

Report
of the
Attorney General
of the
State of Idaho
for the
Years 1905 and 1906

J. J. Guheen
Attorney General

1906
The Pocatello Tribune



TERRITORIAL ATTORNEYS GENERAL.

*D. B. P. Pride.....	1885-1886
Richard Z. Johnson.....	1887-1890

STATE'S ATTORNEYS GENERAL.

George H. Roberts	1891-1892
*George M. Parsons.....	1893-1896
Robert E. McFarland.....	1897-1898
Samuel H. Hayes.....	1899-1900
Frank Martin	1901-1902
John A. Bagley.....	1903-1904
J. J. Guheen.....	1905-1906
*Deceased.	

JUSTICES SUPREME COURT, 1905-6.

Charles O. Stockslager, Chief Justice.....	Hailey
James F. Ailshie, Associate Justice.....	Grangeville
I. N. Sullivan, Associate Justice.....	Hailey

JUSTICES SUPREME COURT, 1907-8.

James F. Ailshie, Chief Justice.....	Grangeville
I. N. Sullivan, Associate Justice.....	Hailey
George H. Stewart, Associate Justice.....	Boise

IDAHO DISTRICT JUDGES.

District	1903-6.	1907-10.	Address.
First	Ralph T. Morgan...	W. W. Wood.....	Wallace.
Second	E. C. Steele.....	E. C. Steele.....	Moscow.
Third	George H. Stewart.	Fremont Wood.....	Boise.
Fourth	Lyttleton Price.....	E. A. Walters.....	Shoshone.
Fifth	Alfred Budge.....	Alfred Budge.....	Paris.
Sixth	J. M. Stevens.....	J. M. Stevens.....	Blackfoot.
	1904-6.		
Seventh	Frank J. Smith....	Edwin L. Bryan...	Payette.

PROSECUTING ATTORNEYS OF THE VARIOUS COUNTIES OF IDAHO.

County.	1905-6.	1907-8.	Address.
Ada	Chas. F. Koelsch...	Chas. F. Koelsch...	Boise.
Bannock	George E. Gray....	George E. Gray....	Pocatello.
Bear Lake ...	Jesse R. S. Budge..	DeMeade Austin...	Paris.
	DeMeade Austin*..		
Bingham	Robert McCracken.	Wm. L. McConnell.	Blackfoot.
Blaine	Francis E. Ensign..	Henry F. Ensign...	Hailey.
Boise	Harry L. Fisher....	W. A. Sample.....	Idaho City.
Canyon	Owen M. VanDuyn.	Owen M. VanDuyn.	Caldwell.
Cassia	Arthur H. Derbyshire	B. P. Howells.....	Albion.
Custer	Wm. J. Lamme.....	Wm. J. Lamme....	Challis.
Elmore	Daniel W. Shetler..	Daniel McLaughlin.	Mountainhome
Fremont	O. P. Soule.....	Douglas Hix.....	St. Anthony.
Idaho	Thomas H. Bartlett.	Edward M. Griffith.	Grangeville.
	A. S. Hardy.....		
Kootenai	E. R. Whitla.....	Peter Johnson.....	Rathdrum.
Latah	Wm. E. Stillinger..	Wm. E. Stillinger..	Moscow.
Lemhi	John C. Sinclair...F. J. Cowen.....		Salmon.
Lincoln	Frank T. Disney...Frank T. Disney...		Shoshone.
Nez Perce ...	B. S. Crow.....	Daniel Needham...	Lewiston.
Oneida	Daniel C. McDougall.	Joseph Davis.....	Malad.
Owyhee	John F. Nugent...Charles M. Hays...		Silver City.
Shoshone	James E. Gyde....	Walter H. Hanson.	Wallace.
Washington..	George P. Rhea....	Frank Harris.....	Weiser.

*Appointed for unexpired term.

OFFICE OF THE ATTORNEY GENERAL,
STATE OF IDAHO,
BOISE, IDAHO, December 1, 1906.

ATTORNEY GENERAL'S REPORT

To His Excellency,

FRANK R. GOODING, Governor.

As required by law, I have the honor to submit my official report, touching matters of public interest connected with the Attorney General's Department, and giving a brief synopsis of a portion of the work of the office from January 1, 1905, during the two years ending December 1, 1906.

The work of this office is so varied and of such a character, that it is hard to describe, and the time that is occupied in the examination of statutes and decisions in order to advise upon the multitude of matters that are submitted to this office cannot be made a matter of record, so that the greatest part of the actual work of the department is not apparent. While, personally, I desire to make my remarks upon this phase of my report very brief, yet the importance of this department and the responsibility placed upon it with reference to so much of the State's business is so great and so little understood that I deem it imperative to make a few general statements.

A portion of the work of this department is the rendering of opinions to the various officers, boards, bureaus and institutions of the State. The time occupied in this manner is slight, however, compared with that devoted to informal discussions with the various State officers and heads of departments upon the construction of statutes and questions of law and procedure relative to their duties. The phenomenal growth of the State and general activity in all of the different State Departments is the greatest factor as the cause of the continual and urg-

ent demands made upon this department; and it seems impossible for this office to confine its business and services to instances occurring within the legitimate scope of the authority of the office. The Attorney General is only authorized and empowered to give opinions to the Legislature, State officers, and heads of State departments when requested to do so in writing and then only in matters relating to their duties or matters in which the State is a party or is directly interested. I have, however, in a great many instances, given opinions and advice to numerous county and school district officers and private individuals upon many subjects, but have done it as a matter of courtesy and have generally called attention to the fact that such opinions and advice were unofficial. The custom seems to prevail (based upon a misunderstanding of the duties of the Attorney General, I presume) whereby hundreds of county and school district officers and private citizens write for opinions upon nearly every conceivable subject. Private citizens send in mortgages, notes, contracts and insurance policies, and the like, for us to advise them upon, all of such matter being of a personal and private nature. These communications must be answered in some way, and greatly adds to the work of the office. My predecessors, in their official reports, have heretofore called attention to the same state of affairs.

We have a large correspondence from all parts of the United States, from persons requesting information as to our laws, and much correspondence of that nature, directed to other State officials, is referred to us; all of which means extra work not within any duties imposed upon us by law and not provided for by the legislature in providing assistance for the office. Individuals, in writing a public officer for information, whether it is his duty to attend to it or not, expect a reply, and it is necessary to reply in the sense that much dissatisfaction results, particularly among residents and citizens of the State if communications are ignored. To undertake, however, to answer by opinions and advice all such communications would require twice the assistance, as many of the requests for opinions and advice would require several

days each and if these were attended to as requested, but very little public business could be transacted. All communications from officers of other states, or of the United States, we have tried to answer in detail, regardless of our insufficient force, but in some private inquiries we could not grant the information for want of time.

My whole time has been devoted to the duties of the position but the demands upon the office have been so very heavy that it was impossible to perform the work within the usual office hours and myself and assistant have been compelled to work extra at least one-half of the Sundays and evenings of the past two years in order to obtain reasonably satisfactory results.

The criminal business before the Supreme Court has been quite heavy. In these criminal cases, as in all others, we have been painstaking in preparing briefs and prosecuting such cases, with a view to having the judgments affirmed; and the results of our efforts are very gratifying in that few cases have been reversed, and none in which this department could in any manner be held responsible. The causes of such reversals have been enumerated in the statement of cases in another part of this report. As the reversal of a case means a new trial, with heavy expense, the importance of having judgments affirmed is apparent. In this connection, I desire to say that I have endeavored to keep in close communication with the various county attorneys with reference to the State business, and I have supplied each county attorney and the district judges with copies of all briefs prepared in this office, in cases before the Supreme Court, in order that they may have the advantage, in trying their cases in the District Court, of our research upon the many points of criminal law discussed in such briefs. I have received many acknowledgments that this has been of great assistance to them. While the compensation of the county attorneys is totally inadequate to the services required of them, I find them always willing to do their best as public officials and energetic in the performance of their duties. I have endeavored to secure an early hearing upon all criminal cases appealed from the District

Courts, and no cases have gone beyond the first term of the Supreme Court after such appeal has been perfected.

In the preparing of briefs upon the many questions raised in criminal cases prosecuted in the Supreme Court, the searching for the decisions of our own Supreme Court was a laborious task, as they were scattered through many volumes of the Pacific Reporter and with no proper index as a guide. Numbers of cases have suffered reversal by reason of mistakes or rulings upon questions upon which our Supreme Court had passed. During the term of our office we have compiled, indexed and sub-headed and had printed a Digest of the Decisions of the Idaho Supreme Court upon all criminal cases decided by that court up to January, 1906, and have placed a copy with each District Judge and each county attorney, the same being marked State property and to be turned over to their successor in office. Such a digest has proven invaluable to the various county attorneys as well as to this office. The preparation of this Digest was accomplished through the special efforts of Mr. Edwin Snow, my assistant.

I have given two hundred written opinions and not less than three hundred oral opinions. A number of these were vexed constitutional questions and were upon important matters that affected the policy to be pursued by the State government for the present as well as the future and necessitated careful and thorough investigation. The conclusion of this office upon a number of important matters resulted in litigation, in all of which the State contention was upheld by a unanimous decision of our Supreme Court. When the deplorable condition of our statutes is taken into consideration, the labor required in formulating so many opinions can only be appreciated by those who are required to attend to it.

It has been the duty and custom of the Attorneys General of the various states of the Union to print in their report such decisions as they deemed of general interest. Idaho is the only state that has not done so; and each of my predecessors have recognized the necessity and advised an appropriation for that purpose. As new

officers are elected in the counties and state each two years, they are asking the Attorney General for opinions upon statutes that have probably been passed upon by every preceding Attorney General; but there is no record in this office to refer to. I have incorporated in this report a small number of the official and unofficial opinions of this office.

It has also been a part of the work of this office to assist in making, and also to examine and pass upon, many contracts of various kinds, also to examine the bonds given for the faithful performance of such contracts, also to examine many bonds given by officials and examine all bonds given by the different banks of the State who have applied to borrow state monies. This office has passed upon many applications made by the various counties upon the Governor for extradition papers and has also examined many applications and requests to the Governor of this State from sister states for warrants of arrest for fugitives from justice.

The duties of the Attorney General, when the office was first created, were primarily to attend to the legal business of the State. Certain special qualifications are necessary in order to be eligible to the office. Subsequent legislation and constitutional provisions have added to these duties matters which require the personal action of the Attorney General to the extent that the original objects and duties prescribed for the office are almost lost sight of. Since the passage of the Revised Statutes in 1887, and which contained the entire schedule of the duties of the Attorney General, which were practically all of a legal nature, more than a dozen acts have been passed adding to those duties; many new departments have been created, such as the State Board of Pharmacy, State Dental Board, State Medical Board, State Insurance Commissioner, State Bank Examiner, State Livestock Sanitary Board, State Horticultural and Pure Food Board, State Immigration Commissioner, State Mine Inspector, State Game Warden, State Engineer, State Wagon Road Commission, Militia Department, etc., etc., all of which provide work for this office. In addition, also, the Attorney General is a member of the following State

Boards: State Land Board, Board of Trustees of Soldiers' Home, State Board of Education, State Board of Prison Commissioners, State Board of Pardons, State Board of Canvassers, State Board of Examiners, and State Board of Equalization. Several of these boards have a great deal of business to attend to at all times, and much of it is detail matter and entirely out of the line of work for which this office was created and seriously interferes with the more important work of this office. Much of the matters before these Boards are referred to this office for investigation and report. The business transacted by this office in connection with the State Land Department has been enormous.

It is the duty of the Attorney General to represent the State in all actions in United States Courts, in and out of the State, and to represent the State in all actions in the various land offices throughout the State and before the Commissioner of the General Land office and the Secretary of the Interior at Washington. We have had over 225 land cases alone, involving property worth nearly a million dollars, which I have included in another part of this report with a statement concerning the same. (See Schedule of Cases, "C"). There are seven Carey Act projects in the State and the appropriation of one million acres, as provided by the United States Laws is practically exhausted. Four of these projects are now in active operation and have added largely to the work of this office and this class of work is constantly increasing. Four of these projects have mortgaged their interests and in all these cases this office was compelled to make close investigations in order to approve the same.

Many questions of a difficult nature are constantly arising with reference to these projects and as all of these Carey Act projects are in the experimental stage, we have no precedent to go by. Idaho is in the lead of all states in which the Carey Act is being applied.

Under the present circumstances, the head of this department should not be a member of the State Boards that take up the major portion of his time in the details

of matters, many of them unimportant and entirely foreign to the duties for which the office was essentially created. I am calling attention to this phase of the matter now, but I desire to go more into detail with reference to the State Land Board in my recommendations in this report. No amount of labor can remedy a system so faulty as the present method of administering the affairs of some of the departments of the State government, and while the rapid growth of the State is responsible for some of the troubles, yet the whole system is entirely wrong when applied to the present conditions existing in the State, and particularly with reference to the constitutional provisions which govern the land office and this office.

One of the most important tasks at the beginning of my administration of the office, was the attempt to secure the relinquishment from the United States of 45,000 acres of worthless lands that had previously been selected by the state's agents in Idaho county, and which the Commissioner of the General Land Office at Washington had theretofore ruled the state could not relinquish. This proved an exceptionally difficult task in many ways. The legislature was in session and this office was practically without assistance, and there was no record in this office or anywhere else that would aid us in making a start in the matter, and we were forced to grope in the dark for months in order to secure evidence on which to support an appeal from the rulings of the Commissioner. An appeal was taken in five cases, which are among the tables submitted, and a large amount of evidence in the nature of affidavits submitted, and the Commissioner was finally induced to reconsider his former decision and allow the state to relinquish such lands. The condition these matters were in was very bad and it required extraordinary work by this department to obtain sufficient evidence to secure a reversal of the Commissioner's decision. After the matter was submitted to the Commissioner of the Land Office and the evidence produced, Senator W. B. Heyburn was called upon to assist, and took an active interest in the same before the department and used every endeavor in our behalf. The

release of this land meant a saving to the State of not less than \$450,000.00, as under our state constitution no state lands can be sold for less than \$10.00 per acre. The evidence produced in these cases shows that these lands are absolutely worthless. We have classed these cases as "Schedule C, Division A," in this report.

Another important matter which caused a great deal of trouble during the eighth session of the legislature and finally resulted in the suit of I. F. Roach, George C. Parkinson, James F. McCarthy, Edward S. Sweet and Mary E. Ridenbaugh, as Regents of the University of Idaho vs. Frank R. Gooding, Governor, H. N. Coffin, Treasurer, Wlil H. Gibson, Secretary of State, and John J. Guheen, Attorney General of the State of Idaho, was disposed of by the unanimous decision of the Supreme Court in which the contentions of the state were upheld. It had become customary for a number of state educational institutions to secure the passage of laws authorizing bond issues for the erection of buildings, and mortgaging the proceeds and income of the lands donated to these institutions for the payment of these bonds; and the claim was advanced that these bonds were not state debts, that it would not require the levy of taxes to pay them, consequently the passage of such acts was made easy. This decision finally settled the status of all lands donated to educational institutions by the United States, as being permanent endowments; the proceeds from the sale of the same to be placed in a permanent fund and only the interest or income from the same to be used for the support and maintenance of educational institutions. But no part of such fund could be used for the erection of buildings. The importance of this decision upon the welfare of this state will be greatly appreciated in the future. (See 81 Pac., p. 642).

Another important decision for the State, in which the contentions of the state were upheld by unanimous decision of the Supreme Court, were the mandamus actions brought by the state to compel the counties of Shoshone, Latah and Nez Perce to extend upon their tax rolls the levies as certified to them by the State Board of

Equalization for the year 1905. The matters included some intricate and important constitutional questions; and the contentions of the various counties were ably presented by the various county attorneys. The State Board of Equalization, and particularly this office, was the subject of much adverse criticism for their position in this matter, occasioned principally, however, through lack of any knowledge of the case, and the decision of the court naturally precludes any suspicion that the state was biased in its contention. These cases are reported in 83 Pac., p. 230.

This office also took up the matter relative to the sale of fish from what was alleged to be private fish ponds and in the case of the State vs. Dolan (81 Pac., p. 640), our Supreme Court practically maintained the contentions of the state. For many years the game and fish laws of the state have been practically ineffective by reason of the construction heretofore put upon the law relative to private fish ponds, and a system has been in vogue in this state for many years by which hundreds of tons of trout were taken from the streams of Idaho and sold within and without the state contrary to law. The breaking up of this practice was most effective.

Many more cases of general importance affecting the whole state have been handled by this office, but on account of their number it is impracticable to give them specific mention in this report. A table of all cases and the disposition made of the same have been included in this report in the briefest possible form; and the same have been classified as to their character. (See Schedules A to C).

I have kept the expense of this office for assistance, for the past two years, within the appropriation provided by the last legislature, but in order to do so myself and assistant were compelled to work very long hours and the compensation I was limited in giving, not being adequate in my opinion, the circumstances were somewhat embarrassing in trying to employ assistance.

Assistants to be of any value in this department must be persons who primarily have received a liberal

legal education and who know how to use it, besides other qualifications; and such persons are entitled to a better compensation than those whose duties are clerical, and the business of this department has reached the stage where a proper compensation must be provided if the state's interests are properly recognized. I have transacted the business of this office with one assistant and one stenographer. I take pleasure in acknowledging the reliable and competent services of Edwin Snow, my assistant, who has been connected with the office since February, 1905. Mr. Snow has taken a personal and special interest in all the affairs and business of the office and his services have proved invaluable to the state. I also desire to acknowledge the valuable services of Mr. Frank Wettach and Mr. Philip R. Hindman, both of these young gentlemen having been employed in this office at different times as stenographers, but being graduates at law and practicing attorneys, they assisted greatly in the legal work of the office.

I have also kept the office expenses within the appropriation allowed by the legislature for that purpose, and there is a balance left. This appropriation is for the furnishing of office stationery, fixtures, supplies, and for the printing of briefs, which is a heavy expense; also to pay the traveling expense when engaged in the business of the office throughout the state. I have paid out of this appropriation for the printing of the Criminal Digest heretofore mentioned, and also the printing of this report. The business of this office requires the presence of the Attorney General and his assistant in all portions of the State. There are two regular terms of the Supreme Court each year at Lewiston in North Idaho, which require our attendance; and the land contests in North Idaho, in which the state is a party, require numerous trips. It is unnecessary to call your attention to the geographical conditions of the country which renders such trips long and expensive, as well as trips to other portions of the state. On some trips the railroad transportation was furnished, which aided materially in cutting down the expense to the state. The sum of \$150.00 has covered two years' ex-

penditure for office furniture and fixtures, and this includes \$50.00 for a new typewriter in exchange for an old one.

The 8th Session of the Legislature passed H. B. 205, Sess. Laws 1905, p. 226, appropriating \$5,000.00 to defray the expense of an investigation to ascertain the condition of the various land funds and timber and other lands donated to the state by the United States, and for securing all data in connection therewith which might be conducive to the best interests of the state, and for the purchase of necessary books that the affairs of the land office might be placed on a thorough business basis.

A few weeks after the passage of this law, March 9, 1905, the State Land Board was informed that a committee of five members of the House, who had been appointed by the House during the session of the legislature to make an investigation of the Land Office and report to the legislature, claimed the right to proceed with this investigation and to use the \$5,000.00 as provided in H. B. 205. At the request of the Board I examined into the matter and informed them that it was my opinion that it was the duty of the State Land Board to expend this appropriation for the purposes provided in the act, and that no authority of law existed for any committee to use the same.

In December, 1905, three gentlemen who had been members of this committee, met at Boise, and desired to proceed with an investigation, but before doing so asked me by wire, as I was out of the city, to give them an opinion as to their powers. This I did by wire and, later, at the request of the committee, and in answer to a letter from them, (which also contained some comments on the opinion given them by wire), I gave them an opinion, setting forth my views in detail.

A campaign of misrepresentation of the scope of H. B. 205 and the attitude of the State Land Board with reference to the same, was immediately started, and a great amount of willful misinformation has been circulated throughout the state.

I have incorporated in this report at page . . . the opinion given the committee at their request, as I desire the coming legislature may know fully my position with reference to H. B. 205 and also the position of the Land Board; and if the coming legislature desire an investigation of the land department to be continued beyond the session of the legislature, they may choose to follow some of the suggestions I have made in this opinion and there will be no difficulty in proceeding.

I desire to express my appreciation of the courtesy extended to this office by the members of the last legislature, by your office, by the District Court and Supreme Court and by all other state officers and heads of departments during the past two years. The relations of this office with all other departments have been of a pleasant character and of such a nature as to dispatch the public business.

RECOMMENDATIONS.

It has been my desire to call attention to many ambiguities and inconsistent provisions in our laws, with a view of recommending that the legislature remedy the same, but found on account of their number, that I had started on an impossible task. I have concluded to call attention to a few matters which I think should be remedied.

First, however, I shall ask that you recommend to the coming legislature that a commission be appointed for the purpose of submitting a code of laws to the legislature of 1909. It is hardly necessary to state that men of known ability should be selected and a compensation provided that is commensurate with the work, and proper assistance should be provided.

The details and the authority and duties of this Commission can be left to the good judgment of the legislature, but the condition of the statutes of Idaho is certainly deplorable. What really comprise the statutes of the state is a fruitful and continuous subject of discussion in every justice court and every other court of the state, and will be for all time unless a change is made;

but if a conclusion is reached as to what are the statutes, then what they mean is still more difficult. So many of the statutes contain ambiguous, unintelligible and inconsistent provisions that they will never be remedied by individual legislative action. The causes that have brought this about since statehood are many and are so familiar to all attorneys that it would be a waste of time to repeat. If the present legislature will arrange to attend to this matter, in a manner that will give results, they can do no greater service to the people of the state. We have a multitude of statutes, if they were only in such shape that there need not be so much controversy as to what the law is; and outside of remedial legislation and some legislation to meet new conditions, the state is not suffering for more laws.

From conversations I have had with the heads of various departments, I apprehend they will recommend to you such changes as in their opinion will strengthen the laws with reference to their different departments. Experience is always the most valuable teacher and the head of each department should be fully aware of the weak spots in the statutes governing his department, and should suggest the remedy.

The matters of a general nature which I desire to call your attention to, with a view that you recommend the suggestions to the legislature, are as follows: A constitutional amendment should be submitted whereby all land matters in connection with the state, should be made a separate department, to be administered by one person as the head of the department, this person either to be elected, or appointed by the Governor. Until this is done the land business of this state cannot be successfully administered either for the state or with the people of the state. Every state land board has no doubt done the best it could, but the business of this land department, if done properly by a board, would require a daily meeting of the Board, and that is simply impossible. As at present constituted the land board is composed of the Governor, Secretary of State, Superintendent of Public Instruction and Attorney General, each of whom has all that he can at-

tend to in looking after the duties for which his office was primarily created; besides, each one is a member of a half dozen other state boards, in some of which the duties are arduous. The duties of the Attorney General require his presence in all parts of the state frequently, as is the case with other members of the Land Board and it is not possible to attend the meetings at all times.

Communications and other matters are received daily in the Land Department which, by all the rules of common business sense, should be attended to immediately, but it is rendered impossible to do so under the present system, and much dissatisfaction results, both to the state and those having business before the land department. It is impossible to explain in the scope of a short report the overwhelming disadvantages of the present system. If the Land Board was composed of individuals who were not connected with the executive department and could meet daily there would be no particular difficulty; but on account of the great amount of land matters to be attended to by the board, and their complexity, and the fact that this board is composed of officers, some of whose primary executive duties demand the greater part of their attention, it makes the present system absolutely vicious in its weakness.

The Act of the Eighth Session of the Legislature in providing for a reorganization of the State Land Department, was the best that could be done, and was a wonderful improvement and has resulted in the department being able to accomplish a great deal of good; but the essential thing required is that some one person should be at the head of this department with power to act and control without consulting any board in order to facilitate business. The legislature, though, is powerless to delegate this power as the State Land Board are constitutional officers, hence the necessity of a constitutional amendment.

The rapid growth of the state in the past few years, and the great increase in litigation which necessarily follows, is working a great inconvenience upon the people in many ways; and I suggest that you recommend a consti-

tutional amendment that would provide for Superior or County Courts for each county, such courts to have probate jurisdiction. The probate practice of this state is complex and the probate business is rapidly increasing, and the importance of these courts is now very great; and they should be presided over by men who are qualified to be judges of a District Court. If this amendment were proposed, it would be two years before it could be adopted, and then some time would elapse before it could be put in operation, and it seems to me, action should be taken now. We have created two new judicial districts in the past two years and there is a necessity now for several more, and it would seem the best policy to provide for County Courts. But very few counties in this state would feel any added expense and, if so, it would be fully set off by the more convenient service and benefits received.

There should be a law giving the State Land Board power to grant rights of way over State land to telegraph, telephone and electric companies.

There should be a law giving the State Land Board authority for granting rights of way over state lands for public highways.

Lots 7 and 8 in Sec. 21 and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and lots 9 and 10 in Sec. 22, Township 9 S., Range 38 E., B. M., containing 166 acres, was specially reserved to the State of Idaho by the United States government a few years ago by reason of the medical properties of the hot springs on the lands. They are known as the Lava Hot Springs. There should be some specific legislation giving the State Land Board full power to take some action that will protect and improve these springs in order that benefit shall be derived from them to the people. While there is no doubt of the Land Board's authority over these lands, they are in a much different position relative to the management of the same; and our present laws are not specific enough. All other lands can be sold but those lands cannot, and it will require the expenditure of money to make them serve the purpose they were reserved for.

The title to the beds of the lakes and navigable streams, and the land between low and ordinary high water mark upon such waters in the state, is a subject of considerable controversy at the present time; and while the state intends to assert its title to these lands for public purposes, a specific statute, authorizing the State Land Board to control these lands for public purposes, is advisable.

H. B. 112, Sess. Laws 1905, p. 99, provides that County Commissioners shall meet on the last day of April to fix interest on county deposits. This was done expecting that the act as originally drawn would first go into effect in June and when the time was changed for taking effect the time of fixing interest was not made in conformity. I would suggest that this date be fixed to be acted upon by the commissioners at some regular meeting of the Board of Commissioners.

Sec. 149, p. 283, Sess. Laws 1901, should be amended so as to empower County Commissioners to allow at any meeting claims for taxes where the same have been paid twice for the same year.

Also, to allow bills for the return of money where parties have bought property at a delinquent sale, paid the money to the county and it is afterwards discovered that the property was erroneously sold.

Also, to allow bills for the return of money when in their judgment it is ascertained that the assessment upon property was so grossly overestimated that the same was a mistake.

They should also be empowered to compromise for a less amount on property which has been bought by the county, whose value has become so uncertain as to make the collection of the tax doubtful.

The powers of the commissioners are limited and
• the amount of trouble caused in every county every year by reason of matters above stated, calls for remedial legislation.

A combination of circumstances arose which impelled the State Board of Education, of which I am a member, to make arrangements for the education and care of the deaf, dumb and blind children in the State, to be done within the State instead of contracting with

schools without the State. The law governing this matter (Sess. Laws 1891, p. 226) is scarcely applicable to present circumstances; and a statute giving the Board of Education full power to make provision for the care and education of these children within the state, should be passed.

I also suggest that S. B. 130, Sess. Laws 1905, be amended so that one-thirtieth of all moneys, etc., etc., shall be paid into the fund created by that bill, instead of nine-thirtieths. On an examination of other acts with reference to this grant of lands, it transpires that there is but one-thirtieth to pay into this fund, and as this act also appropriated this nine-thirtieths for the years 1905-6 to the deaf, dumb and blind school, and there was no such amount, the act was and is misleading.

The powers of the State Board of Equalization in the assessment of property should be extended so as to include the franchises and other property of express companies, Pullman and other sleeping car companies and independent freight car companies operating in this state.

The statutes in relation to the Board of Equalization should also be amended so that the Board shall be subject to the call of the chairman at any time, so that if it is discovered after the adjournment of the Board, that any property has escaped assessment, the same can be assessed. There should also be a provision that the Board can doubly assess property that has escaped taxation the previous year.

Provision should be made for the collection of an adequate penalty for any company that fails to list with the State Equalization Board within the time prescribed by law, all their property as required by law.

Provision should be made that the County Assessor or some other county officer, should make a report to the State Equalization Board by the first day of their meeting, of all the property within his county belonging to the companies of the character that the State Board of Equalization is empowered to assess, and their failure to do so should involve a penalty.

Provision should be made that the mileage of all railroad, telegraph and other companies, through the various school districts of the counties, should be computed and credited to such districts in the county auditor's office.

Sec. 6 of S. B. 165, Sess. Laws 1905, p. 385, should be amended by substituting the word "attorney" and the word "clerk" in line five of said section.

The said section provides for the election of a city clerk, and the use of the word "clerk" in naming the officers to be appointed by the mayor was a mistake and it was intended that a City Attorney should be appointed as provided in the law that S. B. 165 sought to amend.

Sec. 3 of H. B. 146, Sess. Laws 1903, should be amended by substituting the word "one-fifth" for the word "one-half" in line ten of the said section. Also by substituting the word "after" for the word "before" in line nine of the said section.

There is no question but that the use of the words "one-half" and "before" in said sections were mistakes and should be corrected. Sec. 31 of the said bill should also be amended so as to clearly define the liability of the counties for the headgates and measuring devices constructed by the water commissioners, and providing for the allowance of the same upon the presentation of the claim by the water master. As the statute now stands it is ambiguous.

SCHEDULE A.

STATEMENT OF CASES ARGUED IN THE SUPREME COURT OF THE STATE.

1. *Criminal Appeals.*

STATE V. HARNES, (80 Pac., 1129).

The defendant was convicted in the District Court of the Second Judicial District, Nez Perce County, of the crime of rape and sentenced for a term of thirteen years in the State Penitentiary. *Affirmed* May 31st, 1905.

STATE V. SLY, (80 Pac., 1125).

Defendant was convicted in the District Court of the Second Judicial District, Latah County, of the crime of murder in the second degree and sentenced for life. *Affirmed*, May 24th, 1905.

STATE V. WALN AND TURNER, (80 Pac., 221).

Defendants were convicted in the District Court of the Third Judicial District, Washington County, of the crime of robbery and sentenced for a term of seven years in the State Penitentiary. *Reversed* March 25th, 1905, on account of insufficiency of evidence.

STATE V. COOPER, (81 Pac., 374).

Defendant was convicted in the District Court of the Sixth Judicial District, Bingham County, of the crime of practicing medicine without a license and fined. *Reversed* June 24th, 1905, for the reason that the attorneys in the lower court had stipulated that defendant was legally engaged in the practice of medicine in Idaho previous to the passage of the law of 1899.

STATE V. MILES, (83 Pac. 697).

Defendant was convicted in the District Court of the Fifth Judicial District, Bannock County, of the crime of burglary and sentenced to a term of five years in the State Penitentiary. *Affirmed* January 3rd, 1906.

STATE V. WEST, (81 Pac., 107).

Defendant was convicted in the District Court of the Fourth Judicial District, Elmore County, of the crime of grand larceny and sentenced to a term of years in the State Penitentiary. *Reversed*, June 13th, 1905, on account of separation of jury.

STATE V. DOLAN, (81 Pac., 640).

The defendant was convicted in the District Court of the Third Judicial District, Ada County, of the crime of selling trout out of season. *Affirmed*, July 11th, 1905.

STATE V. BURKE, (83 Pac., 228).

Defendant was convicted in the District Court of the Second Judicial District, Nez Perce County, of the crime of burglary and sentenced for a term in the State Penitentiary. *Reversed* November 11th, 1905, on account of insufficient evidence.

STATE V. ROLAND, (83 Pac., 337).

Defendant was convicted in the District Court of the Second Judicial District, Nez Perce County, of the crime of embezzlement and sentenced for a term of eighteen months in the State Penitentiary. *Affirmed*, November 28th, 1905.

STATE V. WETTER, (83 Pac., 341).

Defendant was convicted in the District Court of the Second Judicial District, Idaho County, of the crime of murder and sentenced to be hanged. *Affirmed* November 24th, 1905.

STATE V. KNUDTSON, (83 Pac., 226).

Defendant was convicted in the District Court of the Second Judicial District, Latah County, of the crime of arson and sentenced to a term of seven years in the State Penitentiary. *Affirmed* December 2nd, 1905.

STATE V. SWENSON, (81 Pac., 379).

Defendant was convicted in the District Court of the Sixth Judicial District, Bingham County, of the crime of forgery and sentenced to one year in the State Penitentiary. *Reversed* July 3rd, 1905.

STATE V. CALLOWAY, (84 Pac., 27).

Defendant was convicted in the District Court of the Third Judicial District, Ada County, of violation of the liquor law and fined. *Affirmed* January 31st, 1906.

STATE V. STEERS, (85 Pac., 104).

Defendant was convicted in the District Court of the Fifth Judicial District, Bannock County, of the crime of embezzlement and sentenced for a term of two and one half years in the State Penitentiary. *Affirmed* March 8th, 1906.

STATE V. WRIGHT, (85 Pac., 492).

Defendant was convicted in the District Court of the Seventh Judicial District, Washington County, of the crime of grand larceny and sentenced to a term of years in the State Penitentiary. *Affirmed* March 16th, 1906.

STATE V. DRISKILL.

Defendant was convicted of rape in the District Court of the Third Judicial District, Latah county. New trial granted. State appealed. *Affirmed* April 14, 1906.

STATE V. SIMES.

Defendant was convicted of rape in the District Court of the Second Judicial District, Latah County, and sentenced to a term of years in the penitentiary. *Affirmed* April 26, 1906.

STATE V. MCGINNIS, (85 Pac., 1089).

Defendant was convicted in the District Court of the Third Judicial District, Ada County, of the crime of manslaughter and sentenced for a term of six years in the State Penitentiary. *Affirmed* May 31st, 1906.

STATE V. BOND, (86 Pac., 43).

Defendant was convicted in the District Court of the Third Judicial District, Ada County, of the crime of

murder and sentenced to be hanged. *Affirmed* June 19th, 1906.

STATE V. WILLIAMS, (86 Pac., 53).

Defendant was convicted in the District Court of the Sixth Judicial District, Bingham County, of the crime of grand larceny and sentenced for a term of three years in the State Penitentiary. *Affirmed* June 26th, 1906.

STATE V. COTTERELL, (86 Pac., 527).

Defendant was convicted in the District Court of the Fifth Judicial District, Bannock County, of the crime of grand larceny and sentenced for a term of eighteen months in the State Penitentiary. *Affirmed* June 10th, 1906.

STATE V. MORSE, (86 Pac., 53).

Defendant was convicted in the District Court of the Seventh Judicial District, Washington County, of the crime of grand larceny and sentenced to a term of years in the State Penitentiary. *Affirmed* June 26th, 1906.

STATE V. JESSE DUNN AND JESSE DEMASTERS.

Defendants were convicted in the District Court of the Third Judicial District, Idaho County, of the crime of grand larceny and sentenced to a term of three years' imprisonment in the State Penitentiary. *Pending on Appeal.*

STATE V. JONES et al.

Defendant was convicted in the District Court of the First Judicial District, Kootenai County, of the crime of criminal trespass and fined. *Pending on Appeal.*

STATE V. BARBER.

Defendant was convicted in the District Court of the Seventh Judicial District, Washington County, of the crime of manslaughter and sentenced to a term of seven years in the State Penitentiary. *Pending on Appeal.*

STATE V. IRA BAIRD.

Defendant was convicted in the District Court of the Seventh Judicial District, Washington County, of the crime of grand larceny and sentenced to a term of four years in the State Penitentiary. *Pending on Appeal.*

STATE V. SUTTLES.

Defendant was convicted in the District Court of the Fourth Judicial District, Cassia County, of the crime of rape and was sentenced to a term of ten years in the State Penitentiary. *Pending on Appeal.*

STATE V. IRA COOK AND BORA BRUSHWOOD.

Defendants were convicted in the District Court of the Third Judicial District, Idaho County, of the crime of grand larceny and sentenced to a term of four years in the State Penitentiary. *Pending on Appeal.*

STATE V. O'BRIEN.

Defendant was convicted in the District Court of the First Judicial District, Kootenai County, of the crime of burglary and sentenced to a term of thirteen years in the State Penitentiary. *Pending on appeal.*

(2) *Habeas Corpus Cases.*

In re Shirley Ja. 10 Idaho, 540.

Application for habeas corpus on ground of unlawful detention over term of court. Writ granted January 18th, 1905.

In re Knudtson. 10 Idaho, 676.

Application for habeas corpus after conviction on ground of lack of probable cause at preliminary examination. Application denied and prisoner remanded February 18th, 1905.

In re Miles.

Application for habeas corpus after conviction on

ground of court's jurisdiction. Writ denied and prisoner remanded March 15th, 1905.

In re O'Brien.

Application for habeas corpus after conviction on ground of void commitment. Writ denied and prisoner remanded October 16th, 1905.

In re Moyer, Haywood et al.

Application for habeas corpus before trial on ground of invalid extradition. Writ denied and prisoners remanded, March 13th, 1906.

In re Burgess et al.

Application for habeas corpus after conviction on ground of excessive sentence. Writ denied and prisoners remanded March 2nd, 1906.

In re Prout.

Application for writ of habeas corpus on ground of illegal detention at State Penitentiary by reason of warden's refusal to deduct period when prisoner was out on parole previous to breaking the same. Writ granted and prisoner discharged January 27th, 1906.

In re Harvey.

Application for habeas corpus on ground of illegal detention in State Insane asylum. Writ discharged and prisoner remanded January 21, 1905.

(3) *Civil Cases in Supreme Court.*

Roach et al vs. Gooding et al (81 Pac., 642). Application for Writ of Mandate to compel the Governor and others to issue bonds for University purposes. The question involved was whether the proceeds of the sales of the University lands could be pledged for the purpose of erecting buildings in connection with the University. The Supreme Court decided in favor of the position taken by this office, that it could not be done. Writ denied July 1, 1905.

Gooding et al vs. Profit et al (83 Pac., 230). Application for Writ of Mandate to compel the County Commissioners of Nez Perce County to make a sufficient levy

to raise the county's proportion of the State revenue. The question was whether the special levies, authorized by the legislature for the purpose of paying bonded indebtedness and for other special purposes, were to be computed against the five mill limit prescribed by Section 9 of Article VII of the State constitution. The court supported the contention of this office, that they should not be so computed. Writ granted November 1, 1905.

Gooding et al. vs. Anderson et al (83 Pac., 234). Application for Writ of Mandate to compel the County Commissioners of Latah County to make levy; involving the same points as the preceding case. Writ granted November 1, 1905.

Gooding et al. vs. Cowen et al., (83 Pac., 234). Application for Writ of Mandate to compel the County Commissioners of Shoshone County to make levy, involving the same points as the two preceding cases. Writ granted November 1, 1905.

Noble vs. Bragaw, 85 Idaho, 903—Application for Writ of Mandate to compel the State Auditor to issue warrant for payment of salary of State Veterinarian. Writ granted March 17, 1906. This was purely a friendly suit brought for the purpose of testing the constitutionality of the State Veterinary Bill. The constitutionality of the law was upheld.

Heitman vs. Gooding (86 Pac.,...).—Application for Writ of Mandate to compel the Governor to issue election proclamation, giving Kootenai County two senators and four representatives. Designed to test the constitutionality of the legislative apportionment act of 1905. Writ issued in modified form.

Bingham County vs. Steers et al.—Action on official bond, judgment for the county in the District Court of the Sixth Judicial District. Defendant appeals. Pending.

State of Idaho vs. Baird et al.—Action on bail bond. Judgment for the State in the District Court. Defendant appealed. Pending.

McConnell vs. State Board of Equalization (83 Pac., 494). Petition for Writ of Review to revise assessment

made by the State Board of Equalization. Writ denied December 30, 1905.

Jones vs. Vane (82 Pac., 110). Appeal on petition in intervention—affirmed August 15, 1905.

Corker vs. Elmore County (84 Pac., 509). Appeal originally from order of County Commissioners allowing bills of Road Supervisor. Appeal dismissed February 7, 1906.

SCHEDULE B.

CIVIL ACTIONS IN DISTRICT COURTS.

Bankers' Reserve Ins. Co. vs. Ligget (Ada County), injunction; pending on continuance.

Perrault vs. Board of Medical Examiners, mandamus. Writ granted 7-3-'06.

In re Steve Adams, application for Writ of Habeas Corpus. Writ granted.

Gooding et al vs. Adams et al.; condemnation proceedings brought on behalf of the North Idaho State Insane asylum to get certain land for the public use. Land condemned and purchased by the state June 13, 1905.

Gooding et al vs. Jos. Peterson et al.; condemnation proceedings on behalf of North Idaho Insane asylum to get certain land for the public use. Pending in District Court of the Second Judicial District.

SCHEDULE C.

U. S. LAND OFFICE CASES.

Division 1.

Application to Relinquish Worthless Lands.

1. In re relinquishment land embraced in List No. 4, Agricultural College (12,540.64 acres); and List No. 5, Agricultural College (1222.22 acres), selected at Lewiston Land Office on July 6th and July 31st, 1903. Application granted.

2. In re relinquishment of land embraced in List No. 5, Scientific Schools (8785.69 acres); selected at Lewiston Land Office July 6th, 1903. Application granted.

3. In re relinquishment of land embraced in List No. 5, Charitable Institutions (13,020 acres); selected at Lewiston Land Office July 16th, 1903. Application granted.

4. In re relinquishment of land embraced in List No. 8, Normal Schools (5803 acres), selected at Lewiston Land Office July 16th, 1903. Application granted.

5. In re relinquishment of land embraced in List No. 5, University Territorial grant (4273.56 acres); selected at Lewiston Land Office July 6th, 1903. Application granted.

Division 2.

Cases Against Northern Pacific Railway Co.

1. State of Idaho v. Northern Pacific Railway Co., involving lands selected by University List No. 3, filed at Coeur d'Alene Land Office, July 6th, 1905 (720 acres); pending on appeal before Commissioner.

2. State of Idaho v. Northern Pacific Ry. Co., involving lands selected by University Territorial List No. 4, filed at Coeur d'Alene Land Office, July 6, 1905 (1520 acres); pending an appeal before Commissioner.

3. State of Idaho v. Northern Pacific Ry. Co., involving lands selected by University Territorial List No. 5, filed at Coeur d'Alene Land Office July 6th, 1905 (480 acres); pending on appeal before Commissioner.

4. State of Idaho v. Northern Pacific Ry. Co., involving lands selected by University Territorial List No. 6, filed at Coeur d'Alene Land Office July 6th, 1905 (520 acres); pending on appeal before Commissioner.

5. State of Idaho v. Northern Pacific Ry. Co., involving lands selected by University Territorial List No.

7, filed at Coeur d'Alene Land Office July 6th, 1905 (400 acres); pending on appeal before Commissioner.

6. State of Idaho v. Northern Pacific Ry. Co., involving land selected by University Territorial List No. 8, filed at Coeur d'Alene Land Office July 6th, 1905 (320 acres); pending on appeal before Commissioner.

7. State of Idaho v. Northern Pacific Ry. Co., involving land selected by University Territorial List No. 9, filed at Coeur d'Alene Land Office July 6th, 1905 (669.55 acres); pending on appeal before Commissioner.

8. State of Idaho v. Northern Pacific Ry. Co., involving land embraced in Agricultural College List No. 2, filed at Coeur d'Alene Land Office July 6th, 1905 (1760 acres); pending on appeal before Commissioner.

9. State of Idaho v. Northern Pacific Ry. Co., involving land selected by Agricultural College List No. 4, filed at Coeur d'Alene Land Office July 6th, 1905 (1229.85 acres); pending on appeal before Commissioner.

10. State of Idaho v. Northern Pacific Ry. Co., involving land embraced in List No. 2, Penitentiary Grant, filed at Coeur d'Alene Land Office July 6th, 1905 (1580.96 acres); pending on appeal before Commissioner.

11. State of Idaho v. Northern Pacific Ry. Co., involving lands in Common School Indemnity List No. 4, filed at Coeur d'Alene Land Office July 6th, 1905 (4235.14 acres); pending on appeal before Commissioner.

These appeals were taken by the State of Idaho from the order of the Register and Receiver, rejecting the State's application made on July 6, 1905, to file upon certain lands in Townships 44 44 N., 2 and 3 East. The State's applications were made with a view to satisfying principally the University land grants, but to some extent both Agricultural College and Penitentiary grants. One or two of the applications were for the purpose of satisfying common school indemnity grants. The basis of the Register and Receiver's rejection was the previous filing upon these lands of several lieu selections by

the Northern Pacific Railway Co. These lieu selections had been filed at various times from the years 1900 to 1904 and covered the entire amount of land included within the several selections on the part of the State.

When this matter was turned over to this office by the land department it was decided, upon investigation, that the right of the State to the land in controversy was absolute. Both these townships had been withdrawn from settlement and entry several years before on the application of the State, and by the plain provisions of the act of Congress authorizing these withdrawals no rights of any kind, either by scrip entry or settlement, could attach to these lands as against the State. The scrip entries of the Northern Pacific Railway Company were in the same situation exactly as the entries of the individuals who claimed settlement there; and the decision of the Commissioner of the General Land Office in favor of the State in the cases of the entrymen, as set out in another part of this report, must necessarily be the decision of the Commissioner against the Northern Pacific Railway Company. When the appeals were prepared by this office, therefore, the principal ground upon which we relied was that all the lands included within the State's selections, and in conflict with the scrip entries of the Northern Pacific Railway Co., had been withdrawn from settlement and entry under the act of Congress of August 18, 1894, upon the application of Governor Steunenberg, dated March 15, 1899, and the application of Governor Hunt, dated July 5, 1901; and that from and after that date any selection of the same by scrip or by settlement and entry was unauthorized and void.

There was another point, however, involved in these cases of the Northern Pacific Railway Company which did not arise in the contests of those who claimed settlement upon the lands in these same townships. This point arose out of the fact that by the act of Congress passed February 26, 1895, it was provided that all of the lands within the Coeur d'Alene land district should be examined and classified by a Commission with reference to its mineral or non-mineral character. It was

provided by that act that the Northern Pacific Railway Company could not get title to any land within this land district which had not been classified by the Commission as non-mineral land. It was found upon investigation that the land selected by the State had not been classified as non-mineral and, according to previous decisions rendered by the Department of the Interior, the scrip filings of the Northern Pacific Railway Company were invalid to carry title thereto. The State relied upon a third point in these appeals, namely, that the State's general right to sixty days priority after the filing of the plats of survey as given by the act of Congress of March 3, 1893, was superior to the rights of any scrip entry or any other entryman whatever.

Very full and exhaustive briefs were prepared upon these several points. Other matters of minor consequence were gone into, such as the invalidity of the Northern Pacific company's selection by reason of formal defects in their selection lists and by reason of the invalidity of some of their base.

These appeals were forwarded to the Commissioner of the General Land Office in December, 1906, and have been under advisement in the Railway Contest division of that office ever since that date. This office is confident that its position in these matters will be sustained both by the Commissioner and, if appealed, will be successful in like manner before the Secretary of the Interior.

The importance of these cases is very great. The State's agents are informed that a great deal of other land selected by the Northern Pacific Railway Company is held under title similar to that here attacked by the State, and if it should be shown that the State can successfully contest these selections in these townships, it is probable that it will make considerable difference in the value of the land that may be selected in other townships subsequently to be surveyed and opened to entry. Aside from the importance of the cases as settling the status of the various scrip entries as against the rights of the State, the land itself here in controversy, 13,443 acres in amount, is some of the most valuable in the State

and a part of the very valuable white pine area in what is known as the Marble Creek Basin country of the St. Joe River.

Division III.

Contests With Entry-men.

Among the matters which have imposed upon this office great labor and perplexity have been the contests in Townships 44 N., Ranges 2 and 3 East, involving some 16,000 acres. These contests have been with the entry-men who claimed to have made settlement upon these lands after the State's rights had attained thereto.

This matter has been constantly before this office for the past year and a half, and aside from attending to the legal phases of the appeals, a great deal of time has been spent in answering correspondence of entrymen and their friends and attorneys and in consultation with the attorneys representing the different entrymen. Many things have been said and published relative to the action of the State in this matter which were absolutely without foundation whatever, and the matter was made a factor in the late political campaign and many reports derogatory to the State officials have been published. I shall not attempt to repeat matters of this kind, but desire to make a short statement of the position and action of this office after the matter was referred to it by the State Land Board.

These two townships, as had been ascertained by the State, contain a great deal of valuable timber land, and as early as the year 1899 Governor Steunenberg, under date of March 15th, had applied for the withdrawal of these townships from settlement and entry under the provisions of an act of Congress passed in 1894, authorizing such withdrawal, with the view that the State's land grants might be partially satisfied therefrom. Under the provisions of this act of Congress, no entry or settlement could be made upon the lands after the date when it was withdrawn from the public domain upon the application of the Governor. On July 5, 1901, Governor Hunt renewed his application to have these lands segregated

for the benefit of the State. It was some time after that before the townships were surveyed and formally selected of record for the benefit of the State's land grants. Finally, however, in July, 1905, the plats of survey were filed at the local land office at Coeur d'Alene City, and the State, after satisfying itself that the lands were covered with valuable timber, made selections of large acreage in these townships. The State's applications were rejected, however, by the Register and Receiver for the reason that during the preceding two or three years, and subsequent to the granting of the State's application to have these lands set aside for the State's benefit, numerous individuals claimed to have settled on this land and had, after the filing of the plats, offered their homestead or timber and stone entries and the same had been accepted. Thereupon the papers were turned over to this office for action and appeal from this decision of the Register and Receiver. The State appealed, therefore, to the Commissioner of the General Land office. The only ground set out in the appeal which was considered by the Commissioner was the bare fact that the State had applied for this land before the entrymen had made any attempt to acquire title to it.

It was urged upon this office strongly by the land department that unless some decision were obtained which would settle the State's rights under withdrawals such as this, that each new township as applied for would be covered by homestead and timber and stone entries by persons who thought that when the time came the State would withdraw and leave its lands for the benefit of individuals who claimed it subsequent to the attaching of the State's rights. There were on file in the local land office no affidavits showing the date when settlement had been made, but it was generally known that these persons all claimed residence on the land as of a later date than the State's application for withdrawal.

The State, however, proceeded slowly, with a view that no injustice should be done. The appeals were filed on the very last date possible. We requested the local land office not to forward the appeals to the Commis-

sioner until such action became necessary, and meanwhile the land department put special investigators in the field to examine the various pieces of land with the view to ascertaining the character and condition of the residence that had been made thereon and, so far as possible, the true facts regarding the date when this settlement began. The agents were instructed to use all possible diligence to make the fairest and fullest report possible consistent with the amount of such work there was to do. The agents took photographs of the improvements, measured the clearings, reported fully the character of the land, whether good for agricultural purposes or not, and sent in as far as possible the best information that could be obtained as to the date of settlement and the facts with reference to its bona fide character. It was found in almost every instance, as had indeed been previously ascertained by the State, that this land was distinctively timber land, and it was practically valueless for agricultural purposes and was not of the character of land upon which homestead proof could be made; and it was found, too, that the settlement had been made upon the land, in almost every case, after the withdrawal of the land upon the application of the State, and after due notice of such withdrawal had been published in the newspapers, as required by the act of Congress.

Meanwhile, in December, 1905, the appeals had been forwarded from the local land office to the Commissioner of the General Land Office at Washington. This office was informed of that fact when, in response to a letter in which we asked for still further delay in the matter of the forwarding of these appeals. Upon the appeals we submitted the matter to the Commissioner on the records of his office alone, relying upon the absolute withdrawal of these lands previous to the date of practically all of the settlements made upon this tract.

On March 27, 1906, the Commissioner disposed of the appeal involving the State's common school indemnity list number 1. This was followed on June 16, 1906, by another decision of the Commissioner involving the

State's common school indemnity list number 2. By these decisions the contention of the State was upheld in the cases of 66 entrymen out of 74 cases decided. The remaining lists are still pending on appeal before the Commissioner's office.

About all of the cases decided in favor of the State have been appealed by the entrymen to the Secretary of the Interior and this office is now preparing briefs in opposition to such appeals in all of the said cases. The cases so decided in favor of the State are as follows:

State vs. William M. Ralston.
State vs. Louis Vetting.
State vs. Daisy E. Spencer.
State vs. Charles E. Struthers.
State vs. George Brunn.
State vs. Alfred W. Marshall.
State vs. Ellen Maria Engstrom.
State vs. John Beaton.
State vs. Charles H. Thompson.
State vs. Andrew Bloom.
State vs. Gale Miles.
State vs. Edward P. Brennan.
State vs. George C. Morbeck.
State vs. Ulysses F. Early.
State vs. Lewis M. Squires.
State vs. Christ H. List.
State vs. Charles A. Dewey.
State vs. James Aris.
State vs. Mat Conway.
State vs. Lillian Pardee.
State vs. Albert S. Densmore.
State vs. Clarence E. Stoddard.
State vs. William C. Hendershott.
State vs. Cyrus O. Zinn.
State vs. John Brule.
State vs. George W. Moore.
State vs. Anna E. Balthes.
State vs. Frank C. Moore.
State vs. Edward E. Steele.
State vs. Henry W. Griffith.

State vs. Daniel Hewes.
State vs. Elmer Hewes.
State vs. William L. Zeigler.
State vs. Jerry Alcorn.
State vs. Clara B. Wethered.
State vs. George W. Kays.
State vs. Charles O. Portfors.
State vs. James R. Hall.
State vs. Charles N. Downie.
State vs. Peter G. Craig.
State vs. Charles J. Topping.
State vs. James M. Brown.
State vs. William Helmer.
State vs. Jennie Paulson.
State vs. Stephen A. Thorpe.
State vs. J. Emerson Williams.
State vs. John R. McDonald.
State vs. F. C. Donaldson.
State vs. Albert Anderson.
State vs. Howard A. Weld.
State vs. J. E. Oster.
State vs. Ike Myrick.
State vs. L. B. Fryer.
State vs. Ida M. Ferren.
State vs. William Clark.
State vs. James Russell.
State vs. Joseph J. Russell.
State vs. Ella M. Cavanaugh.
State vs. Alfred Anderson.
State vs. Mary A. Russell.
State vs. Antonio Scapuzzi.
State vs. Hal H. Essig.
State vs. Edward Kirsch.
State vs. Nellie Kildee.
State vs. Leon Demars.
State vs. Lyn Lundquist.

The following cases have been decided by the Commissioner of the General Land Office in favor of the settler. No appeal has been taken by the State:

State vs. Henry W. Thamke.

State vs. Samuel Obrecht.
State vs. William Lesage.
State vs. William Dewar.
State vs. Philip Landry.
State vs. Oliver Lines.
State vs. John J. Morrison.
State vs. Alvin M. Mason.

The following cases are still pending on appeal before the Commissioner of the General Land Office:

State vs. James Able.
State vs. Alfred Anderson.
State vs. Chas. R. Austin.
State vs. Joseph Blanchard.
State vs. Walter Bond.
State vs. Simon D. Brady.
State vs. E. P. Brennan.
State vs. James W. Calkins.
State vs. R. B. Canfield.
State vs. S. O. Chinn.
State vs. Thomas Coddington.
State vs. Louis Compo.
State vs. Elsie Curtis.
State vs. Homer David.
State vs. Louis P. Dallberg.
State vs. John Daviggeo.
State vs. Thomas Davis.
State vs. John J. Dodson.
State vs. J. C. Dwyer.
State vs. Olof Edeen.
State vs. Andrew F. Engstrom.
State vs. Homer E. Estes.
State vs. Homer R. Estes.
State vs. Jesse G. Estes.
State vs. A. L. Ferrell.
State vs. Arthur J. Flint.
State vs. J. B. Foreman.
State vs. J. W. Foley.
State vs. William Frei.
State vs. Newton J. Glover.
State vs. Walter Gumm.

State vs. August Hanson.
State vs. William Hartman.
State vs. George W. Hayes.
State vs. Charles A. Hill.
State vs. H. H. Hoagland.
State vs. Arnold Hooper.
State vs. Chas. F. Hubble.
State vs. John Johnson.
State vs. Peter Johnson.
State vs. J. P. Kleveno.
State vs. Erick O. Kullberg.
State vs. Joseph LaBelle.
State vs. Mick Lally.
State vs. Andrew Leland.
State vs. Paul Leuschel.
State vs. Martin Lindwale.
State vs. E. Lines.
State vs. Mary Lippert.
State vs. L. L. Logan.
State vs. Walter C. Mandall.
State vs. Kip Calkins Miles.
State vs. Charles A. Miller.
State vs. Thomas O. Miller.
State vs. Louis Monson.
State vs. W. G. Moore.
State vs. Wm. McCartor.
State vs. John McCoffrey.
State vs. Joseph O. McComb.
State vs. James R. McGuire.
State vs. Ewen McIntosh.
State vs. James G. Nevins.
State vs. Hill B. Norton.
State vs. A. W. Nystrom.
State vs. Wm. Perkins.
State vs. Zella Perkins.
State vs. Christina Playfair.
State vs. Ralph Plummer.
State vs. J. R. Raymond.
State vs. Paul J. Risley.
State vs. Wm. C. Robinson.
State vs. Geo. H. Root.

State vs. Wm. F. Root.
State vs. Frank Rubedew.
State vs. Wm. Rushing.
State vs. Wm. Scheave.
State vs. David Scheney.
State vs. Thomas O. Scott.
State vs. Peter Severson.
State vs. John Shanon.
State vs. John W. Shepperd.
State vs. Cavie Sherer.
State vs. J. A. Shoufler.
State vs. Wm. Shoufler.
State vs. Mike Short.
State vs. Lulu Showalter.
State vs. L. J. Simpkins.
State vs. Geo. W. Spencer.
State vs. John Stephenson.
State vs. Alva Strong.
State vs. Wm. Stoddard.
State vs. Chas. Strubble.
State vs. Erick Swanberg.
State vs. Chas. Swanberg.
State vs. Franklin Theriault.
State vs. Wm. J. Theriault.
State vs. D. D. Thomas.
State vs. Irving Thomas.
State vs. Wm. H. Thomas.
State vs. Mary C. E. Thompson.
State vs. Ada L. Toles.
State vs. Walter Tyson.
State vs. Patrick Wall.
State vs. Chas. H. Weihl.
State vs. W. W. Welch.
State vs. Andrew West.
State vs. Alda Wethered.
State vs. Dorothy Wethered.
State vs. James P. White.
State vs. F. W. Winship.
State vs. Lawson U. Dewey.
State vs. Theophile Delisle.

Division 4.

Cases in Which Hearings Were Had in the Local Land Office (Coeur d'Alene).

State vs. Kent.

State vs. Geo. Reed.

State vs. Wallace.

State vs. Burgess.

State vs. Dunn.

State vs. Routhier.

These cases all related to land in Township 62 North, Range 1 W. B. M., the plat of survey of which township was filed in the local land office on April 12th, 1905.

Under the provisions of the Act of Congress of March 3rd, 1903, the state was given sixty days prior right after the filing of township plats within which to make selections to satisfy its rights. The land involved in the above contests was selected by the State on the 10th day of June, 1905, to satisfy the grant to the State for charitable and educational purposes. Thereafter contestants in the above cases filed their applications for homestead entry which were rejected by reason of the prior selections of the State. From these decisions they appealed and asked that a hearing be had to determine their rights by reason of their settlement upon the land previous to the survey. In accordance with their application for hearing the cases were tried in August, 1905, before the Register and Receiver. The State won in each instance, the Register and Receiver holding that none of these contestants were shown by the evidence to be bona fide settlers upon the land prior to the survey. Cases are now pending on appeal before the Commissioner and briefs have been prepared in support of the State's contention.

Division 5.

Contests Involving Indemnity Selections For Forest Reserve Losses.

There are a number of contests pending wherein the State's land selections for common school purposes has

been attacked on the ground of invalidity of the base. In other words, that the land in lien of which these selections were made had never really been lost to the State. The selections attacked were made by reason of the fact that many sections numbered sixteen and thirty-six, but as yet unsurveyed, had been lost to the State by inclusion within the Bitter Root Forest Reserve. To make good these losses the State selected certain timber land in Township 52 North, R. 1 East, B. M. After the State's filings had been made, certain individuals offered timber entries thereon, and appealed to the Commissioner of the General Land Office from the action of the Register and Receiver in rejecting the same. The following are cases of this character now pending on appeal:

William W. Webb vs. State of Idaho.
Noah R. Palmerter vs. State of Idaho.
Donna Potter vs. State of Idaho.
Alexander Main vs. State of Idaho.
Harry A. Kunz vs. State of Idaho.
Rodney H. Olney vs. State of Idaho.
Calvin McDorman vs. State of Idaho.
Angus Reid vs. State of Idaho.
Josephine McIntosh vs. State of Idaho.

Division 6.

Miscellaneous Cases.

Walter G. Bangs vs. State, pending before Commissioner.

Nicholas A. Bangs vs. State, pending before Commissioner.

Joseph H. Stevens vs. State, pending before Commissioner.

John H. Gaa vs. State, pending before Commissioner.

Mike Short vs. State, pending before Commissioner.

Guy W. Stewart vs. State, pending before Commissioner.

N. P. Ry. Co. vs. State, pending before Commissioner.

Robert G. Pritchard vs. State, pending before Commissioner.

Mary Carey vs. State, pending before Commissioner.

Alfred McGarey vs. State, pending before Commissioner.

In re Protest Townsite of Kingston. Pending before Coeur d'Alene Land Office.

Orville Jackson and Geo. W. McIntyre vs. State. Settled.

Ex parte relinquishment of lands in Lewiston Scientific School State List No. 6. Appealed to the Secretary and decided in favor of State.

Ex parte cancellation of portion of Lewiston Normal School List No. 8; Normal School purposes. Appealed to the Secretary; decided against the State; pending on petition for review.

OPINIONS

BOISE, IDAHO, February 7th, 1905.

To His Excellency,

FRANK R. GOODING,

Governor of Idaho.

SIR:—In compliance with your request, I have examined House Bill No. 27, entitled, “An Act providing for the issuing of state bonds for the erection and equipment of a metallurgical laboratory, the erection and equipment of an agricultural building, the erection and equipment of a domestic science building, the establishment and support of an auxiliary experiment station, and prescribing how such bonds shall be issued, and how the proceeds of the sale of such bonds shall be expended;” House Bill No. 59, entitled, “An Act providing for the issuance and sale of state bonds in the sum of seventy-eight thousand dollars, and appropriating the proceeds thereof to the Academy of Idaho for constructing additional buildings and increasing the equipment of said academy”; House Bill No. 60, entitled, “An Act providing for the issuance of state bonds in the sum of forty thousand dollars for the purpose of erecting a dormitory and furnishing the same for the Albion State Normal School, and providing how the proceeds of the sale of such bonds shall be expended”; and House Bill No. 63, entitled, “An Act providing for the issue of state bonds for the purpose of establishing an eight-grade training school and furnishing accommodations for the departments of science, manual training, and physical training, by the erection of additions to the present main building of the Lewiston State Normal School, said Act prescribing how the proceeds of the sale of such bonds shall be expended,” with a view of determining two

propositions only which were involved in said request, to-wit: (1) Whether or not the bonds contemplated in said bills would be state debts within the purview of the state debt limitation, and (2) whether or not the provisions of said bills authorizing the proceeds of the sales of land, or of the timber thereon, granted to the State of Idaho by the United States as an endowment for the institutions named in said bills, or the interest upon the proceeds of the sale of said land and timber, to be set aside as a sinking fund for the payment of said bonds and the interest thereon, are constitutional; and I have to advise you as follows, namely:

First: The bonds provided for in said bills evidence the obligations of the State, and they are state debts of a primary nature. The State authorizes their issuance; they are given for money borrowed by the State; the money to be procured thereby is for state purposes, that is, to erect buildings for state educational institutions; and finally the burden to discharge the obligation, both principal and interest, is upon the State. The bonds must be paid out of the State's resources, and can only be discharged by a resort to taxation.

They are state debts, and, as such, must be considered in computing the state debt limit.

Second: The provisions of the bills under consideration authorizing the proceeds of the sales of such land and the timber thereon, or the interest received from the investment of the proceeds of the sale of such land or timber, to be diverted into a sinking fund for the purpose of paying the interest upon such bonds or to discharge the bonds, are void, in that they contravene the provisions of the Constitution of the State of Idaho and the Idaho Admission Act, under which Act donations of lands were made to the State of Idaho for educational purposes; and inasmuch as the uses to which moneys received from the sale of said lands and the interest thereon might be applied were the subject of an opinion by my predecessor, a copy of which opinion is hereto attached for your information, and in view of the fact that all bonding acts heretofore passed, providing for

the issuance of bonds in aid of state educational institutions, containing similar provisions, were by my predecessor declared unconstitutional; and as this opinion has been acquiesced in by the state officials, and they have changed their books and kept their accounts in conformity with said opinion, I do not deem it necessary at this time to enter into a lengthy discussion of the questions suggested therein. I will say, however, that this subject was called to my attention some time ago, upon the introduction of these bills, and in view of the fact that they were in contravention of the opinion of my predecessor above referred to, I made a careful examination into this subject, with reference to the donation of lands made by the general government to the State of Idaho for educational purposes, and I have looked into the matter of land grants to other western states generally, said grants being similar in character and purpose to ours, and I am firmly of the opinion that the grants of land to the State of Idaho for educational purposes were in trust, and that the express terms of the grant and the provisions of the Constitution require the State, as trustee, to maintain the permanency of the funds arising from the sale of lands so granted, and from the sale of the timber upon such lands, and that the State is limited to the use of the interest and income of the funds, and, further, that the State is required to expend such interest in the support of such educational institutions. In this respect, moneys received from leases and rentals of said lands should be used in the support and maintenance of said institutions.

While there has been a slight diversity of opinion among attorneys relative to the construction to be placed upon certain sections of the Idaho Admission Act, with reference to grants of land for school purposes, there has been one case where the precise question came before the Supreme Court of North Dakota, namely:

State ex rel. Board, etc., vs. McMillan, Treas., 96 N. W. 310, decided August 6th, 1903, and the court without any hesitancy construed Sec. 10 of the North Dakota Enabling Act, which is similar to Sec. 5 of the Idaho Ad-

mission Act, to cover all grants of land to the State for educational purposes; and so decided, without reference to the provisions of the Constitution of North Dakota. This is a recent case covering all phases of this subject, and to my mind it is conclusive.

In passing, it may be said that some provision should be made by a tax levy for the payment of the bonds heretofore issued in favor of the various educational institutions. I understand a large amount of the school moneys is invested in these bonds, some of the bonding acts themselves requiring the State Board of Land Commissioners to so invest said funds, and these funds will suffer unless express provision is made for the payment of said bonds as they become due.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

This opinion was upheld in the case of I. F. Roach et al. vs. Frank R. Gooding, Governor, et al., reported in 84 Pac., 642.

BOISE, IDAHO, March 15th, 1905.

To His Excellency,

FRANK R. GOODING,

Governor.

SIR:—Answering your verbal request as to the legality of Senate Bill No. 105, entitled, "An Act to amend Sections 4, 6, and 60 of an Act approved February 10th, 1899, entitled "An Act to provide for the organization, government and powers of cities and villages," I would respectfully state that the original sections sought to be amended by said bill were first enacted in 1893 (Sess. Laws 1893, pp. 97-129), and the whole of said laws, together with other sections, were re-enacted in 1899 (Sess. Laws 1899, pp. 192-215). Sections 6 and 8 of said Act of 1899 were amended in 1903 (Sess. Laws 1903, p. 187). The sole object and intent of Senate Bill No. 105, as gathered from the context, was to provide for biennial elections in cities and towns of more than one thousand and less than fifteen thousand inhabitants, and there

was no intention on the part of the Legislature to make any changes in the offices of such towns; and in order to make such provisions effective it was necessary to amend Sections 4, 6, and 60 of the Act of 1899. In amending Sec. 6 of said Act of 1899, it seems to have been overlooked that said section had been once amended, namely, in 1903 (Sess. Laws 1903, p. 187). The amendment made to said section at that time, however, was a proviso to the effect that the council might provide by ordinance that the city clerk should be ex-officio police judge, which amendment is incorporated in Sec. 6 of Senate Bill 105. Sections 4 and 60, as amended, are perfectly clear; but Sec. 6 of the present bill is somewhat ambiguous, in that it provides for the election of a clerk and other officers, and in lines 14, 15, and 16, which deal with appointive offices, it is provided that the mayor, with the consent of the council, may appoint a city clerk and an overseer of streets, etc. This is clearly an error. There is no question in my mind that if the court was called upon to construe this section it would hold that the clerk must be elected, as provided in the first part of said section and as had always been provided, which would leave that part of the section providing for the appointment of a city clerk inoperative; and that there was no intention on the part of the Legislature to substitute the words "city clerk" for "city attorney" in line 15, and that the same was a clerical error. The election of a clerk had already been provided for in said Sec. 6, and the use of the word "clerk" in line 15 thereof was not necessary and rendered such section ambiguous. Three previous legislatures, in adopting this same section, had used the words "city attorney" in said section where the words "city clerk" are inserted in this bill. As the whole aim and object of Senate Bill 105 was to provide for biennial elections, it is only common sense to presume that an error was made in the use of the word "clerk" for "attorney" in said section. That the Legislature did not intend to repeal the provision for the appointment of the city attorney is plain. It provided for the election of a city clerk in the first portion of Sec. 6, and the word "clerk" being superfluous in line 15, said provision with

the word "clerk" omitted would read * * *
"the mayor, with the consent of the council, may appoint
a city * * * and an overseer of streets,
who shall hold their offices for two years" * * *
With the word "clerk" in line 15, the whole section is ambiguous; with the word "clerk" omitted from line 15, that portion of the paragraph is ambiguous, as said paragraph, as constructed, was framed to include more appointments than one by the mayor and the council, and it is plain that it was not intended that a clerk should be appointed; and it is but fair to presume, in view of the scope and intention of the whole bill, that the Legislature did not intend to deprive the mayor and council of the power to appoint a city attorney. The law providing for the appointment of a city attorney has been in force since the passage of the first act regulating cities of the second class, and the need of it at this time is much they had substituted some position or office other than one whose election had already been provided for, the presumption that a mistake had been made would not be so strong. As a matter of fact, it was a clerical mistake, made in the drawing of the bill, and which was not discovered until after its passage and when it was too late to rectify. The title of Senate Bill No. 105 does not pretend to amend Sec. 6, as passed in 1903; and Sec. 6 as passed in 1903, is only repealed by the repealing clause of this Act in so far as it conflicts with the provisions of this Act; and as in my opinion (and as within my knowledge) the word "clerk" was not intended to be used in line 15 of Sec. 6 of Senate Bill No. 105, I would say that that portion of Sec. 6 of the Act of 1903, wherein the words "city attorney" are used should stand, and lines 14 to 17 of Sec. 6 of Senate Bill No. 105, read in conjunction with the Act of 1903, and read in the light of the facts of the case and the intention of the Legislature, should be read as follows: "The mayor, with the consent of the council, may appoint a city attorney and an overseer of streets, who shall hold their offices two years, unless sooner removed by the mayor, with the consent of the council." There is no mistake in such Act

which would, in my opinion, render the same inoperative, or cause any trouble if the same became a law.

I am, very respectfully,

J. J. GUHEEN,
Attorney-General.

BOISE, IDAHO, April . . . , 1905.

H. N. COFFIN,
State Treasurer,
Boise, Idaho.

SIR:—Replying to your inquiry relative to House Bill No. 132, entitled, “An Act Entitled an Act to Provide for the Payment of Certain University Warrants Issued by Authority of the Idaho Legislature for the Purpose of Erecting a University Building,” approved March 15th, 1905, I have to say that it is very doubtful upon the face of said Act whether you can pay the warrants therein referred to. However, as there is a more serious defect than appears upon the face of said bill, I shall not discuss this phase of it.

These warrants were issued by the Board of Regents of the University of Idaho under authority of an Act entitled, “An Act to Amend an Act Entitled ‘An Act to Establish the University of Idaho,’ ” approved February 24th, 1893 (Session Laws 1893, p. 48). The Act of 1893 provides that these warrants shall be a charge upon certain taxes to be collected during the years 1893, 1894, and 1895, and provides that said warrants shall be a charge upon said taxes only, and not a charge against the State. Certain of these warrants and a list of outstanding warrants were presented to the Board of Examiners March 2nd, 1905, and said Board, at the request of the parties presenting the same, authorized the State Auditor to certify said warrants and said list of warrants to the Legislature, for its action. From the journals of the Legislature it does not appear that this list was received. However that may be, this Act passed the House and the Senate on February 21st, 1905, and March 1st, 1905, respectively, and the action of the Board of Examiners,

in certifying the said warrants and list of warrants, was taken subsequently to the passage of the bill by both houses of the Legislature.

Sec. 18 of Art. IV of the Constitution, among other things, provides:

“They (the Governor, Secretary of State, and Attorney General) shall constitute a Board of Examiners, with power to examine all claims against the State, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law. And no claims against the State, except salaries and compensation of officers fixed by law, shall be passed upon by the Legislature without first having been considered and acted upon by said board.”

The bill was passed by the Legislature before the claims it was intended to pay were certified to the Legislature by the Board of Examiners, and this, in my opinion, renders the Act void.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

BOISE, IDAHO, February 20, 1906.

HON. H. N. COFFIN,

State Treasurer,

Boise, Idaho.

DEAR SIR:—In answer to your inquiry as to whether the bond submitted by the First National Bank of Blackfoot Idaho, as security for the deposit of state money is sufficient, I would advise you as follows:

This bond furnished by the American Surety Company of New York in the sum of \$10,000.00 does not conform to the provisions of law relative to this matter. There is set forth on page 307 of the Session Laws of 1905, the form of bond which must be substantially followed in writing these securities. I would suggest that you advise the First National Bank of Blackfoot, Idaho,

that a bond must be furnished which is substantially the same as that set forth in full in the Session Laws of 1905.

Yours very truly,

J. J. GUHEEN,

Attorney-General.

BOISE, IDAHO, January 18, 1906.

MR. WILL H. GIBSON,

Secretary of State,

Boise Idaho.

DEAR SIR:—Answering your verbal communication as to whether the Act of the Legislature, House Bill No. 216, p. 231, Laws of 1905, providing for the publication and sale in pamphlet form of the laws of Idaho repeals all other acts with reference to the publication and distribution of the said laws, I will say that there is some doubt as to whether this law repeals special laws upon this subject, and to construe that it does so would result in complications that would be somewhat detrimental to the interests of the state, and interfere with the proper duties of certain officials of the state.

I would say that you would be justified in omitting from the provisions of this Act the election laws which are required to be furnished to various election officers of the state, and also such school laws as should be furnished to school and county officers.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

September 22, 1906.

HON. ROBERT S. BRAGAW,

State Auditor,

Boise, Idaho.

DEAR SIR:—Answering your verbal request of yesterday, I will say that the sum of \$2,156.80, being the balance in the fund known as the State Charitable Fund

January 1st, 1906, as shown by the books of your office, is available for the educational expenses of the deaf, dumb and blind children of this state, as provided in the act of 1905 (Session Laws of 1905, page 421), creating the fund known as the "State Charitable Institutions Fund."

Very truly yours,

J. J. GUHEEN,

Attorney-General.

April 8th, 1905.

IN THE MATTER OF THE THUNDER MOUNTAIN WAGON ROAD.

HON. ROBERT S. BRAGAW,

State Auditor,

Boise, Idaho.

DEAR SIR:—I have your letter of the 5th inst., referring to me vouchers and claims Nos. 8353, 8956, 8986 and 9007.

These claims have been regularly allowed by the Board of Examiners, and they should be paid. The balance of the fund of \$20,000.00 appropriated by the State for building the Thunder Mountain Wagon Road should be used for this purpose. In other words, all the money now in the hands of the State Treasurer credited to the Thunder Mountain Wagon Road Fund is available to pay these claims and should be drawn upon to the extent of that amount. I understand that part of the subscribed fund has not yet reached the Treasurer's office, but is in the hands of Ex-Governor John T. Morrison, as trustee, and at present is tied up by litigation. If such fund reaches the Treasurer, the balance due upon any of these bills can then be paid out of such fund, if there is sufficient money. If the amount of the fund appropriated by law has been exhausted, you cannot draw a warrant upon such fund.

Very respectfully,

J. J. GUHEEN,

Attorney-General.

April 1st, 1905:

HON. ROBERT S. BRAGAW,
State Auditor,
Boise, Idaho.

SIR:—Herewith I return to you letter of Frank S. Rice, County Treasurer of Idaho County, which you submitted to me, with request that I advise you what provisions of law are applicable to the state of facts therein disclosed, and I have to say that Sec. 22 of the Act approved March 11th, 1903, is as follows:

“Sec. 22. Any officer who shall refuse to turn over any moneys collected for licenses issued as herein provided, shall be guilty of a misdemeanor, and upon conviction thereof shall be immediately removed from office and be liable to criminal prosecution.”

Sec. 4786 of the Penal Code provides that every officer charged with the receipt, safekeeping, or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony. Sections 4785, 4790 and 4791 of the Penal Code relate to the same matter.

Sec. 1743 of the Political Code constitutes the county attorney the legal adviser of county officers, and Mr. Rice should consult with him; and I also think the Game Warden should be apprised of the situation. The bondsmen of the justice would, of course, be liable for the amount which he withholds.

Very respectfully,

J. J. GUHEEN,

Attorney-General.

April 17th, 1905.

HON. ROBERT S. BRAGAW,
State Auditor,
Boise, Idaho.

SIR:—Replying to your inquiry relative to your duty with reference to certain requisitions made by the Board of Regents of the University of Idaho for money

appropriated to said University, I have to say that I find no law authorizing you to draw warrants upon the Treasurer for moneys in his possession appropriated to the University upon requisitions of the Board of Regents; but, upon the other hand, it is expressly provided that you should draw warrants upon all stated funds or appropriations only upon the presentation of proper vouchers or claims in favor of the parties entitled thereto, which have been approved by the Board of Examiners, as provided by law, and claims against the State incurred in the management of the University are not excepted from this mode of procedure.

It is my view that under the existing law you should draw warrants upon funds and appropriations belonging to the University only after claims incurred in the management of the University have been allowed by the Board of Examiners, and warrants should then be drawn in favor of the parties entitled thereto.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

January 4, 1906.

MISS MAY L. SCOTT,

State School Superintendent,

Boise, Idaho.

MADAM:—Replying to your verbal inquiry of the 3rd instant asking in regard to the fiscal affairs of independent school districts and particularly with reference to the question whether warrants drawn by the officers of such districts must be countersigned by the County Superintendent and the County Auditor, I would respectfully refer you to Sections 1040-1042 of the Political Code. These sections provide as follows:

“Section 1040. * * * The said county treasurer shall pay over to the treasurer of any independent school district under the provisions of this chapter all moneys belonging to such district upon the presentation of an order from the clerk of the Board of Trustees of such

district, signed also by the chairman thereof, and countersigned by the County Superintendent and County Auditor."

"Section 1042. It shall be the duty of the county auditor upon the presentation of any order from the clerk of the board of trustees of any school district in his county, said order also being signed by the chairman of the said board of trustees, or in his absence, by the other member of the board, to draw his warrant upon the school fund standing to the credit of the said district in favor of the person mentioned in the said order: Provided, That in case of independent school districts orders, he shall not draw his warrant, but countersign the warrant or order of said district officers: Provided, further, That the said orders have been countersigned by the county superintendent, but in no case shall he issue a warrant, or countersign an order for a greater amount than there is cash in the treasury to the credit of said district."

It is evident from the history of these sections and the amendments that have at various times been made in the law relating to this subject that it was the intention of the legislature to require all warrants or orders, for whatever purpose issued by the officers of independent school districts, to be countersigned by the county auditor and the county superintendent.

Very respectfully,

J. J. GUHEEN,

Attorney-General.

March 7, 1906.

MISS MAY L. SCOTT,

*State Superintendent of Public Instruction,
Boise, Idaho.*

DEAR MADAM:—In response to your verbal inquiry of March 6, relative to the procedure for levying taxes to provide for the interest and payment of school bonds, I have to advise you as follows:

Your inquiry does not state whether the school district in question is operating under the law applicable

to independent school districts, or whether it is simply under the law relative to the general school districts of the state. You do not specify what particular point you are desirous of having information on, and I can only gather that there is some uncertainty in the case of this district as to how they shall proceed to levy the taxes mentioned above. Assuming that this is the case, I will set out the provisions of the law relative to such levy. Section 1036 of the Political Code provides as follows:

“For the purpose of establishing and maintaining public schools in the several counties of the state, the board of county commissioners of each county shall, at the time of levying the taxes for state and county purposes, levy a tax of not less than five mills nor more than ten mills on each dollar of taxable property, in their respective counties, for school purposes. Said taxes must be assessed and collected in each county as other taxes for state and county purposes. * * * .”

Section 1315 of the Political Code provides that the general meeting of the board of county commissioners for the purpose of levying taxes is to occur on the second Monday of September, annually. There is, however, a special provision of the law relative to the annual levy for the purpose of paying interest on bonds. This is found in Section 1050 of the Political Code, and is as follows:

“The school trustees of each district must ascertain and levy annually the tax necessary to pay the interest as it becomes due, and a sinking fund to redeem the bonds at their maturity, and said tax is a lien upon the property of said school district and must be collected in the same manner as other taxes for school purposes.”

There is nothing said in the above as to when this levy is to occur. It might, however, in my judgment, be levied and voted under the provisions of Section 1043 of the Political Code, which reads as follows:

“It shall be lawful at the annual school meeting and election on the first Monday in June to vote upon the question of whether or not any special tax shall be levied

for any purpose, such as building and repairing school houses, or for the support of public schools in the district; said meeting may first decide the rate to be levied, not to exceed ten mills on the dollar of taxable property, then to proceed to ballot, on which ballot shall be written or printed, "Tax—Yes," or "Tax—No," and none but actual resident freeholders and heads of families of said districts shall vote at such election. A separate ballot box shall be used for voting on any question of taxation or other business concerning schools and school interests, from that used in voting for trustees. It shall be the duty of the judge and clerk of said election to prepare in duplicate an abstract of the vote at such election, showing the number of votes cast for trustee, and the number of votes cast for and against the proposition voted for, to file one of said abstracts with the clerk of the district and the other with the clerk of the board of county commissioners. If a majority of the votes polled at such election are in favor of the tax, the board of trustees must immediately make such levy and certify the fact, the date thereof, and the rate of tax levied, the year for which levied and the number of the district, to the clerk of the board of county commissioners, but not more than one special tax can be levied in one year."

It will be noted in the foregoing that the annual special tax provided for is for "such purposes as building and repairing school houses, or for the support of public schools in the district." It is probable that a tax levied for the payment of interest on bonds would be proper as a special tax under the provisions of this section. It will be noted, however, that the levy must occur at the time of the annual school meeting on the first Monday in June; and it must further be borne in mind that not more than one special tax can be levied in one year.

Trusting that this may answer your question, or if not, trusting that you may make the question so definite that we will be able to tell what is wanted, I am

Very truly yours,

J. J. GUHEEN,

Attorney-General.

February 11th, 1905.

MISS MAY L. SCOTT,

*State Superintendent of Public Instruction,
Boise, Idaho.*

MY DEAR MISS SCOTT:—Replying to your letter of February 9th, relative to provision made for conducting special and regular teachers' examination, I have to say that Section 14, of an Act entitled, "An Act to establish the office of county superintendent of public instruction, and prescribing the duties of the same," approved February 17th, 1899, is as follows:

"The county superintendent shall be allowed all necessary expenses incurred in the examination of teachers, *for blanks, books, stationery, pens and ink*, out of the current expense fund of the county."

Section 24, of Chapter III, of an Act entitled, "An Act to establish and maintain a system of free schools," approved February 6th, 1899, is in part as follows:

"He (the county superintendent) may call to his aid for the purpose of assisting in any public examination any competent teacher or teachers not to exceed two in number, who shall receive as compensation not to exceed four dollars per day."

Doubtless it is the section just recited that you referred to in your telephone communication of the 10th inst., which, of course, if not repealed, would definitely determine the question.

This Act approved February 17th, purports to establish the office of county superintendent of public instruction, and to prescribe the duties of such officer. It embraces the same subject, and was enacted for the same purpose, as Chapter III of the Act approved February 6th. It does not purport to amend the earlier act. It seems to have been the intention of the Legislature to substitute the later act for the earlier one, and to make it contain all the law on the subject, at least with regard to the subject under consideration. There is in the later act a section providing for expenses of examinations, and it is therein provided that the county superintendent shall

be allowed necessary expenses in connection with examinations, for blanks, books, stationery, pens and ink. This provision is found in the earlier act in the section cited supra, relative to assistants, etc., and it must be held that in excluding the provision relative to assistants in the later act, it was the intention of the Legislature to repeal any provision relating thereto contained in the earlier act.

I therefore advise you that there is no provision of law making expenses incurred by the county superintendent in procuring assistance at county teachers' examinations a charge upon the county.

If in your judgment, county superintendents should be allowed such expenses, you would better have prepared a bill with that end in view.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

April 21st, 1905.

MISS MAY L. SCOTT,

*State Superintendent of Public Instruction,
Boise, Idaho.*

MADAM:—Replying to your inquiry relative to the qualifications of electors in school district elections to determine whether or not bonds shall be issued, I have to advise you that in elections of this character persons possessing the general qualifications of electors, and who are "resident freeholders" or "resident householders," are entitled to vote.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

July 18, 1906.

MISS MAY L. SCOTT,

*State Superintendent of Public Instruction,
Boise, Idaho.*

DEAR MADAM:—Referring to the inquiry of Miss Bernice McCoy, county superintendent of Nez Perce

county, in her letter to you of July 16th, I have to advise you as follows:

Sec. 45 of the Act of February 6, 1899, as amended by the Act of March 10, 1903 (Sess. Laws 1903, p. 287), provides:

"That a school house already built shall not be removed, or a new site for school house be designated, except when directed by a two-thirds vote of the electors of said district at an election held for that purpose, which election may be a special or general school election."

We think it is clear from the above that it would be necessary for two-thirds of the whole number of qualified electors of a district to vote in favor of removal to a new site in order to carry it. Otherwise, a small majority of the electors, by securing a two-thirds vote of those present at the meeting could secure such removal.

Yours very truly,

J. J. GUHEEN,

Attorney-General.

April 9th, 1905.

MISS MAY L. SCOTT,

*State Superintendent of Public Instruction,
Boise, Idaho.*

MADAM:—Replying to your letter of April 6th relative to recognition by the State Board of Public Instruction of certificates and diplomas issued by other states, I have to advise you that Sec. 1 of an Act entitled, "An Act to Amend Section Four of Free Schools, Approved February 6th, 1899," approved March 9th, 1905, among other things provides:

"The Board may issue certificates to persons holding state diplomas from other states requiring similar qualifications."

Under this provision the Board is authorized to issue Idaho certificates to holders of diplomas issued by states requiring qualifications similar to those required by Idaho of applicants for diplomas. The qualifications

referred to are prescribed in said Section 1, where it is provided that applicants for state diplomas shall possess good moral character, and shall pass an examination in all the branches included in the course of study prescribed for the public schools of the State, didactics and such other branches as the Board may prescribe; that they shall have been engaged successfully in teaching for at least five years, two of which must be in the state issuing the diploma, and shall be the holder of a state certificate.

Holders of diplomas from state institutions of other states are not entitled to an Idaho certificate by virtue thereof, even though such diploma confers upon the holder a life certificate to teach in the state where issued. The requirements of Idaho relative to the issuance of diplomas must be complied with. In other words, only persons holding diplomas procured by conforming to requirements similar to those in said act prescribed for Idaho diplomas, are entitled to Idaho certificates, without examination, etc.

The Board is not authorized by this act to recognize certificates issued by other states. Applicants for Idaho certificates, other than those holding state diplomas procured as above indicated, must meet the conditions imposed; that is, they must comply with the requirements prescribed for Idaho certificates, which are the same as above recited for Idaho diplomas, with the exception that only three years' teaching experience and a first grade county certificate are required.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

January 4th, 1905.

HONORABLES TAYLOR, HART AND NUGENT,

Idaho State Senate.

GENTLEMEN:—Upon the motion heretofore submitted to me, to-wit:

"That the minutes of the senate be, after having been read and corrected, transcribed to the journal by typewriting the same therein if legal, and when so transcribed be the journal of the senate," I beg to report as follows:

Section 42, Political Code of Idaho, among other things, provides as follows:

"It shall furthermore be the duty of the secretary of the senate and the chief clerk of the house and keep a correct record of the proceedings of each day for the purpose of having such proceedings entered in the journal by the journal clerks of the respective houses."

"It shall be the duty of the journal clerk of the senate to record each day's proceedings in the journal, from which they shall be read by the secretary each day of meeting, in order that they may be authenticated by the signature of the president."

Under the above statute, I am clearly of the opinion that the journal may be kept in typewriting and that all of the proceedings of the senate may be entered upon the journal in typewriting, but this should be done, and then the journal read to the senate and all necessary corrections be made upon the journal.

Your motion, as submitted to me, contemplated the reading and correction of the proceedings of the senate before the same should be entered upon the journal. This would be wrong. I would suggest that if it is your desire that the journal be kept in typewriting, you change the language of the motion.

Respectfully,

J. J. GUHEEN,

Attorney-General.

Boise, Idaho, December 9, 1905.

H. B. POWERS, C. C. MOORE AND HUGH FRANCE,
Boise, Idaho.

GENTLEMEN:—I have your letter to me of November 28th, in which among other things, you requested me to

give you my reasons for my opinion wired you from Pocatello November 28th. Your letter comments upon the fact that my telegram does not give reasons why your committee is without the power claimed by you, and why the funds provided in H. B. No. 205 are not available for the committee. Your telegram to me of November 27 asked my opinion as to whether your committee had power to proceed and as to whether the funds provided in H. B. 205 were available to the committee and you desired a reply by wire by noon of November 28. I did not receive your telegram until 9 a. m. of November 28. I immediately wired you that in my opinion the committee had no power to proceed and that the funds provided in H. B. 205 were not available for your committee. What I understood your committee desired was my opinion or ultimate conclusions as to your power and not my reasons, and as business men you could hardly expect in a matter of this kind, where it was not necessary, that I should undertake to give my reasons by wire. If you had asked me to wire my reasons, I should not have attempted to give them in a telegram.

It is thoroughly agreeable to me to give the committee my reasons, but I desire to do so by letter in order that I may go into the matter more in detail. In your letter of November 28th, you take issue with my opinion and say "It is clear from a review of the action of the Legislature, as expressed in its journals and in H. B. 205, that it was the intent of the legislature that the committee in question should make the investigation, and it is also clear that it was the intent of the legislature that the appropriation should be available to meet the expense of the committee."

It is no doubt your belief that the legislature so intended, but from my examination of H. B. 205 and the journals of the legislature, it is perfectly clear to me that the legislature did not so intend, and if they did so intend, did not proceed in the proper and legal manner to carry out their intentions. That they did not do so is their fault, and not the fault of the officers whose duty it is to construe the laws they enact.

The House is not the legislature. It is only one branch of the legislature. The House Journal is the only journal that has any reference to your committee or any appropriation for your committee, and that reference is only in a report by your committee to the House.

The Senate Journal does not disclose that the Senate ever had any knowledge of the existence of your committee, and when the Senate passed H. B. 205, there was nothing in the title of the bill nor in the body of the bill that would ever lead a member of the Senate to infer that this appropriation was available for any committee or any individuals other than the Board which was authorized by the constitution and the laws of Idaho to have charge of the land matters of the State. I believe you will agree with me that if the Senate had so understood it, they would have arranged for representation upon that committee. However, your committee was authorized by a resolution of the House of February 2nd to make a certain investigation and report the results to the House. On February 15th your committee made a report of a general nature in which you stated it would be necessary to employ experts in order to ascertain the condition of the Land Department, and to obtain the proper data, your committee recommended that an appropriation be made for that purpose and for the purpose of purchasing books, records, indexes and other necessary equipment to enable the State Land Board to conduct the State land business in a business manner. The committee further recommended as follows: "Your committee further asks the authority from this honorable House to carry on the investigation herein suggested and in the most expeditious and economical manner consistent with the best interests of the State, and report their findings and suggestions to the Governor at the conclusion of their work and through him to the next legislature of the State of Idaho."

Upon motion the report of the committee was adopted.

Upon the resolution of February 2nd and the report of February 15th, your committee rely, as I understand

it, for your authority to proceed and use the funds under H. B. 205. The resolutions provided for the appointing of your committee of February 2nd, and the subsequent adoption of the report of your committee on February 15th, did not extend the powers of your committee beyond the life of the legislature. When the eighth session of the legislature of the State of Idaho adjourned sine die March 4, 1905, the legislature ceased to exist and its powers necessarily died with it. When the House adjourned sine die, March 4, 1905, its powers as a branch of the legislature ceased to exist and the authority or powers it had conferred upon your committee while in session ceased to exist, and there is not now, in my judgment, any legal existence of your committee beyond the term of the legislature.

There is no act of the legislature which expressly or by inference designates your committee, or you as individuals, to proceed in any investigation or anything else in connection with the land department of the State or otherwise. The resolution of the House heretofore referred to is not an act of the Legislature, but a simple resolution of one branch of the Legislature with reference to the organization of the committees of the House in order to facilitate the business of the House, and its powers ceased when the House adjourned sine die.

Your committee in their report of February 15th, recommended that the findings and suggestions of the committee after investigation, be made to the Governor and by him to the next legislature. House Bill No. 205 does not name your committee, or yourselves as individuals, to carry out its provisions. It does not make any provisions for any findings or suggestions to be made to the Governor and by him to the next legislature, as was recommended in the report of your committee to the House. The bill provides that the appropriation shall be available for the ascertainment of the status of the various land funds and land grants of the State of Idaho and for the purchase of the proper books, necessary to place the land department upon a business basis. The bill contemplates action and results now and does not

contemplate reports being made to the Governor. To read House Bill No. 205 as it stands, and without any reference to the journals of the House, it does not need any investigation to construe its meaning or as to who shall carry its provisions into effect. Its provisions are of a general nature and are plain. The constitution and laws, as they now exist, make provision as to who shall have charge of the land business of the State. There are no provisions in House Bill 205 that it has not always been, and now is, the duty of the State Land Board to attend to under the laws of the State. House Bill 205 does not add to these duties, but it provides a separate appropriation in order that past records may be investigated and errors ascertained in order to place the land department upon a better basis. The Land Board has the power to do this, irrespective of House Bill 205, but House Bill 205 did away with the necessity of using the maintenance appropriation for this purpose. There are powers designated in House Bill 205 which the legislature could not delegate to a committee or to individuals other than the State Land Board. The legislature could by a bill enacted into law say what system should be used and how the land business of the State should be conducted, and could name the appropriate books to be purchased to carry the law into effect, but the State Land Board must be the agent to perform this duty. If the legislature fails to specify in detail how the business shall be conducted, or the kind and character of the books to be purchased, it cannot delegate that power to a committee. That is what the effect would be if your committee were authorized to act under House Bill 205.

When the legislature wants the land department put upon a business basis, it must say in express terms what is a business basis, or if it chooses to pass general laws, regulating the transacting of the land business, it must leave the details of the execution of these laws to the State Land Board. The State Land Board is not the creation of the legislature. It is created by the same instrument as is the legislature, namely, the constitution of the State of Idaho. The State Land Board is composed of the officers constituting the executive depart-

ment of the State Government (with the exception of the State Auditor and State Treasurer) to-wit: The Governor, Secretary of State, Attorney General and Superintendent of Public Instruction. These officers are elected at the same time and under the same laws as are the members of the legislature; and the people in voting, understand that these officers have charge of the land business of the State, because the constitution expressly provides that the State Land Board shall have the direction, control and disposition of the public lands of the State under such regulations as may be prescribed by law. The Legislature may say how certain things shall be done, but they cannot say who shall do it other than the State Land Board.

The provisions of House Bill 205 are a great deal broader than the recommendations of your committee. In your report of February 15th, where you ask the privilege of conducting an investigation and of reporting your findings and suggestions to the Governor, your committee recommends that you be empowered to employ experts to conduct this investigation. To employ experts is the only feasible and sensible way to get at the matter, but there is no business reason that can be urged why the State Land Board could not employ experts as well as a committee of five members of the legislature, whose duties and residences in different parts of the State naturally keep them away from the scene of the investigation. I simply mention such matters to show that it is not reasonable that the legislature intended what you claim.

I do not split hairs or raise technical objections in construing our laws, as has been said by members of your committee in commenting upon my opinion as wired you at your request. On the other hand, I always desire to give, and always have given, our laws a most liberal construction in order to make them effective. But my examination of this matter thoroughly satisfies me that your contentions were outside of legitimate legal argument, and no matter how I might feel personally about the matter, it was not a case where I could by construction give you the powers that the legislature had failed

to give, and in addition give you some powers that the legislature could not give you had it attempted to do so.

I respectfully submit the foregoing as some of the reasons for my opinion heretofore given you.

Answering the part of your letter regarding the duties of Mr. Marvin, I would say as an individual member of the Board that it was my understanding that he was employed particularly with reference to his capability and experience in land matters generally, and with a view to his assisting the present land board in ascertaining everything possible in connection with the past business of the land department; and to suggest, advise and aid us in adapting present methods to the end that the business of the land department of this state could be placed upon a thorough business basis immediately. The Board has repeatedly adopted new methods which it has found necessary as its investigation of the land business proceeded, and this the Board will continue to do.

As to Mr. Marvin being selected by the Board to especially carry out any one line of work, I do not so understand the matter. There are many different phases of the land business of this State that need the attention that can only be given by those of experience, and it has been, and will be, the intention of the land board to instruct Mr. Marvin as long as his services are satisfactory, to make such investigations under House Bill 205 as the Board deems the most important and material for the benefit of the land department, as well as any other investigation that may be necessary. And the Board is at liberty to employ others to aid them in these investigations or in any other matters pertaining to the land business, irrespective of the employment of Mr. Marvin.

Yours very truly,

J. J. GUHEEN,

Attorney-General.

February 7th, 1905.

HON. JOHN MEYER,
Insurance Commissioner,
Boise, Idaho.

SIR:—Relative to the inquiry submitted by Mr. F. M. Bicker in his letter of January 30th, attached, I have to say that the Act to authorize the organization of mutual co-operative insurance companies, etc., approved March 10th, 1903, (Session Laws 1903, p. 74), does not repeal the Act providing for the organization of county mutual fire insurance companies, approved February 6, 1899, (Session Laws 1899, p. 113), and Mr. Bicker may proceed with the organization of his company under the last Act mentioned, bearing in mind, of course, the limitations prescribed in said Act.

Yours respectfully,

J. J. GUHEEN,
Attorney-General.

February 27th, 1906.

HON. JOHN J. MEYER,
Insurance Commissioner, Building.

SIR:—Relative to the inquiry of Mr. F. M. Becker, attached, dated February 15th, 1905, it is my opinion that county mutual insurance companies are not required to pay the \$50.00 annual license fee, as provided in the Act of 1901 (Sess. Laws, p. 165).

The Act of Sess. Laws, 1899, p. 111, providing for the organization of county mutual fire insurance companies seems to cover fully the entire organization, management, and business of county mutual fire insurance companies, and the Legislature at that time failed to make any provision for a license fee. In fact, it would be entirely out of harmony with the spirit and intention of the Legislature in passing such laws, to require a license fee to be paid to conduct such business. Such laws were passed to encourage the citizens of the State to form such companies for self-protection, and to provide that

they should be charged a heavy fee for so doing is not consistent, and I cannot hold that the Legislature so intended when they enacted the Act of 1901, and re-enacted the same in Session Laws 1903, p. 254, providing such \$50.00 license fee for insurance companies transacting business in this state. While such county mutual fire insurance companies are doing business within the boundaries yet they are confined to doing business entirely within the boundaries of the county in which they are organized, and are also prohibited from insuring property within the limits of incorporated villages or cities (except farmers' warehouses and agricultural buildings), and can hardly be classed among the insurance companies mentioned in the Act of 1903, and for which license fees are required. I think these companies come within the scope of the decision of our Supreme Court in the case of *Ins. Co. vs. Meyer*, 77 Pac., 628, exempting mutual fire insurance companies organized under the laws of this state from the payment of an assessment of two per cent per annum upon gross earnings.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

January 10th, 1906.

HON. EDWARD L. LIGGET,
Insurance Commissioner,
Boise, Idaho.

DEAR SIR:—Your letter of January 8th, calling attention to the special contract of the Minnesota Mutual Life Insurance Co., which you transmitted here with letter of September 2nd, has been received. You ask for an opinion as to whether this is a special contract in conflict with Section 2238 of the Civil Code of 1901, and also with House Bill No. 233, p. 256, Sess. Laws of 1905.

In reply I would say that this office has under date of May 18, 1903, and of January 11, 1904, presented to the Insurance Commissioners of Idaho a general interpretation of the law governing special contracts. The

precise point came up on Special Advisers contract of the Bankers' Reserve Life Association of Omaha, and your files will probably disclose that the entire matter was gone into, and this statute interpreted so far as it refers to special contracts of any kind.

In the light of that opinion, and in the light of other opinions rendered by this office I would say that the Minnesota Mutual Life Insurance Company contract, which you enclosed is in conflict with the laws mentioned, and is prohibited by the laws of the State of Idaho.

The reason your inquiry of September 2nd has not been answered sooner, was on account of the fact that in a conversation very shortly after that time, either yourself or Mr. Keefe intimated in the office, that the matter had been settled.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

May 1, 1906.

HON. EDWARD L. LIGGET,

State Insurance Commissioner,

Boise, Idaho.

DEAR SIR:—We have your letter of April 25, in which you inquire as to the liability of the Pacific Livestock Association to the payment of a two per cent tax on premiums. As we understand it, this corporation was organized under the laws of the State of Washington to carry on the business of livestock insurance, and was admitted to this State on the 26th day of June, 1905. You state that they have complied in every respect with the provisions of the law in regard to the incorporation and regulation of livestock insurance companies, except that they have not yet paid the two per cent tax on net premium receipts in this State.

In reply to your inquiry we would say that there seems to be no question as to the company being liable to the payment of this tax. The Act of March 10, 1905,

regarding livestock insurance associations, provides as follows:

“Section 13. Any corporation authorized by the laws of any other state than this state to do the kind of business hereby authorized, may engage in business in this state upon compliance with the provisions of law authorizing foreign corporations of like character to do business in this state.”

It seems that the language of this act contemplates that foreign corporations of this character may engage in business in this State upon compliance with the laws authorizing foreign corporations of like character in general to do business within the State. “Foreign corporations of like character in general” would be foreign insurance corporations in general. One of the provisions of the law relative to foreign insurance corporations, found in Section 2233 of the Civil Code, is that they shall pay an annual tax of two per cent upon their premium receipts. We think that in the absence of any special provision to the contrary, this must include livestock insurance corporations.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

January 24, 1906.

HON. EDWARD L. LIGGET,

*Insurance Commissioner, of Idaho,
Boise, Idaho.*

DEAR SIR:—I have your letter of January 22, enclosing a letter from the Minnesota Mutual Life Insurance Company. In that letter the company sets forth a clause of their policy as follows:

IV.—BENEFICIARY MAY BE CHANGED.

“The beneficiary or beneficiaries under this policy may be changed by the insured at any time and from time to time, during its continuance, unless prohibited by

legislative enactment—provided the policy has not been assigned—by filing with the company the written request of the insured duly acknowledged, accompanied by this policy for endorsement; such change, however, to take effect only on the endorsement of the same on the policy by the company.”

In regard to this section they ask two questions. First: Whether there is anything in the laws of the State which prohibit a change in beneficiaries upon the request of the insured, in case the present beneficiary named upon the face of the policy is the wife of the insured.

Second: Under the laws of Idaho is it necessary to secure the wife's consent in order to make such a change, when it is not required by the terms of the policy.

In answer to this question I would say that there is nothing in the statute law which prohibits a change of beneficiaries whether such beneficiary is the wife of insured or not; and there is nothing in the statute law of the state making it necessary to secure the wife's consent in order to make such a change of beneficiaries.

We are expressing no opinion as to what would be the effect of the operation of the law of community property upon the interests of the wife, because that is a matter in which the state in its supervisory regulation of life insurance companies has nothing whatever to do. In case the company desires to become informed on this point they would better consult an attorney, who will examine the law on behalf of their private interests.

Very respectfully,

J. J. GUHEEN,

Attorney-General.

October 5, 1906.

HON. E. L. LIGGET,

*State Insurance Commissioner,
Boise, Idaho.*

DEAR SIR:—Yours of October 2nd, inquiring as to the interpretation to be given the statutes with reference to

the deposits of surety companies, required by Section 2 of Senate Bill No. 113, Session Laws of 1905, page 395, as to whether they are to be classed as "special," for the benefit of policy holders residing in this state, or "general," that is, for policy holders residing in any state, received.

It is my opinion that these deposits are primarily for the benefit of the holders of obligations of such companies in this state. The Legislature has no jurisdiction beyond the boundaries of the state, and while the language of the act is general in its terms, the plain intent was the protection of the citizens of this state who did business with these companies.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

November 22, 1906.

HON. E. L. LIGGET,

*State Insurance Commissioner,
Boise, Idaho.*

DEAR SIR:—We have your letter of November 22nd, enclosing copy of agent's agreement with the Western Securities Company, which company is described as the general agent of the Continental Live Insurance and Investment Company.

You submit the question whether this agreement is in violation of the State law against discrimination in insurance rates. In reply we would say that it is purely a question of fact whether or not this so-called bond contract is a method of granting rebates or special privileges in life insurance rates. On its face the contract seems to be independent of the life insurance business; but the real question is how it is used. Until we know that, it is impossible to say whether or not it is unlawful. As we have advised you before with reference to similar contracts, we would say that if, directly or indirectly, it is an attempt to grant lower rates of insurance to one class

of individuals than to others, or special privileges under the guise of agents' contracts, it is unlawful.

If it is not such, there is no question that it is legal; and whether or not contracts such as these do or do not accomplish the result of giving to some classes of persons lower insurance rates than to others, is a matter which your department will be able to ascertain.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

Boise, Idaho, July 8, 1905.

MR. J. WALTER KEEFE,

Deputy Insurance Commissioner.

SIR:—Replying to your verbal inquiry in the matter of fees required of foreign mutual insurance companies desiring to enter this state under the provisions of Sec. 10 of the Act approved March 10th, 1903, I would state that it is my view that such companies come within the provisions of Sec. 14 of the Act approved March 10, 1901, as amended by the Act approved March 10, 1903, and must pay the fees therein required; and they must, of course, pay the fee required in the Act providing for their admission to the business within the state.

I may say, however, that this matter is involved in some obscurity, and the intentment of the Legislature is not easily to be gathered. The question of the applicability of the provisions of Sec. 14 of the Act of March 10, 1903, amendatory to the Act of 1901, *supra*, was before our Supreme Court in the case of *Insurance Co. vs. Myer*, 77 Pac., 628, but the court did not indicate what its view was, merely saying that the annual license fee had been paid, and the Legislature could settle the question by making such modifications as it deemed necessary.

Yours respectfully,

J. J. GUHEEN,

Attorney-General.

April 24th, 1905.

HON. W. N. STEPHENS,
State Game Warden,
Boise, Idaho.

SIR:—I am in receipt of a letter from Mr. R. B. Norris, a justice of the peace at Sand Point, Idaho, dated April 18th, 1905, submitting the inquiry whether or not certain Indians are within the statute protecting the fish and game of the state. Mr. Norris states the facts to be that the Indians referred to have no established home or reservation set apart for them; that they live in Washington in the winter and in Idaho in the summer, and that they are without any settled home; and he also asks if they are required to procure licenses, whether non-resident or resident licenses should be issued to them.

Under the facts stated, it is my opinion that these Indians are required to procure licenses in order to take fish or game in Idaho. As to the class of licenses to be issued, this is a question of fact, and it is impracticable for me to say whether these Indians are residents of Idaho. It is possible that if they maintain a home in Idaho during the summer they should receive resident licenses.

Yours very respectfully,

J. J. GUHEEN,

Attorney-General.

December 18th, 1905.

MR. R. S. GREGORY,
Sec. State Medical Board,
R. 208 Sonna Building,
Boise, Idaho.

DEAR SIR:—Yours of December 15th asking whether there would be anything illegal in the State Medical Board's using money which they may have on hand, for the employment of detectives to work up cases where they are satisfied the law is being violated, or where complaint has been made, also in cases where complaint has

been made touching the professional or other conduct of a licentiate, received.

I find nothing in the statutes which expressly provides that the Medical Board may use the money received from applicants for license, for the purposes you speak of, nor is there anything in the statutes which prohibits it, and there is very little upon which to base a definite legal opinion. The only section in the act which deals with the use of this money is Section 17, which is as follows:

“The members of said Board shall look alone to the revenues of this Act for reimbursement of actual expenses incurred in attendance upon the business of sessions of said Board and they shall look alone to the same source for their per diem allowance, which shall not exceed the sum of five dollars per day each, for each day said Board may be in actual session.”

When this Act was passed it was evidently taken into consideration that the various members appointed on this Board would be from different portions of the state, and that there would be, of necessity, in holding their sessions, traveling expenses incurred. This section also provides for a maximum amount that the members of the Board should receive as per diem during the days they are in session.

This section provides that the members of the Board must depend upon the revenues derived from these licenses to pay their expenses and per diem, and if there is not sufficient for that purpose they have no other means of obtaining it. I take it, under this section, that this money is primarily for this purpose and while there are expenses of this kind to be met, it certainly could not be diverted to other uses. However, it seems to me that there is no one to raise the question as to the Board's disposition of this money except the members of the Board themselves and if they are satisfied I see no reason, if there is a surplus, why the Board should not be empowered to use a reasonable amount in carrying on the investigations and matters you inquire about.

It is certain that the Board in acting under Section 9, where charges have been made against any licentiate, would be compelled to go to some expense, and under such circumstances it would seem to me that the only means of providing for those expenses would be out of this fund. The only difficulty I can see in this matter would be that this money being primarily for the purpose of paying the expenses and per diem of the Board, that in subsequent meetings of the Board there might not be sufficient to pay these expenses, if the Board now uses its surplus for other purposes, and as this is a continuing board, with two new members appointed every year, there might be considerable criticism arise if there was not enough in the fund to pay these actual expenses. I simply mention this as a condition that might arise, and it would seem to me that to avoid any objections that might be hereafter made that it would be good policy for the Board not to use all of this money for such investigations, etc., but if it could be done a small surplus should be retained in order to meet anticipated expenses of subsequent board meetings.

With regards, I remain,

Very truly yours,

J. J. GUHEEN,

Attorney-General.

Boise, Idaho, February 2, 1906.

DR. R. S. GREGORY,

Sec'y State Board of Medical Examiners,

Room 208 Sonna Block, Boise, Ida.

DEAR SIR:—I have your letter of January 27th in which you ask for a construction of Section 10 of the Medical Act of 1899 (Session Laws, page 349). The section is as follows:

“Section 10. Any person practicing medicine and surgery within this State without having obtained the license herein provided for, or contrary to the provision of this Act shall be deemed guilty of a misdemeanor and

upon conviction thereof shall be fined not less than fifty dollars or more than three hundred, or by imprisonment in the county jail not less than ten days nor more than six months, or both such fine and imprisonment in the discretion of the court, together with the costs of prosecution, and in each day such person continuing to practice medicine and surgery contrary to the provisions of this Act shall constitute a separate offense."

As I understand your letter you wish to know particularly whether the last clause of the section above quoted would apply in cases where during part of the time a physician is practicing without a license civil suit is pending to determine the justness of the Board's refusal of such license.

In answer to this inquiry I would say that if the man is guilty of practicing without a license, the fact that a suit was pending or had been instituted to determine his right, would make no difference whatever.

Yours very truly,

J. J. GUHEEN,

Attorney-General.

March 24th, 1905.

MR. W. W. PALING,

Sec'y Board of Dental Examiners,

Mackay, Idaho.

DEAR SIR:—I have your letter of March 21st, relative to proposed change in date and place of meeting of the Board, and I have to say that Sec. 583 of the Political Code of Idaho, relating to the organization, meetings, etc., of the Board, is, in part, as follows:

"It (the Board) shall meet at least once in each year and as much oftener and at such places as may be deemed necessary."

If the Board desires to change its place of meeting, there is no legal objection to such action; in fact, the

section quoted, as you will see, provides that it may meet at such times and places as it deems necessary.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

Boise, Idaho, March 16, 1905.

DR. G. E. NOBLE,

State Veterinary Surgeon,

Boise, Idaho.

SIR:—Replying to your inquiry of this date relative to the construction to be placed on the Act recently passed by the Legislature, being House Bill No. Sixty-five (65), as amended, and entitled, "An Act to Suppress Contagious and Infectious Diseases Among Live Stock, etc," I will say that the evident intent of the Legislature in framing this new law was to repeal all former laws in relation to the subject of suppressing contagious diseases among live stock in all particulars and in every instance where the same subject is covered by the new law. In other words, where provision is made in the new law covering certain features of the work of suppressing and eradicating these diseases and certain procedure is prescribed or discretion vested in the State Veterinary Surgeon, this operates to do away with the old law on the subject, notwithstanding each particular provision of the old law may not be covered by the new.

It was not, in my opinion, intended to continue in force any provision or provisions of the former law in instances where the subject is covered by the new law; and in instances where the former law if attempted to be followed in any particular would retard or prevent the complete enforcement of the new law, or where it would interfere with the exercise of the authority or discretion granted to the State Veterinary Surgeon, his assistants or the inspectors in the discharge of their duties, the former law should be deemed repealed.

The old law was, in my opinion, continued in force solely for the purpose of supplying oversights or omis-

sions, if any should be found to exist in the new law, and that is the only purpose which the former law can be held to serve.

Referring particularly to Sections 22 and 23 of the new law and their bearing upon Sec. 12 of the old law, I will say that the subject referred to in Sec. 12 of the old law, being fully covered by Sections 22 and 23 of the new, Sec. 12 of the old law is no longer in force.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

Boise, Idaho, July 7th, 1905.

DR. GEORGE E. NOBLE,

State Veterinarian.

SIR:—I am in receipt of your communication of July 7th, 1905, inquiring whether you have authority under the law to require all sheep within the state to be dipped during the coming fall. In reply, I would say that in my view, Sec. 38 of H. B. No. 65, approved March 6th, 1905, relative to suppressing contagious and infectious diseases among live stock gives the State Veterinary Surgeon the authority to require all sheep within the state, whether infected or not, to be dipped once each year; and that there is nothing which would abrogate this power in the exercise by the Governor of the authority conferred upon him by Sec. 7 of the Act above mentioned, to take emergency measures for controlling an epidemic of infectious disease, even though such measures should require a dipping of the infected or exposed sheep.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

January 16th, 1906.

MR. A. F. HITT,

State Dairy, Food and Oil Com.

Boise, Idaho.

DEAR SIR:—We have your letter of January 11th, in which you submit a number of questions relative to the Pure Food law. You ask a number of questions relative to your authority under the said law, which we are answering categorically.

First: You ask whether you have the right to open or cause to be opened for inspection "original" packages of food products, meaning by "original" packages, those that may be sacked, wrapped, cased or boxed, that have not yet been opened since the same was sacked, wrapped, cased or boxed by the manufacturer, and which may be in the hands of the manufacturer, wholesaler, or retailer, as the case may be, and all within the state.

In reply to this we would say that Section 6, Session Laws of 1905, p. 55, provides as follows: "It shall be the duty of the Dairy, Food and Oil Commissioner to enforce all laws that now exist, or that may be hereafter enacted in this state regarding the production, manufacture or sale of dairy products, foods, etc., * * * and to inspect any article of * * * food, made or offered for sale within the state, which he may suspect or have reason to believe to be impure, unhealthful, adulterated, misbranded or counterfeited, or not complying with this act." Under the foregoing it is quite clear that you have authority, whenever you believe that any package containing a food product, whether original or otherwise, has been misbranded, or contains adulterated product to cause the same to be opened. This refers alike to packages in the hands of the wholesaler or retailer, or in the hands of the consumer.

Second: Should all "original" packages of food products be so labelled or branded as to indicate the true character of the contents?

Answering this question, would say that there seems to be no provision in the law requiring all packages to

be branded or labeled. However, you are authorized, whenever any food product or package that you suspect contains a food product is not branded to be informed of the nature and character of its contents, and to inspect the same whenever that information is given. It would be a circumstance likely to cause suspicion, if packages that you are reasonably certain contains food products are not labeled in any manner whatever. And if such packages, unlabeled and unbranded, containing food products, contain goods that are sold under false or fictitious name, the person so selling the same would lay himself liable to the provisions of this law for selling misbranded products as much as if the packages were branded falsely.

Third: Has the keeper of a public or private boarding house the right to dilute milk or cream so that the same will not be up to the legal standard authorized by law, and serve the same in the diluted form to patrons. In reply to the foregoing would say that the above mentioned parties could not legally do this.

Fourth: Has any person, persons, firm or corporation the right to dilute in any manner whatsoever milk or cream and sell or serve the same to patrons? Answering this question would say that there is a difference between milk and cream in this respect. Under the provisions of the law no person has a right to dilute milk in any manner, the same being a natural product. In the case of cream, however, there is a variation in its quality and character. The law authorizes a minimum of 18 per cent butter fat, below which cream cannot be sold. It would seem that a person selling cream would have the right to dilute the same within the limits of the legal standard. In other words, some cream might contain a very much larger percentage of butter fat than other cream. A person selling cream then would have the right to dilute such superior article down to the minimum of butter fat required by the provisions of the law.

Fifth: Have I the right to enter a public or private boarding house and take samples of cream or milk from the table, (tendering payment for the same) for inspec-

tion and analysis? Would say in reply that you have such right.

Sixth: Have I the right to go behind the bar of a saloon, or other place where liquors are being sold as a beverage, and make my own selections of samples (tendering payment for same) of the various kinds of liquors, for inspection and analysis?

In reply to this question would say that you are authorized to designate such articles as you wish samples of, and the person selling the articles above mentioned must tender such samples, upon payment as provided by law.

In this connection your attention is called to the fact that there may be various liquors in vessels that are kept for ornamental purposes, and are not sold as a beverage. When you are sure that a certain liquor is being sold as a beverage, you are authorized to designate that particular liquor and require sample of the same.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

December 14, 1905.

MR. J. STEPHENSON, JR.,

State Engineer,

Boise, Idaho.

DEAR SIR:—I have your letter of December 2nd, 1905, as follows: I should like to have an opinion based upon the facts and circumstances set out below.

"A" holds a permit to appropriate public waters of the State of Idaho. By the terms of permit he is required to have one-fifth of the work done by October 5, 1905, in case contest is instituted by any one "holding any permit for the diversion of waters from the same stream (such permit post dating the permit for the diversion of water through such unfinished works)" (Sec. 3 H. B. 146, 1903). But according to the letter of the statute such contest must be filed with the State En-

gineer "on or before such date set for the doing of such one-fifth of such work of construction." On or about Oct. 20, 1905, "B" obtains permit to appropriate waters of the same stream and files petition to have "A's" permit cancelled under the provisions above cited.

Do you think the courts would hold that I could consider the petition in view of the fact that it was filed out of time?

In my judgment you can consider this petition notwithstanding it was filed after the date set for the completion of one-fifth of the work of construction by "A." I have not time to go into the question at any great length but Sec. 3 of H. B. 146, 1903 Session Laws, p. 229, under which a petition is filed for the cancellation of a permit under which there has been a failure to do the prescribed work within the prescribed time, uses the words, "may on or before the date set for the doing of such work," etc., petition State Engineer to cancel said prior permit.

This language is permissive and not mandatory and does not, in my judgment, restrict the petitioner absolutely to a date on or before the date set for the completion of the work.

I believe the use of word "before" in Sec. 3 was a clerical mistake and that it was the intention of the Legislature to use the word "after" instead of "before"; but if not so, I do not believe it restricts the petitioner to that particular time.

I find the words "on or before" used in three other separate sections of this act, and their application to the matters wherein they are used is very obvious; but their literal application in Sec. 3 to the exclusion of allowing a petition to be filed after the date set for the completion of the work would be a direct contradiction of the whole aim and object of H. B. 146, which is essentially to regulate the appropriation and diversion of public waters and to establish the priority of the use of the same.

I cannot understand upon what theory the legislature would want to require the petition for cancellation to be filed "on or before" the day set for the completion of one-fifth of the work. This looks like an absurdity to

me in view of the objects of the entire act, and I cannot understand that the failure to do so would in any way extend the rights of the original petition, or the time fixed in the statute for the completion of the work. If it did, all he would have to do would be to see that no contest were filed and he might be able to hold his claim to the water for an indefinite length of time, without complying with the statute.

The statute intends that a certain amount of work shall be done and done within a certain time in order to have the petitioners right to the water attach. This is mandatory and must be complied with. If not complied with, there is no specific penalty fixed, but it is intended that as a penalty his permit shall be cancelled, and he loses the right he might have acquired by complying with the statutes. He cannot complain if another obtains those rights by a petition filed after the time has expired in which he was given to do the work.

The intention of the Legislature evidently was to forfeit those rights for non-compliance with these terms of the statute and the permit, and the proper way to do this is to consider the petition for cancellation if filed after the time in which one-fifth of the work should be completed.

When a permit is issued by the State Engineer under Sec. 2, the statute is mandatory which directs that the State Engineer must endorse upon the permit the date at which the completion of such work shall be done, and that one-fifth of the work must be completed in one-half of the time set for the completion of the entire work. This is mandatory and, it seems to me, must be complied with in order to give the applicant any right to the use of the water.

If no contests are instituted before one-fifth of the work is completed, and the applicant completes one-fifth of the work after the time set for its completion, and before contest is instituted, and the State Engineer has taken no action in the interim between the time set for the completion of one-fifth, and the actual completion, there might be a question raised as to whether the rights

of the original applicant had lapsed, but I do not understand this to be the question here. But if he fails to comply with the statute and a petition is filed for cancellation before he actually does the necessary work, it would seem to me that you should entertain the petition. To hold otherwise would be to render a very material part of the law meaningless and without force, and I desire to give it such construction as would carry out the spirit of the entire law and not follow the strict letter and language of the statute, which, in my judgment, is a mistake.

You will also notice in line 10, Sec. 3, of said act, the use of the words "one half," which is a mistake and should be one-fifth. This is very apparent when taken and read with the other sections of the act.

However, these are matters in which individual rights are involved and I presume no matter what your action is, the question will be taken into the courts for final determination; and I would be glad to see a judicial construction of this matter where the interested parties can maintain their respective contentions.

I remain,

Very truly yours,

J. J. GUHEEN,

Attorney-General.

November 4, 1905.

MR. C. S. LOVELAND,

State Bank Commissioner,

care Victoria Hotel,

Spokane, Washington.

DEAR SIR:—We have your letter of November 1st, in which you ask whether a trust company may establish branch banks in small towns, setting aside the required capital for each bank from the capital of the main office, keeping the assets of each bank separate, but the profits accruing to the main corporation.

In reply I would state that I find nothing in the banking laws which prohibits this being done, providing, the trust company complies with the general provisions of the banking act and keeps such branch assets separate to the satisfaction of the Bank Commissioner.

Yours very truly,

J. J. GUHEEN,

Attorney-General.

July 7, 1906.

HON. C. S. LOVELAND,

Bank Commissioner of Idaho,

Boise, Idaho.

DEAR SIR:—We have your inquiry of July 6th, asking whether Sec. 7 of the State Banking Law of 1905 (Sess. Laws 1905, p. 176) is designed to prevent the discounting of time checks by private individuals.

In reply we would say that we do not think the design of the Act was to prevent the cashing of time checks or the sale of negotiable instruments in general to private individuals.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

March 24th, 1905.

GENERAL DAVID VICKERS,

Adjutant General,

Boise, Idaho.

SIR:—Replying to your inquiry, attached, relative to lease of armory from Lieut. Tandy, I concur with you in your view that there is no legal objection to the course proposed; provided, that in other respects the lease conforms to the requirements of Sec. 25, Art. II, of an act approved February 18th.

Very respectfully,

J. J. GUHEEN,

Attorney-General.

July 26, 1906.

M. I. CHURCH, Esq.,

Register State Land Department.

DEAR SIR:—Relative to your communication asking, first, whether the Board of Land Commissioners should accept applications for portions of Carey Act lands, less than the smallest sub-division, forty acres; I would say that there seems to be nothing in the law which expressly prohibits this, although it is doubtful whether the Board would consider it expedient at all, or if at all, only in exceptional cases. It would rest entirely in the discretion of the Board, however.

In regard to your further inquiry as to the price of land filed on under the Carey Act, I would say that where there are fractional lots containing something less than forty acres, and the applicant sends in the payment covering the exact acreage, it would be advisable to accept such payment rather than to require payment on the basis of the full forty acre sub-division. On the other hand, where the acreage runs over an even forty, if it is only one or two acres over, there would be no harm in accepting payment for the even forty acres.

Relative to your third inquiry, as to whether the Board has power to lease any portion of the State lands in tracts less than the smallest legal subdivision of forty acres, I would say that there is nothing in the law to prevent the Board from leasing State lands in smaller tracts, and this would be a matter which in each case would rest in the discretion of the Board.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

September 16, 1905.

MR. JAMES E. GYDE,

*County Attorney,**Wallace, Idaho.*

DEAR SIR:—Your telegram with reference to the tax levy was not received by me until the 14th, as I was ab-

sent, hence the delay in answering the same. I have gone into the matter as carefully as I could in the past twenty-four hours, desiring to answer as soon as possible and before action would be taken by your Board. I would state that it is my opinion that none of the special levies made by the Legislature, and as certified by the State Auditor, should be computed against the five (5) mill limit of Sec. 9, Article VII, of the constitution.

The case you cite, namely, *People vs. Scott*, 12 Pac., (Colorado) 608, is hardly applicable here, for the reason that it appears in that case that special levies were made for purposes that properly belonged to the current expense of the State, being such expenses as our Legislature has always incorporated in the yearly appropriation account. However, without taking too much time in a discussion of the distinction, I would say that I do not think that the levy made to pay bonds and interest upon the same, which is done under authority of Sec. 1, Article VIII of the constitution, should be computed against the five mill limit provided in Sec. 9, Art. VII.

Our Supreme Court in the case of *Stein vs. Morrison*, 75 Pac., 246 (See p. 253-4) has distinguished the aims and objects of Art. VII and Art. VIII of the constitution, and from the position there taken I believe that the limitations provided in Sec. 9, Art. VII, only apply to the expenditures and appropriations which are specifically and primarily the running and current expenses of the State, as contemplated in Art. VII, and not for debts created for the building of public institutions. While the question now under discussion was not in issue, the court fully explains the distinction between the two articles of the constitution. Debts for such purposes are authorized by Art. VIII and a limitation placed upon the amount of one and one-half ($1\frac{1}{2}$) per cent of the valuation of the State property.

I understand each article in itself to be full, complete and unambiguous as to the subject it deals with and I believe each should be construed independently of the other.

If bonds were issued for the current expenses of the state institutions, I would say that they would not

be such an indebtedness as is contemplated by Article VIII, but that said article contemplates the building of public institutions, as is said by the Supreme Court in the Stein-Morrison case; and any indebtedness for current expenses would have to be computed against the five (5) mill limit.

There are some questions affecting conditions in this State which would make the construction contended for by Latah County operate harshly. It does not concern me to any greater extent than any other citizen, but we would all like to see our State progress, it having been more or less dormant for a long time. It is improving fast at the present time, and the mill levy provided for by the constitution is barely enough to meet the current expenses, to say nothing of making public improvements. When our valuation reached \$100,000,000.00 we are limited to a three mill levy and the total amount which can be raised will be \$300,000.00 in any one year. At the rate this State is growing, and taking into consideration our geographical conditions, such an amount will fall far short of paying the current expenses of the State and the result would be to stop all progress. The Legislature recognized this fact and at its last session passed a resolution for a constitutional amendment changing Sec. 9.

I notice among the special levies that your county is charged with \$6145.20 as county indebtedness. This amount, as you will readily see, is not chargeable against the five mill limitation. This levy is not made for State purposes for the year 1905 as contemplated by Sec. 9 of Art. VII, but it is for aid due from Shoshone to the State. This item alone constitutes a large part of the alleged excess. The live stock sanitary fund tax does not amount to a great deal, as it is on a class of property of which there is little in your county, but if it were otherwise it would make a difference, as it is for a special purpose and goes into a fund for that purpose and is there used to protect the particular class of property from which it is collected. The money is not used as a part of the current expenses of the State. The State Veterinarian is paid by the State, but all other expenses of this

department must come from this fund. This live stock act is in the nature of a police regulation that the State endeavors to make self-sustaining.

There is always enough difference in State constitutions, as you know, to make the decisions of other states upon constitutional questions require a careful scrutiny, and in view of the fact that our own Supreme Court has so plainly and strongly pointed out the separate aims and objects of Articles VII and VIII, I cannot bring myself to believe that it would hold that the tax limit as fixed in Sec. 9, Art. VII, has any application to the indebtedness created for public improvement that are not a part of the current expenses of the State and that are authorized by Sec. 1 of Art. VIII.

I trust I have made my position plain to you, although there are many other things which could be gone into more satisfactorily in a personal interview, the consideration of which in this letter would make it unduly lengthy.

Very respectfully,

J. J. GUHEEN,

Attorney-General.

This opinion upheld in unanimous opinion of Supreme Court in case of F. R. Gooding, Governor et al., Petitioners, vs. John C. Proffit, et al., County Commissioners Nez Perce County, Defendants, reported in 83 Pac., p. 230.

February 23rd, 1905.

MR. WILLIAM E. STILLINGER,

County Attorney,

Moscow, Idaho.

DEAR SIR:—I have your letter of February 21st, relative to board and lodging of county officials, etc. I have not looked into this matter for the purpose of finally passing upon it, as I have not the time now, but my present view is that the board and lodging of county officials while away from home, etc., are a legal charge

against the county. You will notice that in the Act fixing the salaries of county commissioners (Sess. Laws 1901, p. 226), they are given their actual and necessary expenses. Sec. 3 provides that the "actual and necessary expenses shall be deemed to include all traveling expenses incurred *by any county official* when absent from his residence in the performance of the duties of his office." This section apparently was intended to define what actual and necessary expenses are, but it only says "traveling expenses," and leaves the question open; yet the fact that the Supreme Court had previously passed upon the meaning of "actual and necessary expenses," and had decided that board and lodging were not necessary expenses, would lead to the inference that the legislature in passing this section intended to make provision for the board and lodging of county officials while away from home in the performance of the official duties of their office. I would further take the view that generally county officers have their homes at the county-seat, and their expenses in this regard are the same whether they are there at all times or not; consequently, money paid out by them for board and lodging while traveling on official business is an additional expense, and it is an "actual and necessary expense." In other words, the expenses of a county officer at his home are not lessened materially, if at all, by reason of the fact that he is absent from his home a few days, more or less, each month on official business; and this expense to him while away is an added, actual and necessary expense.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

February 27th, 1905.

MR. WILLIAM E. STILLINGER,

County Attorney,

Moscow, Idaho.

DEAR SIR:—Answering yours of February 21st, will say that witnesses attending preliminary examinations

in cases of misdemeanor are not entitled to fees or actual expenses. In the absence of statutory enactment such expenses cannot be a legal charge against the county. This state of affairs results in a great deal of inconvenience, and often interferes with the Prosecuting Attorney being able to properly perform the duties of his office, but it seems that the Legislature has never considered of sufficient importance to remedy, and as long as the people will not take the matter up they will have to go without these expenses.

Sometimes in extraordinary cases commissioners have made some provisions for payment of expenses in endeavoring to see that justice is done, but if the matter had been contested they could not have done so legally.

Yours respectfully,

J. J. GUHEEN,

Attorney-General.

NOTE—Since the above was written the Legislature of 1905 passed an Act providing for fees for a limited number of witnesses under certain circumstances.

February 22nd, 1905.

MR. ROBERT McCracken,

County Attorney,

Blackfoot, Idaho.

DEAR SIR:—Answering yours of the 17th inst. relative to fees to be collected by sheriffs for process served out of Probate Courts, where such court is sitting as a justice court, in suits involving less than \$300.00, I am of the opinion that he can collect only the fees allowed constables for such services. I cannot see that Sec. 4629 of the Revised Statutes has any application to fees. It refers to the court practice more particularly; but even if it has any application, it is not in favor of the contention that the sheriff should receive more than constable fees. The latter part of Sub. 18 of Sec. 1768 of the Pol. Code, which states, "for all services arising in the justices' courts, the same fees are allowed to constables,"

is broad enough to cover all cases in the Probate Court where such court is exercising its justice jurisdiction, for \$300.00 or less. Of course, these matters are always open to criticism, but it strikes me that this is the only sensible view to take of it. I call your attention to Jack. vs. Siglin, 10 Ore., 93; Pew vs. Good, 23 Ore., 827, which I think will throw some light on the matter.

Yours respectfully,

J. J. GUHEEN,

Attorney-General.

February 10th, 1905.

MR. O. P. SOULE,

County Attorney,

St. Anthony, Idaho.

DEAR SIR:--I had no conversation with Judge Donaldson relative to the matter referred to in your letter of February 8th, and I think that you have misunderstood him. However, this matter was called to my attention the other day just at the noon hour by several parties and I looked into the matter hurriedly before going to dinner, and I advised them that Secs. 2147-2148-2149 of the Revised Statutes were repealed, and that they were repealed by an Act providing for the payment of the salaries of county officers, etc., approved March 7th, 1899 (Sess. Laws 1899, p. 405). While I have not examined the Act carefully, I looked over it sufficiently to see that it takes the place of the provisions of the Revised Statutes relative to salaries. You will notice that in this Act the maximum and minimum salary for every county officer is fixed, without reference to any particular counties or classification; that it gives the county commissioners the authority to fix these salaries between the maximum and minimum amount. My impression from the examination I made of this Act was that it covers all the matters in the Revised Statutes and does away with the classification of counties. The Act found in the Session Laws, 1901, specifically states that the counties are classified for the purpose of fixing the salaries of the county

commissioners; and, in my opinion, that is all the classification was intended to do. The facts of the matter as I understand them, are that under the laws of 1899 county commissioners, even in the smallest counties, could make their salaries the maximum limit, to-wit, \$1000.00, and in some of the small counties this was done, and there was some dissatisfaction about the matter; consequently the Act of 1901 was passed, so that county commissioners should not have as much power in fixing their own salaries as they had under the Act of 1899. However, I would be pleased if you would look into the situation carefully, and if you see any reason for not concurring in my view I wish you would write me fully. I have advised Judge Donaldson that I had written you about this matter, and probably you would better show him this letter.

Yours truly,

J. J. GUHEEN,

Attorney-General.

January 8, 1906.

MR. O. P. SOULE,

County Attorney,

St. Anthony, Idaho.

DEAR SIR:—Answering your communication of recent date, I will say that I think it is the duty of the county commissioners to fix the rate of interest to be paid upon deposits of all county money, at this their January meeting. Like a great many other laws which we have there are some very inconsistent provisions in this law, but taking the law as a whole, and construing it with a view that its objects may be effectuated, I see no reason why the commissioners should not fix this rate of interest at their January meeting. The Act of itself provides that it could take effect and be in force from and after the second Monday in January, 1906. When this law goes into effect it is the duty of the county treasurer to make these deposits under certain conditions, when they are applied for, and also in order that people who wish to get this money may know what they would have to pay for

it, it is necessary that a rate of interest be fixed, and there is no reason or good sense why the whole matter should be held up until the last day of April, for the county commissioners to meet and fix the rate of interest.

That provision in the statute is directory, and its non-observance as to the particular time would not in any way vitiate the law, or any contract made with the borrower under the law.

I presume the county commissioners could, if they saw fit, allow this matter to go over until the last day of April so as to enable them to comply literally with the terms of the statute, but if they do not see fit to do so there is no legal reason in my opinion, why they should not fix this rate of interest at this January meeting.

Since writing the above I have made investigation with reference to the passage of this bill and find that the original idea was to make it effective in two years. Then there was another proposition providing that it should go into effect in the month of June, 1905, but as the bill finally passed it was to go into effect on the second Monday in January, 1906.

The provision providing for the commissioners meeting on the last day of April to fix the rate of interest was made when it was contemplated that the bill should go into effect in June, and when they changed that provision of the bill, they did not change the provision relative to the fixing of the interest to make it harmonize, and it was simply overlooked. This is how these inconsistent provisions came to be passed.

I think the commissioners should fix the rate of interest at the January meeting, and I do not think they are required to meet in April, as it would be wholly unnecessary.

Yours very truly,

J. J. GUHEEN,

Attorney-General.

November 8th, 1905.

MR. J. F. NUGENT,

*County Attorney,**Silver City, Idaho.*

DEAR SIR:—I have your letter of October 14th, submitting the inquiry whether druggists selling bitters and other medicines containing a large percentage of alcohol, which may be used as a beverage, and which if so used will produce intoxication, and which are patented by the government as medicines, must take out a liquor dealer's license in the sum of \$200.00.

In reply, I would say that druggists or others selling liquor to the public without a written prescription of a regularly practicing physician of this State, certifying to certain matters, are amenable to the penalties provided by law for selling liquor without a license.

As to the sale of patent and other medicines containing a certain percentage of liquor, this matter is undoubtedly covered by Sec. 1513 of the Pol. Code of Idaho, which is as follows:

“The words ‘intoxicating liquors,’ as used in this chapter, shall be deemed and construed to include spirituous, vinous, malt, and fermented liquors, and all mixtures and preparations thereof, including bitters, that may be used as a beverage and produce intoxication.”

The question, however, that you will be confronted with is a question of fact and of proof. Competent matters to be given in evidence are the composition and character of the article and the amount of alcohol in it; whether it does readily or with difficulty produce intoxication; whether it is agreeable or nauseous to the taste; whether it is used or not used as a medicine to cure disease; whether it is generally kept and sold by druggists as a medicine; whether it is frequently resorted to and used as a beverage, etc.

See Vol. 17, Enc. Law, (2nd Ed.), p. 204, and cases cited.

I cannot give you an opinion as to any particular kind of medicine, patent or otherwise, as to whether its

sale without first procuring a license is illegal, but you must satisfy yourself by competent evidence as to whether any kind of medicine or other preparation sold comes within the meaning of Sec. 1513, supra, and act accordingly.

If such bitters, mixtures or preparations come within this section, a license should be procured by parties engaged in selling the same. The patent given by the government does not in any way affect the enforcement of the State laws.

With regards, I remain,

Yours very truly,

J. J. GUHEEN,

Attorney-General.

April 11th, 1905.

MISS BERTHA STULL GREEN,

*Ass't County Attorney, Elmore County,
Mountain Home, Idaho.*

MADAM:—I have your letter of April 4th, relative to the duties and compensation of county surveyors, and in reply I have to say that whatever properly belongs to the duties of this officer should be done by him with extra compensation, but the question what the surveyor's duties are, under the facts stated in your letter and under the law, is a difficult one to answer.

Sec. 1717 of the Pol. Code provides that:

“All surveys, maps, and plats ordered by the board of county commissioners shall be made by the county surveyor.”

Clearly, then, considerable discretion is allowed the Board of County Commissioners as to what maps, plats, etc., they may see fit to require. It is this latitude which makes the questions you put very difficult to answer on the part of this office. It would seem that in many instances where the pay of the county surveyor is insignificant the Board might gauge their requirements so as to

make them somewhat commensurate with the salary the county surveyor receives. The latitude, then, that may be allowed to the demands of the commissioners upon the surveyor to help the other offices, such as the assessor, in getting up his plats, the county superintendent in getting up his plats, etc., is largely a local question. The law says positively very little about it. Sec. 1346 of the Political Code provides for the making of plats by the assessor, and the provision at the end of the section as to the expense is as follows:

“All necessary and reasonable expense incurred by the assessor in complying with the provisions of this section shall be audited and allowed by the county as a necessary expense of such office.”

This would seem to indicate that this work is special work, and to be provided for by special allowance of the commissioners. Certainly there is nothing express in the section prescribing the county surveyor's duties, that bears upon the work here mentioned.

In regard to the county superintendent's "plat book," which you mention, it seems probable that you refer to Sec. 1025 of the Political Code, making it the duty of the county superintendent to keep in his office records of the district boundaries. No provision is made as to who shall prepare these transcripts and records. There is nothing saying that it shall be the duty of the county surveyor to make them. The same is true as to the plats and transcripts necessary in the office of the county recorder.

It will be seen, therefore, that Sec. 1717 of the Pol. Code, referred to above, leaving considerable discretion in the hands of the county commissioners, must be invoked in answer to such questions as you have put. And they must of necessity be hard to answer. It is a matter of custom rather than law. In Ada county, duties relating to the assessor's, county superintendent's and recorder's plats, I would say, as a mere matter of information, are not required of the County Surveyor. The whole question is one that can best be settled by your county commissioners, with the advice of the county attorney,

and with a view to pay the county surveyor an adequate compensation for his work. The law is very indefinite, and cannot cover all exigencies, and the best method is to agree upon what is right and fair, without regard to technical matters.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

May 31, 1906.

A. H. DERBYSHIRE, Esq.,

*County Attorney Cassia County,
Albion, Idaho.*

DEAR SIR:—I have your letter of May 28th, in which you ask certain questions relative to your right and option in proceeding under the Industrial School Law, the Delinquent Children Law, or the general criminal law, with reference to certain cases, and particularly with reference to a child thirteen years of age charged with burglary.

I have had no actual experience in prosecuting under the Industrial Reform School Act, as that school was not built when I was prosecuting attorney. Upon reading the Industrial School Law with reference to offenders, and the Delinquent Children Law, it is rather hard to lay down any specific rule, as there is apparent conflict and some of the sections are not altogether plain, and speaking generally, I would say that the prosecuting attorney must to a certain extent use his judgment in these cases as to how he shall proceed. I will say, however, first, that there is no question that as to children between the ages of sixteen and eighteen you must proceed under the Industrial School Law.

As to children sixteen years of age and under, generally I would say you must proceed under the Delinquent Children Law, but from an expression in Section 5 of that law (Sess. Laws 1905, p. 108) it would seem to me that the words "except when the charge against such

child is a felony" would exclude children charged with felony from coming within the purview of the Delinquent Children Law, and that they should be proceeded against under the Industrial School Law. I am not prepared to state this positively, but after reading the Act over, it strikes me that this is the correct interpretation; but inasmuch as it might be the means of working some hardship, I would rather have county attorneys use their judgment in these matters in each particular case, because even if a young child was charged with felony, it might be that the child would be susceptible to being taken care of under the delinquent law just as well as under the Industrial School Law.

The Delinquent Children Law, as you will notice, gives the Probate Court exclusive jurisdiction in such cases, and the whole aim and object of the law seems to be to build up in a community a system whereby juvenile offenders may be dealt with and may be brought before the court continuously, or placed under the charge of probation officers, so that it will have a salutary effect upon the boys and girls who are inclined to be wayward. While it may conflict with some parts of the Industrial Reform School Law, yet there is nothing material about such conflict, and I think that the two laws can be entirely construed together so as to work in entire harmony. Although, as you say, there are many things that are confusing, at the same time I do not think they are of sufficient importance to interfere with the proper application of either law. It would seem to me that if a child was charged with a felony, regardless of age, you should proceed under the Industrial Reform School Law; yet the circumstances might be such on account of the past conduct of the child, and probably the age of the child, that without making a direct charge, the child could come under some of the provisions of the Delinquent Children Law, so as to enable you to proceed against him under that law where you thought it was for the best interests of the child. That is the way I think I would view it if I were prosecuting attorney, and I do not think you will have any trouble in coming to a conclusion as to how you

should proceed in individual cases that you have investigated.

With regards, I remain,

Very truly yours,

J. J. GUHEEN,

Attorney-General.

May 5, 1906.

DE MEADE AUSTIN, Esq.,

County Attorney, Bear Lake County,

Paris, Idaho.

DEAR SIR:—Your letter of May 3rd, with reference to the right of a practicing and licensed dentist to write prescriptions, under a certain state of facts set out by you, received; and I note, also, the circumstances under which the question seems to have been raised. The interest of the practitioners there in certain business enterprises no doubt has brought this matter up. I have not investigated this matter fully, but I have gone into it sufficiently to satisfy myself in a general way that a dentist is not a "physician" who is entitled to give prescriptions within the meaning of Section 1511 of the Political Code, which states that the written prescription must be given by a "regular practicing *physician* of this State." Section 577 of the Political Code makes a distinction as between a physician and surgeon, and "dentists, pharmacists, and midwives in the legitimate practice of their professions." In other words, dentists, pharmacists, and midwives do not pretend to practice medicine, but their functions are entirely different, and they are considered as physicians. I am not prepared to say that a dentist should not be entitled to write a prescription proper for some ailment relating directly to his business, but that is a matter that I know absolutely nothing about, as I have made no inquiry, and do not know what the practice is. I do not understand that dentists are in the habit of prescribing, as my experience is that their work is more in the nature of surgery of a specified

kind, and they perform all their own work and apply their own medicines.

Our laws certainly make a distinction between physicians and dentists. We have an Act (Laws of 1899, p. 349) regulating the practice of medicine in this State, which covers the entire subject. We have another Act (Laws of 1899, p. 387) in which the subject of dental surgery, as you will notice by the title, is regulated. The two acts are entirely different, and legislation covering each subject has been had. Section 1511 of the Political Code is Section 15 of the Act of February 6, 1891 (Laws of 1891, p. 37), regulating the sale of intoxicating liquors, and does not appear in either the medical or dental act. When it speaks of its being lawful for druggists to sell without license liquors for *medicinal* purposes, "upon the written prescription of a regular practicing physician of this state, who certifies that in his opinion the health of the party to whom the liquor is to be sold requires or would be promoted by the use of the particular kind of liquor prescribed," it would seem to me that this would confine it to physicians who were qualified under the medical act (Sess. Laws 1899, p. 349). It does not seem to me that a dentist who might give prescriptions which would apply particularly to that character of business which he represents would have any trouble, but I can see where the difficulty comes in when he diagnoses a case and gets the toothache mixed up with neuralgia, the grip, and other diseases. There are cases where dentists have been considered "physicians" in the broad meaning of the word "physicians" as "persons who heal," etc., but in my investigation I did not run across any cases where a dentist was held a physician in a case like the one we are considering. On the other hand, I have run across a few cases which hold the other way, and one in particular, the case of State vs. McMinn, (N. C.) 24 S. E. 523, in which a dentist issued a prescription for whiskey, where the court squarely holds that he had no right to do so. The court says that their statutes do not recognize that dentists are included in the term "physicians," and cites certain sections of their code where physicians are recognized under certain sections

and dentists under other certain sections; and while I have not examined their code, I presume it is in a general way the same as our own in treating these two classes under different heads. I have made a few notes upon the matter, which I herewith enclose.

I am not writing this as any definite opinion upon the matter, but only as a starter in order to aid you, as I shall expect you to settle this matter according to your own views after you have investigated it. You are upon the ground, and understand the exact facts, and when you look into the law part of it you can apply it to the state of facts existing there. It is impossible for me at this time to take the time necessary to look into it fully, and I make these suggestions to you only as a matter of aiding you in settling the matter yourself.

With regards, I remain,

Very truly yours,

J. J. GUHEEN,

Attorney-General.

November 15, 1906.

DE MEADE AUSTIN, Esq.,

*Prosecuting Attorney Bear Lake County,
Paris, Idaho.*

DEAR SIR:—Your letter of November 12th, asking me the construction of Sec. 3, Senate Bill No. 113, p. 396, Sess. Laws 1905, in relation to the counties paying the premiums on county officials' bonds which are placed with fidelity and guaranty companies, is received. I have been heretofore called upon several times with reference to this matter and have made a thorough investigation and there is no question but what the counties should pay out of the general fund the premiums on these bonds.

Previous to the passage of this law we had upon the statute books two laws governing surety companies, one of which Attorney General Bagley had given his opinion, was repealed by the other. The one he decided was repealed was the law providing for surety companies

depositing \$25,000.00 with the State in order to enable them to do business. When I came into the office, I made an investigation of the matter and decided that this law was not repealed. Inasmuch as there was some conflict, I took the matter up in order that the Legislature might pass one law governing surety companies, and laid the whole matter before the Judiciary Committee of the Senate, the result being Senate Bill 113. I had no part in drawing this bill up but afterwards consulted with the chairman of the committee with reference to the particular clause you inquire about, and he informed me that it was the understanding that all premiums on bonds for State and County officials should be paid by the County and State.

With best wishes, I remain,

Very truly yours,

J. J. GUHEEN,

Attorney-General.

April 11, 1906.

F. E. ENSIGN,

County Attorney,

Hailey, Idaho.

DEAR SIR:—Your letter of April 9, inquiring as to justice's fees in criminal cases, received.

That part of Sec. 2135 of the Revised Statutes which you refer to in your letter governs the amount of fees that can be collected by a Justice of the Peace in criminal cases, and this includes examination for a felony, or in misdemeanor cases. If an examination is waived in a felony case, or a plea of guilty entertained in a case of misdemeanor, \$3.00 is the maximum amount that he can collect. If an examination is not waived, or in the case of a misdemeanor a trial is had, \$6.00 is the maximum amount he can collect. There might be some proceedings after the trial was over, for instance, probably with reference to filing an undertaking, or something of that kind, that he might be entitled to, but the object of the statute

is to fix a maximum amount that a Justice shall receive for these cases.

This is the view I took of this matter before the Commissioners of Bannock County when acting as County Attorney, and is the practice, I think, that prevails throughout the State.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

May 25, 1905.

MR. F. E. ENSIGN,

*County Attorney,
Hailey, Idaho.*

DEAR SIR:—I have your letter of May 23rd, relative to druggists selling liquors, etc. You refer me to the liquor law of 1901, page 37, Sec. 15, which I find upon examination is a mistake, and I presume you have reference to the law of 1891, Session Laws 1891, page 37, Sec. 15. This section is still in force and will be found in Sec. 1511 of the Political Code. Sec. 16, p. 37, Laws of 1891, also remains in force and will be found in the Penal Code, Sec. 4714. Sec. 16 answers your question fully, and the two sections taken together are so plain that no construction is required. If druggists sell liquor in any manner other than as provided in Sec. 15, they must procure the license required the same as any other person. Section 1514 refers to liquors that are not to be drunk on, in or about the premises, and in this case a \$200.00 license is required.

Yours very respectfully,

J. J. GUHEEN,

Attorney-General.

August 23, 1906.

MR. C. M. HAYS,
County Attorney,
Silver City, Idaho.

DEAR SIR:—I have your letter of August 21st, asking my construction of certain expressions contained in Sec. 4, p. 13, 6th Session Laws.

I am leaving the city on this afternoon's train, and hence I have not had time to look into the question. I have always preferred to leave matters of this kind to the County Attorney, he being on the ground and familiar with the facts.

I would say, however, that my construction of that part of the statute would be that the words "in connection with a hotel or tavern" do not necessarily mean that the liquor or the bar room be in the same building; that is physically attached.

The country is sparsely settled and this statute was based upon this fact—travelers must be accommodated—and in such sections a low license is necessary.

The essential thing, of course, is that the provision be not made a cloak for fraud upon the license law. A saloon cannot receive the benefits. The County Commissioners should, of course, pass on this carefully before granting a license and should not hesitate to act if the license law was simply being evaded by the pretense of running a hotel.

Yours very truly,

J. J. GUHEEN,

Attorney-General.

June 9, 1906.

MR. EZRA WHITLA,
Prosecuting Attorney,
Rathdrum, Idaho.

DEAR SIR:—Your letter of June 7th, relative to the assessments of the Spokane Inter-National Railroad Company, and also a number of others, received.

The opinion you gave the assessor regarding the assessments of these railroads being under the control of the State Board of Equalization is correct. The Idaho Northwestern Railroad Company, while of course organized by the Lewis Lumber Company, is still a public corporation, and they having acquired rights and franchises from the State, would compel them to do a railroad business independent of their own private business. All railroad companies of that character should be assessed by the State Board of Equalization. We have statutes that provide that railroad companies have the right to demand a right of way, upon complying with certain conditions, over the State and school lands of the State, but before they can do that they must file their articles of incorporation with the Secretary of State, whether incorporated in this State or not, and when they get that right of way it is by virtue of their quasi public character, and they are under obligations to the public.

We have granted right of way to the Idaho Northwestern Railroad company, I think, over some of our State lands. We have also done the same with the Spokane Inter-National Railroad Company. As to the assessments on this, I cannot say at this time whether they are in the condition to be assessed or not, and this is a matter that the State Board of Equalization will have to look into.

The McGoldrich Lumber Company, and others that you speak of, I presume are using only small logging railroads upon their own property and have nothing whatever to do as public railroad corporations, and of course should be with their other property, and in conformity with the opinion given by you to the assessor.

With regards, I remain,

Very truly yours,

J. J. GUHEEN,

Attorney-General.

October 5, 1905.

MR. O. M. VAN DUYN,
County Attorney,
Caldwell, Idaho.

DEAR SIR:—Yours of October 2nd, relative to the power of counties to hold tax liens over State lands, etc., has been received. In reply I would state that this office has rendered no opinion in this matter. I have at various times discussed this matter of taxation of State lands with individuals and have given oral opinions as to my views. I believe I told some individual from your county that the county could not collect tax upon State lands. The matter of the taxation of State lands came up last winter in this way, viz.: The statutes provided, with reference to the organization of irrigation districts, that there might be levied assessments upon all lands within the district, upon voting upon the same, and that the district might be bonded. Certain irrigation districts had done so and applied to the State for their proportion upon State lands, and my opinion was that the act of the Legislature was unconstitutional in so far as it attempted to create an assessment or tax upon State property.

There is also the law relative to taxing the interest of the purchaser of State lands. My view of the matter is that the State does not part with title until it gives a deed, and while the purchaser of the land might be taxed upon his interest, I do not think that the Legislature has the power to create a lien upon State lands by taxation.

Sec. 4, Art. VII, of the constitution, is very plain upon this point.

In the case of *State vs. Stevenson*, 6 Idaho, 367, 55 Pac., 886, our Supreme Court decided that tax upon State lands is absolutely void. Of course this case is not directly in point on the question which you raise, but it is upon the general proposition of the taxation of State lands.

I will be pleased to look into the matter at some future date, but at the present time I am so pressed with work that it is impossible to take it up. I would be glad

to receive any suggestions from you relative to your investigations of the subject.

With regards, I remain,

Yours very truly,

J. J. GUHEEN,

Attorney-General.

February 7th, 1905.

MR. FRANK S. RICE,

County Treasurer,

Grangeville, Idaho.

SIR:—Replying to your letter of February 1st, relative to compensation of county treasurers for services performed in connection with the sale of lands and timber, I have to say that I am unable to concur in the opinion of your county attorney, that county treasurers are authorized to retain one (1) per cent of funds arising from said sources. There is absolutely no authorization for such action upon your part. It is true that there is a provision for compensation of county treasurers for services in this connection, but the language is, "Shall be allowed"; not "shall deduct", as apparently you contemplate doing; but whatever provisions may be found to this effect, are rendered of no legal efficacy by the provisions of our constitution, and I suggest that you call to the attention of your county attorney, if you care so to do, the following citations, namely:

Constitution of Idaho, Art. IX., Sec. 3.

Id., Art. XVIII, Sec. 7.

Guheen vs. Curtis, 3 Idaho, 443.

State vs. Fitzpatrick, 31 Pac., 112.

One of the syllabi of the last case referred to declares:

"As Sec. 3, Art. IX, of the State Constitution, declares that the permanent school fund shall forever remain inviolate and intact, and all interest thereon shall be expended in the maintenance of the schools of the

state, the legislature is prohibited from enacting any law that would directly or indirectly divert either principal or interest to any other purpose."

There are certain other considerations which tend to render your position untenable, but inasmuch as this matter has been before the office several times, I do not deem it necessary to go into an extended discussion of it at this time.

Your attention is called to Sec. 465, of the Political Code, wherein it is provided that county treasurers delinquent in remitting funds arising from the sale or rental of state lands for a period of five days beyond the time when the same should be transmitted to the state treasurer, shall be liable on his official bond for double the amount withheld.

I advise that it is your duty forthwith to remit all funds of the character under consideration to the State Treasurer, and advise the Auditor thereof, as by law provided.

Respectfully yours,

J. J. GUHEEN,

Attorney-General.

January 6th, 1906.

MR. R. N. HILL,

County Superintendent,

Malad, Idaho.

DEAR SIR:—In response to your verbal request for information as to whether the trustees of independent school districts may keep the school money in a bank outside of the state, I would say that I have examined the law, and find nothing in the statutes to prevent this being done.

The treasurer is liable on his official bond for the safe keeping of the moneys entrusted to his care, and in the absence of any special statutory prohibition, there

is no restriction upon where he may keep it, and as I say there is no statutory restriction that we have discovered.

Very respectfully,

J. J. GUHEEN,

Attorney-General.

February 27th, 1905.

MISS FRANCES BARDMAS,

County Superintendent,

Weiser, Idaho.

MADAM:—Further with regard to your inquiry of January 12th, relative to expenses of county officers, I have to say that it is my opinion that all county officers, when away from home on business connected with the duties of their offices, are entitled to their actual and necessary expenses for board and lodging, as well as other actual and necessary traveling expenses. I am satisfied that it was so intended by the Legislature in the enactment of Sec. 3, p. 227, Sess. Laws 1901.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

January 8th, 1906.

MR. ROBERT MILLIKEN,

County Surveyor, Canyon County,

Nampa, Idaho.

DEAR SIR:—Your letter of January 6th asking me a number of questions and for my construction of the law relative to fees and salary of county surveyors, etc., received.

The county commissioners have a legal adviser designated by law, on whom they must rely. On matters of this kind I do not care to go into, as it is no part of my official duties, and I prefer to allow the commissioners to be guided by the advice of the county attorney. You would not be governed by my advice, if you thought you

had a private right that was being infringed upon and neither would you be bound by it.

However, I will give you a short synopsis of what I think the law is, if you care to hear it.

Section 7, Art. 18, of the Constitution, as amended in the year 1898, provides that all county officers shall be paid by salary. This is mandatory, and absolutely prohibits from receiving fees. The first law with reference to the office of county surveyors was passed in Session Laws of 1897, page 19. This law was repealed by the Act of March 7th, 1899, being the law that was passed by the first legislature immediately after the Constitution was amended in 1898, and was passed in conformity to and in pursuance of that amendment. The law of 1897 regarding the office of county surveyor was passed in 1899 again, on the date of February 16th, as you quote in your letter, but the way that happened to be passed again was this: A good many session laws had been attacked at various times and declared unconstitutional, by reason of the fact that certain requirements of the statute were not complied with in their passage. In order to put a stop to this, the legislature of 1899 took up all the back session laws since statehood, which had not been repealed, and passed them in a body, and passed them with the requirements of the Constitution, in order that they might not be attacked on that ground. This was about the first thing the Legislature of 1899 did, and then when they took up their regular business they passed other laws that repealed some of the laws that they had passed as a body, and that is the exact condition in the case of the Act approved March 7th, 1899, repealing the Act of February 16th, 1899.

I have not time to go into details in explaining this matter, but trust I have made it so you understand it.

I note what you say as to the liberality of the commissioners in allowing the surveyor the munificent sum of \$50.00 per year. This is an unfortunate condition of affairs, but I do not know how it can be remedied. It certainly cannot by misconstruing the law. The county commissioners, as I understand it, have the power to allow

a salary as high as \$800.00 a year, and not less than \$50, and it seems that they placed it, in your county, at the minimum. You are not the only one that has been placed in this same situation. I have a great many complaints, and know of my own personal knowledge of other county officials who are not allowed by the commissioners a salary adequate to the services rendered, and it places matters in a very bad way. There is no question but what the commissioners should try and allow all county officials a fair salary, as it is absolutely necessary for the public good that it should be done. But if they do not do it, I do not see any way to remedy it.

With regards, I remain,

Yours very truly,

J. J. GUHEEN,

Attorney-General.

January 5th, 1906.

MR. OLIVER ELLSWORTH,
San Francisco, Calif.

DEAR SIR:—Your letter of December 28th relative to the filing in this state of Articles of Incorporation of the Railway Employees Mutual Protective Association, has been handed to this office by the Secretary of State.

In answer to your inquiry whether it is necessary for the said Railway Employees Mutual Protective Society, organized under the laws of the State of California to file its Articles of Incorporation previous to doing business in this state, I would say that our law respecting fraternal beneficiary associations which provides that such, before doing business in the state, must file copies of their charter, and Articles of Incorporation with the Insurance Commissioner, expressly excepts fraternal organizations such as I understand yours to be. The section excepting them from the insurance law is as follows:

“Section 2261. This chapter shall not apply to any grand or subordinate lodge of the order of Free and Accepted Masons, Independent Order of Odd Fellows, as they now exist, nor to similar orders or secret societies,

nor to fraternal societies whose subordinate or national bodies pay nothing but funeral or weekly sick benefits, nor to any organization conducted solely for benevolent and charitable purposes, whose members are employed by one corporation or institution or by more than one similar corporation or institution or whose membership is confined to one trade, art or profession."

It is evident, therefore, that it will not be necessary for your association to file its articles with the Insurance Commissioner, or pay any fee for a report to that officer.

There is, however, a law passed by the Legislature of 1903 which requires any foreign corporation doing business in this state to file Articles of Incorporation with the Secretary of State and to indicate its statutory agent for the service of process. This law has been interpreted by our district court to include insurance companies in general. Whether it would include mutual benefit societies is a question that has never been passed upon by the court, and it is indeed a very close question. This matter is before the Supreme Court on appeal now in a case involving old line insurance companies, and the decision, which will undoubtedly come within a month or so, may throw some light on the question that you ask about in your letter.

You will notice that the penalty prescribed for failure to comply on the part of any foreign corporation, is that its contracts are not enforceable, and that its conveyances of real estate are null and void. There is no penalty other than that attached.

With these facts in view, you will probably be better able to reach a conclusion as to whether you ought to file articles of incorporation with the Secretary of State. It being a mooted question, we cannot give absolute opinion.

Very truly yours,
J. J. GUHEEN,
Attorney-General.

April 1st, 1905.

MR. P. W. MITCHELL,
Nez Perce, Idaho.

DEAR SIR:—I have your letter of March 29th relative to village elections, and I have to say that if Nez Perce is a village, governed by Sections 40-52 of an Act approved February 10th, 1899, as amended by an Act approved March 11th, 1901, it is not affected by any enactments of the 1905 Legislature relating to elections, except as to the term of office of the trustee. Sec. 60 of the Act approved February 10, 1899, as amended, is as follows:

“Sec. 60. On the first Tuesday of April, 1905, and biennially thereafter, an election shall be held in each city and village governed by this Act, for officers as in this Act provided, all of which officers shall be elected and hold their respective offices for a term of two years, and until their successors are elected and qualified, at which election the qualified voters of such city may cast their ballots between the hours of nine a. m. and seven o'clock p. m.” (Senate Bill 105, Eighth Session.)

The amendment of 1901 to Sec. 47 of the Act of 1899 is found in the 1901 Session Laws at p. 133, and provides for the appointment of a clerk, treasurer and attorney, etc.

Very respectfully yours,

J. J. GUHEEN,

Attorney-General.

February 23rd, 1905.

MR. J. C. RINDY,
Clerk Dist. No. 90,
Route No. 2, Moscow, Idaho.

DEAR SIR:—Replying to your letter of February 18th, addressed to Attorney General Bagley, relative to qualifications of electors, etc., I beg to call your attention to Sec. 1065 of the Pol. Code of Idaho, wherein it is pro-

vided that trustees have power, when directed by a vote of the district, to build or remove school houses, etc., and to fix the location of school houses. Provided, that in certain cases a two-thirds vote of the electors of the district shall be necessary. The term "electors" is not qualified in any way, and it is not necessary that electors voting on this proposition be resident freeholders, but they must possess the qualifications of electors.

Answering your second question, I have to say that there is no particular time required to make one a bona fide resident of a district. It is largely a question of intention. The term is somewhat elastic, and the sense in which it is used, and the object and intent of the statute bear upon the question.

For your information, I also call your attention to Sec. 1743 of our Pol. Code, wherein county attorneys are constituted the legal advisors of the officers of their respective counties in matters wherein the people or the county are interested or a party, and I would suggest that you had better consult him on matters of this kind, if the county is likely in any manner to become a party to the controversy.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

June 19, 1906.

J. L. KIRTLEY, JR.,

Assessor and Collector,

Salmon, Idaho.

DEAR SIR:—Your letter of June 14th, making certain inquiries in regard to exemptions of resident widows, etc., received.

I have usually made it a rule to refer county officers to their county attorney, he being their legal adviser with reference to their duties, and being upon the ground where matters can be explained to him thoroughly; and I have no doubt if you will consult your county attorney

he will advise you upon the subject. I will state, however, in so far as the first part of your question is concerned, that I have no hesitancy in saying that the exemption law as to widows, applies to a widow who resides in this State and who has property in this State, no matter whether the property is where the widow resides or not. In other words, as illustrated by you in your letter, a widow residing in Pocatello, Idaho, is entitled to her exemption on property situate in Lemhi county to the amount as fixed by statute, provided, of course, she is not exempted to the statutory amount on property assessed in some other county. In other words, under the statute she would be entitled to but one exemption, and that amount is fixed by statute.

With regards, I remain,

Very truly yours,

J. J. GUHEEN,

Attorney-General.

December 5, 1905.

MR. C. A. AXLINE,

Pres. Albion Normal School,

Albion, Idaho.

DEAR SIR:—Your letter of November 28th, asking me to give you construction of Senate Bill No. 111, an Act creating and establishing a Normal School fund, page 393 of the Eighth Session Laws, received.

As I understand the situation, your school has exhausted their direct appropriation for maintenance. My investigation discloses that there is in the Normal School Fund, as created by Senate Bill No. 111, the sum of \$12,443.42 today. Of this amount the Albion Normal School is entitled to one-half, and is entitled to draw bills against it, the same as though it had been a direct appropriation made in the regular appropriation bill for maintenance. One-half of this amount should be now available to you and one-half of any further amounts that are received into this fund during the coming year should also be available to you.

As I understand it, the State Auditor will certify to you quarterly your appropriation of this fund, the same as he has been doing with reference to the direct appropriation. I will furnish the State Auditor with a copy of this letter.

You say in your letter that at the time the appropriation bill was passed, it was expected that the Normal School fund would bring each school \$17,500.00 and that the Albion Normal school would get a total of \$30,000.00 for the two years. I would suggest that you look into the matter very carefully before you conclude to base your expenditures upon an appropriation of \$30,000.00 for the two years, as it does not seem to me that the amount now in this fund to your credit will bear out this expectation. I know that your school does not desire to come before the next Legislature with deficiencies.

With best regards, I remain,

Yours very truly,

J. J. GUHEEN,

Attorney-General.

May 15, 1906.

MR. F. W. KETTENBACH,

*Sec. Lewiston State Normal School,
Lewiston, Idaho.*

DEAR SIR:—Your letter of May 11th, asking me concerning the method the trustees should adopt in condemning and disposing of two old frame buildings connected with the school, received.

I can find nothing in our statutes of an affirmative nature with reference to matters of this kind, but inasmuch as the statutes provide that the Board of Trustees have the general supervision and control of all buildings and property appertaining to said school, it would seem to me that if a proper showing could be made that such frame buildings were an expense and incumbrance, and of no use to the school, they would be justified in disposing of the same to the best possible advantage. In the

absence of any statutory law on the subject, it would be impossible for me to say positively that it would be legal to do so; neither could I say it would be illegal, but as a business proposition, and for the best interests of the school and the state, I do not see where any objections could be taken against disposing of the same, when the trustees are able to make such a showing as you recite. Ordinarily the trustees are not empowered to dispose of property of the school without an act of the Legislature, but this property, as I understand it, would be just the buildings which would, if sold, be in the nature of personal property; and being of no further use to the school, and in fact being an incumbrance, its sale could be simply treated as a business proposition in the ordinary management of the school.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

July 6, 1906.

STATE BOARD OF CONTROL,

Olympia, Washington.

GENTLEMEN:—We have your letter of June 12th in which you inquire as to the law governing the control and guardianship of the person and property of the insane in this State. We would say, first, that the statutes governing this matter are found at Sec. 387-419, inclusive, of the Political Code of Idaho (1901), which provide for the care, free of charge, of the indigent insane. Provision is made, also, for the guardianship of insane persons; and if they are possessed of estates, for the application of the proceeds from the sale of the estates to the expenses of their maintenance while in the State asylum. There is no provision specifically requiring payment from relatives of the inmates. There is one provision, however, to the effect that the Board of Directors of Insane Asylums may "make regulations and fix the terms for the admission of insane persons who are not indigent, or

who are non-residents of the State. All receipts from such sources must be paid into the State treasury."

Sec. 389 of the Political Code.

In this State the estates of insane persons who die leaving no surviving heirs would undoubtedly pass by escheat to the State, the same as in the case of other persons.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

February 10, 1906.

MR. W. A. ALEXANDER,

*Chairman, Village Board of Trustees,
Bonners Ferry, Idaho.*

DEAR SIR:—I have your letter of February 1st, inquiring whether trustees of villages have one or two years from their election.

In reply I would beg to say that the law relative to elections was changed by Senate Bill No. 105, passed at the 1905 session of the legislature, Sess. Laws 1905, page 385, and reading as follows:

"Sec. 60. On the first Tuesday of April, 1905, and biennially thereafter, an election shall be held in each city and village governed by this act, for officers as in this act provided, all of which officers shall be elected and hold their respective offices for a term of two years, and until their successors are elected and qualified, at which election the qualified voters of such city may cast their ballots between the hours of nine a. m. and seven o'clock p. m."

In accordance with the foregoing village trustees elected at the last election would hold office for two years.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

March 24th, 1905.

MR. N. P. MORAN,
Village Clerk,
Cambridge, Idaho.

DEAR SIR:—I have your letter of March 23rd, relative to the changes made by the last Legislature in the laws applicable to village elections. In reply, I beg to say that I am enclosing you herewith copies of Senate Bill No. 105 and House Bill No. 42, which will give you the information you desire. In answer, however, to your question as to whether the law now requires voters to register for this spring's village election, I would say that it is my view that this law does not carry a sufficient emergency clause to make it go into effect in time for this spring's election. Senate Bill No. 105, which I am enclosing, makes no changes in your village election other than making it biennial.

I am, very respectfully,

J. J. GURHEEN,

Attorney-General.

January 21, 1905.

MR. BERT C. JOHNSON,
District Mining Recorder,
Tyson, Idaho.

DEAR SIR:—I have your letter of January 17th, relative to fees of district mining recorders, and I have to say that the provisions of the statute bearing upon this matter, so far as I have been able to discover, are as follows: (Session Laws 1903, p. 290).

“It shall be the duty of the county recorder of the several counties of this state, within fourteen days after receiving them, to transmit to the deputy mining recorder of the district wherein the claims are situated, all location notices, both quartz and placer, which shall not have already been recorded in the office of the deputy mining recorder. It shall be the duty of such deputy mining recorder to record in his records all such notices

received by him and he shall receive as compensation therefor from the clerk sending them one-half the fee authorized by law to be charged for the recording of mining claims. After recording such notices the deputy mining recorder shall return the same to the county recorder."

You are correct in your contention, therefore, that you should have recorded in your office the location notices, but I am unable to find any direction that other instruments relating to mines should be recorded in the district wherein such mines are located; but you are clearly entitled to record location notices and receive the compensation therefor provided in the above section. It is also provided that proofs of manual labor may be recorded with the deputy mining recorder, but apparently it is not compulsory. I suggest that you call to the attention of the county recorder the above provision of the statutes.

If this does not give you the information, kindly advise with me further.

Yours respectfully,

J. J. GUHEEN,

Attorney-General.

March 15th, 1905.

IDAHO TEA COMPANY,
Lewiston, Idaho.

GENTLEMEN:—Replying to your recent letter, addressed to the Governor, submitting the inquiry whether any one of the various classes of solicitors employed by your company come within the purview of the bill recently passed by the Legislature, providing for the licensing of peddlers, etc., I have to say that Sec. 1 of the bill, defining peddlers, is as follows:

"Sec. 1. The term peddler for the purpose of this Act shall be construed to include all persons, both principal and agents, who go from place to place and house to house, carrying for sale and offering for sale or ex-

posing for sale, goods, wares or merchandise: Provided, that nothing in this Act shall apply to peddlers in agricultural or farm products."

You have, I understand, three classes of solicitors, that is to say:

(1) Solicitors visiting railroad towns and calling on merchants and hotels.

(2) Solicitors calling on merchants in towns off railroads and farmers between such towns.

(3) Solicitors calling on individuals at their homes in towns only of the solicitors' residence.

None of the above solicitors carry goods with them for the purpose of sale, and all sales are made by sample, for future delivery. There is not in any case, as I understand, a concurrent sale and delivery.

From what I gather from your letter, I do not understand that your business comes within the purview of this Act. However, I think you would better consult the county attorney of your county. He is on the ground and will understand thoroughly how your business is conducted.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

March 6th, 1905.

MR. J. H. DAY,

Twin Falls, Idaho.

DEAR SIR:—Yours of March 2nd received. My understanding of that portion of Rule 11, p. 12, to which you refer, is that an entryman will be given notice by the water company when water is available for the land embraced within his entry, and that he must within a reasonable time become an actual resident upon said land within his entry, and that he must within a reasonable time become an actual resident upon said land and maintain such residence, to be governed by the rules and regulations relative to residence under the provisions of the United States homestead laws, as stated in said rule. I

will state that the matter of residence upon these lands is going to be taken up by the Land Board for further action. It seems that there has been no final proof made in this state under the Carey Act; and the original Act was amended, allowing the State to make proof of reclamation, etc., and obtain patent to these lands in a body; and this may have the effect of changing these rules in that respect. It is a matter that I have not investigated, as I have had no opportunity to do since coming into this office; and as the matter of final proof has not yet come up there has been no decision as to whether residence is actually necessary.

I am, very respectfully,

J. J. GUHEEN,
Attorney-General.

March 3rd, 1905.

MR. THOS. J. JONES,
Bonnets Ferry, Idaho.

DEAR SIR:—I have your letter of February 28th. Inasmuch as the bill creating the counties of Lewis and Clark made no provision whereby notaries would be allowed to act under their present commissions, it is my opinion that you will have to apply for a new commission and comply with all the requirements of the law regarding the issuance of commissions, the same as if this was an original application.

I am, very respectfully,

J. J. GUHEEN,
Attorney-General.

April 7th, 1905.

MR. HENRY C. ETHELL,
Mountain Home, Idaho.

DEAR SIR:—I have your letter of April 6th relative to your status as city clerk. The opinion I gave Governor Gooding relative to municipal elections is rather long,

and the subject it embraces has no connection with your case, so it is hardly worth while to go to the trouble of making a copy. The amendments to the election laws did not affect those sections of the village government act which provide for the appointment of a clerk, treasurer, etc. They remain the same as heretofore, and your appointment is legal. The provisions relative to the terms of trustees are changed, and they are now elected for a term of two years instead of one, and I presume your appointment is for two years. The subject of my opinion to the Governor was the provision in the recently passed law relative to clerks in what is known as cities of the second class. Previous to the passage of the 1905 act they had always been elected, but through a clerical mistake "city clerk" was inserted where "city attorney" should have been, with the result that the same sections apparently provide for the election of a clerk and also for the appointment of a clerk, the city attorney not being mentioned. I presume whoever read the opinion applied it to village government as well as to cities of the second class. There is, however, no change in this regard in the law relative to village.

Yours very respectfully,

J. J. GUHEEN,

Attorney-General.

April 9th, 1906.

MR. R. J. NEELEY,

417 W. 18th Street,

Cheyenne, Wyoming.

DEAR SIR:—Your letter, enclosing circular of the Twin Falls Investment Company, has been received.

Under the rules adopted by the State Land Board, entrymen of the Twin Falls tract or other Carey lands should begin their residence immediately after water is available for irrigation. This rule has been changed, as I believe I wrote you, so that entrymen have six months after water is available in which to begin their residence.

This extension was granted in order for entrymen to get their affairs in shape.

The paragraph you cite in the circular is misleading, but, of course, the company has nothing to do with the law. It seems to be a misunderstanding upon its part, or it is a known intention to deceive. I shall return this circular to you within a few days, but I desire to keep it for that time in order to look into this matter. We have nothing to do with the Investment Company, and your contract with the water company in no way affects the residence requirement. The law applicable to residence is the United States law. The rules of the Land Board are simply to carry into effect the provisions of this law, and the company has nothing to do with it. Of course, in sending out circulars there should be no misrepresentations, but if any misrepresentations have been made I cannot say what their effect upon your contract would be. I am not informed as to who compose the Investment Company, as this is the first circular that has come to my attention.

Yours very respectfully,

J. J. GUHEEN,

Attorney-General.

April 9th, 1905.

MR. A. P. GUTHRIE,

Attorney at Law,

Twin Falls, Idaho.

SIR:—I have your letter of April 6th relative to incorporation of villages, etc.

It is not entirely clear to me from your letter upon just what phase of the law referred to (Pol. Code, Sec. 1872), you desire my opinion. You say, "In your opinion can a 'city, town or village,' by petition to the Board, etc., become a 'city' until they have been assessed, or until there is two hundred taxable inhabitants in the boundary lines of said 'city' petitioning the County Commissioners, or a majority of them, asking to be incorporated." I presume you desire a construction of the law

relating to the organization of village governments. In that regard, upon a hasty examination of Sec. 1872, it is my impression that the Commissioners, or a majority of them, must be satisfied that there are at least two hundred or more actual residents in the territory described in the petition, and that a majority of the tax-paying inhabitants of the proposed village have signed the petition. I do not understand that it is necessary that the inhabitants of the proposed village shall have been assessed, but they must be subject to taxation. The petition will not necessarily require two hundred signatures, but it is required that there be two hundred inhabitants within the territory proposed to be organized under a village government, and the petition must, of course, under this statute, contain the signatures of a majority of the taxable inhabitants.

This is my view of the statute upon a hasty examination. While I am willing to answer requests of this nature, it should be borne in mind that it is not within my official duty, as prescribed by law, and I therefore desire that you do not treat this as an official opinion.

Yours very respectfully,

J. J. GUHEEN,

Attorney-General.

April 11th, 1905.

HON. CHAS. L. HEITMAN,
Rathdrum, Idaho.

DEAR SIR:—Your letter of March 7th relative to the arrest of Constable Berry, did not reach me until yesterday, too late to have an answer reach you by Monday as requested. I therefore wired you yesterday with reference to the matter, as I presumed you would want to use my view at the trial. I have not looked into it, but there is no question in my mind that officers can sell fish that have been unlawfully taken, as set forth in your letter. Sec. 18 of the Game and Fish Law provides that they take into custody any game or fish, or any portion

of the same, which they may find at the time in the possession of any person, company or corporation, during the time the killing of such game or fish is not permitted by the laws of this State.

The fact that it is perishable stuff would give them the right to dispose of it, without question, without any specific provision in the law. Of course, if it should develop that the fish were not unlawfully taken in the first instance, I presume the constable could be required to refund the money received for them; but in no case would a criminal action lie, and the county attorney should dismiss any such cases. I do not care to interfere with any county attorney's construction of the law until I have heard from and consulted with him, but in the case under consideration I do not understand upon what theory he is prosecuting the case, if he is prosecuting it.

Yours respectfully,

J. J. GUHEEN,

Attorney-General.

April 12th, 1905.

MR. IRWIN S. WATSON,

Boise, Idaho.

SIR:—Answering your communication of April 10th relative to the laws of Idaho affecting foreign fire insurance corporations, I have to say that foreign fire insurance corporations are required to comply with the requirements of the amendment approved March 10th, 1903, to Title IV, Sec. 2653, of the Revised Statutes of Idaho, in addition to complying with the provisions of Chap. LXXXVI, Sections 2214 to 2274, inc., Civil Code of Idaho, relating to insurance companies.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

May 17th, 1906.

MR. BERT LUDINGTON,

Bonnors Ferry, Idaho.

DEAR SIR:—Your letter submitting the inquiry whether there is a law prohibiting the Sunday opening of stores and business places, has been received. There is no such law upon our statute books, and all business places are at liberty to keep open on Sunday the same as any other day, if they so desire.

As to the agreement between the merchants, I am not prepared to say whether the fine could be collected in a civil suit or not. That is a matter that would have to be decided in a civil action.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

March 17th, 1905.

MR. GEORGE L. KARCHER,

Nampa, Idaho.

DEAR SIR:—Replying to your letter of March 13th, submitting the inquiry whether the attached ballot complies with the law in school bond elections, I have to advise you that Section 1047 of the Pol. Code of Idaho provides that ballots in such elections must contain the words "bonds yes" or "bonds no". In order to comply literally with the terms of the statute, separate ballots would have to be printed, some with the words "bonds yes", and some with the words "bonds no", and a voter could use either form of ballot, as his judgment dictated. I see no objection to the form you enclose, and which I attach, as it no doubt substantially complies with the law; but when changes are made from the terms of a statute, it gives room for criticism and attack. It is no part of my official duties to advise you in matters of this kind,

and the above is simply my opinion as an attorney, and not as a state official.

I am, very respectfully,

J. J. GUHEEN,

Attorney-General.

February 7th, 1906.

MR. JAMES E. HART,

Paris, Idaho.

DEAR SIR:—I am writing in response to your letter of January 30th, and to your verbal inquiries made here at the office, in regard to the provisions of the Estray Law passed by the last legislature and approved March 11, 1905.

You ask whether there is any provision of the law requiring the constable to post three notices of the sale in the precinct where the animal is to be sold. In reply I would say that I see no provision requiring this. And in response to your other question, I do not see how the constable could legally charge twenty-five cents for each notice of this kind. You inquire further as to whether the constable could legally make a charge of fifty cents for branding the animal sold, and in reply to this I would say that I am unable to find any provision of the law providing for such a fee. And further, I have not been able to find wherein the constable is authorized to make a charge for a Bill of Sale to the purchaser.

In general I would say that the only fee for branding and for Bill of Sale would be included in the fee for sale provided for in Section K, viz: \$1.00 for the first head sold and fifty cents per head for each additional animal.

The law provides that the recorder shall receive fifty cents for "Each notice sent." I would consider this to mean fifty cents for each notice sent by the recorder in regard to any particular animal or animals included in the notice. For instance, the recorder would receive fifty cents for notifying the owner of the recorded brand that

the animal had been taken up under the estray law and he would further receive fifty cents for notifying the constable that he had so informed the owner.

The constable, on the other hand, is authorized to receive fifty cents for the *notices* he sends and this would include all the notices with reference to any one animal.

You are correct in supposing that the money left after paying the expenses of the sale should be turned into the county treasurer for the benefit of the several school districts.

Hoping this will answer your inquiries, I am

Yours very truly,

J. J. GUHEEN,

Attorney-General.

February 10th, 1905.

MR. HARVEY FORESMAN,
Sheriff, Nez Perce County,
Lewiston, Idaho.

DEAR SIR:—I have your letter of February 7th, making inquiry relative to whose duty it is to collect licenses, etc. I will state that at the present time it is impossible for me to go into these matters in detail. I call your attention to Sec. 1743 of the Political Code of Idaho, defining the duties of county attorneys. Sub. Sec. 3, provides:

“To give advice to the board of county commissioners and other public officers of his county whenever requested upon all public matters in which the people or the state or the county is interested or a party.”

This law makes it the imperative duty of the prosecuting attorney to advise county officials, and I desire that county officials lay these matters before the prosecuting attorney, who is on the ground, and such matters can be thoroughly explained to him. I will, however, state for your benefit with reference to who should collect licenses that it is the duty of the sheriff. It would take some time to go through the different statutes explaining this matter to you, but the matter was before the Su-

preme Court of this State in 1895 in the case of State vs. McDonald, and they settled all doubt by holding that it was the duty of the sheriff to collect licenses. You will find the case in 40 Pac., 312; Vol. 4 of the Idaho Reports. With regards I remain,

Yours truly,

J. J. GUHEEN,

Attorney-General.

June 2, 1906.

T. L. GLENN, Esq.,

Montpelier, Idaho.

DEAR SIR:—Your letter of May 31st, relative to State lands in the Montpelier Irrigation District, and assessments levied against the same, received.

In reply I would state that no assessments have ever been paid under the Act in question, and no appropriations were ever made by the Legislature for the State Land Board to use for that purpose. This matter came up before the Legislature at its last session, and Section 59 of this Act was passed upon by this office as being unconstitutional, as under our constitution, and also the decisions of the Supreme Court, State lands are not subject to assessments or taxes, and cannot be made so by an Act of the Legislature. The matter of providing means, however, by which the State land would bear its proportion of the cost of these irrigation district canals was taken up, and an amendment of the Irrigation District Act, and a sort of substitute for Section 59, was passed, making provisions whereby the State Land Board could buy water rights. You will find that Act on page 378 of the Session Laws of 1905, which is self-explanatory. What should have been done was that a separate Act should have been passed, going into this matter thoroughly, and covering all necessary ground, but for some reason the Legislature did not see fit to go into it, and the Act of 1905 was the result. The State Land Board has not taken any proceedings under this

Act with reference to any irrigation district and it is not probable that they will do so this year, as I think they will prefer to wait until the next Legislature, and have this matter taken up and covered more fully. I think, also, that they would prefer to place these lands upon sale, rather than get into a complicated system of contracts with the irrigation district.

With regards, I remain,

Very truly yours,

J. J. GUHEEN,

Attorney-General.

May 31, 1906.

CAPT. WILLIAM F. CROSS,

Marysville, Idaho.

MY DEAR SIR:—I have your letter of May 28th, in which you make certain inquiries and ask my opinion as to the rights of purchasers of water from the Marysville Canal Company.

As I understand it, your inquiry is directed mainly to what effect the placing of a mortgage upon the property of the canal company would have upon the water right of the purchaser. I will state that it has no effect whatever, in so far as changing the terms of the contract between the water company and the purchaser of a water right is concerned; that it in no way lessens the obligation of the water company to comply with the contract with the purchaser of water rights, and to furnish the amount of water specified in the contract; nor does it impose any further burden upon the purchaser of a water right.

The Marysville Canal Company, or its successors in interest, in so far as its relations with the State of Idaho are concerned, and with the purchasers of water rights from the canal company, is primarily only a construction company, whose rights are dependent wholly upon its contract with the State of Idaho, excepting, of course, the water right which it has appropriated (and

this water is appropriated for this particular land), in so far as the sale of these water rights is concerned. The company have nothing to sell or mortgage except what they have acquired by reason of this contract. Under their contract with the State, these construction companies are allowed to mortgage their interest in their property, but this mortgage must be approved by the Attorney General, and must be made subject to the laws of this state relative to Carey Act matters, and subject to the contract between the State and the company; and this mortgage must contain a clause to the effect that whenever the purchaser of a water right pays for his water right in full, this mortgage must be released in so far as his water right and land are concerned; and the Attorney General will see that this clause is inserted before approving the mortgage. The purchaser of a water right from this company purchases a proportionate interest in the canal system of the company, and the mortgagee of this property cannot acquire any right greater than the company has itself, and that is only to demand of the purchaser of a water right what his contract calls for. As a matter of fact, the property that is really being mortgaged, and which is the security of the mortgagees or the bondholders, as the case may be, is the company's right to sell these water contracts, and the value of these contracts. That is the *value* of the company's property. There have been a number of these companies already that have executed mortgages of this character, and these contracts are assigned to the mortgagee as security for the payment of the mortgage or the bonds; or at least sufficient of these contracts to satisfy the mortgagee that he is going to get his money; but the mortgagee can only collect from the makers of these contracts what the contracts call for, so that the purchaser of a water right from this company is not in any way prejudiced by any mortgage that the company may place upon this property.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

February 23rd, 1905.

MR. C. C. ODENBURG,
Moscow, Idaho.

DEAR SIR:—I have your letter of February 21st, relative to determination of school house site, and I respectfully call your attention to Sec. 1065 of the Political Code of Idaho, defining the duties and powers of school trustee, and providing, among other things, that:

“Said trustees have further power, when directed by a vote of their district, to build or remove school houses, to purchase, receive, hold and convey real and personal property, and to hold, purchase and repair school houses, and to supply the same with necessary furniture, and to fix the location of school houses: Provided, that a school house already built shall not be removed, nor a new site for a school house be designated, except when directed by a two-thirds vote of the electors of said district at an election to be held for that purpose, etc.

I trust that this will satisfactorily answer your inquiry.

I am, very respectfully,

J. J. GUBBEN,

Attorney-General.

May 28, 1905.

MR. A. B. GOUGH,
Montpelier, Idaho.

DEAR SIR:—Your letter of May 26 has been received.

I note what you say with reference to Sec. 13 of the Idaho Admission Bill. I have made some inquiry into this matter and I find that the Interior Department has in a number of cases decided that the discovery of mineral upon school land (Secs. 16 and 36) after the survey, will not give the right to make location, and will not defeat the right of the State. It is in the same condition as land after patent has issued.

Appeal of Harvey, 7 L. D., 459.

Appeal of Minor, 9 L. D., 408.

Appeal of Bennett, 6 L. D., 412.

These cases seem conclusive upon the question of the right to make a mineral entry after survey. I have not yet investigated the question how the State may make lieu selections, or what showing must be made by it, where there are bona fide mineral entries upon school lands, but will try to do so the first opportunity. I cannot find anything around this or the land office showing how this matter is conducted.

Yours very respectfully,

J. J. GUHEEN,

Attorney-General.

September 19, 1906.

MR. E. S. CHASE,
Lardo, Idaho.

DEAR SIR:—Replying to your verbal inquiry of this morning, relative to certain features of the registration law of this state, I have to advise you as follows:

Registrars are not permitted to transfer the names registered at the last previous election to their current lists, with a view to making it unnecessary for these parties to register again, inasmuch as the law requires a new registration for each election, and a complete new list on the part of the registrar. Every elector must register anew for each election.

As to the place of registry, that is immaterial, and an applicant may be registered at any time and place during the period provided by law. While he is required to be at the place of registry during certain hours on each Saturday, the registration of an applicant on Saturday, or any other day, at any place, would be perfectly valid.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

May 23, 1905.

MR. T. C. COOGAN,
202 California St.,
San Francisco, Cal.

DEAR SIR:—Your letter of May 17th, submitting the inquiry whether or not fire insurance companies are within the provision of Sec. 2653 of the Revised Statutes of Idaho, has been received. In reply would say that I inquired into this matter some time ago and my conclusion was that the section included all fire insurance corporations. I do not know what the view of my predecessor was or whether he ever expressed himself, but in looking into the subject I had occasion to speak to the Secretary of State and he was very emphatic in declaring that all fire insurance corporations should comply with the section referred to, and he was very much surprised to hear that there were companies doing business in the State which had not complied with the law. My opinion is settled upon the matter and I do not think it would be worth while to take the matter up again, especially as I am overwhelmed with work at this time. I understand that a case has arisen in the district court of this county and the court takes the view I have expressed and refused to allow the company to recover. The case was looked after carefully there. So far as this office is concerned, I don't think any different opinion would be rendered.

Yours very respectfully,

J. J. GUHEEN,
Attorney-General.

May 25, 1905.

MR. J. M. SHAW,
Kamiah, Idaho.

DEAR SIR:—I have your inquiry of May 22nd, relative to notaries public.

It is my understanding of the law that notaries public are appointed only for the county in which they re-

side, and they cannot legally take acknowledgments outside of the county for which they are appointed. If a notary moves from the county for which he was appointed, he cannot longer act as a notary unless he receives a commission so as to do and complies with the requirements of the Statute; in other words he must be reappointed.

Yours very respectfully,

J. J. GUHEEN,

Attorney-General.

June 1, 1905.

MR. C. E. HELMAN,
Caldwell, Idaho.

DEAR SIR:—Your recent communication asking my views as to the effect of the Sunday closing act, passed by the last Legislature (Sess. Laws 1905, p. 295) has been received.

This law prohibits the keeping open on Sunday of certain kinds of places, such as saloons, dance houses, etc., in all places outside of incorporated towns and cities. The act does not prohibit the keeping open of such places in incorporated cities or villages, but it does not in any manner interfere with the powers now possessed by incorporated cities and villages to pass ordinances regulating the closing of such places. The powers of cities and villages in that respect are just the same now as they were before the passage of this act and all cities and villages can pass ordinances regulating such matters. In any city or village where there was an ordinance closing such places on Sunday previous to the passage of this act, these ordinances are still in force and the act in no way effects them.

Trusting that I have made myself clear, I remain,

Very respectfully yours,

J. J. GUHEEN,

Attorney-General.

June 1, 1905.

MR. W. K. AITKIN,
Turner, Idaho.

DEAR SIR:—I have your letter of March 30th. Mr. McConnell, Register of the Land Office, advises me that he wrote you fully with reference to the matters you inquire about. You say, the question with us is “Does the terms of a lease of state lands grant such holder the right to transfer or sell a right of way or must such right issue from the State Board of Land Commissioners?” The lessee of any school or State lands has no right or authority to grant a right of way for a ditch through such land, or to collect or receive any compensation for such right of way. The State, through the Board of Land Commissioners, grants rights of way. If Mr. Warner is only the lessee of this land, he is not entitled to receive anything for a right of way and you cannot procure any right by paying him anything.

Trusting that I have made myself clear, I remain,

Yours very respectfully,

J. J. GUHEEN,

Attorney-General.

June 12, 1905.

DR. R. L. NOURSE,
Hailey, Idaho.

DEAR SIR:—I have your letter of June 10th, inquiring about certain sections of the Medical Act of 1899. Your question, I believe, was as to whether an applicant for a license who had taken the examination of the Board and been unsuccessful could practice, without liability, pending the review in the courts of the action of the Board in refusing such applicant a license. In reply I would say that Sec. 10 of the Act (Sess. Laws 1899, p. 348) provides that any person who practices medicine without a license is guilty of a misdemeanor; and Sec. 6 of the Act, after making provision for the examination of applicants for a license, specially provides, “No ap-

plicant for a license shall be allowed to practice medicine or surgery, or either of them, until such license shall have been granted." It would seem, therefore, that an unsuccessful applicant would violate the law in practicing medicine or surgery pending the review of the Board's action in the courts.

Yours very respectfully,

J. J. GUHEEN,

Attorney-General.

June 14, 1905.

MR. HERMAN H. TAYLOR,

Sandpoint, Idaho.

DEAR SIR:—I have your letter of June 12th, relative to road tax in villages. I have not looked into the matter at any great length but have done so sufficiently to note that this is another of the inconsistencies so frequently found in our statutes.

When Sec. 1923 was first passed, it is very probable that the framers of the bill knew nothing of the existence of the powers of cities and villages with reference to work upon roads. However, from my examination I would think that the city could proceed under either of these statutes, but, of course, under only one of them. You will notice that Sec. 1911 gives the city council the right to require two days' labor upon the streets and requires three days' notice in writing; and it further provides that not to exceed one dollar can be collected for each day's delinquency. This is in the nature of a penalty which is taxed against the property of the delinquent. The council would, of course, have to provide by ordinance the amount of each day's delinquency to be collected, and it is really a different kind of an act.

Sec. 1923 of the Penal Code, being first passed in 1899, is a later act than Sec. 1911, but, of course, does not pretend to amend the city and village act, in which Sec. 1911 was first enacted, it being an amendment, as you say, of Sec. 887 of the Revised Statutes. When we come to examine the duties of Commissioners and Road

Supervisors in road districts in the county, it would seem to me that the city council and whoever they appoint as road overseers could collect the tax as provided in Sec. 1161 of the Penal Code. It might, however, be better for the city council to pass the ordinance governing the matter first, although in all probability there would be no necessity for this.

This matter has been up in a number of cities in this State to my knowledge and has not worked very satisfactorily.

You will appreciate the fact that this is not an official opinion as it is a matter that I have nothing to do with in an official capacity, and I simply give you my views of it as an individual. I realize that the matter is in such shape that it is largely a matter of guesswork to take any definite position.

Yours very respectfully,

J. J. GUHEEN,

Attorney-General.

September 5, 1906.

SARAH T. DRISCOL,

Payette, Idaho.

DEAR MADAM:—We have your letter of September 1st, in which you inquire concerning the elector's oath. You mentioned that the new law passed by the last legislature has a form of elector's oath which contains the following:

“That I have or will have resided in this State for six months, and in the county for thirty days next preceding the next ensuing election.”

You indicate that this agrees with Sec. 2, Art. 6 of the constitutional provisions for suffrage and election. You say further that in the general election laws, Chap. 21, Sec. 17, there is contained the words:

“He shall be a citizen of the United States and shall have resided in this county for six months and in the precinct ninety days when he offers to vote,”

making an apparent contradiction with the provisions of the new law of 1906. I would say in reference to this apparent contradiction, that you have misquoted the law in the last instance and you will find from reading the section of the General Election Laws that the requirement of a residence of six months in the county and in the precinct ninety days, relates only to voters who are voting upon changes in the county seat of the county and is a special provision authorized by Sec. 2 of Art. 18 of the constitution. There is no contradiction in the law whatever and a thirty days' residence in the county is all that is required for registration.

You ask, secondly, whether it is the duty of the Registrar to ascertain from the voter his age. I would say that the law specifically requires that the Registrar note the age of the voter in his book, and it would not be sufficient to note simply the statement contained in the elector's oath, that he is over twenty-one years of age, the exact age must be ascertained.

Yours truly,

J. J. GUHEEN,

Attorney-General.

August 18, 1906.

MR. C. V. FISHER,

Blackfoot, Idaho.

DEAR SIR:—Your letter of August 18th, making inquiry as to the right of an incorporated village to license drug stores and other general mercantile interests within the village limits, has been received.

My understanding is that villages and cities of the second class have the right and power to license, levy and collect taxes upon any occupation or business within the limits of the village or city by proper ordinance—provided such tax shall be uniform in respect to the classes upon which it is levied.

Subsection 7, on page 607 of the Political Code of Idaho, seems to cover the question you ask. My views upon this matter are not official, as this is a matter out-

side of the official duties of this office and I simply write you in a personal way.

Yours very truly,

J. J. GUHEEN,

Attorney-General.

June 27, 1906.

M. J. SWEeley, Esq.,

Twin Falls, Idaho.

DEAR SIR:—Reply to your letter of June 15th has been delayed somewhat by pressure of Supreme Court business. I have looked into the question quite carefully, however, and my views may be briefly stated as follows:

Sec. 6 of Art. III of the State constitution requires that a Senator or Representative shall have been an *elector* of his county or district for one year next preceding his election; that is, he must have been qualified to vote at any time during a full year preceding his election. Inasmuch as thirty days' residence in the county prior to an election is necessary to qualify one as an elector in that county, I take it that a continuous residence for one year and thirty days in Cassia County would be necessary to render one eligible to either of the offices in question. In other words, thirty days' residence is necessary to constitute one an *elector*, and he must have been an elector (not a resident) for one year preceding his election. He must also have resided in the State at least six months to constitute him an elector, so that the minimum residence in Idaho necessary to render one eligible would be one year and six months—six months to make him an elector, and one year as an elector, as provided in the constitution. Hence the man referred to in your second question, who came to the state the first of last December, could not by any possibility be eligible, as he will not, on election day (November 6th) have even *resided* a year in the State, aside from the fact that he would have not been an *elector* for one year. The latest date at which one must have come to Idaho in or-

der to be eligible to either of the offices in question is May 6th, 1905, that is one year and six months preceding the coming election, and residence in the State must have been continuous since that time; while as to Cassia County it must have been continuous for one year and thirty days, or since October 6th, 1905. The answer to your first question, therefore, would be that if such a man has lived, or rather will have lived, in Cassia County for one year and thirty days at the time of the next election, he is eligible to the office.

So far as registration is concerned, the Supreme Court of this State has held, in the case of *Wilson vs. Bartlett*, 7 Idaho, 271, that under the constitution registration is not one of the substantive qualifications of an elector, but is simply a regulation of the right of suffrage, and *prima facie* evidence of the right to vote; also that the terms "elector" and "qualified elector" are used interchangeably. It is immaterial, therefore, that the men you have in mind have not been registered, provided the requirements of age, citizenship and residence as outlined above, are satisfied.

Trusting that I have made myself clear, I remain,

Very truly yours,

J. J. GUHEEN,

Attorney-General.

January 5, 1906.

MR. JOSEPH LEWIS, SR.,

Dingle, Idaho.

DEAR SIR:—Your letter of January 4th, inquiring as to who are qualified to vote at school district bond elections, received.

To be a qualified elector to vote at school district bond elections a person must be 21 years of age, and must be a resident freeholder, or householder, of the district, or the wife of a resident freeholder or householder of the district. A householder is one who is the head of a family, and residing in the district.

The wife of a qualified elector residing with her husband in the district, is entitled to vote at such elections.

Yours respectfully,

J. J. GUHEEN,

Attorney-General.

December 29, 1905.

MR. D. C. KUNZ,

Salt Lake City, Utah.

DEAR SIR:—Your letter of December 28th, asking me if there is any chance for the Probate Judge to get a leave of absence from the county and State for more than twenty days, received.

The statutes upon the subject are as follows:

“Sec. 1638, Political Code: No county officer must absent himself from the State for more than twenty days unless with the consent of the County Commissioners.”

“Sec. 1617, Political Code: The Board of County Commissioners may grant to any county officer of their respective county (except the probate judge of such county) leave of absence from their county and state for a period not exceeding 90 days, etc.”

This is all the law there is on the subject in this State and this would govern in cases of this kind, and you could not absent yourself from the county and State for more than twenty days even with the consent of the Board of County Commissioners. Other county officers can, because there is always someone to do their work, such as deputies, etc., but on account of the very nature of the office, the probate judge cannot appoint a deputy who can take his place. He can, however, appoint a clerk of the Probate Court, who could keep his office open for him, and transact such business as the clerk of the Probate Court is authorized to do under the statute.

It would seem to me that on account of the peculiar conditions existing in your case, that is your being sick,

that nobody would want to take advantage of your absence, to cause you trouble, and that any stay that you might make over the twenty days would be overlooked. I do not suppose the Commissioners have any desire to declare your office vacant and cause you trouble. Under the circumstances you might ask them to explain to people having business there the peculiar conditions and that you would get back as soon as you could.

There have been instances, I believe, in this State where the Probate Judge has been away for a longer term than twenty days, and the people would simply overlook the matter.

With regards, I am,

Very truly yours,

J. J. GUHEEN,

Attorney-General.

December 14, 1905.

HON. O. E. McCUTCHEON,

Idaho Falls, Idaho.

MY DEAR JUDGE:—I have your letter of November 18th, transmitting brief in regard to the constitutionality of the provisions contained in the Irrigation District Law of 1903 (Sess. Laws, p. 150) relating to the assessments of lands for benefits under the irrigation district.

Your brief is directed to the point that Sec. 11 of the said law is unconstitutional for the reason that no provision is made for notice, and for giving the individuals assessed any opportunity to be heard.

I have considered the brief submitted and have given attention to the cases cited therein, and have looked into the matter with a view to advising the State Engineer. I would be very loath to advise any State officer with reference to his duties, that any law was unconstitutional, unless I was clearly satisfied beyond a reasonable doubt of the unconstitutionality of the Act. Our Supreme Court has laid down this rule, that every rea-

sonable intendment must be made in favor of the constitutionality of the Acts of the Legislature.

Wright vs. Kelly, 43 Pac., 565.

This law is upon the statute books to be carried out and to declare it null and void is a grave prerogative, exercised only with reluctance by the Supreme Court itself, and only exercised when absolutely necessary to a decision in the case before it.

The law in question has been in operation for some years and I would not presume to advise the State Engineer that it was unconstitutional unless great harm were resulting from its operation, and unless its violation of constitutional injunction are very apparent. In this particular case I do not see that any particular constitutional right is being infringed. It is well settled that it is not necessary that a taxpayer shall have notice of every step in a tax proceeding, it is sufficient if at some time in the determination of the amount of the tax or before suit for the collection of it, that he is given his hearing.

The law in question makes provision for the assessment levied under Sec. 11 to be reviewed in the courts. I am unable to agree with your view that the law does not give the court power to review the assessment as being unfair or excessive.

Under Sec. 19 "The Court may inquire into the regularity, legality or correctness of the proceeding and may approve or confirm such proceedings in part, and disapprove and declare illegal or invalid other and subsequent parts of the said proceedings."

The fact that the court is not expressly given the power affirmatively to fix what is a reasonable right on such hearing, but the assessment might have to be made again by the Board, does not in my judgment affect the matter. It seems to me that the law provides for giving a man injured by an unjust and excessive assessment, his day in court. The constitutional provisions for equality and uniformity are not applicable to assessments for

irrigation purposes. As to these matters generally, I cite you:

Tinlock Irrigation District v. Williams, 76 Cal., 360.

Pioneer Irrigation District v. Bradley, 68 Pac., 295 (Idaho).

I wish to say that I think the recent case of Nampa and Meridian Irrigation District v. Brose in our Supreme Court, in which the decision was handed down November 25th of this year, settles all controversy as to the constitutionality of this Irrigation District Law. In this case a bond issue of \$583,505.00 was involved and the constitutionality of the law was attacked, and the court held the law constitutional. I do not remember that any specific attack was made upon Sec. 11 of the Act, but I know that the section was specifically before the Court and is quoted in full in the opinion, and I am thoroughly satisfied that the opinion of the Court, upholding the constitutionality of the law, was intended to cover every section of the act.

I appreciate the force with which you urge your contention, but I could not agree with you, even if the case of the Nampa and Meridian Irrigation District v. Brose had not been decided.

Very truly yours,

J. J. GUHEEN,

Attorney-General.

February 4th, 1905.

MR. HEBER C. SHARP,

*Sec'y Sharp Grocery & Supply Co.,
Rexburg, Idaho.*

DEAR SIR:—I have your letter of February 1st, stating that it is your desire to form a corporation, and submitting the inquiry whether or not under the laws of Idaho a corporation may issue preferred stock under the conditions named; and I have to say that this may be

accomplished simply by inserting in your articles of incorporation a statement that certain stock shall be preferred stock, together with other pertinent facts; or in the absence of any provision to that effect in the articles, the end may be accomplished by a by-law or resolution, concurred in by all holding stock. The essential thing to be observed in the last course suggested is that all holding stock must agree to the issuance of the contemplated preferred stock; otherwise a person holding stock who does not consent to the issuance of preferred stock could successfully object thereto.

Relative to the draft of an article covering this matter, my impression is that one of your local attorneys could give you much better service than I could, at this distance; and I suggest that you lay all the facts before some attorney and have him prepare the articles. I should be very glad to attend to this for you, but I feel that your interest would be served by having it attended to by an attorney before whom you can place all the facts; otherwise my draft of this one article might be inconsistent with the rest of the articles.

Yours respectfully,

J. J. GUHEEN,

Attorney-General.

November 23, 1906.

MR. J. D. BLOOMFIELD,
Nampa, Idaho.

DEAR SIR:—In answer to your telephone communication of yesterday, I desire to state that the Idaho State Constitution specifically exempts State property from taxation, and there is no authority by which the Legislature or any other body can tax State land and create a lien upon State land against the State.

Sec. 477, Political Code, reads as follows:

“Land sold under the provisions of this chapter shall not be taxed until the right to a deed shall have become absolute, except the *value of the interest therein of the*

purchaser thereof, which interest shall be determined by the amount paid on such land and the amount invested in improvements on such lands."

This is slightly changed by Sec. 25, Session Laws 1905, p. 142. The change is not material.

I am aware that in the past purchasers of State lands have failed to make their payments to the State for the same as agreed upon and such payments have been forfeited to the State and the State has cancelled their certificate of sale; and in some cases these lands have been resold. The persons whose certificates have been cancelled by the State Land Board have also failed to pay the taxes assessed for their value of their interest in these lands, and their interests have been sold, as I am informed, at delinquent tax sale, and a tax certificate of sale issued for the same.

Inasmuch as no lien can be created upon this land as against the State, the State has not considered itself a party to any controversies concerning the taxation of the value of a purchaser's cancelled interest.

With regards, I remain,

Very truly yours,

J. J. GUHEEN,

Attorney-General.



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