued on or about January 4th; at least, before the first Monday;) and from that time its provisions, so far as applicable, become the *supreme law* of the State, and supersede any provisions of law on the same subject inconsistent with it. When the first Monday of January, 1884, arrives, therefore, the new official year of this State commences, and all officers who have been elected at the recent election, who have not, prior to that time, assumed their official positions by virtue of laws not heretofore repealed, by force of this amendment are then to commence their official term. The amendment is sweeping in its provisions, so far as this question is concerned, and must be held to apply to *all*. Otherwise, as it seems to me, the outgoing Treasurer must hold until the first Monday of January, 1885. Had the Legislature, in proposing this amendment, designed to exempt the outgoing and the incoming officers from its provisions, it is fair to presume they would have so indicated. There being no such exemption, none can be imported.

As to the length of the term, it seems to me that on this question there can be little, if any, doubt that it is for three years. As the law now stands, County Treasurers are elected for two years. The term of a newly elected Treasurer would, therefore, end in January, (or March,) 1886, and a successor would but for this amendment be elected in 1885. The same is true as to all the State officers, (except Auditor and Clerk of the Supreme Court.) But there being no election in 1885, it became necessary for the Legislature to make some provision by which this *hiatus* might be avoided. For this purpose the last clause of section 1, c. 2, which provides that *all* State, county, or other officers, whose terms would otherwise expire in 1886, should continue to hold until January, 1887, was evidently inserted. But it is said that the clause immediately preceding the above, viz.: "The first general election for State and county officers," etc., "shall be held," etc.,—shows a contrary intention. I think not.

1st. This section starts out by fixing the time of commencement and termination of all offices, saying nothing of the term. It then proceeds, in the clause under consideration, to treat of *elections*, and elections only, without specifying what particular offices are to be filled at the first election to be held after its adoption. This clause says nothing as to *terms of office;* but, immediately following it, comes the final clause of the whole section, which does treat of officers and terms of office, and extends, by express provisions, all terms otherwise ending in 1886. It will thus be seen that, in the only place in the whole section relating to terms of office, the intention of the Legislature to extend, rather than to shorten, is plainly apparent.

2d. This amendment was copied from a similar amendment proposed in Wisconsin in 1882. In the Wisconsin law the clause read, "the first general election for *all* State and county officers," etc. The absence of the word "all" is too significant to leave any doubt that it was not designed that an election of all officers, State and county, should be held in 1884.

Again, it cannot mean *all*, because, by chapter 1, Laws 1883,—an amendment adopted at the same time,—the terms of Secretary of State, Treasurer, and Attorney General are fixed anew at two years, and the State Auditor at four years, and no exception is made as to present incumbents. There being no exception, they, at least, must serve out their terms so fixed. The same is true as to the Clerk of the Supreme Court. He cannot be elected, for his term, as now fixed, does not expire until January, 1886.

Again, if *all* are to be elected, then we must conclude that the last clause of the section has, and can, by no possibility, have any force or effect whatever, for there

is none, and by no possibility can there be any officers upon whom it can operate. The Legislature must be presumed to have known this fact, and, knowing it, it will not be assumed that they placed this clause in the act for amusement, but such a construction will be given to the entire section as that all its terms may be operative and effective. It was a well-known fact, at the time the act was passed, that, in the usual order of things, there would be a large number of county officers to be elected, and that contingencies might arise, from death or resignation, by which some of the State officers would have to be filled in 1884. Hence the expression "for State and county officers" can be construed as being intended to provide for such cases. By this construction no violence is done to the other provisions of the biennial election amendments, which would be done by interpolating in this clause a word which the Legislature *ex industria* have omitted. If not all, then it must mean for such State and county officers as may, under existing laws, be required to be elected at that time. There is no middle course which can be taken, as it seems to me. For if not all, and not such as would otherwise be elected, then who are to be? Why one whose term, constitutional or statutory, has not expired, rather than another? Who is to make the selection, and by what means and from what *data* is it to be determined that any particular office or officer is included in this clause? Is the length of the term, whether two or four years, to determine the question? If so, which one, and why that rather than the other? No such proposition can be entertained for a moment.

Again, there has, since the formation of the state, been every year elections *for* State and county officers, but not *of* all officers, State and county. There is a clear and marked distinction between the two.

December 22d, 1883. W. J. HAHN, Atty. Gen.

C. F. Trask, Esq., Co. Atty., Houston Co.:

DEAR SIR: Your favor received. You say: "Last election we had three running for Commissioner from district No. 1. K. was nominated at the Republican convention; H. at the Democratic convention; M. ran independent. M. was elected three years ago last November, and has acted as Commissioner since that time. K. received certificate of election, and took necessary oath, which was indorsed on said certificate;"—and ask: "On the assembling of the Board of County Commissioners, January 1, 1884, which man will be entitled to his seat, and for how long?" If I understand your statement correctly, there can be but one answer, viz., the man who holds the certificate of election; and he will hold until his successor is elected and qualified. The Legislature will meet before his term, as now established by law, will expire, and will no doubt fix the term of County Commissioners in harmony with the biennial election amendment to the Constitution. If not, it will be then time enough to speculate on the question.

December 26th, 1883. W. J. HAHN, Atty. Gen.

Hamilton Beatty, Esq.:

DEAR SIR: In an opinion bearing date March 3, 1880, Judge Start held that "each Treasurer is entitled to compute his commissions on the amount collected by him, without reference to the amount collected by his predecessor. It is true that by so doing the county where there has been a vacancy has to pay the larger percentage twice, but that is their misfortune." I fully agree in the foregoing. The fees are to be paid at the time of settlement, and if at the time of the first settlement his fees amount to $1,200, I can see no reason why he would not then be entitled to that amount. There is clearly a defect in the law, but I know of no power, outside the Legislature, that can correct it.

December 31st, 1883. W. J. HAHN, Atty. Gen.

INDEX.

ACCOMPLICE.
May be promised full pardon by attorney general on condition of giving testimony, 213.

ACKNOWLEDGMENT.
A mere jurat is not a certificate of, 363.
May be taken by deputy clerk of district court—how signed by him, 327.

ADDITIONAL HOMESTEAD ENTRIES.
Not within Laws 1879, *c.* 84, relating to settlers on swamp lands, 425.

ADMINISTRATORS OF ESTATES.
Must pay for serving and publishing notices, orders, etc., where estates are less than $1,000, 338.

AGRICULTURAL COLLEGE GRANT.
Cannot be diverted to the support of state normal schools, 235.

AMENDMENTS OF CRIMINAL LAWS.
Where punishment is increased, should contain saving clause as to all past offenses, otherwise it is a jail delivery as to those, 452.

ANNUAL ELECTIONS. See CONSTITUTIONAL AMENDMENT; ELECTIONS; TOWN MEETINGS.
To be held at place of holding town or ward meetings, unless changed by vote at meeting preceding, 482.

ANNUAL STATEMENT.
Of county commissioners, must be published as prescribed by section 113, *c.* 8, Gen. St. 1878, 455.

APPEAL. See ATTORNEY GENERAL, 516; RELIEF OF POOR, 408.

ASSAULT.
Committed in the heat of passion, does not affect or modify the offense, 232.

ASSESSOR.
Can be compelled by *mandamus* to perform duty and return assessments, 213.
Duty of, to furnish all ordinary statistics without extra pay, and as part of assessors' duties, 555.
No authority for appointing one not a resident of town, 84.

ASSESSOR OF RAMSEY COUNTY.
Compensation of, as a member of board of equalization under special laws, 490.

ASSIGNMENT. See CERTIFICATE; SCHOOL LANDS.
Of school-land certificate, where land is a homestead, void unless wife, if any, joins, 510.

ASYLUM FOR DEAF, DUMB, AND BLIND.
Superintendant of, is also superintendent of school for imbeciles, 481.

ATTORNEY. See COUNTY ATTORNEY.
Cannot practice before justice of the peace who is his law partner, 457.

ATTORNEY GENERAL.
Advice and opinions of, how limited, 398.
Advice will not be given to county officers, except county attorney, 416, 514.
Duty to give opinions on school questions to superintendent of public instruction *only*, 434.
Rule of, as to applications in *quo warranto* cases to try title to an office, 255.
Discretion, how to be exercised in such cases, 277, 406.

ATTORNEY GENERAL—Continued.
To appear in cases only in which, in his opinion, the state has such an interest as to require protection, 517, 158, 159.
Will decline to advise county officers when county attorney has advised—no appeal lies from his decision to the attorney general, 516.
Will not consider questions of validity of tax which has been extended on tax-lists and partly collected, 260, 280, 291.
Will not decide on the validity of bonds issued—a question for the courts only, 367.

APPORTIONMENT OF REPRESENTATIVE DISTRICTS. See LEGISLATIVE APPORTIONMENT.
An error of description repugnant to intent of act must be rejected—construction of act of 1871 relating to, 263.
Limitations to power of, 140.
When made in advance of and dependent on the making of one by congress, would be void if latter fails, and hence not affect existing law providing for, 488.

APPORTIONMENT OF SCHOOL FUNDS. See SCHOOL-DISTRICTS.
How and when made—reports of clerks the basis of, and neglect to make them causes loss of money to district, 111, 112.
To be made to evening scholars as well as day, 491.
Where districts divided and fail to make proper reports, effect on, 261.

APPRAISAL OF SCHOOL LANDS. See SCHOOL LANDS.
Appraisers only hold for each appraisal for which appointed, 124.
Necessary in all cases, 124.
New one may be had at discretion of commissioner, 124.

APPROPRIATION. See HIGH SCHOOL BOARD.
Authority to draw warrant on treasury amounts to, 7. *Contra*, 66.
Made for one purpose cannot be used for another, 263, 398.
The unexpended balance of an annual appropriation cannot be used for any other year than year for which made, 260.
To state agricultural society not to be paid until certified copy of account filed with state treasurer, 440.
What constitutes—case stated under inebriate asylum acts of 1873 and 1875, 339.

AUDITING BOARD. See DEPOSIT OF PUBLIC FUNDS; BOARD OF AUDITORS.
Duties as to examining books, accounts, etc., of county treasurer, 365.

AUDITOR OF COUNTY. See COUNTY AUDITOR.

AUDITOR OF STATE. See STATE AUDITOR; TAXES.
Duty of, ministerial only as to specific appropriations, 10.

AUTREFOIS ACQUIT.
May be pleaded after trial by jury and verdict, though indictment was void, 159.

BAIL-BOND.
Bail may take principal anywhere, but if on foreign soil must conform to foreign laws as to manner of taking, 276.

BANKS AND BANKING. See DEPOSIT OF PUBLIC FUNDS.
1. *Under banking law of* 1858.
2. *State banks under present law.*

1. *Under banking law of* 1858.

Bonds and stocks of state were a basis for banking at their current value only, 5.
Bonds deposited as security for—how could be assigned to auditor, 145.
Capital stock, how constituted—notes could not exceed same, 27. *Contra*, 77.
Bank once incorporated could not assign rights, franchises, etc., without transfer of stock, 113.
Fees of state auditor, 19, 32.
Securities deposited must have been duly acknowledged as capital stock and recorded, 28, 30.
Provision in banking law as to individual liability of stockholder continuing a year after sale of stock, is a limitation on liability incurred before transfer, and prevents liability unless suit is brought within the year, 113.
Bond of auditor as bank comptroller to be given, 182.
Taxation of national banks, 189, 206.

BANKS AND BANKING—Continued.

2. *State banks under present law.*

Cannot increase capital stock or amend charter under chapter 52, Laws 1864, 173.
Limited under Laws 1881, *c.* 77, § 47, as to amount can loan any one person, 498.
Taxation of—how and where assessed and taxed, 128, 132, 160.
No bank can be organized under Gen. St. *c.* 33, to do lawful business without a *paid-up* capital of $25,000 at least, 432.
Legal *status* of savings banks, where organized, under act of 1867, 323, 414.
Must strictly comply with law under which organized, 414.
Have no contract rights to public deposits for any definite time, 298.
And on death of owner, or becoming defunct, depository bond no longer good, 493.
Transfer of shares must be entered on books of bank, or stockholders' liability will continue to amount shown by books, 532.
Penalty and remedy for failure to comply with certain provisions of banking law, 533.

BASTARDY.
Charge of, is not an offense against state, so as to authorize governor to pardon, 281.
Nor to issue a requisition, 335.

BASTARDY PROCEEDINGS.
Are partly criminal, partly civil, and tried as civil actions, 204.

BOARD OF AUDITORS. See DEPOSIT OF PUBLIC FUNDS.
Chairman of county commissioners to be paid same as other members of, 492.
To designate new bank as depository when owner dies, 493.

BOARD OF CORRECTIONS AND CHARITIES.
Members of, are officers and should take an official oath, 531.

BOARD OF COUNTY COMMISSIONERS. See COUNTY COMMISSIONERS.

BOARD OF EQUALIZATION. See TAXES.
Pay of, not to come out of pay allowed as county commissioners, 492.

BOARDS OF HEALTH. See HEALTH OFFICERS.
Expenses of local boards paid out of general funds in treasury are to be reimbursed by tax levied on entire county, 538.
Powers of, as to schools, and to pupils not vaccinated, 504.
Sections 55 to 61, *c.* 10, Gen. St. 1878, relating to, applies exclusively to towns, 507.
Section 3, *c.* 8, Gen. Laws 1873, as amended by Laws 1881, (Extra Sess.) *c.* 11, applies to all boards of health, 507.

BOND. See OFFICIAL BONDS; DEPOSIT OF STATE FUNDS.
Of county attorney of attached county, where filed—legal effect of not filing, etc., 292.
Of county treasurer—not valid beyond time for which elected, and successor elected and qualified, 484.
Of depository of state funds—form of, 291.

BONDS. See STATE RAILROAD BONDS.
County may issue, for building court-house and jail, 385.
Act for issue of, by village, in aid of flouring-mill, void, not being a public purpose, 270.
Same as to town, 489.
Of independent school-district, cannot be issued by board to refund old bonds without vote of district, 542.
Of school-district maturing next year, should be provided for by levy of tax this year, 540.
Validity of, after issue, will not be considered or decided by attorney general, 367.
When required to be signed by the board, a majority thereof signing is sufficient, 349.

BRIDGE. See ROADS AND BRIDGES.
Where required to be made ready for travel, it is not so without approaches, if necessary, 534.
Rum river bridge—application of certain laws to, 222.

BUILDING ASSOCIATIONS.
To be taxed as corporations on their capital stock or property—members of, not required to list their shares, 459.

CANVASSING BOARD. See ELECTIONS; ELECTION RETURNS.
Can make no amendments to election returns after adjournment, 55.

CAPITAL STOCK. See BANKS AND BANKING; DEPOSIT OF PUBLIC FUNDS.
Defined as to amount necessary to constitute a bank a public depository, 497.
Must be *paid in* to authorize banking business under laws of this state, 432.

CAPITOL GROUNDS.
Title of state to, valid—no liability therefor exists, 526.

CENSUS. See JUDGE OF PROBATE, 338, 444, 448.
To be considered completed when returns are filed with clerk of district court, 441.
Of 1880 not to be taken as basis of salary of judge of probate for that year, 444, 448.

CERTIFICATE. See SCHOOL-DISTRICTS; SCHOOL LANDS; TAXES.
Of auditor as to payment of taxes, must be on all deeds, etc., filed for record, 466.
Of sale of school lands—proof of loss of, with assignment indorsed, must be made in court—affidavit not sufficient to base patent upon, 432.
Of county superintendent, as to use of state text-books in district schools, requisites of, 515.
To teach school may be given for shorter period than fixed by law, but not a longer, 516.
Must be held by teacher at the time of making contract to teach, 513.

CERTIORARI.
Writ of, lies from supreme court (but not from district court) to justice court, 212.

CHANGE OF VENUE. See JUSTICE OF THE PEACE.
In criminal cases, cannot be made except in cases of felony—libel is not a felony, but a misdemeanor, 483.

CHURCH PROPERTY. See TAXES.
Exempt from taxation, 221.

CITIZENS.
When minor children of foreigners, and foreign-born women, become, 345, 502.
Parent of foreign-born minor child must be full citizen to entitle latter to vote on coming of age, 306.

CLAIMS AGAINST COUNTY. See COUNTY.
All except those fixed by law, or authorized to be fixed by some other body, are to be audited by county commissioners, 376, 381.
As fees and costs in criminal cases before justices—returning births and deaths, etc., 384.

CLAIMS AGAINST STATE. See STATE RAILROAD BONDS.
Paid in order of presentation of certificate of boards which audits same, 94.

CLERK HIRE.
Can only be drawn for actual services of clerk, 490.

CLERK OF DISTRICT COURT.
Books to be procured by, at expense of county, are distinct from the books and supplies mentioned in section 110, *c.* 8, Gen. St. 1878, 474.
Can be elected in organized counties, though attached to others for judicial purposes, 383.
Cannot be also county auditor, 350.
Fees of, for filing oaths and bonds of town and county officers, are a county charge, 344, 398.
Fees of, for certificate of judgments, etc., on abstracts of title, 454.
Words "clerk of the district" held to mean, 36.
Holds for four years whenever *elected*, whether it be to fill a vacancy or not, 482, 442, 382.
Office of, is a county office, 12.
Vacancy in, to be filled by judge, 12, 43.
Votes cast for, outside of county, as in county attached for judicial purposes, are void, 349.
Rice county—duty as to collection and reporting fees for services under a special law, 451.

COMMISSIONER DISTRICTS. See COUNTY, (*Redistricting.*)
When county is redistricted, must be election of entire new board, though terms of incumbents have not expired, 439, 441, 449.

COMMISSIONER OF DEEDS.
Power of governor to remove, and how exercised, 70.

COMMISSIONERS OF COUNTY. See COUNTY COMMISSIONERS.

COMMISSIONERS OF PRINTING. See PUBLIC PRINTING.
May call for new bids when bidders combine to prevent competition and force letting at maximum rates, 434.

COMMISSION OF APPRAISAL.
Authority of, under award of state prison commission, 478.

CONSTITUTION.
Adopts office of judge of probate of the territory, 4.
By adopting territorial laws, constituted federal or territorial offices state offices, 6, 7.
Construction of section 9, art. 4, relating to members of legislature as to being eligible to other office, 6, 146, 277, 407.
Prohibition as to holding office created while member of legislature, 277-279.
Infringed by exemption of railroad lands from taxation, 199. See 242.
Infringed by law prohibiting election of county commissioner, etc., to office of county treasurer, 160, 412.
Permits any one entitled to vote to hold any elective office, except, etc., 548, 412.
Prohibits laws authorizing bonds of municipalities in aid of flouring-mill, 270, 489.
Provision as to apportionment of legislative districts discussed, 319.
Prohibition as to length of legislative sessions does not apply to senate where organized as court of impeachment, 274.
Prohibits extra compensation to members of legislature during vacation, 5.
Prohibits paying money out of state treasury without an appropriation, 7.

CONSTITUTIONAL AMENDMENT.
Relating to incorporation of towns and villages by special act, construed, 525, 526.
Of 1883, as to official year—effect on terms of office and salaries, 546, 547, 551. See 18 N. W. Rep. 316.

CONSTITUTIONALITY OF LAWS. See CONSTITUTION.
Acts broader than title, containing more than one subject, may stand as to part properly expressed in title, 282.
A beneficiary cannot accept beneficial part of an act and reject the rest, 282.
Not a question to be reviewed by the executive, where passed upon and decided by his predecessor, 258.
Where properly passed and approved, is a question for courts, not executive officers, 121, 249, 269, 539.

CORONER.
Fees of, to be audited by county board, 469.

CORONER'S INQUEST.
Jurors at, not entitled to mileage, 469.
No "expert fee" can be allowed except to a physician called to make *post mortem* examination—he to be allowed six dollars *per diem* and mileage, 469.
But county board may allow more, 530.

CORPORATIONS. See CONSTITUTION; FOREIGN CORPORATIONS.
Capital stock of, may be taxed in one state and shares in another, 208.
Creation of, by special act, prohibited—prohibition, when applicable, 218.
Cannot be created by altering old charter, 153.
How far charters of, can be amended so as not to be creating new corporation, 190, 198.
As to incorporating villages, etc., by special act, see 525, 526.

COSTS.
In criminal cases, before justice of peace, are to be presented to county by verified bill of party claiming the fees, 384.
In criminal cases, when a county charge, 168.
In district court complainant cannot be required to pay, 168.

COUNTY. See COUNTY COMMISSIONERS; SCHOOL-DISTRICTS; TAXES.
1. *Establishment.*
2. *Organization.*
3. *Redistricting.*
4. *Claims against.*

1. *Establishment.*

Constitutional provisions regarding, are mandatory, 26.

COUNTY—Continued.
Belongs entirely to legislature, 415.
Boundaries of unorganized, may be changed without vote of people, 233.
When organized, requires majority vote of each county affected by change, 45, 59.
Unorganized, is not entitled to county officers except county commissioners, 415. See 231.
Unorganized, where returns of elections of, to be made, 380.
Cannot collect taxes when not duly organized by legislature, 521. See 136.

2. *Organization.*

Can be done only by legislative act, 415.
If organized, is entitled to elect a county attorney, 442.
Where one organized, is attached to another for judicial purposes, justice of peace of latter has no jurisdiction in former, 262.
Respective rights and liabilities, where attached, and when detached from each other, 134.
Suspension of, by reason of Indian war, does not release new from debts of old, 236.

3. *Redistricting.*

Does not *ipso facto* legislate commissioners out of office, but may shorten the term of some, 466.
When to be redistricted, 441.
Where no increase in districts, it only vacates seats of commissioners ceasing to be inhabitants of districts for which elected, 480.
When redistricted, there must be an entire new board elected, 262, 265, 334.

4. *Claims against.*

Acceptance of part of claim allowed against, no bar to suit for balance, 24.
What classes of, are to be audited by county board, 376, 381, 384.
Attached county should pay bill of sheriff for board, etc., of prisoner who is sent therefrom, 327.
Claim of one against another for support of a pauper not valid unless latter had a legal settlement in debtor county, 479.
Liable for care by city of small-pox patient when a pauper, 493.
May be compelled to pay salary of county treasurer twice in same year, how, 420.
Not liable for salaries of persons who pretended to act as county officers when county was unorganized, 495, 496.
Not liable for witness fees to defendant's witnesses in justice court, 492, 501.
Should furnish fuel to jailer for cooking, etc., 235.
And must pay for bedding, change of clothing, etc., for prisoners, where furnished by sheriff, on neglect of county commissioners to provide same, 549.
When costs in criminal cases chargeable against, 168, 384.

COUNTY ATTORNEY. See INCOMPATIBLE OFFICES, 310, 365, 521.

1. *Tenure of his office.*
2. *Duties in general.*
3. *Compensation.*

1. *Tenure of office.*

Elected to fill vacancy, holds for unexpired term of predecessor, 475.
Does not vacate office by enlistment in United States army, 97, 101.
May also hold office of county superintendent, 521.
Every organized county is entitled to elect one, 442.
Cannot delegate duties of office to another, 101.

2. *Duties in general.*

Required to appear in criminal cases before justice of the peace, 159.
Would be improper and illegal for, to appear for defendant in any criminal case, 159.
Duty as regards justice courts, 140.
Duty as to lands of state, 352, 353.
Duty of, in case of allowance and payment of an illegal claim against county, 472.
Duty to advise county officers, 398.
Duty to attend to taking depositions in suits where county is a party, whether in or out of state; but it is not his official duty to secure title to site for court-house unless suit is brought, 482.
Duty to appear in tax cases on appeal to supreme court where county is a party, 517.
Not his official duty to advise school-district officers, and entitled to fees therefor, 468.
No appeal from decision of, to the attorney general, 516.

COUNTY ATTORNEY—Continued.

3. *Compensation.*

County commissioners may reduce salary at any time, 100. *Contra*, 232.
When loses salary if absent, 137.
No right to charge fees for advice or services in criminal cases, 159.

COUNTY AUDITOR. See TAXES.
1. *Powers and duties.*
2. *Salary and clerk hire.*

1. *Powers and duties.*

Need not certify "taxes paid" on patents from United States, 366.
Nor on deeds which recite that they are made merely to correct some error, 366.
Duty in general regarding making certificate of "taxes paid" on deeds, etc., 491.
If he makes certificate of "taxes paid," when tax is due, he is liable to party injured thereby—such certificate does not discharge tax, 347, 350.
To use judgment as to whether transfer on his books is necessary for purposes of taxation, 312.
Must follow directions of state auditor as to tax matters, 479.
No authority to enter abatement of taxes made by county commissioners alone, 463.
Must allow redemption, though sales for a year or years long previously made may have become absolute in purchaser, 362.
Duty as to designation of paper in which tax-list to be published—form to use, 563.
Cannot extend the one-mill school tax on the tax-list unless levied by county commissioners, 483.
No power to declare sale under chapter 135, Laws 1881, (forfeited sale,) void, 493.
No authority to draw orders to pay over to owner of land sold for taxes at forfeited sale in 1881 the excess paid at sale, 488.
Not to decide contest of office of school-district treasurer, 409.
Cannot safely refuse to issue warrants on claims duly allowed by county board for county buildings, 421.
To keep books on system prescribed by public examiner, 546.
Cannot be also clerk of court, 350.
Must keep his office at the county seat, 458.
Appointment of, on resignation of predecessor who qualifies his resignation, 253.
Deputy of, cannot sign orders or papers after revocation of appointment, 481.
Effect of constitutional amendment of 1883 on term and salary, 546, 547, 551. See 18 N. W. Rep. 316.

2. *Salary and clerk hire.*

Basis of his salary fixed on March 1, on valuation of preceding year, and cannot be changed during year, 325.
Not entitled to fees or compensation for making financial statement, 201.
Salary of, when one or more counties are attached for record and judicial purposes, to be computed on the combined value of all the counties, 399.
Salary and clerk hire of, in 1875—no clerk hire goes to, 315.
Salary covers every duty or service done in line of official duty—fees and percentages in excess to be covered into the treasury, 396.
Law allows him fees for acting on county canvassing board and on board of audit, but must pay excess of fees over salary into county fund, 385.
Pay of person appointed to act in place of, during sickness, should be deducted from auditor's salary, 380.
Salary of, to be computed by county board. 381.
Not entitled to compensation other than salary for services on board of equalization, 396, 397.
Not liable to pay United States duty imposed on tax sales, or to affix United States revenue stamps to certificates, 104.
Clerk hire of, can only be drawn for actual services of clerk, 489.
Rule of computation of salary in counties with valuation less than $1,500,000, same as when it exceeds that sum, 462.

COUNTY BONDS. See COUNTY COMMISSIONERS.
Judgment on, how enforced or collected, 133.
May be issued by board to build court-house and jail without vote of the people—manner of providing for payment of interest and principal, 385. See 464, as to orders.
Special law relating to, construed with reference to vote of people for issuance and notice of vote, 517.

COUNTY BUILDINGS. See COUNTY COMMISSIONERS, 385, 464.
Power of board to contract for, without vote of people, 421.

COUNTY BUSINESS.
Term includes services of county commissioners while acting as a board of equalization, 436, 437.

COUNTY COMMISSIONERS. See INCOMPATIBLE OFFICES; SCHOOL-DISTRICTS; TAXES.
1. *Right to hold, and term of office.* 3. *Compensation.*
2. *Powers and duties.*

1. *Right to hold, and term of office.*

Any elector entitled to vote can hold office of, 548.
May be elected to office of county treasurer, 160.
But cannot hold both offices at the same time, nor that of deputy treasurer, 455.
Cannot be overseer of the poor, or receive pay as such—cannot appoint themselves to offices, 508.
Terms may be shortened by redistricting county, as entire new board must be elected at next election, 466.
May legislate themselves out of office by redistricting county, 439, 334.
Effect of removal from county, 280.
May be appointed or elected in unorganized counties, 177, 415, 450.
Where petition to governor for appointment does not show a vacancy exists, there is no authority for appointment, 96.
Term of office of, begins January 1st after their election, 443.
Appointed to fill vacancy holds till next election, and until successor is elected and qualified, 522.
If elected, till term of one creating vacancy expires, and until successor elected and qualified, 312, 399.
Elected in 1883, holds until successor elected and qualified—term should be fixed in harmony with the constitutional amendment of 1883, 552.

2. *Powers and duties.*

Can act only as a board when in session, 496.
Must hold their meetings at the county seat to be legal, 458.
Duty of, to examine county treasurer's and auditor's offices, books, etc., semi-annually, 493.
Power and duty of, in reference to bonds of county treasurer, 523.
It is optional and discretionary with, as to issuance of license to sell liquor, unless vote in town is *against* license, 550, 315.
May rescind any action which does not affect rights of third persons, 348.
Committee constituting majority—power of, 349.
Committee of—majority of, must concur in report to justify action on, 492.
No power to divide county into towns which contain less than 100 inhabitants, 23.
Nor to organize two full townships or more, having each 100 or more inhabitants, into one town, 438.
No power over school funds—cannot direct auditor as to apportionment of, 110.
No jurisdiction to divide school-districts where petition contains majority of part to be set off only—must be majority of entire territory, 101, 130.
No jurisdiction over independent school-districts, 371.
Jurisdiction as to dividing and annexing parts of school-districts, 290.
Cannot legally appoint county superintendent on promise to take less than salary fixed by law, 329.
Power to contract for county buildings without vote authorizing it, 421.
Have power to issue bonds to build court-house and jail—sinking fund for, how provided, 385.
Power to issue county orders for building jail, 464.
Validity of orders or other evidences of indebtedness issued by, may be inquired into, 496.
Cannot allow and direct payment of prospective claims against county, 345, 346.
Mandamus lies against, to compel levy of tax to pay judgments, 133.
To allow a reasonable sum for rent, etc., of county offices, to officers who have kept theirs at their residences, 440.
No right to review, reopen, or reconsider claim or bill passed upon by a preceding board—party must appeal, 329.
No power to allow and make valid, claims for salaries of pretended county officers, 495, 496.

COUNTY COMMISSIONERS—Continued.
Cannot legally order auditor to withhold salary of an officer for failure to perform duties, 472.
No authority to give preference to creditors, 236.
Power of, in relation to bounties to soldiers, etc., 219.
Duty to make and publish annual statement of accounts, whether proceedings were published as meetings occurred or not, 453.
Duty of, to redistrict county when it has requisite number of voters, 441.
Have authority to levy a general county road tax, to be collected as any other county tax, 326, 328.
No authority to abate taxes, only to recommend it to state auditor, 463, 467. .
May allow physician more than six dollars for *post mortem* examination, 530.
Can provide for purchase of a poor farm at a regular meeting only, but time and manner of payment is discretionary, 535.
No power to direct treasurer as to preference in payment of county orders—statute makes presentation the rule, 474.
No power to fix salary of judge of probate, 520.
No power to revoke authority to appoint short-hand reporter after appointment made, 408.
Liable to indictment for willful neglect of duty, 549.
Cannot appoint county officers in unorganized counties, 415.
Or organize towns or school-districts therein, 450.

3. *Compensation.*

Not to receive pay for more than 25 days in one year, 458, 464.
Compensation and mileage of—how limited under amendment of 1873, 387.
Not entitled to pay for their services as board of equalization beyond limit fixed for general services, 436, 437.
Act of 1881 relating to, applies to that official year, 473.
It is only when a commissioner is employed in the business of the county that he can receive pay, 473.
Ten days' pay and mileage for one session to be allowed under law of 1881 for services as members of board of equalization, and not to come out of pay allowed as commissioners, 492.
Cannot receive extra pay as a bridge committee— auditor liable for signing order therefor, 471.
Mileage of, amount entitled to, is distinct from *per diem*, 468.
Pay of—cannot secure *per diem* while traveling to or from the county seat, 462.
Claim for, must be earned, itemized, and allowed as other claims, 499.
Bills for their services have no preference over other bills, and 30 days must expire before payment, 473.
Chairman not entitled to mileage for going to county seat simply to sign orders, 530.
Mileage of, computed on miles *necessarily* traveled, 530.
Chairman of, allowed pay as member of board of auditors same as other members thereof, 492.
Pay of, in Blue Earth county, under General and Special Laws cited, 401.
Of Winona county—pay and mileage of, under Special Laws, 468.

COUNTY DEPOSITORY. See BANKS AND BANKING; DEPOSIT OF PUBLIC FUNDS.
Banks not assessed for "capital stock," by that name, but for money and credits, may become, 332, 346.

COUNTY FUNDS. See BANKS AND BANKING; DEPOSIT OF COUNTY FUNDS.
Can be deposited outside of county in certain cases, 415.
All funds in county treasury are, so far as treasurer's or depositary's liability is concerned, 395.
Loaning out, is embezzlement on part of county treasurer—if he receives interest on such loan it belongs to county, 379.
What consitutes a loan of—instances, 386.

COUNTY LINES. See COUNTY SEAT.
A law changing, requires majority vote at a general election of each organized county affected by change, 26, 45, 59.

COUNTY OFFICERS. See INCOMPATIBLE OFFICES; TERM OF OFFICE.
All except judge of probate and clerk of court under control of legislature as to term of office, 233.
And when elected to fill vacancy, hold balance of unexpired term of predecessor only, 477, 479, 484.

COTNTY OFFICERS—Continued.
Where appointed on organization of county, to hold until the next general election, their successors should qualify immediately after election, 518.
Cannot collect rent of office, in certain cases where board neglect to provide offices—duty of board as to furnishing, 416.
Court commissioner not one whom board must furnish office for, 494.
Of Ramsey county, to make monthly and annual reports of fees, etc.—how to be made up, 458.

COUNTY OFFICES.
When there is a vacancy in all at same time, how to be filled, 73.
When duty of county board to provide offices for county officers, 416, 494.

COUNTY ORDERS.
Receivable for county taxes without regard to order of presentation, 311, 356.
Cannot be paid to towns for town taxes, 68.
Cannot be received in payment of fines and forfeitures, 170.
Can be taken in redemption of land sold for taxes and bid off by counties, 35. *Contra*, 51.
To be paid in the order of presentation, as per record of treasurer, 474.
Draw interest after demand at 7 per cent., 153, 311, 402, 423.
Ordinary demand orders cannot be made to draw 10 per cent. by a general resolution of board, 402.
County commissioners may issue, to limit allowed by law, for building a jail without vote of people, 464.
Cannot be issued on estimates of building committee under a building contract with contractors, 345, 346.
May be signed by chairman of board any time after allowance by board, whether in session or not, 498.

COUNTY PRINTING.
Except as to tax-lists and notices, and the laws, may be let to paper without reference to its age in county, 492.

COUNTY RECORDS.
Where all destroyed, cannot collect the taxes, but may extend them next year same as if omitted, 137.

COUNTY ROADS. See ROADS.
County, not town, is liable for damages by laying out or altering, 478.
Appropriations for, are made from the county general fund, 387.
County board to assess the damages, and to be paid by an order signed by chairman and auditor—the assessment amounts to an allowance, 512.

COUNTY SEAT. See COUNTY LINES.
Cannot be changed, after once located, without special act, which must be submitted and adopted by vote of majority of electors of county at a general election, 431, 537.
In voting for removal of, but one place should be voted for, 20.
Laws changing, not to be read literally, but as intended, 131.
Where it is located pending a contested vote for removal, 490.
Meetings of board at any other point, except in emergency, are not legal, 457.
Of Marshall county—when and how located at Warren—no authority for removal to Argyle, 485.

COUNTY SUPERINTENDENT. See SCHOOL-DISTRICTS; INCOMPATIBLE OFFICES.
Commencement of term in 1883 not affected by constitutional amendment which took effect in 1884, 546.
When office was made elective throughout state—term commences first Monday in December after election, 444.
Office of, pertains solely to the management of public schools, and women may hold it, 487, 299. *Contra*, 390.
Women may hold office of, if it is not an elective one, 299.
Women cannot vote for, 541, 345.
Appointment of, under law relating thereto, 248.
Qualifications necessary under such law, 281.
Law relating to, could not be changed by county commissioners, though they were to adopt it in first instance, 209.
Compensation of one holding over after repeal of law relating to appointment is governed by new act fixing amount, 303.

COUNTY SUPERINTENDENT—Continued.
Salary of, fixed by county commissioners within certain limits—not to be less than $10 for each organized district in county, 495.
District in two counties to be counted in county where school-house is, 495.
When he revokes teacher's certificate, should specify in his statement filed with clerk the ground of revocation, 513.
May also hold office of county attorney, 521.
Cannot also hold office of county auditor, 418.
Cannot revoke teachers' certificates arbitrarily and without cause—causes for which he may revoke, 509.

COUNTY SURVEYORS.
Fees of, for surveying school lands for state, same as for persons, 88.

COUNTY TREASURER. See TAXES; SCHOOL-DISTRICT; BONDS; DEPOSIT OF PUBLIC FUNDS.
1. *Term and qualification.*
2. *Powers, duties, and liabilities.*
3. *Compensation.*

1. *Term and qualification.*

Effect of constitutional amendment of 1883 on term and salary, 546, 547, 551.
Elected to fill vacancy, holds only for unexpired term, and until successor elected and qualified—bond not good for longer time, 484.
County commissioner is elegible to office of, 168, 412.
But cannot hold both offices at same time by himself or deputy, 455.
Where bond, though defective, is filed by, in time, no vacancy is created, 63, 67.
Failure to file an additional bond when required, within 10 days after notice, creates vacancy in office of—when board not in session should file it with county auditor, who is clerk, 394. [See State v. Sanderson, 26 Minn. 333.]

2. *Powers, duties, and liabilities.*

Duty as to receiving town and school orders paid in on taxes, 416.
Duty as to payment of money due to school-districts—must have certificate of exclusive use of state text-books, 411, 422.
Cannot lawfully cash town and school-district orders drawn by their treasurers, but only orders of county auditor drawn in their favor, 357.
May receive town orders in payment of taxes—when, 358.
Should not refuse to pay order of county auditor given school-district treasurer because of controversy over latter's right to the office, 409.
No right to deal in school orders or redeem them, instead of paying over funds, 267.
To keep books on system prescribed by public examiner, 546.
Duty of, as to collection of personal property taxes, 572.
Cannot legally agree to postpone collection of personal property tax until after June 1st, 538.
What property to take by distress for taxes—nothing exempt, 438.
If, after return of delinquent list, he learns of property, he should take it, 438.
What evidence of authority his deputy must have to collect taxes by distress or otherwise, 438.
What degree of search for property to be made by, 438.
In collecting personal property taxes, cannot take property sold to *bona fide* purchaser after its assessment for tax against it, 533.
Where no banks or bankers are in county, he may select his own place of deposit in or out of county, 411.
Should decline to deposit funds with depositary who has not fully complied with law by giving bond, etc., 445.
Where no depositary is designated, is responsible for all public funds, where designated is responsible for deposits in excess of bank's assessed capital stock, 427, 430.
Manner of examining accounts of, by auditing board—depositing in bank in individual and official name—liability for funds not in designated banks, 365.
No right to loan out county funds with or without interest, and is liable to criminal prosecution therefor—also to civil action—if he receives interest it belongs to county, 379.
What amounts to loan—instances, 386.
No authority to pay order signed by deputy county auditor after notice of revocation of his appointment, 481.
May pay in legal tender, but no right to speculate in county money, *i. e.*, gold, 101.

COUNTY TREASURER—Continued.
When enjoined by court having jurisdiction, the injunction is justification for non-action, 109.
Not warranted in paying an order illegal on its face, 472.
Responsible for amount shown by receipts given for payment of taxes, which receipts are conclusive against him, 343.
Liability for money stolen from safe, and for mixing his own with county funds, 222.
Bond of, duty of county commissioners in reference to, generally, 523.
Bond of, is security for all taxes, town as well as county, 68.

3. *Compensation.*

Fixed by section 172, *c.* 8, Gen. St. 1878, and is in full for all services, 438.
Not entitled to percentage on moneys collected and paid him by town treasurer, 85.
Fees of, not affected by collection of war tax, 98.
May retain his fees out of town or district funds on settlement with them, 113, 118.
May compute commissions on receipts when received, and without reference to amount received during same term by his predecessor, 221, 420, 552.
Not entitled to pay for expenses while away from county seat collecting taxes, 381, 400, 468.
Fees of, where distress is levied for taxes, same as constable fees—none allowed unless levy is made—county not liable for them, 438.
Not entitled to percentage on amount retained from school-districts to pay for school books ordered, 486.
Not entitled to percentage on school funds received, in addition to his salary, 529.
Salary of, in counties where valuation is between six and eight millions, limited to $2,000. 445.
See supreme court case cited *contra*, 446.
Where salary fixed by special law at certain sum, cannot receive a full year's salary where term is cut short by constitutional amendment, 548. Affirmed, 18 N. W. Rep. 316.

COURT COMMISSIONER. See MARRIAGE.
Not entitled to office furnished at county expense, 494.

DEBT. See STATE RAILROAD BONDS.
No imprisonment for in this state, 444.
Limit of state debt, 143, 271.

DEPOSIT OF PUBLIC FUNDS. See BANKS AND BANKING; COUNTY TREASURER.
County treasurer only required to deposit in bank when designated by board, 471.
If depository law is fully complied with, treasurer is not liable, otherwise he is for all public funds, 445.
Treasurer depositing in bank in excess of bank's assessed capital stock, such excess is at his risk, 427, 430, 497.
Where no depository lawfully designated, is liable for all funds, 430, 445.
When no bank or banker in county, depository law not applicable, and board cannot designate other parties, but treasurer may select depository, 411.
Board of audit may entertain proposals from banks outside of county if public interests require it, 415.
May be made in bank which is not assessed for "capital stock" by that name, but for money and credits, 332, 346. See 427, 430, 445, 497.
Capital stock of depository defined—excludes real estate, 497.
Commissioners for, have discretion to designate depositories at any time they may see fit to invite proposals, 298.
Chairman of board may be depositary if he is a banker or owns a bank, 455.
When bank becomes defunct by death of owner or otherwise, a new depository is to be designated, 493.
Rule as to computation of interest on monthly balances, 422.

DEPOSIT OF STATE FUNDS.
State treasurer not limited to state and national banks, but may select private banks, 398.
Form of bond given, 291.
Bonds of depositaries, when new, to be given—penalty—effect of change of rate of interest by oral agreement—authority of examiner and board as to rejection—statute defective, 511.

DEPUTY AUDITORS.
May execute tax deeds or other instruments which auditor could, 125.

DESERTERS.
Persons fleeing from draft or deserting cannot be disfranchised by proclamation of the president, nor by act of congress, 211, 224.

DETECTIVES.
Governor no power to appoint, as there is no such office, 443.

DISTRICT COURT. See CLERK OF.
Authority to appoint a short-hand reporter of, cannot be revoked by county commissioners after appointment by judge, 406.

DOG LICENSE LAW.
How violations of, to be prosecuted, 124.
Repeal of, did not affect money paid in treasury on account of, and town could not vote to refund it to parties paying, 533.

DRAFT.
Clergymen subject to, under law of 1862, 85.
Persons fleeing to avoid, cannot be disfranchised, 211.

ELECTION DISTRICTS.
May be established in unorganized counties and on Indian reservations by the governor, 30.

ELECTION RETURNS.
For members of legislature, to be sent to senior county; *i. e.*, county having oldest organization in the district, 516.
Judges of, no right to deputize third party to carry returns, and such person is not entitled to any compensation from county, 345.

ELECTIONS. See VOTERS AND VOTING; WOMEN.
Must be by ballot, except as to town officers, 352.
Provisions as to time and place of holding are mandatory, and must be strictly pursued, 530.
Not invalid for non-observance of directory provisions of law regarding, 184.
Votes cast for ineligible candidate are of no effect, and election fails, 330.
Votes given to candidate on his pledge to donate his salary are void, 362.
Votes cast at, for a minor, are void, 379.
Returns of, in unorganized counties—where to be made, 380.
To be held biennially in even-numbered years, but not for *all* officers in 1884, 551.

ELECTIONS IN TOWNS. See TOWN MEETINGS.
To be held at usual place of holding town meetings, unless changed by vote, 482.

ELECTIVE FRANCHISE. See COUNTY SUPERINTENDENT; WOMEN.
Cannot be taken away by presidential proclamation nor act of congress, 211, 224.

ELEVATORS. See TAXES AND TAXATION.
On railroad lands—whether are personal or real property is a question of fact, 318.

ELIGIBILITY. See OFFICE.
Rule as to votes cast for ineligible candidate stated, and authorities cited, 146, 277, 407.

EVIDENCE.
No distinction between that of negroes and white persons under laws of this state, 185.

EXECUTIVE OFFICERS.
Nothing to do with consequences or constitutionality—to administer law as they find it, 67, 121, 212, 269, 539.
Not required to pass on rights of parties, *e. g.*, under a tax deed, 102.

EXECUTORS AND ADMINISTRATORS. See ADMINISTRATORS OF ESTATES.
Objection to certain bill regarding, 156.

EXEMPTION FROM TAXATION. See HOMESTEAD LANDS; RAILROAD LANDS; TAXES.
Of railroad lands by general law is unconstitutional, 199. See 242.

EXEMPTION OF HOMESTEAD.
Extends to process or execution for costs, fines, etc., in criminal cases, 171.

EXTRADITION OF FUGITIVES. See REQUISITIONS.

EXTRA SESSION OF LEGISLATURE.
Bond to pay costs of, invalid on grounds of public policy, 168.

FEES OF COUNTY OFFICERS.
Where precise amount is not fixed by law, but only the rate, claims for, must be presented to county board, 376.
Auditor's salary of latter class, 381.
Of register of deeds for entries in tract index-book, 462.
Of sheriff, on returns of taxes collected, not to be retained out of collections made, but to be audited under law of 1858, 4.
Amount allowed on returns of taxes unpaid, and mileage, under law of 1858, 5.
Regarding care, etc., of prisoners, 454.
Of county surveyor for surveying school lands, 88.
Of county treasurer—war tax not to be included in computing, 98.
County treasurer not entitled to, on moneys paid him by town treasurer, 85.
Of county treasurer—may be retained by him out of the various funds collected by him, 113.
Of town treasurer—not to be computed on moneys received from predecessor, 523.

FINANCIAL STATEMENT.
Where to be published "for three weeks," but three insertions are required or to be paid for, 255.

FINES AND FORFEITURES.
Cannot be paid in county orders, 170.

FISH-WAYS.
Notice by commissioners to build—what it should contain—how served—who by, 373.

FOREIGN CORPORATIONS. See INSURANCE COMPANIES.
Veto of act relating to, advised—should not be permitted to hold lands in perpetuity *ad libitum*, 453.

FREEHOLDERS. See SCHOOL-DISTRICTS.
Who are—when women become, 345.

FREIGHT CHARGES ON RAILROADS. See JUDICIAL POWER; RAILROADS.
Laws of 1874 relating to, construed, 296.
Legislative control over—how reasonableness of, ascertained, 237.

FUGITIVES FROM JUSTICE. See REQUISITIONS.
Cannot be extradited when serving out sentence in this state, unless pardon is granted and accepted, 421.

GAMBLING.
How to be prosecuted under law in 1863, 122.

GARNISHMENT.
Does not lie against public officers, 160.

GERMAN. See SCHOOL-DISTRICTS.
May be taught in schools of St. Paul, and other school-districts, 535.

GOVERNOR. See CONSTITUTIONALITY OF LAWS; PARDON; RAILROAD LANDS; REQUISITIONS.
When veto power of, should be used, 151.
Appointing power of—implies power of removal, 128.
No power to appoint justice of the peace, 177, 519.
Power as to appointment of officers in unorganized counties, 177.
Has no authority to create new offices, as by appointing special detectives, 443.
Cannot grant pardon until after trial and conviction, 172.
Temporary absence of, not such vacancy as to authorize lieutenant governor to exercise duties of the office, 41, 79.
Where lieutenant governor acts as, should be paid, 79.
May also hold office of United States senator, 103, 108.
No authority to adjust or pay claim of state agent for collection of claim against United States under certain legislative resolution, 514.

GRAND JURY.
No power over state prison, 342.
Cannot be reduced in number by legislative act, 65.
Duties under law of 1863, 111.

GRANTS OF LAND. See INTERNAL IMPROVEMENT GRANT; RAILROAD LANDS.
When *in præsenti*, are not forfeited until so declared by legislative act or judicial proceedings, though cause of forfeiture may exist, 328.

GROSS EARNINGS TAX. See RAILROAD TAX ON EARNINGS; TAXES AND TAXATION.
Constitutionality, policy, and history of, discussed, 199, 242.
Provisions for, construed, 246, 254.
For the purpose of computing, all the branches of St. Paul & Pacific Railroad treated as one road, 254.
Percentage of, payable by the Winona & St. Peter Railroad Company from 1865 to 1873, 282.
When it attached on Hastings & Dakota Railroad, 336.
When it attached on River Division Chicago, Milwaukee & St. Paul, 337.
Southern Minnesota Railway Extension Company is a distinct corporation, and may avail itself of chapter 111, Sp. Laws 1873, relating to, 397.
Union Depot Company at St. Paul liable to pay on moneys paid it by other corporations, (if part of its earnings,) though previously taxed in their hands, 513.

HEALTH OFFICERS. See BOARDS OF HEALTH.
Duty to look after and prosecute offenses against the public health, 507.

HIGH-SCHOOL BOARD.
Power to dispose of, to schools or to expenses, the unexpended balance of appropriation remaining at end of school year, 392.
No discretion as to what schools shall receive state aid first—must be served in order of application, 389.
No power to make fund appropriated for one year applicable to two years—to divide it, 389.

HIGH SCHOOLS.
Lessons in Greek not necessary to entitle to state aid, 441.
Not entitled to state aid if charge for instruction is made to non-resident pupils, 531.

HIGHWAYS. See ROADS AND BRIDGES.

HOMESTEAD. See EXEMPTION.
School land held as a, cannot be sold or certificate assigned without signature of wife, 510.

HOMESTEAD LANDS. See TAXES AND TAXATION.
Are taxable before patented, and may be sold for taxes, 144.
But taxes levied on, become void on reversion of land to government, 217.
Liable to taxation after patent issues, for bonds issued previously thereto, 220.
When held under cash entries, or after proving up, are taxable, 306.
Otherwise not—but improvements are taxable, 306.
Not proved up, are not taxable till then, 364.
Improvements and interest of holder to be taxed as personal property, 244.

HOUSE OF REPRESENTATIVES. See LEGISLATURE; SPEAKER OF HOUSE, 480.
Need not remain in session during impeachment trials, 275.
May adjourn to day certain, but cannot convene after time limited for session, 275.

ILLUMINATING OILS. See OIL.
Statute relating to inspection of, construed, 539, 548.

IMPEACHMENT TRIAL. See SENATE.
Not necessary for house to remain in session during, 275.

INCOMPATIBLE OFFICES.
1. *What are incompatible offices.*
2. *What are not.*

1. *What are.*

County attorney and deputy county treasurer, 365.
County attorney and judge of probate, 310.
County auditor and county superintendent of schools, 468.
County auditor and clerk of court, 350.
County commissioner and overseer of the poor, 508.
Clerk of district court and county treasurer, 396.
County commissioner and deputy county treasurer, 455.
County auditor and county treasurer, 148.
County auditor and deputy county treasurer, 224.
Sheriff, or deputy, and notary public, 340.
Member of legislature and justice of the peace, 295.
Trustee of school-district and teacher, 486.

2. *What are not.*

Justice of peace and county attorney, 240.
Governor and United States senator, 103, 108.
County attorney and county superintendent, 521.
County attorney and register of deeds, 310.
Register of deeds, clerk of district court, and judge of probate, 214.
What constitutes incompatibility, 350, 521.

INDIAN TRIBES.
State laws do not extend to, where tribal relations are maintained, 348.

INELIGIBILITY. See CONSTITUTION; ELIGIBILITY; OFFICE.
Of majority candidate does not give minority one the right to office, 277.

INFECTIOUS DISEASE. See BOARDS OF HEALTH; SCHOOL-DISTRICTS.
Schools may be closed by boards of health where prevailing, 564.

INSANE, HOSPITAL FOR.
Letting work on, to lowest bidder—case stated and discussed, 275.

INSURANCE COMMISSIONER.
Appointment—term of office—failure of senate concurrence leaves incumbent holding over, 331.

INSURANCE COMPANIES. See TOWN INSURANCE COMPANIES, 466, 427.
Mutual companies, except town insurance companies, are not authorized to be organized in this state, 431.
Application of certain sections of General Statutes (1866) to home companies, 238.
Are private corporations—may have vested rights—are subject to legislative regulation subject to such rights, 289.
Change in law does not affect those already licensed for the year, 226.
Cannot be organized under law relating to benevolent societies, 287.
Mutual life companies defined—no law for organization of, in 1874, 288, 289.
Other than life, fire, and marine, organized under laws of foreign government, not entitled to do business here without deposit in this state of $100,000, or certificate of such deposit in state where organized, 485.
What constitutes organization of—certificate of deposit and of right to do business does not, 485.

INSURANCE LAW.
District court has jurisdiction under act of 1860, 184.

INTEREST. See COUNTY ORDERS, 402.
When payable on school orders, 341.
Due on sales of school lands, cannot be reduced as to past sales, 524.
Rule of computation of, on monthly balances of public funds on deposit, 422.
On county orders, 7 per cent. from date of demand, 153, 423.
On state debts cannot be paid or allowed unless specially authorized by law, 341.
Not chargeable on taxes from time of becoming delinquent to date of sale, 472.

INTERNAL IMPROVEMENT GRANT. See GRANTS OF LAND.
Was a present grant of a floating title, which becomes fixed only on survey and selection; hence, government could dispose of land not selected by making subsequent grants to railroads, 294.

INTOXICATING LIQUORS. See LIQUOR LICENSE.
Treaty provisions relating to, were abrogated by admission of the state into the Union, 40, 62.
Law relating to, prohibits manufacturers and brewers, as well as others, from selling without license anywhere, 464.
General law relating to, is made inoperative in certain villages by their charters; but to a limited extent in some cases, 517.
Licenses may be issued to different classes of sellers, at different rates for each class, by county commissioners, 428.

JAILS. See COUNTY; PRISONERS.
Sheriff or jailer may furnish bedding, etc., at expense of county, but cannot make repairs to, unless ordered by county commissioners, 549.
What constitutes separate rooms in, 549.
Commissioners of county to provide—may issue county orders for building, 464.
Or county bonds, 385.

JUDGE OF DISTRICT COURT. See DISTRICT COURT.
Ineligible to membership of board of corrections and charities, 531.

JUDGE OF ELECTION. See ELECTIONS; VOTERS AND VOTING.
May be candidate and legally elected to an office at election where he presided as judge, 184.

JUDGE OF PROBATE. See ADMINISTRATORS OF ESTATES; PROBATE COURT.
A constitutional officer—one elected at first state election could act, 4.
Appointed to fill vacancy, holds only until successor is duly elected and qualified, 238.
Whenever elected, holds for two years under the constitution, 403, 447.
Whenever holds over, is an officer *de facto* only, 447.
Can require an account by administrator, but cannot withdraw management of estate from his hands before removal, 78.
No power to compel county auditor to issue warrant for bill of fees, etc., audited by him, 516.
May perform ceremony of marriage, 443.
Salary of, to be computed as provided by law, and county commissioners have no jurisdiction or power in the matter, 520.
Salary of—rule as to computation of percentage on population of county, 415, 522.
Salary of, cannot be computed on census taken the same year, and after computation has been made for the year, 338, 444, 448.
Salary of, in Rice county—whether Special or General Laws in force as to, 431.
Cannot charge or receive fees for examining and committing insane persons to hospitals, 385, 448, 484, 497.
Clerk hire of, must be provided by county—not the judge, 448.
Cannot receive extra compensation, 497.

JUDICIAL DISTRICTS.
Act creating Seventh district constitutional—governor may appoint judge for new, 228.

JUDICIAL POWER. See FREIGHT CHARGES, ETC.
Law fixing tariff rates of freight is an exercise of, and therefore invalid, 237, 238.

JURORS. See GRAND JURY.
At coroner's inquest not entitled to mileage, 469.
Mileage (district court) to be computed from his residence to court, 470.

JURY TRIAL. See VILLAGES, 369, 326.
Citizen arrested for failure to perform military duty has right to, before justice of peace, 121.
In justice court no peremptory challenges allowed in criminal actions—challenges for cause tried same as civil actions, 240.
Party prosecuted under village ordinance not entitled to, 369. See 326.

JUSTICE OF THE PEACE.
Cannot be appointed by the governor, 177, 519.
Acceptance of appointment of office of town justice vacates office of village justice by one who held latter, and should turn over his docket to successor, 531.
Term is fixed by constitution at two years, and legislature can neither shorten nor lengthen it, 371.

JUSTICE OF THE PEACE—Continued.
And whenever *elected* holds for two years—no more, no less, 241, 427.
Cannot be member of legislature, or *vice versa*, 295.
Cannot audit and allow witness fees to defendant's witnesses in criminal cases before him, 492, 501.
Jurisdiction in cases of simple and aggravated assault—practice, 205.
Law partner of, cannot practice before his court, 457.
Not entitled to charge for preliminary examination prior to issuing warrant at 15 cents per folio, 494.
When once he transfers case on a change of venue he loses jurisdiction, 356.
Cannot refuse to take jurisdiction of case transferred to him on such change, 356.

LAND GRANTS. See GRANTS OF LAND; RAILROAD LANDS; TAXES, ETC.
Belle Plaine Salt Company—how title to be acquired by company, 262.
Construction of certain, relating to St. Paul & Pacific Company, 180, 183, 201.

LAWS.
Enactment of, requires approval of governor—hence substantive clauses not in bill when approved are no part of the law, 475.

LEGALIZING ACTS.
Whether an act void in first instance can be legalized, *quære*, 212. See 219.

LEGISLATIVE APPORTIONMENT. See APPORTIONMENT OF LEGISLATIVE DISTRICTS.
Can only be made at the first session after the census taken—hence districts then formed cannot be changed by change of county lines meantime, 319.
Power of apportionment generally, 140.

LEGISLATIVE POWER.
Over railroads in this state, 237, 296.

LEGISLATURE.
Members of first, not entitled to *per diem* during vacation of, 3.
Member of, cannot hold office created at session of which he was a member, 316.
Sessions of, limited to 60 solar consecutive days, 246.
Members of, eligible to other offices, 146, 406-408.
Has no power to reduce interest on income from sales of school lands, 524.
When in session, whether special or regular, may enact any constitutional laws, 478.
Terms of office of officers of, 480.

LIBEL.
Was a misdemeanor at common law—is not made a felony by statute—hence no change of venue can be taken in criminal case of, 483.

LIBRARY.
School board of independent districts no power to appropriate school money for, 501.

LIQUOR LICENSE. See INTOXICATING LIQUORS.
Cannot be legally issued by county commissioners when not in session, 496.
May be issued by county board at different rates to different classes, 428.
Petition of electors against license does not have effect of vote—commissioners to use discretion, 232.
Commissioners not *required* to issue license in any case, 315, 550.
Unless vote in town is against license, it has no effect, 550.
County commissioners cannot transfer license from one person to another, nor refund anything where licensee quits business—fee to be the same for part of a year as for a year, 508.
Money paid county commissioners for, belongs to school fund, but not in cities and villages whose charters provide otherwise, 308.
Twenty days' notice of voting on question at annual town meeting in towns is necessary, 315.
County commissioners may refuse to grant, even if notice was not given, 315.
Vote to prohibit licenses, under special law, relating to Anoka must be a majority of all legal votes *cast at the election*—not on that question—against license, 505.
Vote of town against, continues in force until revoked by a vote to the contrary, 497.
Such vote does not revoke existing licenses, 505, 508.
Brewers outside city limits, who retail beer, must have, 464.
Officers willfully refusing to enforce law prohibiting sale of liquor without license, how to be prosecuted, 122.
United States license no defense to prosecution under state laws relating to, 122.

LOGS.
Where cut and owned in this state, but are in Wisconsin waters on May 1st, are taxable in this state, 317.

MARRIAGE.
In what cases consent of guardian of minor required, 224.
License for, must be issued in county where parties reside, 234.
Court commissioners have no power to perform ceremony, 355.
Judges of probate may perform ceremony, 443.

MARRIED WOMEN.
Rights and liabilities of, under law of 1863, 114.
Where under age, cannot make power of attorney to sell real estate, 155.
Power to convey real estate must be as prescribed by statute, 247.
Taxes to be assessed and collected against her personal property the same as if single, 232, 241.

MARSHALL COUNTY.
Location of county seat—law relating to, construed, 485.

MEDICAL PRACTICE ACT.
Does not apply to those who have practiced medicine five years in this state, 545.

MEMBERS OF LEGISLATURE. See CONSTITUTION; LEGISLATURE; OFFICE.
Right to hold other offices, 146.

MILEAGE.
Of county commissioners, 468.
Of county commissioners of Winona county, 468.
Of jurors of coroner's inquest, none, 469.
Of jurors of district court—how computed, 469.
Of sheriff in pursuit of escaped criminal—rule governing allowance of, 474.

MILITARY DUTY.
Act of congress with reference to, controls, 120.
Citizen charged with failure to perform, has a right to jury trial, 121.
Who exempt from, under United States and state laws, 83.
Clergymen not exempt from, 85.

MILITIA.
Law of 1862 relating to, did not apply to volunteer regiments of the state in United States service, 89.
Law exempting uniformed members of, from taxation to certain amount, not to be held unconstitutional by executive officers, 269.

MILITIA OFFICERS.
Votes for, cannot be cast by proxy, 122.

MINERAL LANDS.
Free to all according to priority of claim and occupancy, 225.

MINNEAPOLIS MILLERS' ASSOCIATION.
May fix price to be paid by its agents for grain, but cannot control price to be paid by other parties, 483.

MORTGAGES. See TAXES.
Entitled to record without payment of taxes, 241.

MURDER.
Where wound is given in this state, from which death results in another, the other and not this state has jurisdiction, 308.

NATIONAL BANKS. See BANKS AND BANKING; TAXES.
Taxation of shares of stock in, by state, 206.

NATURALIZATION.
Of parent of foreign-born children makes latter citizens on coming of age, 345, 366, 502.

NORMAL SCHOOLS. See STATE NORMAL SCHOOLS.
Defined—agricultural college grant cannot be diverted to support of, 235.

NOTARY PUBLIC.
Is a civil officer, and therefore cannot hold office of sheriff at the same time, 340.

OATH OF OFFICE. See OFFICE; OFFICER; TERM OF OFFICE.
Statute regarding, is directory, unless it declares a failure to take, creates vacancy, 309.

OFFICE. See INCOMPATIBLE OFFICES; OFFICERS; TERM OF OFFICE; VACANCY IN OFFICE; QUO WARRANTO.
A county commissioner may be thrown out of, by redistricting the county, 334.
Cannot be sold to candidate offering to refund or donate a part or all of his salary, 362, 329.
Eligibility of members of legislature to other offices is *res adjudicata* in attorney general's office, 407.
Every voter is eligible to any elective, 548.
Minors ineligible, and votes cast for them are void, 379.
Regency of university is not an, 428.
Member of board of corrections and charities is, 531.
Where term not fixed by law, held during pleasure of appointing power, 128.
Vacancy in, person appointed to fill, holds till next election, and when elected, for remainder of unexpired term, 441, 449.
Except as to term fixed by constitution, 442.
Rent of, by county officers—county commissioners may allow reasonable sum only, 440.
Title to, can only be tried by *quo warranto*—cannot be questioned collaterally, 540.
Term of, county commissioners appointed to fill vacancy holds until next general election, and until successor is elected and qualified, 522.

OFFICERS. See TERM OF OFFICE; VACANCY IN OFFICE.
Defined—members of board of corrections and charities are, 531.
Regents of university are not, 147.
Commissioners to take soldiers' vote are not, 147.
Constitutional—statute cannot change or add to qualifications of, when defined by constitution, 108.
Executive, nothing to do with consequences, 67, 212. See 102.
Executive, to execute all laws not plainly unconstitutional, 121, 269, 539.
Where no authority exists for election of, none can be supplied by any one but the legislature, 36.
All except town officers must be elected by ballot, 352.
Failing to qualify within time prescribed, may qualify any time before vacancy declared, 331. See 309, 313.
Rules as to compensation for services within and without line of duty stated, 418.

OFFICES. See OFFICE; TERM OF OFFICE.
Territorial, were adopted by the constitution, 23.

OFFICIAL BONDS. See BOND.
How should be executed—penalty necessary—obligee to be named—duty of public examiner in relation to—partner cannot bind firm by signing firm name to, 374.
Material alterations in, after execution, invalidates, unless done with assent of signers, 67, 68.
Where filed—filing or not does not affect validity, 292.
Statute requiring, is directory, unless it declares that a failure to give and file one shall create a vacancy, 309.
Of county officers recorded at expense of county, 313.
Distinction as to newly-elected officers and incumbents as to time of filing—law directory merely as to the one, mandatory as to the other, class, 394, 395.
Provisions requiring approval are directory merely, and neglect to observe, does not create vacancy or deprive of salary, 84.

OFFICIAL BOOK-KEEPING.
System prescribed by examiner to be pursued—statute relating to, construed, 546.

OFFICIAL MALFEASANCE.
Attesting and issuing county orders known to be fraudulent, is, 109.

OFFICIAL YEAR.
When commences, under constitutional amendment of 1883, 551.

OIL.
Penalty for selling uninspected, to parties within this state, attaches, whether to be used here or not, 539.

OIL—Continued.
Inspector not authorized to enter a warehouse and inspect all oil there held, and collect fees therefor—the *holding* of uninspected oil is not unlawful—selling or offering to sell it is, 548.

ORDERS. See COUNTY ORDERS; SCHOOL-DISTRICTS; TOWN ORDERS.
School and town—how treated by county treasurer when paid in on taxes, 416.

ORGANIZATION OF COUNTIES. See COUNTY.
When and how effected, 63.
Must be by authority of some legislative act, 418.

PARDON. See GOVERNOR; REQUISITIONS.
Cannot be granted until after conviction, 172.
Quære, whether it can before sentence, 92.
Power of, includes commutation of sentence, 35, 39.
Power of, cannot be exercised by any one but governor, 39.
Cannot be granted in bastardy case, because bastardy is not a crime, 281.
Proper for governor to grant, to accomplice who has testified on promise of same by attorney general, 213.

PATENT. See HOMESTEAD LANDS; SCHOOL LANDS; TAXES.
To school land can only issue, in case of death of certificate holder, to party determined by decree of probate court to be entitled, 471.

PAUPERS. See COUNTY, 493; POOR; RELIEF OF POOR.
Legal settlement, gained only by one year's continuous residence in county, 479.

PHYSICIANS.
Who have practiced five years in this state are not required to be licensed, 545.
May be allowed more than six dollars for *post mortem* examination, 530.

POLL-TAX.
Law providing for, not to be held unconstitutional by executive officers, 121.
Applies to all male inhabitants of certain age, aliens as well as voters, 121.
Who are subject to—pensioner may be, 325.
Provision of city charter relating to, repealed by subsequent general law, 169.

POOR. See COUNTY, 493; RELIEF OF POOR, 408, 426, 479.
How supported under law of 1858, 20, 21.
Overseer of, county commissioner ineligible to office of, 508.

POOR FARM.
Can only be purchased at a regular meeting of county commissioners, 535.

POOR-FUND TAX.
Cannot be levied separately, 474.

POST MORTEM EXAMINATION. See CORONER'S INQUEST.
County commissioner may allow more than six dollars for, 530.

PRACTICE. See MEDICAL PRACTICE ACT.
Bills changing rules of, discussed, 156, 157.
Bills changing, should be closely examined, 158.

PRESIDENTIAL ELECTORS.
Foreign-born citizens of declared intention may vote for, 45.

PRESIDING OFFICER.
Every meeting or body has inherent power to change at any time, 273.

PROBATE COURT. See JUDGE OF PROBATE.
Administrators must pay for serving and publishing notices, orders, etc., where estates are less than $5,000 in value, 338.

PROCLAMATION OF GOVERNOR.
On vote for removal of county seat, is *prima facie* evidence of location, 490.

PROSECUTION.
Distinction between indictment and other prosecutions—when barred as to adultery, 542.

PROSTITUTION. See REQUISITIONS.
Would be fostered by law prohibiting prosecution for, under state law, when convicted under city ordinance, 452.

PROVOST MARSHAL.
Acts governed by law of necessity, 87.

PRISONERS.
Male and female to be confined in separate rooms—what are and what are not separate rooms stated, 549.

PRISON INSPECTORS. See STATE PRISON.
Authority of, regarding protection of prison and shops against fire, 341.

PUBLICATION OF TAX-LIST. See TAXES.
When day of letting not fixed by law, notice is necessary, 302.
May be in paper having "patent outside," 305.
What constitutes a, 167.
When law says "for three weeks," it means for three insertions in weekly paper, 255.

PUBLIC EXAMINER. See OFFICIAL BOOK-KEEPING.
Cannot be required to examine accounts of boards of education of cities—classes of accounts he is to examine, 378.

PUBLIC PRINTING. See COMMISSIONERS OF PUBLIC PRINTING.
Laws relating to, construed and defined, 304, 305.

QUALIFICATION OF OFFICERS. See OFFICERS; VACANCY IN OFFICE.
Unless statute makes a failure to qualify in a certain time a cause of vacancy, and vacancy has been declared, it may be done any time until the latter, 309, 313.

QUO WARRANTO. See ATTORNEY GENERAL.
Application to attorney general to bring action of—how made—what required, 255.
Discretion of attorney general as to bringing action in—how to be exercised, 277.
When application to be granted—when not, 406.
The only way or proceeding to try title to an office, 540.
Or for usurpation of office, 406.

RAILROAD COMMISSIONER.
Member of legislature which created office is ineligible thereto, 326.

RAILROAD COMMISSIONERS.
Power of, under law of 1874, *c.* 26, as to fixing schedule rates, 296.

RAILROAD LANDS.
1. *Right and title to.*
2. *Taxation of.*

1. *Right and title to.*

Grant to Minnesota & Cedar Valley Company construed as to deficiency on branch line being made up on main line, 1.
Right to conveyance of Minnesota Central Railway lands discussed, 229.
Grant to Minnesota & Pacific Company discussed, 52, 53.
Completed miles necessary to earn, on St. Paul & Pacific branch line, 180, 183, 201.
Branch lines entitled to the same amount as main line, 186.
Form of conveyance for St. Paul & Pacific Company, 175.
Minnesota & Pacific (now Manitoba) Company could not acquire title to, in advance of construction, except indemnity lands, 409.
Settlers' claims to, under chapter 201, Sp. Laws 1877, relating to incompleted portions of St. Vincent branch St. Paul, Minneapolis & Manitoba Railway, considered, 404, 409.
Grant to Minnesota Valley road (St. Paul & Sioux City)—application for deed of, under, 210.
Right to deed by said company considered, 214, 215.
Deed to issue to Winona & St. Peter Railroad on completion of 10 miles of road, 94.
Grant to Winona & St. Peter Railroad Company construed as to rights of settlers and the company, 320.
Duty of governor in certain case of contest between Winona & St. Peter Company and St. Paul & Sioux City Company to give deed to one adjudged to be owner, where on appeal no stay of proceedings is granted, 450.

RAILROAD LANDS—Continued.
Grants of, construed strictly against grantee, 286.
Grant to St. Paul & Chicago Railway construed, 285.
State institutions grant as against company's rights to swamp lands selected, 286, 287.
Deed of, made under power to make it, though made under mistake as to compliance with precedent conditions, is valid until set aside by court, 405, 409, 410.
Do not revert to the grantor, where grant is a present grant, until forfeiture declared by granting power or by judicial proceedings, 328.
Where original grant is a grant *in præsenti* fixed by definite location of line—intersecting lines take, as tenants in common, each a moiety of lands, 185. See 450.

2. *Taxation of.*

Taxation, and not exemption, the only constitutional rule, 199. See 242.
Contract of St. Paul & Pacific with Litchfield and others construed as not rendering taxable, 209.
If contracted to be sold, neither land nor interest of purchaser taxable, under law in 1864, 170.
Law of 1865, making taxable when contracted to be sold, construed as prospective only, 205.
Where fee has not passed out of company, lands cannot be taxed—only the interest and improvements of the purchaser can be taxed, 435, 467.
Case stated where permit is held to be contract for sale of lands, and makes land taxable, 402.
Where sold to a purchaser, but not patented to the company, are taxable—state auditor no right to decide question, 356.
When once sold, become and remain taxable, though company afterwards acquired title again, 541.
Purchased by company after their taxation, are not exempt therefrom in company's hands, 533.

RAILROADS. See FREIGHT CHARGES ON; GROSS EARNINGS; RAILROAD LANDS; TAXES.
Discussion of bill as to St. Paul & Pacific, 151.
Discussion of bill as to Minneapolis & St. Cloud, 153.
Charters of, are contracts, and, to be binding, must be accepted by company, 190.
Franchises of, not merged by sale to state, but may be regranted, 50, 51.
Constitutionality of act relating to Lake Superior & Mississippi Railroad Company discussed, and held invalid, 190, 198.
All in this state subject to section 4, art. 10, Const., and bound to carry freight on equal and reasonable terms, 237.
Unequal, unreasonable, and oppressive rates of fare or freight by, works a forfeiture of charter, 237.
Courts must decide what are equal and reasonable rates of tariff upon, 237, 238.
Law of 1874 regarding charges for transporting and handling freight, construed, 296.
Right of way over school-lands should be acquired by condemnation, 169.
Right of one to use roadway or right of way of another, how acquired, 267.
Right to extend line must be expressly granted by legislative act, 267.

RAILROAD SECURITIES.
Deposited for a particular purpose, cannot be exchanged for others, 54.

RAILROAD TAX ON EARNINGS. See GROSS EARNINGS TAX; TAXES.
Constitutionality, policy, and history of, discussed, 199, 242.
Provisions relating to, construed, 246, 254, 282.
In computing on St. Paul & Pacific Railroad, the road and all its branches are to be treated as one road, 254. See 282.

RAMSEY COUNTY OFFICERS.
Compensation of, under special laws, construed as to certain items claimed by county auditor, clerk of court, and county treasurer, 418-420.

RECORDING DEEDS. See COUNTY AUDITOR; TAXES.
Register no authority to record without certificate of auditor of payment of taxes, 491, 466.
United States patents, mortgages, and deeds made to correct an error, do not require certificate of "taxes paid," 241, 366.
Register cannot correct errors, though clerical, in record of deed made many years before—must be re-recorded correctly, 380.

RECORDING OFFICIAL BONDS.
County should pay for, 313.

REGENT OF UNIVERSITY.
Not an officer, and a judge of district court may therefore accept appointment of, 428.
May be member of legislature, 43.

REGISTER OF DEEDS.
Elected to fill vacancy, holds for unexpired term only, 233.
Not to record deeds, etc., without certificate of "taxes paid" by cash or sale, 466, 491.
Quitclaim deeds cannot be recorded without auditor's certificate of "taxes paid," 363.
Not to record deeds sworn to instead of acknowledged, 363.
To record tax certificates, etc., without acknowledgment of auditor, 309.
Fees for making entries in tract index, 10 cents for each transfer or conveyance, not each description. 324, 462, 481.
Fees of, for abstracts, 15 cents for each transfer, where county owns books, 481.

RELIEF OF POOR. See COUNTY COMMISSIONERS; POOR.
How commissioners limited as to, 426.
No appeal from allowance by county commissioners to poor person, 408.
Claim for, by one county against another, not valid unless person aided had a legal settlement in debtor county—what constitutes legal settlement, 479.

REPRESENTATIVE DISTRICTS. See APPORTIONMENT.
Law of 1871 relating to, construed, 263.

REQUISITIONS.
1. *Upon other states.*
2. *Upon this state.*

1. *Upon other states.*

Applications for—what to contain, 454, 457.
Governor no jurisdiction to demand fugitive, unless it appears affirmatively and directly that he has fled, and is a fugitive from the justice of this state, 416.
Where based on affidavit, latter must be so explicit as to justify committing the accused, 457.
Affidavit of flight must allege the facts, not the conclusion of law, 457.
Should issue where indictment found, irrespective of the facts attending the case, 37.
But in other cases, rules of the executive department must be complied with, 335.
Should not issue where offense barred by statute of limitations, 542.
Not to be issued in bastardy case, 335.
Warden of state prison has no authority to arrest escaped convict in another state without, 117.

2. *Upon this state.*

When papers in due form, customary to issue warrant, 80.
Especially where indictment is found, 37.
Not material whether offense charged in, is offense here, 56.
Warrant to be issued on—form and substance of, 56.
Fugitive must have fled from justice of other state; and unless proof of that fact appear to have been before demanding governor, warrant should not issue for arrest, 271, 335, 416, 417.
Verdict of coroner's jury not a basis for, 152.
Will not be honored where issued for collection of taxes or debts, 444.
Where seems to have been issued for the collection of a debt, should be investigated, and warrant withheld therefor, 174.
Where alleged fugitive is serving out sentence in state prison, delivery on, should be postponed, unless governor sees fit to pardon. Delivery in such case can be made in no other way, 421.

RESIDENCE.
Term defined—inmates of charitable institutions, prisons, etc., have none therein, 257.
What constitutes, as a qualification for voting, 240.

REVENUE STAMPS.
Not required on instruments used by state or county for collection of taxes, 179.

ROAD-DISTRICTS.
Town board cannot attach territory outside of town to districts within the town, 325.
Not entitled to tax raised in, separately, but only *pro rata* out of a common town fund, 472.
May be divided any time during the year except the 20 days preceding annual town meeting, 482.

ROADS AND BRIDGES.
What constitutes opening of, 12.
Obstruction of, is an indictable offense, 69.
When non-user is a waiver of public rights in, 31.
When once laid out, opened, and used, are subject to town authority to keep open and repair, 31.
State or district roads—law constitutional which compels counties through which road runs to pay the expense, 36, 37.
Power of town supervisors over, under laws of 1858, 22.
Power of county board in certain case, as to funds to be raised and used for, 224.
On section lines need not be laid out or surveyed—statute constitutes the lines public roads, 390.
Laid over school land sold but not patented, damages payable to purchaser when not in default, 400.
Towns not liable for damages for laying out or altering *county* road—the several kinds of roads—damages for each, how to be paid, 470.
Refusal of supervisors to lay out, prevents action on same highway for one year—same as to determination to lay out, appealed from and reversed on appeal, 493.
On county roads, board assesses damages, which amounts to an allowance, to be paid by order signed as usual, 512.
Petitioners for town roads need not be legal voters of the town where petition is filed. 521.

ROAD TAXES.
County road tax may be levied by county board—limitation upon, 326, 328. [See 22 Minn. 356.]
Cannot be levied as a separate tax, 474.
Of town do not belong to district reporting and paying, but go to a common town fund, 472.

ROBBERY OF PUBLIC FUNDS.
County treasurer liable for money stolen, 222.
So, also, is school-district treasurer, 501.

SALARY. See COUNTY AUDITOR; COUNTY SUPERINTENDENT; COUNTY TREASURER; JUDGE OF PROBATE.
Of county auditor, how determined—clerk hire cannot go to auditor, 315.
How computed in certain cases, 462.
Of judge of probate, how computed—must be based on census taken prior to computation, 338.
Computation of percentage of population as to salary of, 415.
Of county superintendents, how fixed—district partly in two counties, how to be counted in fixing, 495.
Where county has less than 100 organized districts, law fixes amount, and commissioners have no discretion, 303.
Of county treasurer, how limited in certain counties of between six and eight millions valuation, 445.
Of county treasurer—to be computed on amount collected at the time of collection; hence it is immaterial how much was collected in the year by his predecessor, 420, 552.
Of county treasurers and auditors elected in 1883, begins with their term on January 1, 1884, 547.

SALARIES.
Of the first state officers—when they commenced, 2.
Of last territorial officers—how paid, 5.
Of public officers may be fixed, altered, or reduced by legislature, or other body authorized to fix, 60, 100.
Cease when term ceases or stops, 548.

SALT SPRINGS.
Land grant—how title of company to be perfected, 262.

SAVING CLAUSE.
All amendments to criminal laws should contain, as to all offenses committed prior to amendment, 452.

SAVINGS BANKS. See BANKS.
When organized under act of 1867, not subject to provisions of later acts, unless reorganized under them, 323, 414.
Must strictly comply with law under which organized, 414.

SCHOOL-DISTRICTS. See COUNTY COMMISSIONERS; COUNTY SUPERINTENDENT; TAXES.

1. *Formation—alteration—organization.*
2. *Powers and liabilities.*
3. *District meetings.*
4. *Powers and duties of school boards.*
5. *District officers—qualification—term.*
6. *Right to attend school—text-books—rules.*
7. *Teachers—qualification—contracts.*
8. *School-houses—sites.*
9. *Taxation.*
10. *School funds.*

1. *Formation—alteration—organization.*

Cannot be formed, changed, or altered except on a petition of majority of entire district to be affected, 101, 130, 152, 236.
Petition for formation of, gives county commissioners no jurisdiction unless the signers are not only legal voters but freeholders, and are a majority of such residing in the territory affected, 512, 523.
Where petition for formation of, must be recommended by county superintendent, both he and the petitioners must unite upon the same territory, 512.
Petition for altering, where territory lies in two counties, must be presented to and agreed to by each county board, 239.
Division of, where situated in two counties, does not require joint meeting of both county boards to act on petition, 433.
But both must concur in same petition, 538.
May consist of an entire township, or of a territory six miles square in different townships—power of county commissioners as to giving school privileges to non-residents in such district, 500.
Power of county commissioners with reference to dividing and annexing parts left to other districts, 290.
County board may attach territory not in any district to adjoining district, and whole territory may be taxed, 382.
Division of—repeal of law authorizing, pending proceedings for, invalidates proceedings, 71.
Division of—no power in any one but the legislature to divide funds or property—old one retains all, with all liabilities, 88, 99, 302, 361, 433, 510. *Contra*, 226, 234.
Independent districts cannot be formed or changed by county commissioners or anybody but the people or the legislature, 245, 371, 500.
Nor cannot exceed six miles in length or breadth, 520.
Not legally formed and organized, cannot act as corporation and levy valid tax, 174.
May exercise corporate powers as soon as organized by election of officers, 84, 117.
Filing acceptances of offices by school officers elected, not essential to a legal organization, 117.
Organization by election of officers after time prescribed by law of 1863, *held* valid, 114.
Organization of, suspended by reason of Indian war, does not affect legal *status*, 236.
Do not lose organization by failure to hold annual meetings, elect officers, or make reports, 289.
Presumed to have been legally organized after one year's exercise of franchise, even though original organization may have been irregular, 439.
Will be conclusively presumed to have been legally organized after having actually been organized, held school, levied taxes, etc., for years, 538.
When attempted reorganization is void, district remains the same as before, 520.

2. *Powers and liabilties.*

At annual meeting, can act upon all things except building, purchasing, or fixing site of school-house, without any notice, 71, 74, 324, 477.
May repeal or modify action taken at regular annual meeting, at a duly-called meeting, 479.
By vote of majority, at duly-called meeting, can sell or exchange school-house and site, and designate new site, 260.
Cannot vote to change site of school-house without notice thereof, 476.
Two-thirds vote of legal voters residing in the district (not merely present and voting) required, when, 476.
No power to vote an increase or any compensation to officers of, 476.

SCHOOL-DISTRICTS—Continued.
Funds in treasury, raised for school purposes, cannot be appropriated by vote to purchasing site for a school-house, 316.
Cannot dismiss from office member of school board, 310.
Cannot borrow money, except as provided in relation to bonds, and orders voted and issued for a school-house and site, and furniture, 317.
But may issue promissory notes for past indebtedness, 317.
May appropriate surplus funds voted and raised for teachers' wages to other purposes after teachers are paid, 367.
Cannot elect a building committee—trustees charged with such duties, 425.
Power to allow or audit claims—trustees nothing to do with claims allowed by vote of district, 444.
Stove purchased by director for school-house a proper charge against, 251, 253.
Contract to furnish wood for present use, means seasoned wood fit for heating school-house, 314.
A sale of globes and maps, made payable "when there are funds," may be defeated by refusal of district to provide funds, 355.
Orders, when may be made to draw interest—case stated, 341.
Each citizen of, is liable for its debts individually, 182.

3. *District meetings.*

Called for 7 o'clock, voters not constituting a quorum should wait until 8 o'clock—meeting held legal under facts stated, 334.
Certain facts held not to affect validity of—clerk not to decide question of legality of, 477.
Validity of certain meetings and proceedings relative to voting bonds and selecting site for building school-house—majority present and voting constitute majority of electors of district, 390, 392.
Legal voters at, who are, 231.
Vote of meeting preceding may be reconsidered at adjourned meeting, 230, 231.
Delay in calling to order, does not affect its validity, 231.
Action taken at annual, may be modified or repealed at special, 230, 231, 315, 366, 479.
May rescind or modify former vote—moderator at special meeting, as well as at annual, is to decide who are voters, and all such questions, 366.
Designation of site at one meeting, and approval of its minutes, does not prevent another vote and selection at an adjourned meeting, 230, 231.
Director calling to order and acting as moderator is *de facto* such officer until another is chosen and seated, 273.
Meetings should be called by clerks on request of freeholders, 203.
Law regarding notice of annual meeting is directory merely, and notice is not necessary, except for vote on raising money or fixing site for school-house, 71, 74, 324, 477.
Notice of meeting sufficient if people can fairly understand purpose of meeting, 325.
In giving notice of, neither the day of posting nor of the meeting should be counted, 400.
Right of women to vote limited to district where they reside, 345. See 513.
Women who are foreigners, and not naturalized, not entitled to vote in, 345, 358.
If two trustees move away, die, or resign, special meeting should be called to fill vacancies, 297, 298.
No special meeting can be held to elect officers—if no annual meeting held, old officers hold over, and vacancies to be filled by appointment, 226, 227.

4. *Powers and duties of school boards.*

Trustees no power to bind district on notes signed by them, 188.
Trustees have no power without vote of district to hire or borrow money to build a school-house, 110.
Trustees may act and contract by majority, if no express provision to contrary exists in the law, 111, 260.
Trustees no power to purchase school apparatus, outline maps, or library, without a vote of district, 266.
Trustees may contract for fuel if voters neglect, (or if contract made under vote should fail,) and bind district, 314.
Relative powers and duties of teachers and trustees, 265.
Trustees cannot hire teacher except at a duly-called meeting—contract not so made, though teacher performs it, cannot be enforced unless ratified by district, 536.

SCHOOL-DISTRICTS—Continued.
Trustees may employ more than one teacher, if district has funds, notwithstanding an adverse resolution voted by the district, 354.
Trustees of, can contract for three months' school and no more, without a vote of district either before or after annual meeting, 102, 250, 436, 538.
A longer hiring may be ratified by district vote, 102.
Trustees not bound by resolutions of voters when their authority is derived, not from the voters, but from the law; they have discretion in such cases, 336, 362, 369.
Board must follow directions voted by district as to length of terms of school, the number of terms, or the sum voted for teachers' wages, 503.
School boards cannot exclude unvaccinated children from school; nor can boards of health, 504.
School boards can exclude children coming from families having infectious disease, from the public school, 504.
Trustees refusing to provide a school when term is voted and funds provided by district, are subject to penalty in section 86, school law, 384.
When one member of board refuses to assent to contract by majority, he may be compelled to, by law, 260.
Director refusing to sign contracts or attest orders, works no injury and does not subject him to a penalty, 310.
Board of independent district no power to make an appropriation for a public library, 501.
Board of education of independent district no power to relieve treasurer from liability for money stolen from him, 501.
Power of boards of independent districts to suspend or expel pupils for being absent or tardy discussed and confirmed, 506.
Board of education of independent district no right to issue bonds to refund bonds falling due, without vote of district, 542.

5. *District officers—qualification—term.*

Officers of, must be elected by ballot, 352.
Not entitled to gratuitious advice of county attorney, 468.
Qualify by taking official oath, 538.
Qualification of, not essential to right to act, 84, 107, 117, 239.
Hold until successors qualify, and no vacancy occurs by failure to qualify, 107, 330.
An alien, though ineligible, may act as clerk *de facto*, and meetings called and other acts done by him are valid, 316.
Clerk failing to accept office and qualify, board may declare vacancy and appoint, 313.
Cannot be appointed by city council where city charter contains no reference to schools, 108.
Director of, cannot be appointed before there is a vacancy in that office, 514.
Vacancy in office of clerk not caused by temporary absence—acts of *de facto* officer valid, 234.
Clerk cannot be punished or removed for refusal to give bond under text-book law, 489.
Women may hold any office pertaining solely to the management of schools; *e. g.*, county superintendent, 390, 487.
Treasurers must give new bonds on re-election—old bond will continue in force for 10 days, and a reasonable time for appointment thereafter, 518.
Treasurer's bond—rule of estimating amount of, 516.
Treasurer's sureties cannot deny their liability on his bond on ground of his ineligibility, 510.
Terms of—certain cases relative to filling vacancies, etc., considered and decided, 396.
Term of directors of independent school-districts commences as soon as they qualify after election, 393.
Term of new member of such board begins on third Saturday of September, 538.
Treasurer's term cannot be shortened by an erroneous entry by clerk on the record, 372.

6. *Right to attend school—text-books—rules.*

All children between proper ages, in good faith living in district, and have not come there for the purpose of attending school, are entitled to attend, 396.
Colored children cannot be excluded from public schools, 53.
Right of minor to attend school in, depends on his, not his parents', residence in the district, 235.

SCHOOL-DISTRICTS—Continued.
Residence in, depends on intention, and this is gathered from acts and declarations of party, 372.
Inmates of charitable institutions are not residents of district where institution is located, 257.
School trustees have discretion to admit non-resident scholars—one in good faith domiciled in a family in the district is not a non-resident, but has right to attend school, 106.
Scholars domiciled out of district may be required by trustees to pay tuition, and the fact that the parent owns land in district does not change the rule, 256.
Use of Bible in schools is discretionary with trustees, 83. *Contra*, 229.
Public schools must be taught in English language, 76.
But foreign language may be taught to a limited extent, 535.
German may be taught in the city schools of St. Paul under special law relating to St. Paul, 535.
Independent school-districts are subject to the state text-book law, "the Merrill law," 367, 421.
Duty of clerk as to ordering state text-books, 372.
Power of board of independent district to require declamation and composition, and to prescribe or designate pieces or subjects, 528.
Rules for government must be reasonable and proper—this a question for the courts, 506.
Schools may all be closed by boards of health where infectious disease is prevailing, 504.

7. *Teachers—qualification—contracts.*

Must be qualified to teach during whole term of contract, 259.
Where certificate expires before contract ends, it should be renewed or a new one procured, 259.
Must have certificates at the time of hiring, and a bond or promise of superintendent that one *will be issued* is not enough, 513.
Certificates of, may be for shorter time than fixed by law, but not longer, 516.
Certificates may be revoked for cause shown only, not arbitrarily—causes stated, 509.
In joint districts, county superintendent of county where school-house is situated licenses teacher, 307.
Normal school certificate does not entitle one to teach in independent district, 264.
A trustee cannot be teacher, 486.
Teacher can recover for full term, where prevented from teaching, if ready and not in fault, less damages to district for failure to fully perform, 126. See 87.
Written contract may be filed after services have been performed under verbal contract, 111.
Teacher is without remedy if teaching longer than three months without vote of district authorizing, or ratifying contract therefor, 102.
Term "month" construed as meaning calendar, not lunar month, under law of 1864, 141.
School month is four full weeks, with five working days in each week, and not 20 consecutive week days, 267.
Teacher necessarily suspending school for want of fuel need not make up time thus lost, 314.
Teachers are required to attend both the institutes held by county superintendent and state superintendent in the county—must make up time of such attendance, 310.
Holidays, except twenty-second of February, are not recognized by school laws, 267.
Law relating to procuring school registers for use of teachers, as amended by chapter 10, Gen. Laws 1868, construed. 260.
To be paid under law in force when contract was made, 88, 95.
Institutes—an unexpended balance of an annual appropriation for holding teachers' institutes cannot be used for any other year than year for which made, 260.

8. *School-houses—sites.*

In building school-house, trustees may be advised, but cannot be controlled, by vote of district as to plans, builder, etc., 269.
Trustees, no legal right to permit use of school-house for any other than school purposes, 423. [See chapter 127, Laws 1881.]
Use of school-house for other than school purposes—statute of 1881 construed—power of trustees under, 496.

SCHOOL-DISTRICTS—Continued.
When school-house is burned during term, teacher can, if always ready and willing to teach, recover wages for term, though no school was held—not so if house was destroyed by lightning, 370.
School-house liable to sale on execution against district, 188.
But cannot be sold by creditor holding a lien until same is foreclosed in court, 250.
School-house built on land, and used, is notice to mortgagee taking mortgage on land —case stated where title was defective, 353, 511.
Site for school-house cannot be acquired on school lands held under contract of purchase from state, 534.
How site of school-house to be designated and changed under laws of 1862, 227.
Vote on selection of site is valid, though notices duly posted were torn down, 269.
Trustees must build on site selected by vote for school-house, else district not liable to pay for same, 297.
Voters may at lawful meeting rescind vote of former meeting as to selecting site and raising money to build school-house, etc., 366.
Change of site of school-house requires vote of two-thirds of voters of district, not two-thirds of those present and voting at meeting, 309, 429.
Except to change towards center of district, 476, 510.
Certain proceedings relative to contracting to erect school house and pay contractor as fast as money voted is collected, considered—no interest allowable in such case, 393.

9. *Taxation.*

Levy not to exceed nine mills in any one year for building school-house, 369.
Levy not to exceed nine mills, except when not sufficient to support a school three months, 417.
Each voter entitled to vote on levying tax on propety of district, 187.
Vote of, to raise money for school-house, is entirely void if in excess of limit authorized by law, 131.
Trustees cannot levy tax for more than period specially mentioned in law, 69.
Trustees having raised tax illegally, cannot use it to pay teachers employed in excess of authority, 69.
After tax voted, entered on rolls, and partially collected, a vote to rescind is void, 241.
Report of clerk as to tax voted can only embrace such as were voted prior to time fixed for making report, 264.
If district votes to have school more than three months, must vote adequate means —trustees no power to levy tax for same, 256.
Validity or legality of tax for school purposes cannot be raised before attorney general, after having been extended and partly collected, 260, 291. See 280.
On union of districts, tax levied by one cannot be equalized by voting like tax on the other one, 187.
On division of districts, the territory remaining retains its name or number, and powers and duties as to taxation, 486.
Division of district before levy, and after vote to raise tax, vitiates tax as to part set off, 138.
On division of districts after tax is levied, and before paid, should be paid to old treasurer, 491.
Disposition of taxes in certain cases under law of 1862, 73.
Bonds of district maturing next year, tax should be levied this year to pay them, 540.

10. *School funds.*

Apportionment of fund cannot be based on a verbal return, 11.
Apportionment of fund can only be *pro rata* of amount collected, 23.
Apportionment to be made by auditor as prescribed by law, not as directed by county commissioners, 110.
Can be apportioned only on basis of October reports of district clerks, and failure to report causes loss of money to district, 111, 113.
To be made according to scholars reported by clerk, 222.
How certain funds were to be drawn and applied under law of 1862, 79, 81.
Apportionment of certain funds, under law of 1862, between existing districts in proportion to scholars, 84, 88.
Once duly apportioned to district, her right thereto cannot be divested, 135.
Where district left out of apportionment by superintendent by accident, auditor to count in when making apportionment, 155.
Apportionment of money on new reports in case where old were destroyed by fire, 155.
Not to be apportioned to district just organized and having had no school, 240.

SCHOOL-DISTRICTS—Continued.
Auditor should correct returns if he knows of errors, and apportion accordingly, 240.
How and when apportioned under laws of 1867, 245.
Reports for apportionment, how made where district is divided—effect of not making, 261, 268.
Cannot be legally apportioned on a scholastic census taken in part or all before day fixed by law, 318.
County auditor responsible to district for, if he erroneously refuses to make an apportionment to it, 268.
Evening schools to be reported for apportionment of funds same as day schools, 491.
Should be paid over by county treasurer instead of redeeming orders of district, 267.
Orders of treasurer of district on county treasurer cannot lawfully be paid by latter—he must have the order of county auditor in favor of district treasurer, 357.
Money levied for general purposes of school cannot be used for building school-house, 315.
School-district orders are receivable for school taxes only, 311, 358.
Treasurer no authority to pay orders drawn by clerk, until attested by director, 509.
License money paid county commissioners must go exclusively to school purposes—otherwise in cities or villages whose charters appropriate it otherwise, 308.
Arising from taxation not payable to district without proof of exclusive use of state text-books in district, 411, 515.
Treasurer of district to retain certificate as to use of state text-books to show to county treasurer when he draws money due, 494.
When stolen from the treasurer he is absolutely liable, and cannot be relieved by any action of the board, 501.
Power of legislature as to disposition of—sources of common-school fund—of district fund—how each may be used—powers of trustees, etc., 251, 524.
Both principal and interest due or to become due on past sales are inviolate, and latter cannot be reduced, 524.
Power of board created to invest, does not extend to exchange of securities after investment, 201.

SCHOOL LANDS.
Source of title of state to, is the United States grant in the enabling act, 234.
Title to—how proved, 234.
State's claim to all school sections, whether settled on or not before survey, asserted and considered, 37, 45, 115.
Whether state entitled to on Winnebago and other Indian reservations, 78, 115, 267.
Whether selection of, in lieu of those pre-empted under act of congress, March 3, 1857, should be made pending decision of case involving state's right, 75, 93.
Power of state to grant right of way over, doubtful, 169.
Power of land commissioner to divide land into small subdivisions—deduction of damages to, from improvements on, 71.
Right of settlers on, to cut timber, 166.
Cannot be sold without appraisal, 124.
New appraisal may be ordered at commissioner's discretion, 124.
Appraisal made cannot be disregarded or modified by commissioner, 169.
Appraisers only hold for particular appraisements for which appointed, 124.
Where returned and sold as prairie, when in fact more valuable for timber—remedy of state limited to preventing waste, 141.
Sale of, on day fixed, not absolutely essential, but may be made afterwards, 74.
Place of sale and the lands to be sold are within discretion of commissioner, 67.
Assignment of certificates of sale—rights of assignee, 67.
Where land is a homestead, unless wife joins in assignment it is invalid, 510.
Patents not to issue to heirs of purchaser before decree of distribution of probate court, 241, 471.
In case of death of holder of certificate the decree of probate court must be had, and copy furnished to show who is entitled to patent, 471.
Patent must issue to original purchaser, unless a decree or order of court is obtained determining other parties entitled thereto—*ex parte* affidavits not sufficient proof, 432, 440.
Taxed after sale same as other real estate under law of 1870, 263.
Criminal prosecutions for trespass upon, are at expense of county, 239.
County surveyors entitled to statutory fees for surveying, 88.
Bill for reduction of interest on purchase money due on sales of school land held unconstitutional as to past sales, 524.

SEED-GRAIN TAX.
What extensions permissible under the law as to payment of, 413.

SECRETARY OF SENATE.
Must pay for assistance he employs for closing up business after session, 299.

SECRETARY OF STATE.
Duties of, relating to binding, etc., of pamphlets, reports, etc., 304.
Duty of, regarding state seal, 42.

SEDUCTION.
Requisite allegations in complaint for, 457.

SENATE.
Cannot change law as to compensation of officers of, by simple resolution, 299.
Right to sit as court of impeachment beyond time limited for legislative session, 274.

SENATORS. See SENATE.
Elected in 1882 hold for four years, 527.
May be chosen at general election to fill vacancy without a proclamation of the governor, 55.

SEPARATE TRACT. See TAXES AND TAXATION.
What constitutes, 163.

SETTLERS.
Claims to lands, under act of 1877, on line of St. Paul, Minneapolis & Manitoba Railway, considered—"settlers" defined, 404, 405, 409.
On swamp lands—what to prove, to secure lands by relinquishment of state to United States, 519.

SHERIFF. See COUNTY.
Neither sheriff nor deputy can hold office of notary public, 340.
Duties as to service of warrants, writs, etc.—fees and mileage therein, 222.
Fees and mileage when unsuccessful, 403.
If without fault, in matter of escape of criminal, is entitled to mileage for pursuing him, 474.
Fees for boarding prisoners committed from another county, a charge against such county, not the state, 327, 499.
Fees for certain services relating to prisoners—board, washing, attending court, etc., 454.
Fees for carrying insane to hospital, same as that allowed any other person designated therefor, 499.
What allowable, under laws of 1860, for carrying convicts to the state prison, 41.

SHORT-HAND REPORTER. See DISTRICT COURT.

SMALL-POX PATIENTS.
When paupers, county liable to city or town for care of, 493.

SOLDIERS' BOUNTY.
Whether payment of, by counties, can be legalized by legislative act, 212, 219.

SPEAKER OF HOUSE.
Term of office of, 480.

SPECIAL LEGISLATION. See CONSTITUTION; CORPORATIONS.
Discussion of law relating to L. S. & M. R. R. Co., with reference to, 218.
As to towns and villages—any amendment not attempting to form a corporation may be passed, 426, 525, 526.

STATE.
When it became such, and its officer's term began, 2, 8.
If liable to suit, would not be liable for injuries received by state employe by the carelessness of a co-servant or employe, 525.
Nor liable to pay for capitol grounds, 525, 526.

STATE AGRICULTURAL SOCIETY.
Report of expenditures to be made by—effect of failure, 440.

STATE AID TO HIGH-SCHOOLS. See HIGH-SCHOOL BOARD; HIGH SCHOOLS.
To be given in order of applications received from schools, 389.

STATE AUDITOR. See TAXES.
Duty of, to examine and draw warrants in all cases of claims against state, and to see that all come within class law provides for, 94.
No authority to discriminate, but must, in absence of other direction, pay in order of presentment all claims allowed against state, 94.
No authority to pay deficiency in one appropriation out of another, 398.
Duty to construe tax law—his construction to be followed until annulled by judgment of court, 479.
An executive, not a judicial, officer—cannot reverse action or decision once made in matters of abatement, etc., of taxes, 434.
No power to determine taxability of lands on *ex parte* statements, nor to cancel taxes assessed, 356.
Authority of, as to cancellation of taxes—has no equitable jurisdiction—must give state benefit of doubts, 541.
Fees of, under banking act of 1858, 19.

STATE BANKS. See BANKS AND BANKING.

STATE BOARD OF HEALTH. See BOARDS OF HEALTH.

STATE CLAIM.
Against United States, for percentage on sales of Indian lands—percentage for collection to be paid by legislative act, not by governor, 514.

STATE DEBT.
Constitutional limit of—new debt cannot be created beyond limit, to pay old, 143, 271.

STATE FUNDS. See DEPOSIT OF.
May be considered county funds while yet in hands of county treasurer, 395.

STATE LANDS. See INTERNAL IMPROVEMENT GRANT; SCHOOL LANDS; SWAMP LANDS.
When relinquished to United States, 294, 519.
When lands sold for taxes become—actions against parties trespassing upon, 352, 353.

STATE NORMAL SCHOOLS. See NORMAL SCHOOLS.
Cannot use money appropriated for building purposes for current expenses, 263.
Certificate from, enables holder to teach in common schools, but not in independent districts, 264.

STATE OFFICERS. See GOVERNOR, STATE AUDITOR, ETC.
Cannot be garnished, or funds in their hands attached, 43.
Constitution did not adopt territorial officers as, 6.

STATE PRINTING. See COMMISSIONERS OF PRINTING.
How contracted for under law of 1860, 198.
May be relet where bidders combine to prevent competition for, 434.

STATE PRISON. See COMMISSION OF APPRAISAL; WARDEN.
Authority of inspectors as to leasing shops, etc., 269.
Inspectors of, no power to draw money from state in advance of expenditure, 243.
Authority of warden—how limited as to delivery of remains, on death of prisoners in prison, for surgical study, 498.
Award of commission appointed to settle differences with prison contractors—construed with reference to authority of appraisers, 478.
Warden of, no authority to arrest escaped convict in another state without requisition, 117.
Grand jury have no control over or duty to perform with reference to, 342.

STATE RAILROAD ADJUSTMENT BONDS.
To be signed by officers of state in office when issued, 495.

STATE RAILROAD BONDS. See BANKS AND BANKING.
History of their issue—railroad first mortgage bonds issued as security for, not to exceed in amount the state bonds received, 12.
Discretion of governor as to delivery, 33, 35.
Foreclosure of mortgages given to secure, discussed, 41, 42.
History of foreclosure of mortgages for, and objections to validity of foreclosure sales discussed, 46, 50.
If valid, are taxable, 129.

STATE REFORM SCHOOL.
Managers of, to receive persons under 17 years of age committed by United States court for any term sentence fixes, 540.

STATE ROADS. See ROADS AND BRIDGES.
How far town authorities had jurisdiction over, under law of 1858, 22.

STATE SCHOOL FOR IMBECILES.
Under charge of superintendent of deaf, dumb, and blind asylum, 481.

STATE SCHOOL FUNDS. See SCHOOL-DISTRICTS; TAXES, ETC.
Duty of board created to invest, ends with investment, 201.
Cannot be diverted, or money paid into, refunded out of, 370.
Income of, is also inviolate, and interest to accrue cannot be reduced, 524.

STATE SEAL.
Duty of governor and secretary of state regarding, 42.

STATE TEXT-BOOKS. See SCHOOL-DISTRICTS; COUNTY TREASURER.
Duty of district clerks as to when and how many to order for each year, 372.
Certificate of use of, required (after two years use in county) to entitle district to school money, 411, 422.
Certificate as to use of, by district, to be retained by treasurer and produced or shown to county treasurer when money due district is drawn, 494.
Such certificate should bear date but a short time prior to payment, 515.
Duty of county treasurer as to moneys applicable under law relating to, 369.
Independent districts are subject to law relating to, 367, 421.
County treasurers not entitled to percentage on money retained from districts to pay for text-books ordered, 486.
Clerk of school-district cannot be punished or removed for refusal to give bond under law, 489.
Agents for sale of, are not insurers and not responsible for loss of, by fire, theft, etc., 538.
Women cannot vote upon continuance of, in schools, nor can electors in districts not subject to text-book law—special districts, 442.

STATE TREASURER. See DEPOSIT OF STATE FUNDS.
In depositing state funds may select private as well as state and national banks, 398.
Duty in certain case relative to receiving state bonds, 35.

STATE WARRANTS.
Do not draw interest—payable only when treasurer has funds, 341.

STATISTICS.
Duty of assessors to furnish all ordinary, without extra pay, 465.
Fees for furnishing extra, 465.

STATUTE OF LIMITATIONS.
Bars prosecution for adultery after one year from time of offense, in all cases, without exception, 542.
Exceptions in, will not be implied or ingrafted by the courts, 542.
Requisition will not issue if it bars prosecution, 542.

SUPERINTENDENT OF PUBLIC INSTRUCTION. See ATTORNEY GENERAL.
Office of, under territory, not continued by state constitution, 6.
Creation of office of—vacancies in, how filled, 288.
Term of office of, when expires, 520.
On written application of superintendent only, is attorney general required to give opinions upon school questions, 434.

SURETIES.
On bond of a treasurer, estopped to deny liability on ground of his ineligibility, 510.

SWAMP LANDS. See GRANTS OF LAND.
State not entitled to any, within the limits of railroad grants, except where not taken by railroads, 126.
Government selections of, conclusive, 127, 522.
State grants of, are present grants, conveying only a floating title, which becomes fixed only on location of line of road or making certain selections—state may dispose of same any time before location of line or selection, 249, 258.
Claim of railroad company against state institutions for lands selected for latter, denied, 258.

SWAMP LANDS—Continued.
Constitutionality of grant of, not a question for executive after approval of the law, 258. See 284.
State institutions grant not a contract, and subsequent disposition of lands granted to, may be made by legislature, 284.
State not liable to pay land-office fees for entering selections of, 217, 522.
Land commissioner has power to sell grass on, 67.
Act for relief of settlers on, does not include "soldiers' additionals," 425.
But does, lands held under homestead or tree-claim entries—evidence necessary, 519.

TAXES AND TAXATION. See COUNTY AUDITOR; COUNTY TREASURER; GROSS EARNINGS; RAILROADS; SCHOOL-DISTRICTS.

1. *What property taxable—what exempt.*
2. *Assessment and listing of property.*
3. *Abatement and equalization.*
4. *Rate and manner of levy—corrections.*
5. *Payment and collection of tax—treasurer's power and duty.*
6. *County auditor's certificate as to payment.*
7. *Publication of tax-list—what constitutes—where published—descriptions in.*
8. *Judgment—nature and effect.*
9. *Tax sale—manner and effect.*
10. *Sale of forfeited lands.*
11. *Assignment where bid in by state.*
12. *Redemption from sale—who may redeem—when and how made.*
13. *Refundment where sale was void.*
14. *Taxation of railroad lands.*
15. *School taxes.*
16. *Miscellaneous.*

1. *What property taxable—what exempt.*

Property used for private or select school purposes is not exempt, 388, 395.
Dwelling-house on Carleton college grounds, leased for rental, is not exempt, 344.
Parsonage of a church is not exempt, 344.
Bishop's residence and grounds, not necessary for use of church, are taxable, 54, 55.
The funds of Carleton college are exempt, 344.
Lands entered and not patented under homestead act are subject to taxes, 119, 144.
How collected against such lands, 144.
Lands not pre-empted or taxable at time of assessment cannot afterwards be extended on list, or taxed as omitted lands, 93.
Lands held under homestead act under cash entries, or after proving up, are taxable, 305.
Before that, only improvements can be taxed, 306.
Timber-culture lands are virtually homestead lands, and improvements are taxable as personal property, 336.
Lands located with half-breed scrip taxable before patent, 59.
Lands entered under special acts of congress are taxable from date of entry, 165.
Capital stock in corporation being taxed in another state, does not prevent taxing shares of stockholders resident in this state, 208.
National bank shares are to be taxed in this state—manner of, 189, 206.
Banks—what securities and property of, taxable, 160.
Saw-logs cut and owned in this state, but which are in Wisconsin waters on May 1st, are taxable here, 317.
Residents may be taxed for moneys loaned to parties out of state, 32.
Lands sold for taxes continue taxable, 24.
Cannot be imposed on state revenue, or machinery of state government, by the United States, by duties and stamps, 104, 179.
Lands pre-empted, but not paid for, are not taxable, 24.
Property upon, and owned by residents on, military reservations of United States is exempt from taxation, 100.
Lands held under homestead law are not taxable until final proof made; only the improvements can be taxed, 364.
Certificates of purchase at tax sale are not taxable, but land is, and should be transferred to purchaser by the auditor for taxation, 121.
Treasury notes of United States not taxable by state, 78, 178.
State receipts or other instruments not taxable by United States, 104, 179.
Where land is exempt, that fact must be pleaded by answer, else judgment against it will be valid, 446.
After foreclosure of mortgage on land, debt is satisfied thereby, and mortgage cannot be taxed as a credit, 306.
Certificates of foreclosure and sale of land are not taxable as personal property, 377. *Contra*, 401.

TAXES AND TAXATION—Continued.
Certain Catholic church property held exempt, 221.
Parish schools of churches are exempt—how tax levied on may be abated—if sold on judgment, latter may be canceled—how, 476.

2. *Assessment and listing of property.*

All proceedings for enforcing, must comply strictly with law, 62.
Assessment of, after time mentioned in law, (1859,) valid, 11.
Poll-tax may be assessed and collected after time prescribed therefor, 123.
What provisions as to, are directory, 123.
In assessing real estate, what constitutes separate tract in country or in town, 163.
All property to be assessed at cash value irrespective of incumbrances, 529.
Taxation of banks—how and where taxed, 128, 132.
Telephone companies are not telegraph companies, but are to be assessed and taxed as companies or associations, 435.
Steam-boat companies—how taxed, 76.
Who is a merchant under tax law, 75, 80.
Where property to be listed in certain case under law of 1860, 75.
Omitted lots or tracts—how assessed, and when, 190.
To be assessed at true comparative value, and equalized in same way, 86.
Assessment of personal property taxes—when to be made—effect of law where sale is made, 264.
Where personal property of non-residents to be listed under laws of 1861, 225.
Are assessed and collected on property of married woman same as if single, 232.
Assessment of sum payable on a contract of sale as a credit, should be at full price of sum payable, 237.
Taxes may be assessed on stock of goods, and also on proceeds of sale of same, as money or credits, 264.
Money must be listed where owner resides, though money may be in bank in England—statutory and common-law rules applicable, 332.
Assessment of corporate stock to be listed and taxed at place of business or principal office, 459.
Applies to building associations, 459.
Listing of warehouses, elevators, or grain-houses in town where situated, 459, 318.
Parties owning property are not entitled to any deduction on account of what they owe on purchase price, 535.
Indebtedness is to be deducted from credits only, not from any other assessable property, 535. See 150.
Money and other personal property is to be assessed as of its *status* on May 1st—subsequent investment or disposition makes no difference, 536.
Mortgages to be assessed in town where mortgagee resides, even though double taxation results by also taxing the property, 529.
Where land was assessed by the acre one year, which had since been divided or platted into lots, cannot be reassessed next year, 388.
On school lands sold, tax is levied in same manner as other lands, under law in 1870, 263.
In villages, under the general law, the assessor of the town in which village is situated is to assess village property, 506.

3. *Abatement and equalization.*

Abatement of taxes cannot be made under present law by county commissioners—can be made by state auditor only on recommendation of county commissioners, 425, 463, 529.
State auditor no jurisdiction unless county commissioners recommend same officially as a board; he cannot grant rehearing, or act a second time on same matter, 434.
State auditor no authority to grant abatement, cancel a sale, or satisfy the judgment recovered, even where sale to state has been made, and though land was not taxable, 446. [Changed by Laws 1881, c. 10.]
County commissioners had no authority to abate taxes or costs where land was sold on judgment for tax, 347, 350.
No power existed in county commissioners to order reassessment or abatement after time of redemption expired, under laws in 1863, 139.
Where power of abatement was vested, under law in 1862, 61, 96.
County board had the power of remitting tax or modifying assessment, under law in 1858, 11.

TAXES AND TAXATION—Continued.
Equalization of assessment—mode and manner of making—power of board as to raising values and adjusting same between towns, 86.
Equalization of assessment—power of county board to raise or lower town or individual assessment on personal or real property—definition of term "equalize," 288.
Equalization board cannot meet after time fixed by law—such provision is mandatory, 98, 326, 437.
No remedy for failure of equalizing board to meet at time and place required by law, 326.

4. *Rate and manner of levy—corrections.*

Tax voted in excess of legal limit renders vote void, and no tax can be extended, 131. *Contra*, 343.
If amount voted by town exceeds limit, auditor to extend only what law allows, 343.
Limit of tax levy for county purposes under chapter 11, Gen. St. 1866, 239.
Must be levied on uniform rule of percentage on valuation of property, 148.
May be levied by county board for county roads and bridges beyond a five-mill tax levied for ordinary purposes, 326, 328.
After amount fixed for support of poor by county commissioners is extended on tax-list they cannot change it, 328.
Taxation signifies an annual levy or assessment, and one town board cannot levy for future years, 215.
Commissioners' estimate for revenue fund may state items, but no separate tax can be levied, but a gross levy for all purposes made, 474.
The one-mill school tax must be levied by county commissioners, or auditor has no authority to extend it on list, 483.
Levy extended for reimbursement of expenses of town boards of health must be on property of entire county, 535.
Lands held under homestead law, how tax levied on, 244.
Time prescribed for levy of, by auditor, directory, and may be done any time before delivery of duplicate to treasurer, 87, 96.
When *mandamus* will issue to compel levy of, 133.
No tax can be extended or collected after repeal of law authorizing same, 97.
Where assessor's return fails to show certain facts, auditor to inquire and act on best information obtainable, 87, 98.
Auditor to remedy omissions of assessors in certain cases, 258.
Provision as to deduction of debts from credits unconstitutional, as violating rule of uniformity, 150.

5. *Payment and collection of tax—treasurer's power and duty.*

Taxes are payable in orders of county, town, etc., for county, town, etc., taxes only, 311.
County orders are receivable for county tax without regard to order of presentation, 356.
Wolf county orders receivable in payment of taxes, 342.
Receipts for payment of taxes are not conclusive, 475.
But are against the treasurer and his sureties, 343
County treasurer's liability arises when he refuses or neglects to collect collectible personal tax, or to file delinquent list and affidavit—grasshopper extension acts construed and applied, 378.
Collection of personal tax by distress—authority for levying—diligence in search for property—no property exempt—fees, same as constable's, to come out of property levied upon, 438.
Personal property levied on for tax cannot be conveyed by party to defeat collection of same, 25.
Personal property tax is not a lien on property assessed, but a personal claim against the owner, 65, 533.
Become delinquent June 1st—parties have all of May 31st in which to pay, 388.
Treasurer cannot levy distraint after June 1st in collection of personal property taxes, 372.
Collection of personal property tax cannot be postponed beyond June 1st by treasurer, by agreement, without his being liable therefor, 533.
No fees allowed for collecting personal property tax unless levy is made by distress, 501.
The collector of taxes is entitled to percentage on what he collects only, 27.
Fees of treasurer for land sold to county for taxes under laws of 1858, 22.

TAXES AND TAXATION—Continued.
Taxes reported by road overseer, when collected, go to common town fund, not to road-district reporting and paying, 472.
Statutes extending time for payment of, in certain counties, on account of grasshopper raid, construed, 363, 378.
Limit of such extension, 413.
No imprisonment for non-payment of taxes in this state, 444.
Interest on taxes is not chargeable between time tax becomes delinquent and time of sale, 472, 534.

6. *County auditor's certificate as to payment.*

County auditor's certificate of "taxes paid," if untrue, would not discharge the taxes actually due, and if injury occurs to any one the auditor is liable to the party injured, in damages, 347, 350, 371, 475. See 207.
Auditor must certify "taxes paid," if his books and records do not show any unpaid, under law of 1862, 142. *Contra*, under law in 1882, 491.
Cannot so certify from books alone—must see if taxes remain in treasurer's hands unpaid, 491.
Auditor's certificate of "taxes paid" is required on all quitclaim deeds—object of law stated, 257, 293, 363. *Contra*, 104, 142, 207. See 343.
Certificate of payment required before record of sheriff's certificate of foreclosure of mortgage, 115.
Tax need not have been paid to entitle a mortgage or an assignment of mortgage to record, 59, 104, 178, 241.
Patents from United States do not require certificate of "taxes paid" to be recorded, 366.
So of deeds made to correct some error in former deed, 343.
Purchaser at tax sale should pay all subsequent taxes, else he forfeits his lien—auditor should certify "taxes paid" on deed of subsequent tax purchaser, after time for redemption thereon has expired, 171.
Auditor to certify "taxes paid" when all are paid, except those for which tax sale was had and redemption expired and deed given, 257.
Auditor's certificate of "taxes paid" under law of 1866—effect on tax sales, 343.
A tax sale is equivalent to payment for purposes of transfer for record, 104, 257, 293, 343.
Provisions as to transfer of lands for taxation explained and construed, 104, 207, 293, 363, 491.
Auditor to use discretion as to when transfer necessary for purposes of taxation, 312.
On homestead lands, become void when the land reverts to the government, and auditor should then certify "taxes paid," 217.
Certificates of tax sale and assignments—when may be recorded, and how—county auditor's certificate on—how made, 381.
Tax certificates, assignments, and certificates of redemption need not be acknowledged by auditor to entitle them to record, 309.

7. *Publication of tax-list—what constitutes—where published—descriptions in.*

A tax sale not published for full time is invalid, 167.
Effect of but 10 days' publication where law requires 20—remedy, 357.
Percentage for publication covers notices and everything required to accompany the list, 348, 359.
Paper which is printed in one county and distributed in another, not a legal paper of latter county, 461.
Publication to be let to lowest bidder on day fixed by law—accepted bid constitutes a contract, 300.
May be published in a paper which has a "patent inside" or "patent outside," or both, 305.
Publication may be in supplement to paper, 327.
Letting of contract for publication—where—in what kind of paper—who to designate paper, 371.
Change of name of paper after designation not material, if proof shows it to be same paper, 433.
Where county commissioners fail to designate paper, county auditor to do it—how to be done by him—form of designation, 463.
Qualifications of paper in order to be legally designated, 456.
One description in list and judgment—what constitutes—examples, 359.

TAXES AND TAXATION—Continued.
Description of property listed—should not be subdivided where belongs to one owner and is contiguous, 307.
Publication of list—not legal when merely printed and not distributed, 537.
Publication of list—should be in exact form in which printer receives it—omission of sign ¼, the dollar mark, ($,) the word "of" between the abbreviations discussed, 376.

8. *Judgment—nature and effect.*

Taxes are a lien on the land until paid—the judgment is a proceeding *in rem* to foreclose the lien, 459, 461.
Judgment may be valid though property taxed was exempt, 446.
Unless exemption is pleaded as a defense, judgment against the land is valid, 446.
Where, after judgment and sale, land is bid in and still held by state, it is not proper to enter another judgment against the land or to sell it, 534.
State auditor may satisfy tax judgment in certain cases, 467.
Clerk's and printer's fees, how to be charged against delinquents paying before judgment, 388.
Errors in description cannot be corrected after judgment—sale must follow judgment description, 351.

9. *Tax sale—manner and effect—tax deed.*

Sale cannot be adjourned to different place from that fixed by law, 182, 198.
Sale must follow advertisement and list as to description, and auditor cannot subdivide tracts at the sale, 160, 163.
Under law of 1858 register of deeds to sell until county treasurer qualified, 4.
At sale of land for, officer selling may purchase, 127.
Repeal of law after assessment and before sale prevents sale for, 73.
Surplus arising from sale, under chapter 4, Laws 1862, to be paid to party in whose name title appears of record, 102.
Surplus at sale belongs to owner, and will not pass to grantee by quitclaim deed, 222.
Surplus at sale claimed by original owner and by holder of tax deed—how to be paid, 172.
Cancellation of sale—auditor of state cannot cancel where applicant does not show there was any sale, 467.
Title to land sold for taxes vests absolutely after expiration of period of redemption, 352.
A tax sale is a contract, and the rate of interest cannot be changed after sale so as to affect past sales—all made prior to 1877 bear 2 per cent. per month, except sales to state not assigned—may be changed as to them, 388.
Executive officers no power to declare a tax sale void—must be done by judgment of court—rule *caveat emptor* applies to purchaser at tax sale—state does not guaranty the title, 430.
Where tax was actually paid before sale, tax deed is void, but auditor or register cannot correct records, 158.
What recitals tax deed should contain, 72.
Tax deed need not be stamped with United States stamps, 104.
County auditor's duty ends with execution of tax deed, and he has nothing to do with question of rights under it, 102.
Purchasers at tax sales, under law of 1862, entitled to deed before expiration of year for redemption, 107.
Certainty is required in description in tax deed—illustration of sufficient description, 125.

10. *Sale of forfeited lands.*

Requisites for sale of forfeited lands under act of 1862, 82.
Sales of forfeited lands under laws of 1860-64, how to be made, 164.
The forfeited sale law of 1875, for Hennepin county, referred to and distinguished, 322.
Act of 1881, for sale of forfeited lands, authorizes sale of all on which taxes were delinquent in and prior to 1879, 455.
And also lands referred to in Sp. Laws 1878, *c.* 259, 456.
Construction of same, as to what taxes and what lands to be included in list—the right of redemption—merger of judgment, etc., 459.
Two separate notices to be given for sale of 1881: one for regular annual sale, the other for forfeited sale, 471.

TAXES AND TAXATION—Continued.
Excess of amount due, paid at forfeited sale of 1881, not to be paid to owner of land, 488. See *contra*, 19 N. W. Rep. 83.
No authority for auditor, under law of 1881, relating to forfeited sales, to satisfy judgment and sale, on proof of payment of tax, 493.
Lands unsold at forfeited sale in 1881, (chapter 135,) because of an injunction or otherwise, to be disposed of by state auditor, 508.

11. *Assignment where bid in by state.*

Assignment of property bid in for state must be in fee-simple absolute, 314.
Certificates of assignment—when to be made under certain sales, 346.
Assignee of certificate of sale to state must pay all subsequent taxes, or forfeit his lien, 106, 171.
After time for redemption expires on sale to state, state may bring trespass for cutting on lands bid in for state. Before that, injunction or an action for damages can be brought, 352.

12. *Redemption from sale—who may redeem—when and how made.*

Must be by party having an interest or lien—"redemption" defined, 329. *Contra*, 362.
May be by any person from sales where time has not expired, though tax titles for certain prior years may be outstanding, 362.
By minor heirs may be made any time during disability, or for two years after it ceases, and may be of the whole or a part of an undivided interest, 351.
By minor—evidence necessary—auditor's duty in such case, 180, 234, 241, 351.
By minor heirs after time limited and before deed issued, 172, 241.
Subsequent purchaser redeeming from sale to prior purchaser does so at his peril—owner may redeem from sale to him without repaying amount he paid in redemption, 383.
A prior tax purchaser must redeem from sale to subsequent purchaser, or lose lien, 106, 142, 171.
Mortgagor is owner until foreclosure, but mortgagee has a right to redeem from sale if mortgagor does not, 112.
Right to redeem—evidence of, 142.
No right of redemption exists after the two years from sale, though no tax deed issued, 167.
Right of redemption is a vested right, 179, 164.
Right of, after forfeited sale, under various acts, 179.
Land sold for delinquent taxes could, under law of 1858, be redeemed in county orders, except where certificate of sale is assigned by county, 35. *Contra*, 51.
Section 37, *c.* 6, Laws 1877, was of doubtful validity; was repealed by law of 1878—later law repeals former by covering whole subject—authorities cited, 383.
Redemption from sale must be according to plain terms of law—percentage computed on amount of sale, 201.
Law extending time for redemption held not to apply to sales made prior thereto, on which time for redemption had expired, 355.
A certain other law, specially made retrospective, held good as to lands forfeited to the state and held by it only, 360.
Law regarding notice to redeem (section 37, *c.* 6, Laws 1877) not retroactive, and could not be made applicable to past sales, 447.
Such law was repealed in 1881, 465.
Notice to redeem was not required or authorized after repeal, 465, 512.
Effect of repeal as to sales where time of redemption expired before repeal, 512.
Interest tax purchaser is entitled to, on subsequent taxes paid before and after delinquent, 375.
Rate of interest on subsequent taxes paid by purchaser, not affected by change in rate in 1877, 364.
How far right of redemption can be cut off after sale, 512.
Interest on amount bid at sale and on subsequent taxes, when delinquent, is necessary to be paid, 350.
Redemption from a tax sale cannot be made by paying less than amount of sale and all subsequent taxes, interest, and penalties, 350.
Redemption cannot be partial, even though description was of a separate tract, 314, 471.
Exception stated, 351.
County treasurer not entitled to percentage on redemption money paid him, 228, 230.

TAXES AND TAXATION—Continued.

13. *Refundment where sale was void.*

Tax was to be refunded if land was not taxable at time of assessment and payment, under law in 1865, 204.
Power of commissioners to refund under section 164, tax law of 1874, was limited to one year from January succeeding levy of tax, 306.
Power to refund, but not to abate taxes, was conferred on county commissioners under law of 1874. Both powers were conferred by law of 1875, and were unlimited, 322.
Where tax was paid by mistake, as on wrong land, county commissioners could refund under authority of section 157, tax law, as amended 1875, 351.
The act of 1875, authorizing county commissioners of certain counties to remit and refund portion of tax of 1874 unequally assessed, construed as mandatory—rule stated, 322.
The right to refundment is now limited by section 97, tax law, and petitioner for, must bring himself strictly within its provisions, 467.
Refundment is to be made by county auditor only where there is a sale declared void by judgment for reasons stated therein, 475.
Refundment cannot be made unless it appears there was a sale, even though land was not taxable, 467.
Where taxes had been paid prior to sale, refundment to be made—state auditor, not county auditor, to cancel sale, 480.
Under section 97, tax law, the judgment must state for what reason the tax sale was declared void, 475, 505.
Refundment is a right of purchaser which is part of contract of sale, and cannot be interfered with by subsequent law, 550.
Payment of subsequent taxes by tax purchaser, not a condition of refundment where sale to him was void, 550.
Section 21, *c.* 10, Laws 1881, not retroactive, and does not authorize refundment as to past sales, 502.
When right to refundment is complete, 550.
Amount refunded to purchaser at void tax sale is to be charged to all the funds benefited by the original sale in the like proportion, 423, 429.
Duty of auditor on judgment filed to draw order, 429.
How amount refunded to be recollected, 429, 529.
Where tax is refunded on void sale it is not to be reassessed or relevied, but to stand as originally extended against property, and (with costs, etc.) included in current taxes at next sale, 529.

14. *Taxation of railroad lands.* See RAILROADS.

Exemption of railroad lands, and payment of percentage of earnings instead thereof, discussed, 199, 242.
Railroad lands contracted to be sold under certain permits held taxable, 402.
Railroad lands of St. Paul & Pacific Company, contracted to be sold, were not taxable until conveyed, nor was the interest of purchaser, under law in 1864, 170.
But act of 1865 made all sold subsequently taxable as soon as contract was made, 205.
Transfer to Litchfield and others was not a sale, 209.
A tax on land sold by railroad company, where fee is still in company, is not valid; but the interest of purchaser and his improvements are taxable as personal property, 435, 467.
Railroad lands once sold thereby lose exemption and are afterwards taxable, though company acquires title again, 541.
Tax on land contracted to be sold by railroad company and contract forfeited, how canceled and refunded, 378.
Railroad lands of Northern Pacific sold to purchasers are taxable, though no patent issued—state auditor no power to decide or cancel the tax assessed, 356.
Where a railroad company purchases real property which had been assessed and taxed, it takes it subject to the lien for taxes, and must pay them, 533.

15. *School taxes.* See SCHOOL-DISTRICTS.

Trustees of school-district no power to exceed limit prescribed by law for levying taxes, 69.
Tax raised in excess of authority cannot be used for school purposes, 69.
School-districts not to levy tax in excess of nine mills, except where insufficient to support a school three months, 417.

TAXES AND TAXATION—Continued.
School-tax must be limited to district as it exists at time of levy, and division after vote, but before time of levy, does not affect validity as to old district, 138.
Cannot be extended by auditor against school-district unless reported prior to time fixed by law, 264.
The one-mill tax cannot be extended by auditor until levied by county commissioners, 483. [Changed by chapter 53, Laws 1883.]
Taxes levied by an illegally organized school-district are void, and may be recovered back if paid, 174.

16. *Miscellaneous.*

In questions of cancellation state auditor has no equitable jurisdiction—must give state benefit of doubt—no presumption of exemption exists, 541.
State auditor to construe tax law and give directions, which must be followed until annulled by court, 479.
Laws relating to taxation are to be strictly construed—application of rule, 220.
Can only be levied for public purpose—loaning funds for aiding flouring-mill is not such purpose, 489, 270.
On real estate are not debts, nor personal claim against owner, 460.
Must be appropriated exclusively to purposes for which raised, 64, 240, 280.
Raised by vote in town for building a town hall, may, by vote of town, be appropriated to road and bridge purposes, 316.
Surplus which remains after purpose is accomplished for which tax was levied by county may be used for any other purpose by county board, 347.
Where tax is regularly extended and partly collected, it is too late to raise question of legality before attorney general or any executive officer, 260, 280, 291.
County attorney to look after interests of county in tax cases, even in supreme court, 517.
Power of county to which another is attached, to levy and collect in attached county, 63.
Status of Lake and Cook counties as to right of former to collect tax for 1882 in latter, 521.
Where all county records of taxes are destroyed by fire, what course to be taken, 137.
Law relating to taxation places married women on same footing as if sole, 241.
Where payment of taxes was voluntary, cannot be recovered back, 467.
Section 124 of tax law (Cooley, Index Dig. 47) was repealed by section 120, *c.* 1, Laws 1878, 423.

TERM OF OFFICE. See OFFICERS; VACANCY IN OFFICE.
Of all county officers elected to fill vacancy, is for unexpired term only, 125.
Except as to certain officers whose terms are fixed by the constitution, 352.
One appointed to vacancy holds till next election—one then elected holds balance of unexpired term—exception as to certain constitutional offices, 352.
County attorney, elected to fill vacancy, holds for unexpired term only, 258.
County auditor, elected to fill vacancy, holds for unexpired term only, 182.
Of county commissioners—necessarily affected by redistricting county, 262, 265.
May be shortened or cut off as to incumbents, 134.
Term of justice of peace is fixed at two years by the constitution, 371.
Commencement and end of, as fixed by constitutional amendment of 1883, 551.

TIMBER BOUNTY.
Right to, runs with the land when sold, 347.

TRACT INDEX.
Fees for making entries in, 324.

TRAMPS.
Veto of bill relating to, advised on grounds stated, 452.

TREASURER. See COUNTY TREASURER; STATE TREASURER; TOWN TREASURER.
Percentage not allowable on redemption money paid on tax sale, 228, 250.

TREE CLAIMS.
Improvements on, are taxable as personal property, 336.

TOWN. See COUNTY COMMISSIONERS.
Not to be organized where containing less than 100 inhabitants, 23.
Organization of—when vote on, necessary, 115.
Organization of, suspended by Indian war, does not affect its legal existence, or release from obligations, 236.

TOWN—Continued.
The legislature can, but the county commissioners cannot, organize two or more congressional townships into one town, 438.
Are villages carved out of town, and organized under general law, independent of the town, *quære*, 368.
Where two congressional townships are organized as one, they may be divided, without a petition of a majority of legal voters, by county commissioners, 324.
On division of, how debts should be apportioned and tax levied in absence of statute provisions, 226.
Division of into road-districts, when to be made by supervisors, 373.
Not liable for damages for county roads, 470.
May vote tax to build town-house if do not exceed limit, 58.
Tax voted and levied for town-hall purposes may, by subsequent vote, be appropriated for road and bridge purposes, 316.
Cannot vote money received lawfully into treasury, to individuals paying it in, 533.
Power to vote money under law in 1864—how and to what purposes limited, 178.

TOWN BOARD. See TOWN OFFICE.
No power to levy tax for future years, 215.

TOWN CLERK.
Where oath of office and bond to be filed, 293.

TOWN INSURANCE COMPANIES.
Cannot insure outside of limits fixed in articles of incorporation, 427.
Cannot include other towns by amendment of articles, 427. [Changed, chapter 117, Laws 1881.]
"Adjoining towns" defined, 427. [Changed, chapter 67, Laws 1883.]
Votes, members may cast—officers and directors must be residents, but if non-residents are elected, acts will be valid and bind company, 466.

TOWN MEETING. See ELECTIONS; LIQUOR LICENSE; VOTERS AND VOTING.
Vote to change place of, must be previously duly noticed, else vote taken and meeting held under it are both void, 530.
Not invalid by failure of clerk and moderator to take oath, 71, 84.
Not being held, old officers hold over, 72.
On a tie vote, under Gen. St., (1866,) determining by lot was illegal, but one so taking office is an officer *de facto*, 256.
Where a tie vote is found and lots are not cast, incumbent holds over till successor is elected and qualified, 340.
A vote at, against license, holds good until revoked by another vote duly had to the contrary, 497.
Questions of "no license" to be voted upon at annual, and 20 days' notice given. Commissioners may refuse license in town even if notice was not given, 315.

TOWN OFFICE.
Town board no right to declare office vacant because party holding proves ineligible, 240.

TOWN ORDERS.
Receivable for town taxes only, 311, 357.
Cannot lawfully be paid by county treasurer in cash—must have county auditor's warrant in favor of town treasurer—may be received for town taxes, 357.

TOWN-SITES.
Cannot be vacated by legislative act, where vested rights are injuriously affected, or divested thereby, 60.

TOWN TREASURER. See TAXES.
Not entitled to percentage on money received from his predecessor, 523.

UNCONSTITUTIONALITY. See CONSTITUTIONALITY OF LAWS.
Of bill to reduce interest on sales of school lands as to past sales, 524.
Of bill relating to tramps, 452.

UNITED STATES REVENUE STAMPS. See TAXES.
Cannot be required on tax certificates, 104.

UNORGANIZED COUNTIES. See COUNTY.
Governor's power to appoint commissioners in, 415, 450; latter's powers, 177, 415, 450.
Not entitled to county officers, 415.

VACANCY IN OFFICE. See COUNTY COMMISSIONERS; COUNTY TREASURER; OFFICE; OFFICERS; TERM OF OFFICE.
When should be declared, in case of refusal or neglect to qualify, as to county commissioner, 330, 331.
Is created by refusal to qualify within reasonable time, as to judge of probate, 447.
Created by failure of county treasurer to give additional bond, when required, within time prescribed by law, 394.
When filled by appointment, appointee holds till next election; elected one, till original term ends, 399, 449.
Created by death of officer-elect before qualifying, under law of 1869, 313.
Was not created by enlistment in United States service, 97, 99.
If filled by appointment, appointee holds till next election; if by election, for balance of unexpired term, 441, 449.
All officers (except constitutional) elected to fill vacancy, hold for unexpired term only, 182, 441, 442, 449.

VACCINATION.
Children not vaccinated cannot, for that reason, be excluded from the public schools, 504.

VILLAGES.
Cannot be formed or created by special law, but any amendment as to existing villages, not forming new ones, may be passed by special law, 525, 526.
Are those organized under the general law independent of the town? *Quære*, 368.
Under the general law no village assessor is provided for, nor is authority to appoint one given, and town assessor must assess village property, 506.
Fines and penalties, imposed by virtue of village law, belong to village—assaults and the like offenses are not so imposed, 402.
Jury trial need not be had for offenses against village ordinances, 369. *Contra*, 326.

VOLUNTEER REGIMENTS.
Governor has appointment of officers of, 89-92.

VOTERS AND VOTING. See ELECTIONS; WOMEN.
Foreign-born children, of parents duly and fully naturalized while children were minors, become citizens and voters on becoming 21 years old, 345, 366, 502.
No property qualifications required of, 367.
Eligible to any election office, except, etc., 548.
No provision is made for women to vote for county superintendent of schools, 541.
And her right is limited to voting in the district where she resides, 345, 442, 541.
Right of women at school elections, etc., in city of Faribault—city charter construed in connection with general law, 513.

WARDEN OF STATE PRISON. See REQUISITIONS; STATE PRISON.
Cannot deliver remains of prisoners who die in prison to physicians generally, 498.
Salary of, under chapter 68, Laws 1864, 187.

WHEAT.
Millers' Association no authority to fix price at which others than its agents must purchase, 483.

WITNESS FEES. See COUNTY.
Not allowed to defendants' witnesses, in criminal cases, in justice court—cannot be audited and allowed by justice, and are not a county charge, 492, 501.

WOLF BOUNTY ORDERS.
Not payable by state treasurer, but he may receive them for taxes, 342.

WOMEN.
Are eligible to office of county superintendent, 487, 299. *Contra*, 390. But cannot vote at general elections for, 541.
Cannot vote on question of continued use of state text-books, 442.
Right to vote in school matters limited to voting in district where they reside—hence cannot vote for county superintendent, 345.
When foreigners, and not naturalized, are not entitled to vote, 345, 358, 502.
Can vote on any measure relating to schools—instances, 345, 358.
When they are voters and freeholders, can petition for formation or alteration of school-districts, 345.
Right to vote at elections of school officers in Faribault—special law construed in connection with constitution and statutes, 513.